Received
August 26, 2011
Commission on
State Mandates

August 26, 2011

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

SUBJECT: Test Claims for Unfunded Mandates Relating to the California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108

To the Commission:

This firm represents the Ventura County Watershed Protection District and the County of Ventura (collectively, "Claimants") with respect to the enclosed Test Claims concerning California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108 ("Permit"). The Claimants submit the enclosed Test Claims seeking reimbursement of funds expended and to be expended with various activities mandated by the Permit.

Enclosed are the Test Claim Forms of the Claimants (sections 1-4 and section 8), a Written Narrative Statement and Table of Costs for complying with the mandated activities (section 5), supporting Declarations (section 6), and Documentation (section 7). The Documentation includes a copy of the Permit as well as the previous 2000 Permit that it superseded, as well as other relevant documents.

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

Sincerely,

Theresa A. Dunham

Encs.
TAD:cr

SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814
OFFICE: 916-446-7979 FAX: 916-446-8199
SOMACHLAW.COM

RECEIVED
May 17, 2017
Commission on State Mandates

May 17, 2017

Via Electronic Mail

Heather Halsey, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Los Angeles Region Water Permit – County of Ventura
Test Claim No. 11-TC-01

Dear Ms. Halsey:

In response to your letter of March 3, 2017, the County of Ventura and the Ventura County Watershed Protection District (the "claimants") hereby submit the following documents to cure Test Claim No. 11-TC-01:

- Commission on State Mandates Test Claim Forms for both claimants, authorized and signed by Auditor-Controller Jeffrey S. Burgh;
- Section 5 Written Narrative with explanation of test claim timeliness at pages 1-2, as well as detailed costs descriptions at pages 18-19, 22, 29, 32-33, 35, 39, and at Exhibit 1; and
- Section 6 Declarations of Jeff Pratt for the County, Glenn Shephard for the District, and Theresa Dunham for both claimants

As outlined in your letter, please substitute these documents for those included in the original filing on August 26, 2011. Should you have any questions about the foregoing, please do not hesitate to contact me at (916) 446-7979 or tdunham@somachlaw.com.

Sincerely,

Theresa A. Dunham

TAD/je

COMMISSION ON STATE MANDATES
TEST CLAIM AND TEST CLAIM AMENDMENT FORM
Authorized by Government Code sections 17553 and 17557(e)

GENERAL INSTRUCTIONS

- Local agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later. "Within 12 months of incurring increased costs" means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant. The statute of limitations above may be tolled if a joint request for a legislatively determined mandate is filed with the Legislature pursuant to Government Code section 17574.
- Complete sections 1 through 8, as indicated. Type all responses. *Failure to complete any of these sections will result in this test claim being returned as incomplete. Pursuant to Government Code section 17553 and Title 2, California Code of Regulations section 1183, the Commission will not exercise jurisdiction over statutes and executive orders which are not properly pled. Proper pleading requires that all code sections (including the relevant statute, chapter and bill number), regulations (including the register number and effective date), and executive orders (including the effective date) that impose the alleged mandate are listed in section 4 of the test claim form. Please carefully review your pleading before filing. Test claims may not be amended after the draft staff analysis is issued and the matter is set for hearing, or if the statute of limitations on the statute or executive order being added has expired, (Gov, Code, § 17557(e); Cal. Code Regs., tit. 2, § 1183.)*
- Please submit the test claim filing by either of the following methods:
  1. **E-filing**. The claimant shall electronically file the completed form and any accompanying documents in PDF format to the e-filing system on the Commission's website (http://www.csm.ca.gov), consistent with the Commission's regulations (CCR, tit.2, § 1181.2). The claimant is responsible for maintaining the paper documents with original signature(s) for the duration of the test claim process, including any period of appeal. ***No additional copies are required when e-filing the request.***
  2. **By hard copy**. Original test claim submissions shall be unbound, double-sided, and without tabs. Mail, or hand-deliver, **one original and seven (7) copies** of your test claim submission to: Commission on State Mandates, 980 9th Street, Suite 300, Sacramento, CA 95814

Within 10 days of receipt of a test claim, or its amendment, Commission staff will notify the claimant or claimant representative whether the submission is complete or incomplete. Test claims will be considered incomplete if any of the required sections are not included or are illegible. If a completed test claim is not received within thirty 30 calendar days from the date the incomplete test claim was returned, the executive director may disallow the original test claim filing date. A new test claim may be accepted on the same statute or executive order alleged to impose a mandate.

You may download this form from our website at www.csm.ca.gov.

If you have questions, please contact us:

Website: www.csm.ca.gov
Telephone: (916) 323-3562
E-Mail: csminfo@csm.ca.gov

(continued on page 2)

Test claim filing requirements on statutes or executive orders that are subject of legislatively determined mandate.

A local agency or school district may file on the same statute or executive order as a legislatively determined mandate if one of the following applies:

A) The Legislature amends the reimbursement methodology and the local agency or school district rejects reimbursement.
B) The term of the legislatively determined mandate, as defined in 17573(e) has expired.
C) The term of the legislatively determined mandate, as defined in 17573(e) is amended and the local agency or school district rejects reimbursement under the new term.
D) The mandate is subject to Article XIII B, section 6(b) and the Legislature does both of the following:
   i. Fails to appropriate in the Budget Act funds to reimburse local agencies for the full payable amount that has not been previously paid based on the reimbursement methodology enacted by the Legislature.
   ii. Does not repeal or suspend the mandate pursuant to Section 17581.

A test claim filed pursuant to Government Code section 17574(c) shall be filed within six months of the date an action described in subparagraph (A), (B), (C), or (D) of paragraph (1) occurs.

1. TEST CLAIM TITLE

Ventura County Watershed Protection District & County of Ventura, Order No. R4-2010-0108

2. CLAIMANT INFORMATION

County of Ventura
Name of Local Agency or School District

Jeffrey S. Burgh
Claimant Contact

Auditor-Controller
Title

800 S. Victoria Avenue
Street Address

Ventura, CA 93009-1540
City, State, Zip

(805) 654-3151
Telephone Number

(805) 654-5081
Fax Number

jeff.burgh@ventura.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

Theresa A. Dunham, Esq.
Claimant Representative Name

Special Counsel to County of Ventura
Title

Somach Simmons & Dunn
Organization

500 Capitol Mall, Suite 1000
Street Address

Sacramento, CA 95814
City, State, Zip

(916) 446-7979
Telephone Number

(916) 446-8199
Fax Number

tdunham@somachlaw.com
E-Mail Address

For CSM Use Only

Filing Date:

RECEIVED
August 26, 2011
Commission on State Mandates

Revised May 17, 2017

Test Claim #: 11-TC-01

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections (include statutes, chapters, and bill numbers) (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]), regulations (include register number and effective date), and executive orders (include effective date) that impose the alleged mandate .

California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108, NPDES Permit No. CAS00-4002, Adopted July 8, 2010, Effective 50 days thereafter (August 27, 2010) pursuant to NPDES Memorandum of Agreement between United States Environmental Protection Agency and California State Water Resources Control Board.

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

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

5. Written Narrative: pages 1 to 48.
6. Declarations: pages 49 to 108.
7. Documentation: pages 109 to 1094.

Sections 5, 6, and 7 should be answered on separate sheets of plain 8-1/2 x 11 paper. Each sheet should include the test claim name, the claimant, the section number, and heading at the top of each page.

5. WRITTEN NARRATIVE

Under the heading "5. Written Narrative," please identify the specific sections of statutes or executive orders alleged to contain a mandate.

Include a statement that actual and/or estimated costs resulting from the alleged mandate exceeds one thousand dollars ($1,000), and include all of the following elements for each statute or executive order alleged:

(A) A detailed description of the new activities and costs that arise from the mandate.

(B) A detailed description of existing activities and costs that are modified by the mandate.

(C) The actual increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate.

(D) The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(E) A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(F) Identification of all of the following funding sources available for this program:
- (i) Dedicated state funds
- (ii) Dedicated federal funds
- (iii) Other nonlocal agency funds
- (iv) The local agency's general purpose funds
- (v) Fee authority to offset costs

(G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.

(H) Identification of a legislatively determined mandate pursuant to Government Code section 17573 that is on the same statute or executive order.

6. DECLARATIONS

Under the heading "6. Declarations," support the written narrative with declarations that:

(A) declare actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate;

(B) identify all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs;

(C) describe new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program);

(D) If applicable, describe the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of Section17574(c).

(E) are signed under penalty of perjury, based on the declarant's personal knowledge, information or belief, by persons who are authorized and competent to do so.

7. DOCUMENTATION

Under the heading "7. Documention, " support the written narrative with copies of all of the following:

(A) the test claim statute that includes the bill number alleged to impose or impact a mandate; and/or

(B) the executive order, identified by its effective date, alleged to impose or impact a mandate; and

(C) relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate; and

(D) administrative decisions and court decisions cited in the narrative. Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement; and

(E) statutes, chapters of original legislatively determined mandate and any amendments.

8. CLAIM CERTIFICATION

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

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

Jeffrey S. Burgh
Print or Type Name of Authorized Local Agency or School District Official

Auditor-Controller
Print or Type Title

Signature of Authorized Local Agency or School District Official

May 12, 2017
Date

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

COMMISSION ON STATE MANDATES
TEST CLAIM AND TEST CLAIM AMENDMENT FORM
Authorized by Government Code sections 17553 and 17557(e)

GENERAL INSTRUCTIONS

- Local agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later. "Within 12 months of incurring increased costs" means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant. The statute of limitations above may be tolled if a joint request for a legislatively determined mandate is filed with the Legislature pursuant to Government Code section 17574.
- Complete sections 1 through 8, as indicated. Type all responses. *Failure to complete any of these sections will result in this test claim being returned as incomplete. Pursuant to Government Code section 17553 and Title 2, California Code of Regulations section 1183, the Commission will not exercise jurisdiction over statutes and executive orders which are not properly pled. Proper pleading requires that all code sections (including the relevant statute, chapter and bill number), regulations (including the register number and effective date), and executive orders (including the effective date) that impose the alleged mandate are listed in section 4 of the test claim form. Please carefully review your pleading before filing. Test claims may not be amended after the draft staff analysis is issued and the matter is set for hearing, or if the statute of limitations on the statute or executive order being added has expired, (Gov, Code, § 17557(e); Cal. Code Regs., tit. 2, § 1183.)*
- Please submit the test claim filing by either of the following methods:

  1. **E-filing**. The claimant shall electronically file the completed form and any accompanying documents in PDF format to the e-filing system on the Commission's website (http://www.csm.ca.gov), consistent with the Commission's regulations (CCR, tit.2, § 1181.2). The claimant is responsible for maintaining the paper documents with original signature(s) for the duration of the test claim process, including any period of appeal. ***No additional copies are required when e-filing the request.***
  2. **By hard copy**. Original test claim submissions shall be unbound, double-sided, and without tabs. Mail, or hand-deliver, **one original and seven (7) copies** of your test claim submission to: Commission on State Mandates, 980 9th Street, Suite 300, Sacramento, CA 95814

Within 10 days of receipt of a test claim, or its amendment, Commission staff will notify the claimant or claimant representative whether the submission is complete or incomplete. Test claims will be considered incomplete if any of the required sections are not included or are illegible. If a completed test claim is not received within thirty 30 calendar days from the date the incomplete test claim was returned, the executive director may disallow the original test claim filing date. A new test claim may be accepted on the same statute or executive order alleged to impose a mandate.

You may download this form from our website at www.csm.ca.gov.

If you have questions, please contact us:

Website: www.csm.ca.gov
Telephone: (916) 323-3562
E-Mail: csminfo@csm.ca.gov

(continued on page 2)

Test claim filing requirements on statutes or executive orders that are subject of legislatively determined mandate.

A local agency or school district may file on the same statute or executive order as a legislatively determined mandate if one of the following applies:

A) The Legislature amends the reimbursement methodology and the local agency or school district rejects reimbursement.
B) The term of the legislatively determined mandate, as defined in 17573(e) has expired.
C) The term of the legislatively determined mandate, as defined in 17573(e) is amended and the local agency or school district rejects reimbursement under the new term.
D) The mandate is subject to Article XIII B, section 6(b) and the Legislature does both of the following:
    i. Fails to appropriate in the Budget Act funds to reimburse local agencies for the full payable amount that has not been previously paid based on the reimbursement methodology enacted by the Legislature.
    ii. Does not repeal or suspend the mandate pursuant to Section 17581.

A test claim filed pursuant to Government Code section 17574(c) shall be filed within six months of the date an action described in subparagraph (A), (B), (C), or (D) of paragraph (1) occurs.

1. TEST CLAIM TITLE

Ventura County Watershed Protection District & County of Ventura, Order No. R4-2010-0108

2. CLAIMANT INFORMATION

Ventura County Watershed Protection District
Name of Local Agency or School District

Jeffrey S. Burgh
Claimant Contact

Auditor-Controller
Title

800 S. Victoria Avenue
Street Address

Ventura, CA 93009-1540
City, State, Zip

(805) 654-3151
Telephone Number

(805) 654-5081
Fax Number

jeff.burgh@ventura.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

Theresa A. Dunham, Esq.
Claimant Representative Name

Special Counsel to Ventura County Watershed Protection District
Title

Somach Simmons & Dunn
Organization

500 Capitol Mall, Suite 1000
Street Address

Sacramento, CA 95814
City, State, Zip

(916) 446-7979
Telephone Number

(916) 446-8199
Fax Number

tdunham@somachlaw.com
E-Mail Address

For CSM Use Only

Filing Date: **RECEIVED** August 26, 2011 **Commission on State Mandates**

Revised May 17, 2017

Test Claim #: 11-TC-01

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections (include statutes, chapters, and bill numbers) (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]), regulations (include register number and effective date), and executive orders (include effective date) that impose the alleged mandate .

California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108, NPDES Permit No. CAS00-4002, Adopted July 8, 2010, Effective 50 days thereafter (August 27, 2010) pursuant to NPDES Memorandum of Agreement between United States Environmental Protection Agency and California State Water Resources Control Board.

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

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

5. Written Narrative: pages 1 to 48.
6. Declarations: pages 49 to 108.
7. Documentation: pages 109 to 1094.

Sections 5, 6, and 7 should be answered on separate sheets of plain 8-1/2 x 11 paper. Each sheet should include the test claim name, the claimant, the section number, and heading at the top of each page.

5. WRITTEN NARRATIVE

Under the heading "5. Written Narrative," please identify the specific sections of statutes or executive orders alleged to contain a mandate.

Include a statement that actual and/or estimated costs resulting from the alleged mandate exceeds one thousand dollars ($1,000), and include all of the following elements for each statute or executive order alleged:

(A) A detailed description of the new activities and costs that arise from the mandate.

(B) A detailed description of existing activities and costs that are modified by the mandate.

(C) The actual increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate.

(D) The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(E) A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(F) Identification of all of the following funding sources available for this program:
- (i) Dedicated state funds
- (ii) Dedicated federal funds
- (iii) Other nonlocal agency funds
- (iv) The local agency's general purpose funds
- (v) Fee authority to offset costs

(G) Identification of prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate.

(H) Identification of a legislatively determined mandate pursuant to Government Code section 17573 that is on the same statute or executive order.

6. DECLARATIONS

Under the heading "6. Declarations," support the written narrative with declarations that:

(A) declare actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate;

(B) identify all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs;

(C) describe new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program);

(D) If applicable, describe the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of Section17574(c).

(E) are signed under penalty of perjury, based on the declarant's personal knowledge, information or belief, by persons who are authorized and competent to do so.

7. DOCUMENTATION

Under the heading "7. Documention, " support the written narrative with copies of all of the following:

(A) the test claim statute that includes the bill number alleged to impose or impact a mandate; and/or

(B) the executive order, identified by its effective date, alleged to impose or impact a mandate; and

(C) relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate; and

(D) administrative decisions and court decisions cited in the narrative. Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement; and

(E) statutes, chapters of original legislatively determined mandate and any amendments.

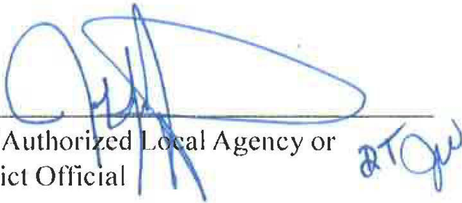
8. CLAIM CERTIFICATION

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

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

Jeffrey S. Burgh
Print or Type Name of Authorized Local Agency or School District Official

Auditor-Controller
Print or Type Title


Signature of Authorized Local Agency or School District Official

May 12, 2017
Date

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

SECTION 5 – WRITTEN NARRATIVE

Table of Contents

I. Introduction 1

II. Program Background 3

III. Federal Law 4

IV. State Mandate Law 7

V. State Mandated Activities 11

A. Public Information/Participation Program 12

1. Requirements of Federal Law 15

2. Requirements From Prior Permit (2000) 16

3. Mandated Activities 17

4. Actual and Reimbursable Costs 18

B. Reporting Program and Program Effectiveness Evaluation 19

1. Requirements of Federal Law 20

2. Requirements From Prior Permit (2000) 21

3. Mandated Activities 21

4. Actual and Reimbursable Costs 22

C. Special Studies 22

1. Requirements of Federal Law 26

2. Requirements From Prior Permit (2000) 26

3. Mandated Activities 27

4. Actual and Reimbursable Costs 29

D. Watershed Initiative Participation 29

1. Requirements of Federal Law 30
2. Requirements From Prior Permit (2000) 31
3. Mandated Activities 32
4. Actual and Reimbursable Costs 32

E. Vehicle and Equipment Wash Areas 33
1. Requirements of Federal Law 34
2. Requirements From Prior Permit (2000) 34
3. Mandated Activities 34
4. Actual and Reimbursable Costs 35

F. Illicit Connections and Illicit Discharges Elimination Program 35
1. Requirements of Federal Law 36
2. Requirements From Prior Permit (2000) 37
3. Mandated Activities 38
4. Actual and Reimbursable Costs 39

VI. Statewide Cost Estimate 39
VII. Funding Sources 39
VIII. Prior Mandate Determinations 39
IX. Declaration of Costs 40
X. Conclusion 40

I. Introduction

On July 8, 2010, the California Regional Water Quality Control Board Los Angeles Region ("Los Angeles Water Board") adopted a new storm water permit, Order No. R4-2010-0108 (NPDES – "National Pollutant Discharge Elimination System"), NPDES No. CAS004002 (hereinafter the "2010 Permit" or "Permit"), regulating discharges from the municipal separate storm sewer systems ("MS4s") within the Ventura County Watershed Protection District, County of Ventura and the incorporated cities therein (collectively referred to as the "Permittees").[1,2] The 2010 Permit includes requirements that are more stringent and exceed the requirements of federal law, and that were not included in the prior 2000 Ventura County MS4 NPDES Permit, Order No. 00-108, NPDES No. CAS004002 ("2000 Permit"),[3] which was adopted by the Los Angeles Water Board in 2000. (Vol. 1, Tab 2.) Although the 2010 Permit is a renewal of the 2000 Permit, it contains a number of new unfunded state mandates for which the Ventura County Watershed Protection District (the "District") and the County of Ventura (the "County")[4] are entitled to reimbursement under Article XIII B section 6 of the California Constitution. Accordingly, the County of Ventura and the Ventura County Watershed Protection District (collectively "Claimants") jointly file this Test Claim.

Under the NPDES Memorandum of Agreement ("MOA") between the U.S. Environmental Protection Agency ("EPA") and the California State Water Resources

---

[1] Waste Discharge Requirements for Storm Water (Wet Weather) and Non-Storm Water (Dry Weather) Discharges From the Municipal Separate Storm Sewer System Within the Ventura County Watershed Protection District, County of Ventura, and the Incorporated Cities Therein ("Permit"), Volume 1 of section 7.

[2] The Permit in question was first issued on May 7, 2009. However, on March 10, 2010, the State Water Resources Control Board ("State Water Board") sent a letter to the Los Angeles Water Board requesting that the Los Angeles Water Board agree to a voluntary remand of Order No. R4-2009-0057 because of significant new information submitted to the State Water Board after the May 7, 2009 adoption of the Permit, and because of other procedural irregularities. (Vol. 3, Tab 6.) On March 11, 2010, the Los Angeles Water Board issued a letter stating that it intended to reissue the January 28, 2010 version of the Permit as a Tentative Permit, and that the Los Angeles Water Board would hold a hearing and reconsider the Permit in its entirety on July 8, 2010. (Vol. 3, Tab 7.) On May 5, 2010, the Los Angeles Water Board issued a draft Permit, Notice of Public Hearing for Reconsideration of the National Pollutant Discharge Elimination System Permit for the County of Ventura Watershed Protection District, the County of Ventura, and Incorporated Cities Therein. (Vol. 3, Tab 8.) Although the scope of the July 8, 2010 hearing was limited to comments and evidence on certain provisions of the Permit, the Los Angeles Water Board's action was to reconsider, and adopt the Permit in its entirety. (See Permit, Vol. 1, Tab 1 at pp. 2, 125.) Accordingly, the Permit was adopted on July 8, 2010. Under the NPDES Memorandum of Agreement Between the U.S. Environmental Protection Agency ("EPA") and the California State Water Resources Control Board ("MOA"), NPDES Permits shall become effective on the 50th day after the date of adoption, which is on or about August 27, 2010. (MOA, Vol. 3, Tab 5 at p. 22.)

[3] Order No. 00-108, NPDES No. CAS004002, Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges Within Ventura County Flood Control District, County of Ventura, and the Cities of Ventura County ("2000 Permit"), Volume 1 of section 7.

[4] Ventura County is a general law County, and the Ventura County Watershed Protection District is a special district. Both are local agencies as defined by Government Code section 17518.

Control Board, NPDES Permits shall become effective on the 50th day after the date of adoption, which in this instance is on or about August 27, 2010. (MOA, Vol. 3, Tab 5 at p. 22.) At Section II.F. on page 22 of the MOA attached as Exhibit A to the Declaration of Theresa A. Dunham, the section titled "Final Permits" provides that permits become effective 50 days after adoption where the EPA has made no objection to the permit, if (a) there has been significant public comment, or (b) changes have been made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments). On May 5, 2010, the Los Angeles Water Board issued a draft Permit, Notice of Written Public Comment Period and Notice of Public Hearing. The EPA made no objection to the draft Permit as proposed by the Los Angeles Water Board on May 5, 2010, or prior to its adoption on July 8, 2010. There was, however, significant written public comment submitted on or before June 7, 2010, which was the closing date for submittal of written public comments (See http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura.shtml).

In all, 21 written comment letters were submitted to the Los Angeles Water Board on or before June 7, 2010, including from diverse interests such as the Natural Resources Defense Council and the Building Industry Association of Southern California. Further, the National Resources Defense Council and the Building Industry Association of Southern California both requested and received Party status in this quasi-judicial proceeding. After the close of the written comment period, and prior to the close of the Public Hearing on July 8, 2010, further revisions were made to the draft Permit that was issued on May 5, 2010. The additional revisions were not the result of requests made by EPA but were due to comments provided by other interested parties (See http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura.shtml).

Accordingly, the Permit adopted by the Los Angeles Water Board on July 8, 2010, was subject to significant written public comment and was revised as compared to the version that was sent to EPA on May 5, 2010. Thus, according to the terms of the binding MOA between EPA and the State Water Resources Control Board, the "effective date" of the Permit was "50 days after adoption." 50 days after the July 8, 2010 adoption date is August 27, 2010. This Test Claim has been timely submitted in that it has been submitted within one year of the effective date of the 2010 Permit.

This section of the Test Claim identifies the activities in the 2010 Permit that are unfunded mandates. The new unfunded mandates are described in more detail below, but generally they are as follows:

1. New public outreach requirements including: distribution of storm water pollution prevention materials to auto parts stores, home improvement stores, and others; development of an ethnic communities strategy; distribution of school district materials to

50 percent of all K-12 students every two years or development of a youth outreach plan; creation and implementation of a behavioral change assessment; conducting pollutant-specific outreach; conducting corporate outreach; and implementing a business assistance program.

2. New requirements to develop an electronic reporting program and an electronic reporting format; and, a new requirement to conduct a Program Effectiveness Assessment.

3. New requirements to conduct or participate in special studies to develop tools to predict and mitigate adverse impacts of hydromodification, and to comply with hydromodification control criteria; new requirements to update and expand the technical guidance manual; and, a requirement to develop an off-site mitigation list of sites/locations and schedule for completion of such projects.

4. New requirements to participate in the Southern California Storm Water Monitoring Coalition ("SMC"); SMC Regional Bioassessment Monitoring Program; and, Southern California Bight Projects.

5. New requirement for elimination of wash water discharges from County facilities for Fire Fighting Vehicles.

6. New requirements for mapping the County storm drain system.

This Test Claim does not challenge the authority of the Los Angeles Water Board to impose these requirements on MS4 discharges. Rather, it sets out new requirements that are unfunded State mandates and entitled to reimbursement under Article XIII B section 6 of the California Constitution because they exceed federal requirements.

II. Program Background

This Test Claim addresses the choice of the Los Angeles Water Board to adopt requirements that are more stringent than those imposed by the federal Clean Water Act ("CWA"). California ("State") has long been a national leader in protecting the quality of waters of the State. The State adopted the Porter-Cologne Water Quality Control Act ("Porter-Cologne") in 1969, three years prior to the adoption of the CWA and eighteen years before federal law expressly regulated MS4 discharges. Congress adopted the CWA as a scaled-back version of Porter-Cologne. As a result, State requirements are generally more stringent than the requirements of the CWA. The Los Angeles Water Board has the authority to impose more stringent requirements on those covered by the federal National Pollutant Discharge Elimination System ("NPDES permits") under both Porter-Cologne and the California Water Code. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619 ("*City of Burbank*"), Vol. 2, Tab 1; Wat. Code, § 13000, Vol. 2, Tab 24.) When a regional water quality control board ("regional board"), like the Los Angeles Water Board here, issues a storm water permit, it is implementing both federal and state law.

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma*, *supra*, 503 U.S. at p. 101.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law (Wat. Code, § 13374.). (*City of Burbank*, *supra*, 35 Cal.4th at p. 621, Vol. 2, Tab 1.)

The California Supreme Court has expressly described the reservation of significant components of water quality regulation to the State. The court has stated, "[t]he federal Clean Water Act reserves to the state 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)." (*City of Burbank*, *supra*, 35 Cal.4th at pp. 627-628, Vol. 2, Tab 1.)

The Commission on State Mandates ("Commission") has heard two prior test claim cases pertaining to MS4 discharges. (*In re Test Claim on: Los Angeles Regional Water Quality Control Board Order No. 01-182, Case Nos. 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21* ("Los Angeles Decision") (July 31, 2009); *In re Test Claim on San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Case No. 07-TC-09* ("San Diego Decision") (March 26, 2010).) In addition, numerous MS4 test claim cases have been filed and are waiting to be heard by the Commission.[5] In the San Diego and Los Angeles Decisions, the Commission determined that certain storm water discharge obligations were unfunded State mandates because they were: (a) State mandates that exceeded the requirements of the CWA and its implementing regulations; (b) created new programs or otherwise required an increase in the level of storm water pollution controls delivered by permittees; and, (c) imposed more than $1,000 in costs that permittees had insufficient authority to recover their costs through the imposition of fees. Although the specific provisions are different in this case, the Commission's conclusions are similar and compel the same result here.

III. Federal Law

The 2010 Permit was issued under the authority of the CWA. (33 U.S.C. § 1251 et seq., Vol. 2, Tab 10.) The CWA was enacted in 1972 and amended in 1987 to specifically include a permitting system for all discharges of pollutants from point sources to the waters of the United States. The 1987 Amendments created an NPDES permit requirement for

[5] For a complete list of test claims pertaining to actions of the regional boards, see http://www.csm.ca.gov/regional_water.shtml.

MS4 discharges serving a population of more than 100,000 persons or from systems that the United States Environmental Protection Agency ("EPA") or the State determine contribute to a violation of water quality standards or represent a significant contribution of pollutants to waters of the United States. Title 33 United States Code section 1342(p)(2) requires NPDES permits for the following discharges:

> (C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.
> (D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.
> (E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of water quality standard or is a significant contributor of pollutants to waters of the United States.

Under the CWA and title 33 United States Code section 1342(p)(3)(B), MS4 permits state that they:

> (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 State determines appropriate for the control of such pollutants.

In 1990, EPA issued regulations to implement Phase I of the NPDES program. (55 Fed. Reg. 47990 (Nov. 16, 1990), Vol. 2, Tab 18.) EPA regulations defined which entities need to apply for permits and provided the information requirements to include in the permit application. The permit application must propose management programs that the permitting authority will consider, including:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. (40 C.F.R. § 122.26(d)(2)(iv), Vol. 2, Tab 14.)

Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[6] are not less stringent than those in the CWA. (33 U.S.C. § 1370, Vol. 2, Tab 12.) In *City of Burbank*, the California Supreme Court held that a regional board may issue a permit that exceeds the requirements of the CWA and its accompanying federal regulations.[7] The State Water Board has said that because NPDES permits are adopted as waste discharge requirements, they can more broadly protect "waters of the State" and not be just limited to "waters of the United States." (*In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association*, State Board Order No. WQ 2001-15, Vol. 3, Tab 3 at p. 9, n. 20 ["the inclusion of 'waters of the state' allows the protection of groundwater, which is generally not considered to be 'waters of the United States.' "].) Furthermore, the California Water Code states that the uses and objectives set out in basin plans and the need to prevent nuisance will require the regional boards to adopt requirements that are more stringent than federal law:

> Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill materials permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance. (Wat. Code, § 13377, Vol. 2, Tab 29.)

In 1972, California became the first state authorized to issue NPDES permits through an amendment to Porter-Cologne. As previously stated, Porter-Cologne has a greater reach than the CWA. For example, Porter-Cologne extends the State's authority to non-point sources (e.g., agricultural runoff), discharges to groundwater, and to discharges to land overlying groundwater. (Wat. Code, § 13050, Vol. 2, Tab 25.) Porter-Cologne applies to "waters of the State" which is defined as, "any surface water or groundwater, including saline waters, within the boundaries of the State." (*Id.*, § 13050(e), Vol. 2, Tab 23.)

The 2010 Permit was issued by the Los Angeles Water Board as a "waste discharge requirement" pursuant to the authority of the California Water Code. (Wat. Code, § 13260, 13263, 13374, Vol. 2, Tabs 26-28.) Regional boards have acknowledged that requirements of MS4 permits may exceed those of federal law, based on the stricter authority of Porter-

[6] "*Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' into 'waters of the United States,' the waters of the 'contiguous zone,' or the ocean." (40 C.F.R. § 122.2, emphasis added, Vol. 2, Tab 13.)

[7] "The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to 'enforce any effluent limitation' that is not '*less stringent*' than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserve authority . . . ." (*City of Burbank*, *supra*, 35 Cal.4th at pp. 627-628, Vol. 2, Tab 1.)

Cologne. (Permit, Vol. 1, Tab 1 at p. 25 ["The Regional Water Board may use its discretion to impose other provisions beyond MEP, as it determines appropriate for the control of pollutants, including ensuring strict compliance with Water Quality Standards."].) The court in *City of Burbank* further held that components of NPDES permits may exceed federal requirements and that state and regional boards must consider State law. (*City of Burbank*, *supra*, 35 Cal.4th at p. 618, Vol. 2, Tab 1.) However, State orders are still subject to the California Constitution, including Article XIII B section 6.

IV. State Mandate Law

Article XIII B section 6 of the California Constitution requires the State Legislature to provide a subvention of funds to local agencies any time the Legislature or a State agency requires the local agency to implement a new program, or provide a higher level of service under an existing program. Article XIII B states in relevant part:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service . . . . (Cal. Const., art. XIII B, § 6(a), Vol. 2, Tab 19.)

The purpose of Article XIII B section 6 is "to preclude the tate 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, Vol. 2, Tab 5.) The section was "designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues." (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, Vol. 2, Tab 2.) The Legislature enacted an administrative scheme to implement Article XIII B section 6, at Government Code section 17500 et seq. (*Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333, Vol. 2, Tab 7 [statute establishes "procedure by which to implement and enforce section 6"].)

The Legislature defined the parameters regarding what constitutes a State mandated cost, defining "Costs mandated by the state" to 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. (Gov. Code, § 17514, Vol. 2, Tab 22.)

Orders issued by a regional board pursuant to Porter-Cologne are within the definition of "executive order." (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 920, Vol. 2, Tab 3.) Government Code section 17556 identifies seven exceptions to the rule requiring reimbursement for State mandated costs. The exceptions are as follows:

(a) The claim is submitted by a local agency . . . that requests or previously requested legislative authority for that local agency . . . to implement the program specified in the statute, and that statute imposes costs upon that local agency . . . requesting the legislative authority.

(b) The statute or executive order affirmed for the state a mandate that has 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 . . . , 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, or are 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. (Gov. Code, § 17556, Vol. 2, Tab 23.)

None of these exceptions are directly applicable to the mandates challenged as part of this Test Claim. Exceptions (a), (b), (e), (f), and (g) are not relevant to this Test Claim, and exceptions (c) and (d) relating to federal mandates and fee assessments are addressed later in this Written Narrative Statement. Moreover, the program or increased level of service must impose "unique requirements on local governments" that carry out State policy. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 50, Vol. 2, Tab 4.) The requirements

of the mandates in this Test Claim are "unique requirements on local governments" and are not requirements that fall upon both local governments and private parties, to obviate the need for a subvention of State funds under Article XIII B section 6.

When a new program or level of service is in part federally funded, courts have held that the authority to impose a condition does not equate to a direct order or mandate to impose the condition. Where the "state freely choos[es] to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government." (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1594 ("*Hayes*"), Vol. 2, Tab 6.) Additionally, when a state agency exercises discretion and chooses which requirements to impose in an executive order, those aspects that were not strictly required in the federal scheme are state mandates. (*Ibid.*) In addition, when a state law or an order mandates a change in an existing program that requires an increase in the actual level or quality of governmental services provided, the increase is a "higher level of service" within the meaning of Article XIII B section 6 of the California Constitution. (*San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877, Vol. 2, Tab 9.) For example, where an executive order required school districts to take special steps and measures to address segregation by race in local schools, the appellate court called this a "higher level of service" where the order had requirements that exceeded federal law because they mandated that the school district take defined remedial actions that were simply advisory under prior law. (*Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 177 ("*Long Beach*"), Vol. 2, Tab 8.)

Generally, the law of State mandates as dictated by the California Constitution, statutes, and case law, establishes a three-part test for mandates:

(i) Obligations imposed must be a new program or higher level of service;

(ii) The mandate must arise from a law, regulation, or executive order imposed by the State, rather than the federal government; and,

(iii) The costs cannot be recoverable by the local agency through the imposition of a fee.

If paragraphs 1, 2, and 3 are satisfied, then the mandated costs generally fall within the subventure requirement of Article XIII B section 6.

(i) New Program or Higher Level of Service

The determination of whether something is a new program or higher level of service is largely a factual exercise that involves comparing the terms of the former and current permits. This Commission's San Diego Decision addresses an important principle at issue in this Test Claim. All storm water permits are required 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)(iii), Vol. 2, Tab 11.) In the proceedings leading to the San Diego Decision, the Finance Department argued that the new permit did not constitute a "new program" or "higher level of service" because each incremental increase in best management practices or other permit requirements was necessary to assure continued compliance with the maximum extent practicable standard (or "MEP" standard). The Finance Department argued that:

> . . . the entire permit is not a new program or higher level of service because additional activities, beyond those required by the 2001 permit, are necessary for the claimants to continue to comply with the federal Clean Water Act and reduce pollutants to the Maximum Extent Practicable. (San Diego Decision, Vol. 3, Tab 2 at pp. 48-49.)

However, the Commission correctly rejected such arguments in that decision, recognizing the logical implications of the standard as articulated by the Finance Department. Specifically, the Commission noted that "[u]nder the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly." (San Diego Decision, Vol. 3, Tab 2 at p. 49.) Indeed, adhering to the Finance Department's interpretation, would allow the State to justify virtually any mandate on the grounds that it falls within the MEP standard. The Commission rejected such an approach in the San Diego Decision, and should do the same here.

(ii) State Mandates

The Government Code exempts costs mandated solely by federal law or regulation, except where the state "statute or executive order mandates costs that exceed the mandate in that federal law or regulation . . . ." (Gov. Code, § 17556(c), Vol. 2, Tab 23.) The obligation imposed by the state in the implementation of a federal mandate should still be considered a "state mandate" as long as the state has a say in the manner in which the mandate is passed on to local agencies. The California Supreme Court has stated:

> In our view the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government. (*Hayes, supra*, 11 Cal.App.4th at p. 1593, Vol. 2, Tab 6.)

The Commission relied on this in both the San Diego and Los Angeles Decisions with respect to storm water permits where the regional boards "freely chose" to exercise their discretion. (San Diego Decision, Vol. 3, Tab 2 at p. 37; Los Angeles Decision, Vol. 3, Tab 1 at p. 22.) The Commission should rely on the same analysis if such arguments are again raised here.

(iii) Fee Authority

Mandates are exempted from the requirements of Article XIII B section 6 where 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." (Gov. Code, § 17556(d), Vol. 2, Tab 23.) Article XIII D of the California Constitution requires that fees incident to property ownership be subjected to a majority vote by affected property owners or by two-thirds of registered voter approval. (Cal. Const., art. XIII, § D, subd. 4(d), Vol. 2, Tab 20 (otherwise referred to as Proposition 218).) In the San Diego Decision, this Commission held that the necessity of voter approval (and the possibility of voter rejection) of a fee renders that permittee's fee authority inadequate to satisfy the exemption of Government Code section 17556, subdivision (d). (San Diego Decision, Vol. 3, Tab 2 at pp. 106-107.) However, the Commission also found fees that result from a property owner's voluntary decision to seek a government benefit are not subject to the voter requirements of Proposition 218, and therefore such fees are sufficient within the meaning of Government Code section 17556, subdivision (d). (*Id.* at pp. 107-108.) In other words, for example, when a property owner voluntarily seeks to "develop" his or her property, fees charged by the respective local government to process an associated development application result from a property owner's voluntary decision and therefore are not subject to the voter requirements of Proposition 218. As indicated further below, the District and the County have identified State mandates that may only be funded by the imposition of a tax or fee that would be imposed on property owners subject to the requirements of Proposition 218.

In sum, the 2010 Permit imposes new requirements on the County and the District that exceed the requirements of federal law, were not components of the 2000 Permit, and are unique to local government. Similar requirements have been held by the Commission to be unfunded State mandates for which the Claimants were entitled to reimbursement; the new requirements in the 2010 Permit are similar State mandates in this case. Thus, the County and the District are entitled to reimbursement under Article XIII B section 6 of the California Constitution.

V. State Mandated Activities

On July 8, 2010, the Los Angeles Water Board issued the 2010 Permit to the Permittee. (See generally, Vol. 1, Tab 1.) The 2010 Permit mandates many new programs and activities that are not required by either federal law or the 2000 Permit. Each of the subheadings below contain a provision or provisions of the 2010 Permit and discusses how each mandate meets the requirements for reimbursement under the relevant standards.

Specifically, each provision identified as an unfunded mandate contains: (1) the specific provision of the 2010 Permit that mandates a new program or higher level of service; (2) applicable federal law, if any, and how the requirements contained in the 2010 Permit exceed those federal requirements; (3) the related provisions in the 2000 Permit, if any, and how the requirements in the 2010 Permit are new and different from those previous requirements; (4) a discussion of the specific activities mandated by the 2010 Permit and the actions undertaken by the County or the District to comply with those mandates; and, finally (5) the specific costs associated with each requirement as identified by the declarations and appendices to this Written Narrative Statement. Excerpts of the challenged 2010 Permit provisions have been provided as part of this written narrative in order to help facilitate the Commission's analysis of this Test Claim. However, Claimants' assertions that the requirements of the 2010 Permit represent a State mandate are not necessarily limited to the particular language quoted. Rather, the mandates themselves may encompass all related language within the broader sections identified that constitute the underlying mandates within the 2010 Permit.

A. Public Information/Participation Program

The 2010 Permit increases the public outreach requirement imposed on the Permittees, creating a number of new program requirements. These new obligations include a mandate for the Permittees, and specifically the District as the Principal Permittee. Further, the National Pollutant Discharge Elimination System Implementation Agreement, Ventura Countywide Stormwater Quality Management Program ("Implementation Agreement") between the District and the other Permittees sets forth the District's roles and responsibilities as the as "Principal Permittee," which also requires the District to perform the 2010 Permit public outreach requirements. (Implementation Agreement, Vol. 3, Tab 4 at p. 3-9.) Thus, the Permit and the Implementation Agreement require the District to distribute storm water pollution prevention materials to various entities, develop an ethnic communities strategy, provide materials to 50 percent of all K-12 students every two years and/or develop a youth outreach plan, develop and implement a behavioral change assessment strategy, coordinate and develop a pollutant specific outreach program, conduct corporate outreach, and implement a business assistance program. These activities are not mandated by federal law, were not required as part of the 2000 Permit, and constitute a new program or higher level of service for which the Permittees have and will continue to bear the costs of implementation. The relevant portions of the 2010 Permit require as follows:

Permit Parts 4.C.2(c)(1)(C), 4.C.2(c)(2), 4.C.2(c)(6), and 4.C.2(c)(8):

> 2. *Residential Program*
>   (c) *Outreach and Education*
>   (1) *Collaboratively, the Permittees shall implement the following activities:*
>
>   . . .

(C) Distribute storm water pollution prevention public education materials no later than (365 days after Order adoption date) to:

(i) Automotive parts stores

(ii) Home improvement centers/lumber yards/hardware stores

(iii) Pet shops/feed stores

(2) The Principal Permittee shall develop a strategy to educate ethnic communities through culturally effective methods. Details of this strategy should be incorporated into the PIPP, and implemented, no later than (365 days after Order adoption date).

. . .

(6) The Principal Permittee, in cooperation with the Permittees, shall provide schools within each School District in the County with materials, including, but not limited to, videos, live presentations, and other information necessary to educate a minimum of 50 percent of all school children (K-12) every 2 years on storm water pollution. Alternatively, a Permittee may submit a plan to the Regional Water Board Executive Officer for consideration no later than (90 days after Order adoption date), to provide outreach in lieu of the school curriculum. Pursuant to Water Code section 13383.6, the Permittees, in lieu of providing educational materials/funding to School Districts in the County, may opt to provide an equivalent amount of funds or fraction thereof to the Environmental Education Account established within the State Treasury.

. . .

(8) The Permittees shall develop and implement a behavioral change assessment strategy no later than (365 days after Order adoption date) in order to determine whether the PIPP is demonstrably effective in changing the behavior of the public. The strategy shall be developed based on current sociological data and studies. (2010 Permit, Vol. 1, Tab 1 at pp. 42-49)

Permit Part 4.C.2(d):

(d) Pollutant-Specific Outreach

The Principal Permittee, in cooperation with the Permittees, shall coordinate to develop outreach programs that focus on metals, urban pesticides, bacteria and nutrients as the pollutants of concern no later than (365 days after Order adoption date). Metals may be appropriately addressed through the Industrial/ Commercial Facilities

Program (e.g. the distribution of educational materials on appropriate BMPs for metal fabrication and recycling facilities that have been identified as a potential source). Region-wide pollutants may be included in the Principal Permittee's mass media outreach program. (2010 Permit, Vol. 1, Tab 1 at p. 44.)

Permit Part 4.C.3(a)-(b):

3. Business Program

(a) Corporate Outreach

(1) The Permittees shall work with other regional or statewide agencies and, associations such as the California Storm Water Quality Association (CASQA), to develop and implement a Corporate Outreach program to educate and inform corporate franchise operators and/or local facility managers about storm water regulations and BMPs. Once developed, the program shall target a minimum of four Retail Gasoline Outlets (RGO) franchisers and cover a minimum of 80% of RGO franchisees in the county, four retail automotive parts franchisers, two home improvement center franchisers and six restaurant franchisers. Corporate outreach for all target facilities shall be conducted not less than twice during the term of this Order, with the first outreach contact to begin no later than two years after Order adoption date . . . .

(b) Business Assistance Program

(1) The Permittees shall implement a Business Assistance Program to provide technical information to small businesses to facilitate their efforts to reduce the discharge of pollutants in storm water. The Program shall include:

(A) On-site, telephone or e-mail consultation regarding the responsibilities of businesses to reduce the discharge of pollutants, procedural requirements, and available guidance documents.

(B) Distribution of storm water pollution prevention education materials to operators of auto repair shops, car wash facilities (including mobile car detailing), mobile carpet cleaning services, commercial pesticide applicator services and restaurants. (2010 Permit, Vol. 1, Tab 1 at pp. 44-45.)

1. Requirements of Federal Law

Neither the 2010 Permit, nor any of its supporting documents, specifically identify any federal regulations as authority for the 2010 Permit's public outreach requirements. Moreover, no federal statute, regulation, or policy specifically requires large municipal storm water permits to include the type of public outreach requirements present in the 2010 Permit. Federal regulations do provide general public outreach and education requirements for large municipal storm water permits. (40 C.F.R. §§ 122.26(d)(2)(iv)(A)(6), (B)(6), (D)(4), Vol. 2, Tab 14.) However, those regulations do not require anywhere near the level of specificity included by the Los Angeles Water Board in the 2010 Permit. Federal regulations require large municipal storm water permits to include:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. (40 C.F.R. § 122.26(d)(2)(iv), Vol. 2, Tab 14.)
>
> [A] program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities. (40 C.F.R. § 122.26(d)(2)(iv)(A)(6), Vol. 2, Tab 14.)

Further, large municipal storm water permits must include:

> [E]ducational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials. (40 C.F.R. § 122.26(d)(2)(iv)(B)(6), Vol. 2, Tab 14.)

Finally, municipal storm water permits must include "[a]ppropriate educational and training measures for construction site operators." (40 C.F.R. § 122.26(d)(2)(iv)(D)(4), Vol. 2, Tab 14.) Where the State freely chooses to impose costs associated with a new program or higher level of service upon a local agency as the means of implementing a federal program, then the costs represent a reimbursable State mandate. (*Hayes*, *supra*, 11 Cal.App.4th at p. 1593, Vol. 2, Tab 6; *Long Beach*, *supra*, 225 Cal.App.3d at p. 155, Vol. 2, Tab 8.) Federal law does not require storm water NPDES permits to include the highly specific public outreach program that is contained in the 2010 Permit, yet the State has exercised its discretion to impose that program on the Permittees. For that reason, the public

education requirements in the 2010 Permit identified above exceed the requirements of federal law and represent a State mandated program.

2. Requirements From Prior Permit (2000)

The 2000 Permit contained a limited public participation and education program, but nothing nearly as specific as the requirements identified above and mandated as part of the 2010 Permit. The relevant provision of the 2000 Permit related to public participation and education requirements are as follows:

2000 Permit Part 4.A:

A. Programs for Residents

1. *Co-permittees shall identify staff who will serve as the public reporting contact person(s) for reporting clogged catch basin inlets and illicit discharges/dumping, and general storm water management information within 6 months of permit issuance, and thereafter include this information, updated when necessary, in public information, the government pages of the telephone book, and the annual report as they are developed/published. The designated contact staff will be provided with relevant storm water quality information including current resident program activities, preventative storm water pollution control information and contact information for responding to illicit discharges/illegal dumping.*
2. *Co-permittees shall mark storm drain inlets with a legible "no dumping" message. In addition, signs with prohibitive language discouraging illegal dumping must be posted at designated public access points to creeks, other relevant water bodies, and channels by July 27, 2002.*
3. *Each Co-permittee shall conduct educational activities within its jurisdiction and participate in countywide events.*
4. *Each Co-permittee shall distribute outreach materials to the general public and school children at appropriate public counters and events. Outreach material shall include information such as proper disposal of litter, green waste, and pet waste, proper vehicle maintenance techniques, proper lawn care, and water conservation practices.*
5. *The Discharger shall insure that a minimum of 2.1 million impressions per year are made on the general public about storm water quality via print, local TV access, local radio, or other appropriate media.*
(2000 Permit, Vol. 1, Tab 2 at p. 14)

As the Commission can plainly see, there is no requirement in the 2000 Permit for the Permittees, and therefore the District, to distribute storm water pollution prevention materials to specific entities, develop an ethnic communities strategy, or provide educational materials to students. There is also no requirement that Permittees, and therefore the District, must implement a behavioral change assessment strategy, a pollutant specific outreach program, or conduct corporate outreach and business assistance programs. Thus, the addition of this requirement in the 2010 Permit constitutes a new program or higher level of service.

3. Mandated Activities

As noted above, the 2010 Permit increases the public outreach and education requirement imposed on the Permittees, including obligating the Permittees to distribute storm water pollution prevention materials to various entities, develop an ethnic communities strategy, provide materials to 50 percent of all K-12 students every two years and/or develop a youth outreach plan, develop and implement a behavioral change assessment strategy, coordinate and develop a pollutant specific outreach program, conduct corporate outreach, and implement a business assistance program. Accordingly, the District, as the Principal Permittee and through the Implementation Agreement, must have implemented or must implement a number of new and costly activities arising from the mandate, including but not necessarily limited to the following:

- The District needed to develop and distribute storm water pollution prevention materials to automotive parts stores, home improvement centers, lumber-yards, hardware stores, pet shops, and feed stores by July 8, 2011.

- The District needed to develop and implement a strategy to educate ethnic communities by July 8, 2011.

- The District must distribute materials for school age children, or develop a Youth Action Plan, to educate school age children throughout the County.

- The District needed to develop and implement a behavioral change assessment strategy by July 8, 2011.

- The District needed to develop pollutant specific outreach programs for metals, urban pesticides, bacteria, and nutrients by July 8, 2011.

- The District must work with other regional or statewide agencies and associations, to develop and implement a Corporate Outreach program that is designed to educate and inform corporate franchise operators; and such Corporate Outreach shall be conducted at least twice during the Permit term.

- The District must implement a Business Assistance Program that includes providing technical information to small businesses through on-site, telephone, or email consultations, and includes distributing storm water pollution prevention education materials to various types of small businesses (e.g., auto repair shops, car wash facilities).

This has also forced the District, as the Principal Permittee, to modify or expand a number of its existing activities, thus increasing the cost and effort of these actions. Moreover, these requirements exceed the federal MEP standard by requiring new, specific requirements that are arguably not economically feasible considering current local government budgetary constraints. Because federal law does not specifically mandate any of these specific activities mandated by the 2010 Permit, and such requirements were not contained in the 2000 Permit, the provisions of the 2010 Permit impose a new program or higher level of service and constitute a series of unfunded mandates. The District is entitled to reimbursement for the above described actions.

4. Actual and Reimbursable Costs

To comply with the 2010 Permit requirements to develop and distribute storm water pollution prevention materials to automotive parts stores, home improvement centers, lumber-yards, hardware stores, pet shops, and feed stores (Part 4.C.2(c)(1)(C) at p. 42), the District's costs amounted to $27,996 in fiscal year 2009-2010, $20,402 in fiscal year 2010-2011, and $4,705.75 in fiscal year 2014-2015.

To comply with the 2010 Permit requirements to develop and implement a strategy to educate ethnic communities (Part 4.C.2(c)(2)), the District's costs amounted to $3,262.50 in fiscal year 2014-2015 and $6,375 in fiscal year 2015-2016.

To comply with the 2010 Permit requirements to distribute materials for school age children, or develop a Youth Action Plan, to educate school age children throughout the County (Part 4.C.2(c)(6)), the District's costs amounted to $34,970 in fiscal year 2009-2010, $5,677.92 in fiscal year 2013-2014, $5,070.17 in fiscal year 2014-2015, and $9,497.90 in fiscal year 2015-2016.

To comply with the 2010 Permit requirements to develop and implement a behavioral change assessment strategy (Part 4.C.2(c)(8)), the District's costs amounted to $21,000 in fiscal year 2009-2010, $21,000 in fiscal year 2010-2011, $21,000 in fiscal year 2011-2012, $20,000 in fiscal year 2012-2013, $20,000 in fiscal year 2013-2014, $20,000 in fiscal year 2014-2015, and $20,000 in fiscal year 2015-2016.

To comply with the 2010 Permit requirements to develop pollutant specific outreach programs for metals, urban pesticides, bacteria, and nutrients (Part 4.C.2(d)), the District's costs amounted to $3,620 in fiscal year 2009-2010 and $3,620 in fiscal year 2010-2011.

To comply with the 2010 Permit requirements to develop and implement a Corporate Outreach program that is designed to educate and inform corporate franchise operators (Part 4.C.3(a)(1)), the District's costs amounted to $10,438 in fiscal year 2010-2011.

To comply with the 2010 Permit requirements to implement a Business Assistance Program that includes providing technical information to small businesses through on-site, telephone, or email consultations, and includes distributing storm water pollution prevention education materials to various types of small businesses (e.g., auto repair shops, car wash facilities) (Part 4.C.3(b)(1)), the District's costs amounted to $693.08 in fiscal year 2009-2010 and $9,963.89 in fiscal year 2010-2011.

Summarizing the aforementioned public outreach requirements identified above, the District's total costs, pursuant to its obligations and responsibilities under the Implementation Agreement, amounted to $88,279.08 in fiscal year 2009-2010, $65,423.89 in fiscal year 2010-2011, $21,000 in fiscal year 2011-2012, $20,000 in fiscal year 2012-2013, $25,677.92 in fiscal year 2013-2014, $33,038.42 in fiscal year 2014-2015, and $35,872.90 in fiscal year 2015-2016. The District's costs for fiscal years 2009-2010 through 2015-2016 are set forth in Exhibit 1 to this Written Narrative Statement.

B. Reporting Program and Program Effectiveness Evaluation

The 2010 Permit requires the District, as the Principal Permittee, to develop an electronic reporting program and form for the annual report by July 8, 2011, and to evaluate, assess, and synthesize the results of the monitoring program and the effectiveness of the implementation of best management practices (i.e., conduct a program effectiveness evaluation). The requirement for the development of an electronic reporting program and form for the annual report and the requirement to conduct a program effectiveness evaluation, are not mandated by federal law and were not required as part of the 2000 Permit. Accordingly, the requirements constitute a new program or higher level of service. The relevant portions of the 2010 Permit, specifically Parts 4.I.1 and 3.E.1(e) require as follows:

Permit Part 4.I.1:

> *I. REPORTING PROGRAM*
>
> *1. The Principal Permittee in consultation with the Permittees and Regional Water Board staff shall convene an adhoc working group to develop an Electronic Reporting Program, the basis of which shall be the requirements in this Order. The Committee shall no later than one year after Order adoption date (July 8, 2011) submit the electronic reporting form in each subsequent year.* (2010 Permit, Vol. 1, Tab 1 at p. 87.)

Permit Part 3.E.1(e):

> *(e) Evaluate, assess, and synthesize the results of the monitoring program and the effectiveness of the implementation of BMPs*. (2010 Permit, Vol. 1, Tab 1 at p. 40.)

1. Requirements of Federal Law

Neither the 2010 Permit, nor any of its supporting documents, specifically identify any federal regulations as authority for the particular types of annual reporting requirements identified above. However, the federal requirements for annual reporting that do exist include the following:

> The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under § 122.26(a)(1)(v) of this part must submit an annual report by the anniversary of the date of issuance of the permit for such system. The report shall include:
>
> (1) The status of implementing the components of the storm water management program that are established as permit conditions;
>
> (2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with § 122.26(d)(2)(iii) of this part; and
>
> (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under § 122.26(d)(2)(iv) and (d)(2)(v) of this part;
>
> (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year;
>
> (5) Annual expenditures and budget for year following each annual report;
>
> (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs;
>
> (7) Identification of water quality improvements or degradation. (40 C.F.R. § 122.42(c), Vol. 2, Tab 15.)

Where the State freely chooses to impose costs associated with a new program or higher level of service upon a local agency as the means of implementing a federal program, the costs then represent a reimbursable State mandate. (*Hayes*, *supra*, 11 Cal.App.4th at p. 1593, Vol. 2, Tab 6; *Long Beach*, *supra*, 225 Cal.App.3d at p. 155, Vol. 2, Tab 8.) Federal law does not require the 2010 Permit to include the highly specific electronic reporting program and format, or require Permittees to conduct program effectiveness evaluations. Yet the State has exercised its discretion to impose that program on the Permittees. Thus, the

reporting and program effectiveness requirements in the 2010 Permit identified above, exceed the requirements of federal law and represent a State mandated program.

2. Requirements From Prior Permit (2000)

The 2000 Permit did contain annual storm water reporting and assessment requirements, but did not contain the types of specific requirements outlined above in the 2010 Permit, and certainly did not contain any requirement that Permittees design and implement an electronic reporting format for implementation or conduct a program effectiveness evaluation. The relevant provisions of the 2000 Permit related to annual reporting requirements are as follows:

2000 Permit Part 3.D.1:

1. *The Discharger shall submit, by October 1 of each year beginning the Year 2001, an Annual Storm Water Report and Assessment documenting the status of the general program and individual tasks contained in the Ventura County SMP, as well as results of analyses from the monitoring and reporting program CI 7388. The Annual Storm Water Report and Assessment shall cover each fiscal year from July 1 through June 30, and shall include the information necessary to assess the Discharger's compliance status relative to this Order, and the effectiveness of implementation of permit requirements on storm water quality. The Annual Storm Water Report and Assessment shall include any proposed changes to the Ventura County SMP as approved by the Management Committee.*

   The Discharger shall submit, by October 1, 2000, the Annual Report for the period July 1, 1999 through July 27, 2000 documenting the status of the general program up to permit reissuance and the results of analyses from the monitoring and reporting program. (2000 Permit, Vol. 1, Tab 2 at p. 12.)

Thus, the addition of this requirement in the 2010 Permit constitutes a new program or higher level of service.

3. Mandated Activities

As noted above, the 2010 Permit increases the annual reporting requirements imposed on the District by requiring the District to develop an electronic reporting program and form, and to conduct a program effectiveness assessment. This has forced the District to develop an electronic reporting program, and to conduct a program effectiveness assessment, which are expanded activities as compared to those reporting requirements required as part of the 2000 Permit. Moreover, the development of an electronic reporting program and form, and program effectiveness assessment are unrelated to reducing pollutants to the MEP, using

management practices, control techniques and system, design and engineering methods. Accordingly, these requirements exceed the federal MEP standard. Because federal law does not specifically mandate any of these activities mandated by the 2010 Permit, and such requirements were not contained in the 2000 Permit, these provisions of the 2010 Permit impose a new program or higher level of service and constitute a series of unfunded mandates. The District is entitled to reimbursement for these above described actions. (2010 Permit, Vol. 1, Tab 1 at p. 74

4. Actual and Reimbursable Costs

To comply with the 2010 Permit requirements to develop an electronic reporting program (Part 4.I.1), the District's costs amounted to $11,850 for fiscal year 2009-2010.

To comply with the 2010 Permit requirements to develop an electronic reporting format (Part 4.I.1), the District's costs amounted to $35,675 for fiscal year 2009-2010 and $4,293.75 for fiscal year 2010-2011.

To comply with the 2010 Permit requirements to perform a program effectiveness assessment (Part 3.E.(1)(e)), the District's costs amounted to $10,013.12 in fiscal year 2012-2013 and $6,766.25 in fiscal year 2013-2014.

Summarizing the aforementioned annual reporting requirements identified above, the District's total costs, pursuant to its obligations and responsibilities under the Implementation Agreement, amounted to $47,525 in fiscal year 2009-2010, $4,293.75 in fiscal year 2010-2011, $10,013.12 in fiscal year 2012-2013, and $6,766.25 in fiscal year 2013-2014. The District's costs for fiscal years 2009-2010 through 2014-2015 are set forth in Exhibit 1 to this Written Narrative Statement.

C. Special Studies

The 2010 Permit includes many special studies and unique requirements that are not directly associated with the federally required programs for large MS4 permits. Specifically, the Permit requires the District as the Principal Permittee to conduct or participate in a hydromodification control study ("HCS") to develop tools to predict and mitigate adverse impacts of hydromodification, and to comply with hydromodification criteria. The Permit also requires the Permittees to update the technical guidance manual to include new informational requirements with respect to hydromodification criteria, best management practice performance criteria, and low impact development principles and specifications. Further, the Permit requires the Permittees to identify a list of eligible off-site mitigation projects, and develop a schedule for completing off-site mitigation projects. These identified Permit activities are being conducted by the District, as the Principal Permittee, and through its obligations and responsibilities identified in the Implementation Agreement. These activities are not mandated by federal law, were not required as part of the 2000 Permit, and constitute a new program or higher level of service for which the District has and will

continue to bear the costs of implementation. Theses provisions in Part 4.E of the 2010 Permit, as well as provisions within the Monitoring Program for the 2010 Permit, require the District, as the Principal Permittee, to engage in special studies that were not required by the 2000 Permit. Specifically, theses provisions provide that:

Permit Part 4.E.III.3(a)(1)(D)-(E):

> *(D) The Southern California Storm Water Monitoring Coalition (SMC) is developing a regional methodology to eliminate or mitigate the adverse impacts of hydromodification as a result of urbanization, including hydromodification assessment and management tools.*
>
> *(i) The SMC has identified the following objectives for the Hydromodification Control Study (HCS):*
>
> *(I) Establishment of a stream classification for Southern California streams*
>
> *(II) Development of a deterministic or predictive relationship between changes in watershed impervious cover and stream-bed/stream bank enlargement*
>
> *(III) Development of a numeric model to predict stream-bed/stream bank enlargement and evaluate the effectiveness of mitigation strategies*
>
> *(E) The Permittees shall participate in the SMC HCS to develop:*
>
> *(i) A regional stream classification system*
>
> *(ii) A numerical model to predict the hydrological changes resulting from new development*
>
> *(iii) A numerical model to identify effective mitigation strategies*
>
> *(F) Until the completion of the SMC HCS, Permittees shall implement the Interim Hydromodification Control Criteria, described in subpart 4.E.III.3(a)(3)(A) below, to control the potential adverse impacts of changes in hydrology that may result from new development and redevelopment projects identified in subpart 4.E.II.* (2010 Permit, Vol. 1, Tab 1 at pp. 59-60.)

Attachment F, Section F:

> *The principal Permittee shall conduct or participate in special studies to develop tools to predict and mitigate the adverse impacts of Hydromodification, and to comply with hydromodification control criteria.*
>
> …
>
> *The principal Permittee may satisfy this requirement by participation in the Development of Tools for Hydromodification Assessment and Management*

Project undertaken by the SMC and coordinated by the SCCWRP. .
(2010 Permit, Vol. 1, Tab 1, section F at pp. F-15 and F-16.)

Permit Part 4.E.IV.4:

4. Developer Technical Guidance and Information

(a) The Permittees shall update the Ventura County Technical Guidance Manual for Storm Water Quality Control Measures to include, at a minimum, the following:

(1) Hydromodification Control criteria described in this Order, including numerical criteria.

(2) Expected BMP pollutant removal performance including effluent quality (ASCE/U.S. EPA International BMP Database, CASQA New Development BMP Handbook, technical reports, local data on BMP performance, and the scientific literature appropriate for southern California geography and climate).

(3) Selection of appropriate BMPs for storm water pollutants of concern.

(4) Data on Observed Local Effectiveness and performance of implemented BMPs.

(5) BMP Maintenance and Cost Considerations.

(6) Guiding principles to facilitate integrated water resources planning and management in the selection of BMPs, including water conservation, groundwater recharge, public recreation, multipurpose parks, open space preservation, and redevelopment retrofits.

(7) LID principles and specifications, including the objectives and specifications for integration of LID strategies in the areas of:

(A) Site Assessment.

(B) Site Planning and Layout.

(C) Vegetative Protection, Revegetation, and Maintenance.

(D) Techniques to Minimize Land Disturbance.

(E) Techniques to Implement LID Measures at Various Scales

(F) Integrated Water Resources Management Practices.

(G) LID Design and Flow Modeling Guidance.

(H) Hydrologic Analysis.

(I) LID Credits.

(b) Permittees shall update the Technical Guidance Manual within (120 days after Order adoption date).

(c) *The Permittees shall facilitate implementation of LID by providing key industry, regulatory, and other stakeholders with information regarding LID objectives and specifications contained in the LID Technical Guidance Section through a training program. The LID training program will include the following:*
   (1) *LID targeted sessions and materials for builders, design professionals, regulators, resource agencies, and stakeholders*
   (2) *A combination of awareness on national efforts and local experience gained through LID pilot projects and demonstration projects*
   (3) *Materials and data from LID pilot projects and demonstration projects including case studies*
   (4) *Guidance on how to integrate LID requirements into the local regulatory program(s) and requirements*
   (5) *Availability of the LID Technical Guidance regarding integration of LID measures at various project scales*
   (6) *Guidance on the relationship among LID strategies, Source Control BMPs, Treatment Control BMPs, and Hydromodification Control requirements*

(d) *The Permittees shall submit revisions to the Ventura County Technical Guidance Manual to the Regional Water Board for Executive Officer approval.* (2010 Permit, Vol. 1, Tab 1 at pp. 66-67.)

Permit Part 4.E.III.2(c)(3)-(4):

(3) *Location of off site mitigation. Offsite mitigation projects must be located in the same sub-watershed (defined as draining to the same hydrologic area in the Basin Plan) as the new development or redevelopment project. A list of eligible public and private offsite mitigation projects available for funding shall be identified by the Permittees and provided to the project applicant. Off site mitigation projects include green streets projects, parking lot retrofits, other site specific LID BMPs, and regional BMPs. Project applicants seeking to utilize these alternative compliance provisions may propose other offsite mitigation projects, which the Permittees may approve if they meet the requirements of this subpart.*

(4) *Timing and Reporting Requirements for Offsite Mitigation Projects. The Permittee(s) shall develop a schedule for the completion of offsite mitigation projects, including milestone dates to identify fund, design, and construct the projects. Offsite mitigation projects shall be completed as soon as possible, and at the latest, within 4 years of the certificate of occupancy for the first project that contributed funds toward the*

> *construction of the offsite mitigation project, unless a longer period is otherwise authorized by the Executive Officer. For public offsite mitigation projects, the permittees must provide in their annual reports a summary of total offsite mitigation funds raised to date and a description (including location, general design concept, volume of water expected to be retained, and total estimated budget) of all pending public offsite mitigation projects. Funding sufficient to address the offsite mitigation volume must be transferred to the permittee (for public offsite mitigation projects) or to an escrow account (for private offsite mitigation projects) within one year of the initiation of construction.* (2010 Permit, Vol. 1, Tab 1 at pp. 58-59.)

1. Requirements of Federal Law

Neither the 2010 Permit, nor any of its supporting documents, specifically identify any federal regulations as authority for the permit requirements provided here. At most, 40 Code of Regulations part 122.26(d)(2)(iv)(A)(2) requires:

> (2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section.

Where the State freely chooses to impose costs associated with a new program or higher level of service upon a local agency as the means of implementing a federal program, then the costs represent a reimbursable State mandate. (*Hayes*, *supra*, 11 Cal.App.4th at p. 1593, Vol. 2, Tab 6; *Long Beach*, *supra*, 225 Cal.App.3d at p. 155, Vol. 2, Tab 8.) Federal law does not require the 2010 Permit to include provisions requiring Permittees to engage in these types of specific special studies, yet the State has exercised its discretion to impose that program on the Permittees. Thus, the reporting requirements in the 2010 Permit identified above, exceed the requirements of federal law and represent a State mandated program.

2. Requirements From Prior Permit (2000)

The 2000 Permit Monitoring and Reporting Program (2000 Permit, Vol. 1, Tab 2, section T at pp. T-1 to T-11) contained no reference to participation in a hydromodification program, no requirement that the Permittee update the Technical Guidance Manual with Best Management Practice ("BMP") performance criteria, and contained none of the off-site mitigation requirements for identifying mitigation sites and preparing a schedule. Specifically, 2000 Permit Part 3.E stated only that:

The Discharger shall submit a Storm Water Monitoring Report on July 15, 2001 and annually on July 15 thereafter. The report shall include:

a. Status of implementation of the monitoring program as described in the attached Monitoring and Reporting Program, CI-7388.

b. Results of the monitoring program; and

c. A general interpretation of the significance of the results, to the extent that data allows. (2000 Permit, Vol. 1, Tab 2 at p. 13.)

Moreover, 2000 Permit Part 4.C.2 stated only that:

The Discharger shall no later than July 27, 2002, prepare a technical manual which shall include:

a. specifications for treatment control BMPs and structural BMPs based on the flow-based and volume-based water quality design criteria for the purposes of countywide consistency, and

b. criteria for the control of discharge rates and duration. (2000 Permit, Vol. 1, Tab 2 at p. 16.)

Thus, the addition of these new requirements in the 2010 Permit constitutes a new program or higher level of service.

3. Mandated Activities

As noted above, the 2000 Permit contained no reference to participation in a hydromodification study program, no requirement that the Permittee update the Technical Guidance Manual with BMP performance criteria and other specific information, and none of the requirements for identifying off-site mitigation locations and establishing a schedule for completion of off-site mitigation projects. Similarly, the requirements of federal law do not specifically mandate that Permittees engage in the type of specific hydromodification program prescribed in the 2010 Permit, nor do they require any of the other mandates highlighted above. Thus, the identified subdivisions of Part 4.E of the 2010 Permit and section F of Appendix F impose a new or higher level of service than the previous mandates and constitute an unfunded mandate for which the District is entitled to reimbursement. This new requirement has forced the District to implement a number of new and costly activities arising from the mandate, including but not necessarily limited to as follows:

- The District needed to update the Technical Guidance Manual to comply with the requirements specified in the 2010 Permit. To do so, the District, as the Principal Permittee, hired consultants with specific expertise in this area. The requirements are highly specialized and it took District staff, consultants, and County staff almost a year to develop the information necessary for the update.

- To participate in the SMC HCS, the District, as the Principal Permittee, will need to pay its fair share of the costs.

- The District will need to spend staff time and resources to develop local information for the regional study and coordinate with other participants.

- To meet the mandates associated with the off-site mitigation requirements in Parts 4.E.III(c)(3) and 4.E.III(c)(4) of the Permit (i.e., identify potential mitigation locations and establish a schedule), the District, as the Principal Permittee and through its obligations and responsibilities under the Implementation Agreement, will need to develop a complete off-site mitigation program. Activities associated with developing such a program include mapping and surveying locations that are suitable for off-site mitigation that are appropriate, and developing a schedule for completion.

Neither the 2010 Permit, nor any of its supporting documents, specifically identify any federal regulations as authority for the special study requirements identified above. Federal law requires that permits for municipal discharges 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)(iii), Vol. 2, Tab 11.) Although not defined in federal law, the Permit defines MEP to mean the following:

> *The technology-based permit requirement established by Congress in CWA section 402(p)(3)(B)(iii) that municipal dischargers of storm water must meet. Technology-based requirements, including MEP, establish a level of pollutant control that is derived from available technology or other controls. MEP requires municipal dischargers to perform at maximum level that is practicable. Compliance with MEP may be achieved by emphasizing pollution prevention and source control BMPs in combination with structural and treatment methods where appropriate. The MEP approach is an ever evolving and advancing concept, which considers technical and economic feasibility.* (2010 Permit Part 6, Vol. 1, Tab 1 at p. 108.)

As clearly indicated, the requirements of MEP are specifically related to using "technology" to control pollutants, using pollution prevention and source control techniques. The activities identified here (updating the Technical Guidance Manual in the manner specified, participating in or conducting a regional HCS study and developing on offsite mitigation program) are unrelated to using pollution prevention and source control techniques to control pollutants to the MEP. Because federal law does not specifically mandate any of these specific activities mandated by the 2010 Permit, and such requirements were not contained in the 2000 Permit, these provisions of the 2010 Permit impose a new program or higher level of

service and constitute a series of unfunded mandates. The District is entitled to reimbursement for the above described actions.

4. Actual and Reimbursable Costs

To comply with the 2010 Permit requirements relating to hydromodification (Part 4.E.III.3(a)(1)(D)-(E), Attachment F, Section F, page F-15), the District's costs amounted to $123,180.85 for fiscal year 2012-2013, $52,947.43 for fiscal year 2013-2014, and $6,533.25 for fiscal year 2014-2015.

To comply with the 2010 Permit requirements relating to the Technical Guidance Manual / BMP performance criteria (Part 4.E.IV.4), the District's costs amounted to $104,844.26 for fiscal year 2009-2010, $101,919.81 for fiscal year 2010-2011, and $7,350.20 for fiscal year 2011-2012.

To comply with the 2010 Permit requirements relating to off-site mitigation program structure (Part 4.E.III.2(c)), the District's costs amounted to $5,242.88 for fiscal year 2009-2010, $17,460.50 for fiscal year 2010-2011, and $93,607.64 for fiscal year 2011-2012.

To comply with the 2010 Permit requirements relating to off-site mitigation sites/locations (Part 4.E.III.2(c)), the District's costs amounted to $12,966 for fiscal year 2010-2011 and $69,030.07 for fiscal year 2011-2012.

Summarizing the aforementioned special studies requirements identified above, the District's total costs, pursuant to its obligations and responsibilities under the Implementation Agreement, amounted to $110,087.14 in fiscal year 2009-2010, $132,346.31 in fiscal year 2010-2011, and $169,987.91 in fiscal year 2011-2012. The District's costs for fiscal years 2009-2010 through 2014-2015 are set forth in Exhibit 1 to this Written Narrative Statement.

D. Watershed Initiative Participation

The 2010 Permit requires the District, as the Principal Permittee, to participate in regional monitoring coalition groups, participate in regional bioassessments, and participate in a regional monitoring survey. The 2000 Permit did not require the District to participate in these activities. Previously, the District could voluntarily participate, contingent on available resources. Required participation is not mandated by federal law, was not required as part of the 2000 Permit, and constitutes a new program or higher level of service for which the Permittees have and will continue to bear the costs of implementation. The relevant provisions of Part 4.B of the 2010 Permit mandate as follows:

1. *The Principal Permittee shall participate in water quality meetings for watershed management and planning, including but not limited to the following:*

   (a) Southern California Stormwater Monitoring Coalition (SMC)

(b) Other watershed planning groups as appropriate

2. The Principal Permittee shall participate in the following regional water quality programs, and projects for watershed management and planning:

(a) SMC Regional Monitoring Programs

(1) Southern California Regional Bioassessment

(A) Level of effort per watershed

(i) Probabilistic sites per watershed

(I) Ventura River – six

(II) Santa Clara River – three

(III) Calleguas Creek – six

(ii) Integrator sites per watershed

(I) Ventura River – one

(II) Santa Clara river – one

(III) Calleguas Creek – one

(iii) Fixed bioassessment sites

(I) The permittees shall perform bioassessment at one fixed urban site in each major watershed. Site selection shall be determined by the results of the first year SMC results, as approved by the Executive Officer.

(b) Southern California Bight Projects

(1) Regional Monitoring Survey – 2008, and successive years

(2010 Permit, Vol. 1, Tab 1 at pp. 41-42.)

1. Requirements of Federal Law

Neither the 2010 Permit, nor any of its supporting documents, specifically identify any federal regulations as authority for the 2010 Permit's requirements associated with participation in regional monitoring coalitions, regional bioassessment, and regional monitoring surveys. Moreover, no federal statute, regulation, or policy requires municipal storm water permits to include participation in regional monitoring efforts as a Permit requirement. Federal regulations implementing the CWA require all NPDES permits to contain certain monitoring provisions, including those establishing "type, intervals and frequency sufficient to yield data which are representative of the monitored activity . . . ." (40 C.F.R. § 122.48, Vol. 2, Tab 17.) In addition, the regulations require certain types of monitoring "to assure compliance with permit limitations." (*Id.* § 122.44(i), Vol. 2, Tab 17.) These requirements apply primarily to parameters for an individual Permittee's discharge. (*Id.* § 122.44(i), Vol. 2, Tab 16.) Monitoring requirements specific to storm water permits under section 122.26 of the federal regulation are largely aimed at identifying sources and characterizing pollution arising from outflows within each MS4's jurisdiction. (*Id.*

§§ 122.26(d)(1)(iv)(B), (2)(iii), Vol. 2, Tab 14.) Storm water management programs "may impose controls on a system wide basis, a watershed basis, a jurisdiction basis, or on individual outfalls." (*Id.* § 122.26(d)(2)(iv), Vol. 2, Tab 14.) While cooperative agreements may be required, "each copermittee is only responsible for their own systems." (*Id.* § 122.26(d)(2)(i)(D), Vol. 2, Tab 14.) Even where a programmatic approach is taken, federal regulations state that, "Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate." (*Id.* § 122.26(a)(3)(vi), Vol. 2, Tab 14.)

In the San Diego and Los Angeles Decisions, the Commission correctly read these regulatory provisions to mean that, while a regional board may impose collaborative approaches to monitor and control pollutants on a watershed basis, such requirements exceed the mandate in federal law or regulations. (San Diego Decision, Vol. 3, Tab 2 p. 74; Los Angeles Decision, Vol. 3, Tab 1 pp. 30-31.) Specifically, the Commission found that:

> The federal regulations *authorize* but *do not require* with specificity regarding whether collaboration occurs on a jurisdictional, watershed or other basis…the permit requires specific action, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has *freely chosen* to impose these requirements. (San Diego Decision, Vol. 3, Tab 2 p. 74, emphasis added.)

Similarly, here, the federal regulations may "authorize" the Los Angeles Regional Board to insert monitoring requirements into the 2010 Permit but do not require that the type of regional monitoring efforts mandated in the 2010 Permit be imposed.

2. Requirements From Prior Permit (2000)

The 2000 Permit was silent on the SMC participation requirement and contained no such mandate. As to the regional bioassessment and the Southern California Bight Projects Regional Monitoring Survey, these too were not specifically required, though monitoring and reporting generally were covered by the 2000 Permit in Part 3.E (2000 Permit, Vol. 1, Tab 2 at p. 13), which required only that:

> *E. Storm Water Monitoring Report.*
>
> *1. The Discharger shall submit a Storm Water Monitoring Report on July 15, 2001 and annually on July 15 thereafter. The report shall include:*
>
> *a. Status of implementation of the monitoring program as described in the attached Monitoring and Reporting Program, CI-7388.*
>
> *b. Results of the monitoring program; and*
>
> *c. A general interpretation of the significance of the results, to the extent that data allows.*

Thus, the addition of these new requirements in the 2010 Permit constitutes a new program or higher level of service.

3. Mandated Activities

As noted above, the 2000 Permit contained no mandate to participate in the SMC or other regional groups, and no requirement that the District, as Principal Permittee, participate in a regional bioassessment or in the Southern California Bight Regional Monitoring Survey. Similarly, the requirements of federal law do not specifically mandate that Permittees must engage in regional activities where the geographic scope of the monitoring program expands beyond the Permittees' jurisdictional boundaries. Thus, the identified subdivisions of Part 4.B of the 2010 Permit impose a new or higher level of service than the previous mandate and constitute an unfunded mandate for which the District is entitled to reimbursement. These requirements have forced the District to spend staff and resources to attend meetings outside of its jurisdictional boundaries, coordinate activities with other non-Ventura County MS4 Permittees, and financially support studies being conducted by a non-profit organization. Mandated participation in regional programs outside of the Permittees' jurisdictional area exceeds the MEP standard contained in federal law. The Permit defines MEP as follows:

> *The technology-based permit requirement established by Congress in CWA section 402(p)(3)(B)(iii) that municipal dischargers of storm water must meet. Technology-based requirements, including MEP, establish a level of pollutant control that is derived from available technology or other controls. MEP requires municipal dischargers to perform at maximum level that is practicable. Compliance with MEP may be achieved by emphasizing pollution prevention and source control BMPs in combination with structural and treatment methods where appropriate. The MEP approach is an ever evolving and advancing concept, which considers technical and economic feasibility.*
> (2010 Permit, Vol. 1, Tab 1 at p. 108.)

Clearly, mandated participation in region-wide (i.e., Southern California) coalitions, bioassessments, and monitoring surveys is unrelated to performance of pollution prevention and source control best management practices. Accordingly, mandated participation in these activities exceeds MEP and federal law. Because federal law does not mandate any of these specific activities, and because such requirements were not contained in the 2000 Permit, these provisions of the 2010 Permit impose a new program or higher level of service and constitute a series of unfunded mandates. The District is entitled to reimbursement for these above described actions.

4. Actual and Reimbursable Costs

To comply with the 2010 Permit requirements relating to SMC participation (Part 4.B.1), the District's costs amounted to $9,412 in fiscal year 2009-2010, $14,706 in fiscal year 2010-2011, $15,882 in fiscal year 2011-2012, $9,375 in fiscal year 2012-2013, $9,375 in

fiscal year 2013-2014, $35,267.86 in fiscal year 2014-2015, and $36,409 in fiscal year 2015-2016.

To comply with the 2010 Permit requirements relating to regional bioassessment (Part 4.B.2.(a)(1)), the District's costs amounted to $67,093.11 in fiscal year 2009-2010, $86,290 in fiscal year 2010-2011, $85,683.16 in fiscal year 2011-2012, $67,395 in fiscal year 2012-2013, $55,118 in fiscal year 2013-2014, $70,122.04 in fiscal year 2014-2015, and $36,409 in fiscal year 2015-2016.

To comply with the 2010 Permit requirements relating to S.CA Bight – regional monitoring survey, the District's costs amounted to $200 in fiscal year 2015-2016.

Summarizing the aforementioned watershed initiative requirements identified above, the District's total costs, pursuant to its obligations and responsibilities under the Implementation Agreement, amounted to $76,505.11 in fiscal year 2009-2010, $100,996 in fiscal year 2010-2011, $101,565.16 in fiscal year 2011-2012, $76,770.02 in fiscal year 2012-2013, $64,493 in fiscal year 2013-2014, $105,189.90 in fiscal year 2014-2015, and $36,609 in fiscal year 2015-2016. The District's costs for fiscal years 2009-2010 through 2015-2016 are set forth in Exhibit 1 to this Written Narrative Statement.

E. Vehicle and Equipment Wash Areas

The provisions of Part 4.G.I.3(a) of the 2010 Permit require each Permittee to eliminate discharges of wash waters from vehicle and equipment washing through one of four specified methods. These provisions apply to all public agency vehicle and equipment wash areas with no exemptions for fire fighting vehicles. The specific methods identified as applied to fire fighting vehicles are not mandated by federal law, were not required as part of the 2000 Permit, and constitute a new program or higher level of service for which the County must bear the costs of implementation. Specifically, these provisions provide that:

Permit Part 4.G.I.3(a):

> *(a) Each Permittee shall eliminate discharges of wash waters from vehicle and equipment washing no later than (365 days after Order adoption date) by implementing any of the following measures at existing facilities with vehicle or equipment wash areas:*
> *(1) Self-contain, and haul off for disposal*
> *(2) Equip with a clarifier*
> *(3) Equip with an alternative pre-treatment device; or*
> *(4) Plumb to the sanitary sewer* (2010 Permit, Vol. 1, Tab 1 at p. 79.)

1. Requirements of Federal Law

Neither the 2010 Permit, nor any of its supporting documents, identify any specific federal regulations as authority for the 2010 Permit's elimination of wash water discharge requirements in the manner specified in the 2010 Permit for fire fighting vehicles.

2. Requirements From Prior Permit (2000)

The 2000 Permit required Permittees to ensure that all corporate yards had vehicle and equipment wash areas that were self-contained, or covered, or equipped with a clarifier, or other pretreatment facility, and were properly connected to a sanitary sewer. However, the 2000 Permit specifically exempted fire fighting vehicles. (2000 Permit, Vol. 1, Tab 2 at p. 20.)

Permit Part 4.E.4:

> 4. *Co-permittees shall require that all vehicle/equipment wash areas must be self-contained, or covered, or equipped with a clarifier, or other pretreatment facility, and properly connected to a sanitary sewer. This provision does not apply to fire fighting vehicles.* (2000 Permit, Vol. 1, Tab 2 at p. 20.)

3. Mandated Activities

As noted above, the 2010 Permit creates a new requirement with respect to fire fighting vehicles. Where as previously, fire fighting vehicles were exempt, the 2010 Permit provides no continued exemption. Accordingly, the County, as a Permittee, is now required to retrofit 30 fire stations to comply with this new Permit requirement.

Federal law does not mandate that wash waters from public agency vehicle and equipment areas must be eliminated through one of the methods specified in the 2010 Permit, and specifically, such a requirement has never previously been imposed on fire fighting vehicles. MEP is defined in the Permit as:

> *The technology-based permit requirement established by Congress in CWA section 402(p)(3)(B)(iii) that municipal dischargers of storm water must meet. Technology-based requirements, including MEP, establish a level of pollutant control that is derived from available technology or other controls. MEP requires municipal dischargers to perform at maximum level that is practicable. Compliance with MEP may be achieved by emphasizing pollution prevention and source control BMPs in combination with structural and treatment methods where appropriate. The MEP approach is an ever evolving and advancing concept, which considers technical and economic feasibility.* (2010 Permit Part 6, Vol. 1, Tab 1 at p. 108.)

MEP clearly incorporates technical and economic feasibility. While technically feasible, the retrofitting of 30 fire stations is not economically feasible, and therefore the requirement as applied to fire fighting vehicles goes beyond MEP. Accordingly, the vehicle wash area provisions that now apply to fire fighting vehicles constitutes a new program or higher level of service and are therefore unfunded mandates. The County is entitled to reimbursement for this required action.

4. Actual and Reimbursable Costs

To comply with the 2010 Permit's Vehicle and Equipment Wash Area requirements for fire fighting vehicles (Part 4.G.I.3(a)), the County's costs amounted to $315,392.57 in fiscal year 2009-2010, $108,904.75 in fiscal year 2011-2012, $437,438.42 in fiscal year 2012-2013, $312,759.76 in fiscal year 2013-2014, and $6,113 in fiscal year 2015-2016. The County's costs to comply with the mandated activities are set forth in Exhibit 1 to this Written Narrative Statement.

F. Illicit Connections and Illicit Discharges Elimination Program

The 2010 Permit has mandated additional activities as part of the Illicit Connections and Illicit Discharges Elimination Program that represents a costly mandate to Permittees, and specifically, the County. The Illicit Connections and Illicit Discharges Elimination Program requires the Permittees, including the County, to screen for illicit connections by preparing a map that shows the location and length of all underground pipes 18 inches and greater in diameter, and all channels within the Permittees' permitted area. This activity is not mandated by federal law and was not required as part of the 2000 Permit, and constitutes a new program or higher level of service for which the Permittees must bear the costs of implementation. The relevant portions of the 2010 Permit, specifically Part 4.H.I.3, require as follows:

Permit Part 4.H.I.3(a):

(1) Each Permittee shall submit to the Principal Permittee:

(A) A map at a scale and in a format specified by the Principal Permittee showing the location and length of underground pipes 18 inches and greater in diameter, and channels within their permitted area and operated by the Permittee in accordance with the following schedule:

(i) All channeled portions of the storm drain system no later than 90 days after Order adoption date (insert date).

(ii) All portions of the storm drain system consisting of storm drain pipes 36 inches in diameter or greater, no later than May 7, 2012.

> *(iii) All portions of the storm drain system consisting of storm drain pipes 18 inches in diameter or greater, no later than May 7, 2014.* (2010 Permit, Vol. 1, Tab 1 at p. 86.)

1. Requirements of Federal Law

Neither the 2010 Permit, nor any of its supporting documents, specifically identify any federal regulations as authority for the 2010 Permit's storm drain mapping requirement. With respect to federal requirements associated with illicit discharges, the federal regulations require as follows:

> (B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:
>
> (1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by he municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);
>
> (2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;
>
> (3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residential chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

> (4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;
>
> (5) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges of water quality impacts associated with discharges from municipal separate storm sewers;
>
> (6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and
>
> (7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary. (40 C.F.R. § 122.26(d)(2)(iv)(B), Vol. 2, Tab 14.)

With respect to mapping requirements, the federal regulations require as follows:

> (B) A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:
>
> (1) The location of known municipal storm sewer system outfalls discharging to waters of the United States;
>
> (2) A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;
>
> (3) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;
>
> (4) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;
>
> (5) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and
>
> (6) The identification of publicly owned parks, recreational areas, and other open lands. (40 C.F.R. § 122.26(d)(1)(iii)(B), Vol. 2, Tab 14.)

2. Requirements From Prior Permit (2000)

The 2000 Permit contains some limited requirements to meet the federal requirements for illicit discharges, which are as follows:

2000 Permit, Part 4.F:

1. *Co-permittees shall investigate the cause, determine the nature and estimated amount of reported illicit discharge/dumping incidents, and refer documented non-storm water discharges/connections or dumping to an appropriate agency for investigation, containment and cleanup. Appropriate action including issuance of an enforcement order that will result in cessation of the illicit discharge, and/or elimination of the illicit connection, shall take place within six months after the Co-permittee gains knowledge of the discharge/connection.*
2. *Each Co-permittee shall train its employees in targeted positions, as defined by the Ventura County SMP, on how to identify and report illicit discharges by January 27, 2001, and annually thereafter.*
3. *Automotive, food facility, construction and Co-permittee facility site inspection visits shall include distribution of educational material that describes illicit discharges and provides a contact number for reporting illicit discharges.*
4. *New information developed for Phase I industrial facility educational material shall include information describing illicit discharges. The information shall include: types of discharges prohibited, how to prevent illicit discharges, what to do in the event of an illicit discharge, and the array of enforcement actions the facility may be subject to, including penalties that can be assessed.* (2000 Permit, Vol. 1, Tab 2 at pp. 21-22.)

However, the 2000 Permit does not require mapping of the storm drain system as part of this program. Thus the addition of this new requirement in the 2010 Permit constitutes a new program or higher level of service.

3. Mandated Activities

As noted above, the 2010 Permit requires the County to conduct mapping of the storm drain system within the County's unincorporated areas. This requirement is not mandated by federal law and was not contained in the 2000 Permit. This has forced the County to prepare extensive maps to meet this mandate. Further, the requirement to prepare the storm drain system map exceeds the federal MEP standard because it is not a technology-based pollutant control technique or best management practice that is designed to reduce discharges of pollutants. Because federal law does not specifically mandate this requirement as contained in the 2010 Permit, and the requirement was not contained in the 2000 Permit, this provision of the 2010 Permit imposes a new program or higher level of service and constitutes an unfunded mandate. The County is entitled to reimbursement for the above described action.

4. Actual and Reimbursable Costs

To comply with the 2010 Permit's storm drain mapping requirements (Part 4.H.I.3(a)), the County's costs amounted to $32,610.17 in fiscal year 2009-2010 and $23,442.09 in fiscal year 2010-2011. The County's costs to comply with these mandated activities are set forth in Exhibit 1 to this Written Narrative Statement.

VI. Statewide Cost Estimate

The 2010 Permit only relates to areas under the control or jurisdiction of the County, the District, and the other Permittees. Therefore, the cost estimate provided for implementation of the MS4 Permit only relates to these identified areas. Accordingly, no statewide cost estimate is available or required.

VII. Funding Sources

Under the Implementation Agreement, the District receives funding from the other Co-Permittees to help finance the District's obligations and responsibilities as the Principal Permittee and for the activities specified in the Implementation Agreement. The Co-Permittees may fund their portion of the District's Principal Permittee costs either by deducting their share from the proceeds of the Benefit Assessment Program or by payment to the District. The District's Benefit Assessment Program was authorized by the Ventura County Watershed Protection Act ("Act"), as amended by Chapter 438, Statutes of 1987, and Chapter 365, Statutes of 1988. The purposes for which the Benefit Assessments are levied fall within those activities that are subject to the requirements of Proposition 218. Accordingly, any increase in the Benefit Assessment to pay for increased costs mandated by the 2010 Permit must be approved by the voters and property owners, pursuant to the requirements of Proposition 218. The level of funding available to the District through the Benefit Assessment Program is currently less than what is necessary to fund the newly mandated requirements.

The County's total program costs of $1.7 million annually for its Permittee obligations are funded strictly through the County's General Fund, except for $58,000 which comes from the Benefit Assessment Program.

The District and County are not aware of any dedicated State funds, dedicated federal funds, other nonlocal agency funds, or local agency general purpose funds that are or will be available to fund their respective new activities. In addition, the District and County do not have fee authority to offset these costs.

VIII. Prior Mandate Determinations

The vital portions of previous Commission decisions are cited in relevant portions of the narrative section of this Test Claim. However, as required, Claimants have assembled a

list of the previous test claim decisions that are relevant to this Test Claim. They are as follows:

- *In re Test Claim on: Los Angeles Regional Water Quality Control Board Order No. 01-192, Case Nos. 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21* ("Los Angeles Decision") and can be found in Volume 3, Tab 1;

- *In re Test Claim on San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Case No. 07-TC-09* ("San Diego Decision") and can be found in Volume 3, Tab 2.

IX. Declaration of Costs

Actual and/or estimated costs resulting from the alleged mandates exceed $1,000, as set forth in Exhibit 1 to this Written Narrative Statement.

X. Conclusion

The 2010 Permit imposes many new mandated activities and programs on the District and the County. As detailed above, the costs to develop and implement these programs and activities as required are substantial. The District and County believe that the costs incurred and to be incurred satisfy all the criteria for reimbursable mandates and respectfully requests that the Commission make such findings as to each of the mandated programs and activities set forth herein.

EXHIBIT 1

SB 90 AGENCY CERTIFICATION

AGENCY: Ventura County Watershed Protection District, Fund 1720

MANDATE NAME(S) AND PROGRAM NUMBER(S) and COSTS INCURRED IN FISCAL YEARS 2010, 2011, 2012, 2013, 2014, 2015, and 2016:

Element Eligible for Reimbursement	FY 10 Cost Incurred	FY11 Cost Incurred	FY12 Cost Incurred	FY13 Cost Incurred	FY14 Cost Incurred	FY15 Cost Incurred	FY16 Cost Incurred	Citation: NPDES Permit No. CAS004002 Order No. 10-108
Public Outreach								
Distribute SW Pollution Prevention materials to Auto Parts Stores, Home Improvement, etc.	27,996.00	20,402.00	-	-	-	4,705.75	-	4. C. 2 (c) (1) (C) pg 42
Ethnic communities strategy	-	-	-	-	-	3,262.50	6,375.00	4. C. 2 (c) (2)
School District materials to 50% of all K-12 every two years/ Youth Outreach Plan	34,970.00	-	-	-	5,677.92	5,070.17	9,497.90	4. C. 2 (c) (6)
Behavioral Change Assessment	21,000.00	21,000.00	21,000.00	20,000.00	20,000.00	20,000.00	20,000.00	4. C. 2 (c) (8)
Pollutant- Specific Outreach	3,620.00	3,620.00	-	-	-	-	-	4. C. 2 (d)
Corporate Outreach	-	10,438.00	-	-	-	-	-	4. C. 3 (a) (1)
Business Assistance Program	693.08	9,963.89	-	-	-	-	-	4. C. 3 (b) (1)
Annual Reporting								
Development	11,850.00							4. I . 1
Electronic reporting format	35,675.00	4,293.75						4. I . 1
Program Effectiveness Assessment				10,013.12	6,766.25			3. E. (1) (e)
Special Studies								
Hydromodification (through SCCWRP and SMC)				123,180.85	52,947.43	6,533.25		Attachment F section F Page F-15 and E. III 3

								(E) page 60
Technical Guidance Manual Update/BMP Performance Criteria	104,844.26	101,919 81	7,350.20					4.E.IV.4
Off-Site Mitigation Program Structure	5,242.88	17,460.50	93,607.64					4. E. III.2(c)(3)-(4)
Off-Site Mitigation List of Sites/Locations		12,966.00	69,030.07					4. E. III.2(c)(3)-(4)
Watershed Initiative Participation/Regional Representation								
SMC Participation	9,412.00	14,706.00	15,882.00	9,375.00	9,375.00	35,267.86		4. B. 1.
Regional Bioassessment	67,093.11	86,290.00	85,683.16	67,395.02	55,118.00	70,122.04	36,409.00	4. B. 2. (a) (1)
S.CA Bight – Regional Monitoring Survey							200.00	4. B. 2. (b) (1)

SB 90 AGENCY CERTIFICATION

AGENCY: County of Ventura, Fund 1475 Unincorporated Stormwater

MANDATE NAME(S) AND PROGRAM NUMBER(S):

Element Eligible for Reimbursement	FY 10 Cost Incurred	FY11 Cost Incurred	FY12 Cost Incurred	FY13 Cost Incurred	FY14 Cost Incurred	FY15 Cost Incurred	FY16 Cost Incurred	Citation: NPDES Permit No. CAS004002 Order No. 10-108
Map at a scale and in a format specified by the Principal Permittee showing the location and length of underground pipes 18 inches and greater in diameter	$32,610.17	$23,442.09	-	-	-	-	-	Part 4.H.I.3(a)

SB 90 AGENCY CERTIFICATION

AGENCY: County of Ventura

MANDATE NAME(S) AND PROGRAM NUMBER(S):

Element Eligible for Reimbursement	FY11 Cost Incurred	FY12 Cost Incurred	FY13 Cost Incurred	FY14 Cost Incurred	FY15 Cost Incurred	FY16 Cost Incurred	Citation: NPDES Permit No. CAS004002 Order No. 10-108
Eliminate discharges of wash waters from vehicle and equipment washing	$315,392.57	$108,904.75	$437,438.42	$312,759.76	$0.00	$6,113.00	Part 4.G.I.3(a)

COSTS INCURRED IN FISCAL YEARS 2011, 2012, 2013, 2014 and 2016

DECLARATION OF JEFF PRATT

COUNTY OF VENTURA

I, JEFF PRATT, hereby declare and state as follows:

1. I am the Director of Public Works for the County of Ventura (the "County"). In that capacity, I have direct oversight of the County's implementation of requirements contained in Order No. R4-2010-0108, Waste Discharge Requirements for Storm Water (Wet Weather) and Non-Storm Water (Dry Weather) Discharges From the Municipal Separate Storm Sewer Systems Within the Ventura County Watershed Protection District, County of Ventura and the Incorporated Cities Therein ("Permit"), as adopted by the California Regional Water Quality Control Board for the Los Angeles Region.

2. Before becoming the Director of Public Works for the County, I was the Director of the Ventura County Watershed Protection District (the "District").

3. The County is a Co-Permittee.

4. I have reviewed sections of the Permit as set forth herein and am familiar with those provisions. I am also familiar with the pertinent sections of Order No. 00-108 ("2000 Permit"), which was issued by the Los Angeles Regional Water Quality Control Board in 2000.

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

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

7. Based on my understanding of the Permit, and the requirements of the 2000 Permit, I believe that the Permit requires the County to undertake the following new and/or

upgraded activities not required by the 2000 Permit and which are unique to local government entities:

a. Enhancement of Illicit Connections Elimination Program: Part 4.H.I.3 of the Permit requires the Permittees to develop a map showing the location and length of underground pipes 18 inches and greater in diameter, and channels within their permitted area. To comply with this requirement, the County must develop a map of all of the County's storm drain system for the unincorporated areas of the County. The County's costs to comply with Part 4.H.I.3(a) amounted to $32,610.17 in fiscal year 2009-2010 and $23,442.09 in fiscal year 2010-2011.

b. Vehicle and Equipment Wash Areas: Part 4.G.I.3 of the Permit requires each Permittee to eliminate discharges of wash water from vehicle and equipment washing by implementing one of the specified measures. To comply with this Permit provision, the County must retrofit 30 fire stations throughout the County. The County's costs to comply with Part 4.F.I.3(a) amounted to $315,392.57 in fiscal year 2009-2010, $108,904.75 in fiscal year 2011-2012, $437,438.42 in fiscal year 2012-2013, $312,759.76 in fiscal year 2013-2014, and $6,113 in fiscal year 2015-2016.

8. I am informed and believe that there are no dedicated state, federal, or regional funds that are or will be available to pay for any of the new and/or upgraded programs set forth in this declaration. I am not aware of any fee or tax which the County would have the discretion to impose under California law to recover any portion of these new activities. I am further informed and believe that the only available source of funding to pay for these new activities will be the County's General Fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11th day of May 2017 at Ventura, California.

Jeff Pratt

DECLARATION OF GLENN SHEPHARD

VENTURA COUNTY WATERSHED PROTECTION DISTRICT

I, GLENN SHEPHARD, hereby declare and state as follows:

1. I am the Director of the Ventura County Watershed Protection District (the "District"). In that capacity, I have direct oversight of the District's implementation of requirements contained in Order No. R4-2010-0108, Waste Discharge Requirements for Storm Water (Wet Weather) and Non-Storm Water (Dry Weather) Discharges From the Municipal Separate Storm Sewer Systems Within the Ventura County Watershed Protection District, County of Ventura and the Incorporated Cities Therein ("Permit"), as adopted by the California Regional Water Quality Control Board for the Los Angeles Region.

2. The District is designated in the Permit as the Principal Permittee for implementation of the Permit, as well as a Co-Permittee.

3. I have reviewed sections of the Permit as set forth herein and am familiar with those provisions. I am also familiar with the pertinent sections of Order No. 00-108 ("2000 Permit"), which was issued by the Los Angeles Regional Water Quality Control Board in 2000.

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

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

6. Based on my understanding of the Permit, and the requirements of the 2000 Permit, I believe that the Permit requires the District to undertake the following new and/or upgraded activities not required by the 2000 Permit and which are unique to local government entities:

a. Public Information and Participation Program: Parts 4.C.2(c)(1)(C), 4.C.2(c)(2), 4.C.2(c)(6), 4.C.2(c)(8), 4.C.2(d), 4.C.3(a), and 4.C.3(b)(1), among other Parts of the Permit, require the District, as Principal Permittee, to distribute storm water pollution prevention materials to various types of businesses, develop and implement an ethnic communities strategy, provide materials to 50 percent of all K-12 students every two years and/or develop an alternative youth action plan, develop and implement a behavioral change assessment strategy, coordinate and develop a pollutant specific outreach program, develop and implement a corporate outreach program, and implement a business assistance program. These activities are being conducted by the District as Principal Permittee. The costs of these activities are funded in part through funding provided by the District pursuant to its obligations under the Implementation Agreement (included in section 7 of the Test Claim), as well as through funding provided to the District from the Permittees under the Implementation Agreement. The District's costs to develop and distribute storm water pollution prevention materials to automotive parts stores, home improvement centers, lumber-yards, hardware stores, pet shops, and feed stores (Part 4.C.2(c)(1)(C) at p. 42) amounted to $27,996 in fiscal year 2009-2010, $20,402 in fiscal year 2010-2011, and $4,705.75 in fiscal year 2014-2015. The District's costs to develop and implement a strategy to educate ethnic communities (Part 4.C.2(c)(2)) amounted to $3,262.50 in fiscal year 2014-2015 and $6,375 in fiscal year 2015-2016. The District's costs to distribute materials for school age children, or develop a Youth Action Plan, to educate school age children throughout the County (Part 4.C.2(c)(6)) amounted to $34,970 in fiscal year 2009-2010, $5,677.92 in fiscal year 2013-2014, $5,070.17 in fiscal year 2014-2015, and $9,497.90 in fiscal year 2015-2016. The District's costs to develop and implement a behavioral change assessment strategy (Part 4.C.2(c)(8)) amounted to $21,000 in fiscal year 2009-2010, $21,000 in fiscal year 2010-2011, $21,000 in fiscal year 2011-2012, $20,000 in fiscal year 2012-2013, $20,000 in fiscal year 2013-2014, $20,000 in fiscal year 2014-2015, and $20,000 in fiscal year 2015-2016. The District's costs to develop pollutant specific outreach programs for metals, urban pesticides, bacteria, and nutrients (Part 4.C.2(d)) amounted to $3,620 in fiscal year 2009-2010 and $3,620 in fiscal year 2010-2011. The District's costs to develop and implement a Corporate Outreach program that is designed to educate and inform

corporate franchise operators (Part 4.C.3(a)(1)) amounted to $10,438 in fiscal year 2010-2011. The District's costs to implement a Business Assistance Program that includes providing technical information to small businesses through on-site, telephone, or email consultations, and includes distributing storm water pollution prevention education materials to various types of small businesses (e.g., auto repair shops, car wash facilities) (Part 4.C.3(b)(1)) amounted to $693.08 in fiscal year 2009-2010 and $9,963.89 in fiscal year 2010-2011.

b. Reporting Requirements: Parts 3.E(1)(e) and 4.I.1 of the Permit require the District, as Principal Permittee, to develop an electronic reporting program and form, and to conduct a program effectiveness evaluation. The costs of these activities are funded in part through funding provided by the District pursuant to its obligations under the Implementation Agreement (included in section 7 of the Test Claim), as well as through funding provided to the District from the Permittees under the Implementation Agreement. The District's costs to develop an electronic reporting program (Part 4.I.1) amounted to $11,850 for fiscal year 2009-2010. The District's costs to develop an electronic reporting format (Part 4.I.1) amounted to $35,675 for fiscal year 2009-2010 and $4,293.75 for fiscal year 2010-2011. The District's costs to perform a program effectiveness assessment (Part 3.E.(1)(e)) amounted to $10,013.12 in fiscal year 2012-2013 and $6,766.25 in fiscal year 2013-2014.

c. Hydromodification Control Study: Parts 4.E.III(a)(1)(D)-(E) and Monitoring Program – No. CI 7388 for Order No. R4-2010-0108, Appendix F, section F of the Permit require the Permittees, and the District, as Principal Permittee, to conduct or participate in special studies to develop tools to predict and mitigate adverse impacts of hydromodification, and to comply with hydromodification control criteria. The District's costs relating to hydromodification (Part 4.E.III.3(a)(1)(D)-(E), Attachment F, Section F, page F-15) amounted to $123,180.85 for fiscal year 2012-2013, $52,947.43 for fiscal year 2013-2014, and $6,533.25 for fiscal year 2014-2015.

d. Technical Guidance Manual for Storm Water Quality Control Measures: Part 4.E.IV.4 of the Permit requires the Permittees to update the Ventura County

Technical Guidance Manual for Storm Water Quality Control Measures ("Technical Guidance Manual") to include a number of new informational requirements, including but not limited to, hydromodification criteria, expected best management practice performance criteria, and low impact development principles and specifications. The development of the Technical Guidance Manual was conducted by the District as Principal Permittee. The cost of this activity is funded in part through funding provided by the District pursuant to its obligations under the Implementation Agreement (included in section 7 of the Test Claim), as well as through funding provided to the District from the Permittees under the Implementation Agreement. The District's costs relating to the Technical Guidance Manual / BMP performance criteria (Part 4.E.IV.4) amounted to $104,844.26 for fiscal year 2009-2010, $101,919.81 for fiscal year 2010-2011, and $7,350.20 for fiscal year 2011-2012.

e. Off-Site Mitigation Projects: Parts 4.E.III.2(c)(3) and 4.E.III.2(c)(4) of the Permit require the Permittees to develop a list of eligible public and private offsite mitigation projects available for funding, and to develop a schedule for completion of the offsite mitigation projects. The development of the list of eligible public and private and offsite mitigation projects, as well as the development of the schedule for completion is being conducted by the District as the Principal Permittee. The cost of this activity is funded in part through funding provided by the District pursuant to its obligations under the Implementation Agreement (included in section 7 of the Test Claim), as well as through funding provided to the District from the Permittees under the Implementation Agreement. The District's costs relating to off-site mitigation program structure (Part 4.E.III.2(c)) amounted to $5,242.88 for fiscal year 2009-2010, $17,460.50 for fiscal year 2010-2011, and $93,607.64 for fiscal year 2011-2012. The District's costs relating to off-site mitigation sites/locations (Part 4.E.III.2(c)) amounted to $12,966 for fiscal year 2010-2011 and $69,030.07 for fiscal year 2011-2012.

f. Participation in the Southern California Stormwater Monitoring Coalition: Part 4.B.1 of the Permit requires the District, as Principal Permittee, to participate in water quality meetings for watershed management and planning, including participation in the Southern California Stormwater Monitoring Coalition. The cost of this activity is

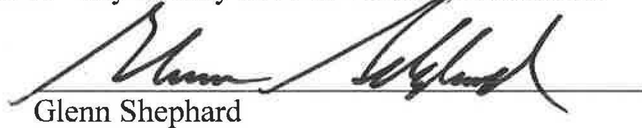
funded in part through funding provided by the District pursuant to its obligations under the Implementation Agreement (included in section 7 of the Test Claim), as well as through funding provided to the District from the Permittees under the Implementation Agreement. The District's costs to participate in the Southern California Stormwater Monitoring Coalition (Part 4.B.1) amounted to $9,412 in fiscal year 2009-2010, $14,706 in fiscal year 2010-2011, $15,882 in fiscal year 2011-2012, $9,375 in fiscal year 2012-2013, $9,375 in fiscal year 2013-2014, and $35,267.86 in fiscal year 2014-2015.

g. Southern California Regional Bioassessment: Part 4.B.2(a)(1) of the Permit requires the District, as Principal Permittee, to participate in water quality monitoring programs with the Southern California Stormwater Monitoring Coalition, including participation in the Southern California Regional Bioassessment. The cost of this activity is funded in part through funding provided by the District pursuant to its obligations under the Implementation Agreement (included in section 7 of the Test Claim), as well as through funding provided to the District from the Permittees under the Implementation Agreement. The District's regional bioassessment costs (Part 4.B.2.(a)(1)) amounted to $67,093.11 in fiscal year 2009-2010, $86,290 in fiscal year 2010-2011, $85,683.16 in fiscal year 2011-2012, $67,395 in fiscal year 2012-2013, $55,118 in fiscal year 2013-2014, $70,122.04 in fiscal year 2014-2015, and $36,409 in fiscal year 2015-2016.

h. Southern California Bight Projects: Part 4.B.2(b)(1) of the Permit requires the District, as Principal Permittee, to participate in water quality monitoring programs with the Southern California Stormwater Monitoring Coalition, including participation in the Southern California Bight Projects. The cost of this activity is funded in part through funding provided by the District pursuant to its obligations under the Implementation Agreement (included in section 7 of the Test Claim), as well as through funding provided to the District from the Permittees under the Implementation Agreement. The District's costs to participate in the Southern California Bight Projects amounted to $200 in fiscal year 2015-2016.

7. I am informed and believe that there are no dedicated state, federal, or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this declaration. I am not aware of any fee or tax that the District would have the discretion to impose under California law to recover any portion of the costs of the programs and activities set forth in this declaration. I further am informed and believe that the only available source for the District to pay for these new programs and activities is the District's general operating fund, and from the general funds of the Permittees, which are then provided to the District through the Implementation Agreement (included in section 7 of the Test Claim).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11th day of May 2017 at Ventura, California.



Glenn Shephard

DECLARATION OF THERESA A. DUNHAM

I, THERESA A. DUNHAM, hereby declare and state as follows:

1. I am the Special Counsel to the County of Ventura (the "County") and the Ventura County Watershed Protection District (the "District"). I am the claimant representative for both the County and the District for purposes of their test claims filed with the Commission on State Mandates. I also represented the County and District before the California Regional Water Quality Control Board Los Angeles Region ("Los Angeles Water Board") in its quasi-judicial proceeding for adoption of the storm water permit that is the subject of these test claims, Order No. R4-2010-0108, National Pollutant Discharge Elimination System ("NPDES") No. CAS004002 (the "Permit"), which regulates discharges from the municipal separate storm sewer systems ("MS4s") within the Ventura County Watershed Protection District, County of Ventura and the incorporated cities therein (the "Permittees").

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

3. Attached hereto as Exhibit A is a true and correct copy of the "NPDES Memorandum of Agreement between the U.S. Environmental Protection Agency and the California State Water Resources Control Board" ("MOA"). At Section II.F. on page 22, titled "Final Permits," the MOA provides that permits become effective 50 days after adoption where EPA has made no objection to the permit, if (a) there has been significant public comment, or (b) changes have been made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate U.S. Environmental Protection Agency ("EPA") comments).

4. On May 5, 2010, the Los Angeles Water Board issued a draft Permit, Notice of Written Public Comment Period and Notice of Public Hearing. The EPA made no objection to the draft Permit as proposed by the Los Angeles Water Board on May 5, 2010, or prior to its adoption on July 8, 2010. There was, however, significant written public comment submitted on or before June 7, 2010, which was the closing date for submittal of written public comments (See

http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura.shtml). In all, 21 written comment letters were submitted to the Los Angeles Water Board on or before June 7, 2010, including from diverse interests such as the Natural Resources Defense Council and the Building Industry Association of Southern California. Further, the Natural Resources Defense Council and the Building Industry Association of Southern California both requested and received Party status in this quasi-judicial proceeding.

5. After the close of the written public comment period, and prior to the close of the Public Hearing on July 8, 2010, further revisions were made to the draft Permit that was issued on May 5, 2010. The additional revisions were not the result of requests made by EPA but were due to comments provided by other interested parties (See http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura.shtml).

6. Based on this information and belief, the Permit adopted by the Los Angeles Water Board on July 8, 2010 was subject to significant written public comment and was revised as compared to the version that was sent to EPA on May 5, 2010. Thus, according to the terms of the binding MOA between EPA and the State Water Resources Control Board, the "effective date" of the Permit was "50 days after adoption." 50 days after the July 8, 2010 adoption date is August 27, 2010.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 12th day of May 2017 at Sacramento, California.

Theresa A. Dunham

EXHIBIT A

NPDES MEMORANDUM OF AGREEMENT BETWEEN THE U.S. ENVIRONMENTAL PROTECTION AGENCY AND THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

I. PREFACE

A. Introduction

The State Water Resources Control Board (State Board) is the State water pollution control agency for all purposes of the Clean Water Act pursuant to Section 13160 of the California Water Code. The State Board has been authorized by the U.S. Environmental Protection Agency (EPA), pursuant to Section 402 of the Clean Water Act (CWA), to administer the National Pollutant Discharge Elimination System (NPDES) program in California since 1973.

The Chairman of the State Board and the Regional Administrator of EPA, Region 9 hereby affirm that the State Board and the Regional Boards have primary authority for the issuance, compliance monitoring, and enforcement of all NPDES permits in California including NPDES general permits and permits for federal facilities; and implementation and enforcement of National Pretreatment Program requirements except for NPDES permits incorporating variances granted under Sections 301(h) or 301(m), and permits to dischargers for which EPA has assumed direct responsibility pursuant to 40 CFR 123.44. The State may apply separate requirements to these facilities under its own authority.

This Memorandum of Agreement (MOA) redefines the working relationship between the State and EPA pursuant to the Federal regulatory amendments that have been promulgated since 1973, and supersedes:

1. THE MEMORANDUM OF UNDERSTANDING REGARDING PERMIT AND ENFORCEMENT PROGRAMS BETWEEN THE STATE WATER RESOURCES CONTROL BOARD AND THE REGIONAL ADMINISTRATOR, REGION IX, ENVIRONMENTAL PROTECTION AGENCY, signed March 26, 1973; and

2. The STATE/EPA COMPLIANCE AND ENFORCEMENT AGREEMENT, dated October 31, 1986. The State's standard operating procedures for the NPDES and pretreatment programs are described in the State's Administrative Procedures Manual (APM).

The State shall implement the provision of this MOA through the APM. The State's annual workplan, which is prepared pursuant to Section 106 of the CWA, will establish priorities, activities and outputs for the implementation of specific components of the NPDES and pretreatment programs. The basic requirements of this MOA shall override any other State/EPA agreements as required by 40 CFR 123.24(c). EPA shall implement the provisions of this MOA through written EPA policy guidance and the annual State/EPA 106 agreement.

B. Definitions

The following definitions are provided to clarify the provisions of this MOA.

1. "The APM" means the State's Administrative Procedures Manual. The APM describes standard operating requirements, procedures, and guidance for internal management of the State Board and Regional Boards in the administration of the NPDES and pretreatment programs. The APM is kept current through periodic updates.

2. "Comments" means recommendations made by EPA or another party, either orally or in writing, about a draft permit.

3. "Compliance monitoring" means the review of monitoring reports, progress reports, and other reports furnished by members of the regulated community. It also means the various types of inspection activities conducted at the facilities of the regulated community.

4. "CWA" means the Clean Water Act [33 USC 1251 et. seq.].

5. "Days" mean calendar days unless specified otherwise.

6. "Prenotice draft permit" is the document reviewed by EPA, other agencies, and the applicant prior to public review.

7. "Draft permit" is the document reviewed by EPA and the public.

8. "Enforcement" means all activities that may be undertaken by the Regional Boards, the State Board, or EPA to achieve compliance with NPDES and pretreatment program requirements.

9. "EPA" means the U.S. Environmental Protection Agency (EPA) Region 9, unless otherwise stated.

10. "Formal enforcement action" means an action, order or referral to achieve compliance with NPDES and pretreatment program requirements that: (a) specifies a deadline for compliance; (b) is independently enforceable without having to prove the original violation; and (c) subjects the defendant to adverse legal consequences for failure to obey the order (see footnote #6, p.19, National Guidance for Oversight of NPDES Programs, FFY 1986, dated January 20, 1985). Time Schedule Orders, Administrative Civil Liability Orders, Cease and Desist Orders, Cleanup and Abatement Orders, and referrals to the Attorney General meet these criteria. Effective January 1, 1988, the State and Regional Boards will have authority to impose administrative civil liability, consistent with the requirements of 40 CFR 123.27(a)(3)(i), for all NPDES and pretreatment program violations.

11. "Issuance" means the issuance, reissuance, or modification of NPDES permits through the adoption of an order by a Regional Board or the State Board.

12. "Objections" means EPA objections to applications, prenotice draft permits, draft permits, or proposed permits that are based on federal law or regulation, which are filed as "objections", and which must be resolved before a NPDES permit can be issued, or reissued or modified thereto. "Objection" and "formal objection" mean the same thing.

13. "Proposed permit" means a permit adopted by the State after the close of the public comment period which may then be sent to EPA for review before final issuance by the State. The State's common terminology of "adopted permit" is equivalent to the term "proposed permit" as used at 40 CFR 122.2.

14. Quality Assurance" means all activities undertaken by the State or EPA to determine the accuracy of the sampling data reported on Discharge Monitoring Reports (DMRs), inspection reports, and other reports.

15. "State" means the staff and members of the Regional Boards and the State Board collectively.

16. "106 Workplan" means the annual agreement that is negotiated between the State and EPA.

C. Roles and Responsibilities

1. EPA Responsibilities

EPA is responsible for:

a. Providing financial, technical, and other forms of assistance to the State;

b. Providing the State Board with copies of all proposed, revised, promulgated, remanded, withdrawn, and suspended federal regulations and guidelines;

c. Advising the State Board of new case law pertaining to the NPDES and pretreatment programs;

d. Providing the State Board with draft and final national policy and guidance documents;

e. Monitoring the NPDES and pretreatment programs in California to assure that the program is administered in conformance with federal legislation, regulations, and policy;

f. Intervening as necessary in specific situations (such as development of draft permits, or permit violations) to maintain program consistency throughout all states and over time;

g. Administering the program directly to the following classes of facilities:

(1) Dischargers granted variances under Sections 301(h) or 301(m) of the CWA; and

(2) Dischargers which EPA has assumed direct responsibility for pursuant to 40 CFR 123.44, and

2. <u>State Board Responsibilities</u>

The State Board is responsible for supporting and overseeing the Regional Board's management of the NPDES and pretreatment programs in California. This responsibility includes:

a. Evaluating Regional Board performance in the areas of permit content, procedure, compliance, monitoring and surveillance, quality assurance of sample analyses, and program enforcement;

b. Acting on its own motion as necessary to assure that the program is administered in conformance with Federal and State legislation, regulations, policy, this MOA, and the State annual 106 Workplan;

c. Providing technical assistance to the Regional Boards;

d. Developing and implementing regulations, policies, and guidelines as needed to maintain consistency between State and federal policy and program operations, and to maintain consistency of program implementation throughout all nine regions and over time;

e. Reviewing decisions of the Regional Boards upon petition from aggrieved persons or upon its own motion;

f. Assisting the Regional Boards in the implementation of federal program revisions through the development of policies and procedures; and

g. Performing any of the functions and responsibilities ascribed to the Regional Boards.

h. California Pretreatment Program responsibilities as listed in Section III.B. of this MOA.

3. Regional Board Responsibilities

The following responsibilities for managing the NPDES and pretreatment programs in California have been assigned to the Regional Boards. These responsibilities include:

a. Regulating all discharges subject to the NPDES and pretreatment programs, except those reserved to EPA, in conformance with Federal and State law, regulations, and policy;

b. Maintaining technical expertise, administrative procedures and management control, such that implementation of the NPDES and pretreatment programs consistently conforms to State laws, regulations, and policies;

c. Implementing federal program revisions;

d. Providing technical assistance to the regulated community to encourage voluntary compliance with program requirements;

e. Assuring that no one realizes an economic advantage from noncompliance;

f. Maintaining an adequate public file at the appropriate Regional Board Office for each permittee. Such files must, at a minimum, include copies of: permit application, issued permit, public notice and fact sheet, discharge monitoring reports, all inspection reports, all enforcement actions, and other pertinent information and correspondence;

g. Comprehensively evaluating and assessing compliance with schedules, effluent limitations, and other conditions in permits;

h. Taking timely and appropriate enforcement actions in accordance with the CWA, applicable Federal regulations, and State Law; and

i. California Pretreatment Program responsibilities as listed in Section III. B of this MOA.

D. Program Coordination

In order to reinforce the State Board's program policy and overview roles, EPA will normally arrange its meetings with Regional Board staff through appropriate staff of the State Board. In all cases, the State Board will be notified of any EPA meetings with Regional Boards.

E. Conflict Resolution

Disputes shall be resolved in accordance with the Agreement on a Conflict Resolution Process Between Regional Administrator, EPA, Region 9 and Chairman, State Water Resources Control Board.

II. PERMIT REVIEW, ISSUANCE, AND OBJECTIONS

A. General

The State Board and Regional Boards have primary authority for the issuance of NPDES permits. EPA may comment upon or object to the issuance of a permit or the terms or conditions therein. Neither the State Board nor the Regional Boards shall adopt or issue a NPDES permit until all objections made by EPA have been resolved pursuant to 40 CFR 123.44 and this MOA. The following procedures describe EPA permit review, comment, and objection options that may delay the permit process. These options present the longest periods allowed by 40 CFR 123.44. However, the process should normally require far less time.

The State Board, Regional Boards, and EPA agree to coordinate permit review through frequent telephone contact. Most differences over permit content should be resolved through telephone liaison. Therefore, permit review by the State and EPA should not delay issuing NPDES permits. However, if this review process causes significant delays, the Chief, Division of Water Quality (DWQ) of the State Board (or his or her designee), and the Director, Water Management Division (WMD) of EPA (or his or her designee) agree to review the circumstances of the delays. The State Board and EPA shall determine the reasons for the delays and take corrective action.

To the extent possible, all expiring NPDES permits shall be reissued on or before their expiration. If timely reissuance is not possible, the State Board will notify the Regional Administrator of the reasons for the delay. In no event will permits continued administratively beyond their expiration date be modified or revised.

In the case of the development of a general permit, the Regional Board will collect sufficient data to develop effluent limitations and prepare and draft the general permit. The Regional Board will issue and administer NPDES general permits in accordance with the California Water Code, Division 7 and federal regulations 40 CFR 122.28.

1. EPA Waiver of Review

   a. EPA waives the right to routinely review, object to, or comment upon State-issued permits under Section 402 of the CWA for all categories of discharges except those identified under II.A.2. below.

   b. Notwithstanding this waiver, the State Board and the Regional Boards shall furnish EPA with copies of any file material within 30 days of an EPA request for the material.

   c. The Regional Administrator of EPA, Region 9 may terminate this waiver at any time, in whole or in part, by sending the State Board a written notice of termination.

   d. The State shall supply EPA with copies of final permits.

2. Permits Subject to Review

   a. The Regional Boards shall send EPA copies of applications, prenotice draft permits, draft permits, adopted (proposed) permits, and associated Fact Sheets and Statements of Basis for the following categories of discharges.

      (1) Discharges from a "major" facility as defined by the current major discharger list;

(2) Discharges to territorial seas;

(3) Discharges from facilities within any of the industrial categories described under 40 CFR Part 122, Appendix A;

(4) Discharges which may affect the water quality of another state;

(5) Discharges to be regulated by a General Permit (excludes applications since they are not part of the General Permit process);

(6) Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons;

(7) Discharges from any other source which exceeds a daily average discharge of 0.5 million gallons; and

(8) Other categories of discharges EPA may designate which may have an environmental impact or public visibility. The Regional Boards or the State Board will consult with EPA regarding other significant discharges.

B. Applications

The provisions for EPA review of applications do not apply to General Permits, because applications are not part of the General Permit Process.

1. Initial Applications

a. The Regional Boards shall forward a complete copy of each NPDES application to EPA and the State Board within 15 days of its receipt.

b. EPA shall have 30 days* from receipt of the application to comment upon or object to its completeness.

(1) EPA shall initially express its comments and objections to the Regional Board through staff telephone liaison.

(2) EPA shall send a copy of comments or objections to an application to the Regional Board, the State Board, and the applicant.

(3) If EPA fails to send written comments or objections to an application within 30 days of receipt, EPA waives its right to comment or object.

c. An EPA objection to an application shall specify in writing:

(1) The nature of the objection;

(2) The sections of the CWA or the NPDES regulations that support the objection; and

(3) The information required to eliminate the objection.

2. <u>State Agreement with EPA Objections and Revised Applications</u>

a. If the State agrees with EPA's objections, the Regional Board shall forward a complete copy of the revised application to EPA within 10 days of its arrival at the Regional Board offices.

---

*COMPUTATION OF TIME: Pursuant to 40 CFR 124.20(d), three (3) days shall be allowed for transit of documents by mail. Therefore, the State must allow at least 36 days, from the postmark date on the application for receipt of an EPA response. If the State Board or a Regional Board delivers a document to EPA within less than three days, the number of days saved by such delivery may be subtracted from the 36 days. All of the timeframes mentioned in this MOA are in calendar days.

b. Another 30-day review period shall begin upon EPA's receipt of the revised application; and

c. This application review process shall be repeated until the application complies with all NPDES regulations.

d. When EPA has no objections pursuant to 40 CFR 123.44, the Regional Board may complete development of a prenotice draft NPDES permit.

e. If an objection is filed, EPA shall advise the State Board and the Regional Board in writing when the application is complete.

f. The Regional Board will be responsible for notifying the applicant.

3. <u>State Disagreement with EPA Objections and Draft Permits</u>

If the Regional Board or the State Board disagrees with EPA's assertion that an application is incomplete, they may issue a prenotice draft permit, provided that:

a. The Regional Board or the State Board states in a transmittal letter that the prenotice draft permit has been issued an EPA objection to the application;

b. EPA may add comments upon or objections to the prenotice draft permit including a reiteration of its objection to the application;

c. Objections to an application will be subject to the same procedures as an EPA objection to the prenotice draft permit, as described below except that the State shall not issue a public notice for a draft permit for which there is an unresolved EPA objection.

C. <u>Prenotice Draft Permits</u>

1. <u>EPA Review of Individual Prenotice Draft Permits</u>

a. It is the intent of the Regional Boards, or the State Board whenever it undertakes the issuance of an NPDES permit, to issue apranotice draft NPDES permit. A copy of

associated Statement of Basis or Fact Sheet shall be sent to EPA. As a matter of urgency the Regional Board or the State Board may decide not to issue a prenotice draft NPDES permit.

b. EPA shall have 30 days from its receipt to send comments upon, or an initial objection to, the prenotice draft permit to the Regional Board and State Board.

(1) If EPA mails an initial objection pursuant to 40 CFR 23.44 within 30 days from its receipt of a prenotice draft permit, EPA shall have 90 days from its receipt of the prenotice draft permit to mail a formal objection.

(2) If EPA requests additional information on a prenotice raft permit, a new 30-day review shall begin upon EPA's receipt of the additional information.

(3) If EPA mails an initial objection pursuant to 40 CFR 123.44 within 30 days from its receipt of additional information, EPA shall have 90 days from its receipt of the additional information to mail a formal objection.

c. If a prenotice draft permit is not issued, the procedures and schedules for EPA review, comment, and objections to a prenotice draft permit, described in Section II.C.4, shall apply to the draft permit.

2. <u>EPA Review of Prenotice Draft General Permits</u>

a. The Regional Boards, or the State Board whenever it undertakes the issuance of an NPDES General Permit, shall mail a copy of each prenotice draft Generalmit and Fact Permit Sheet, except for those for stormwater point sources, to:

(1) Director
Office of Water Enforcement and Permits (EN 335)
U.S. Environmental Protection Agency
401 M Street S.W.
Washington, D.C. 20460; and

(2) EPA, Region 9.

b. EPA, Region 9, and the Director of the Office of Water Enforcement and Permits, EPA Headquarters, shall have 90 days from their receipt of the prenotice draft General Permit to send comments upon or objections to the State Board and Regional Board.

c. If a prenotice draft general permit is issued, the procedures and schedules for EPA review, comment, and objections to a prenotice draft permit, described in Section II.C.4 shall apply to the draft general permit.

3. EPA Comments

a. The Regional Boards and State Board shall treat any comments made by EPA upon a prenotice draft individual permit or upon a prenotice draft General Permit as they would comments from any authoritative source.

b. The Regional Boards or the State Board shall prepare a written response to each significant comment made by EPA that they do not accommodate by revising the draft permit.

4. EPA Objections

The discussion below describes the procedures the Regional Boards and State Board may pursue if EPA issues an objection to a prenotice draft permit. NPDES regulations restrict the resolution of an EPA objection to three alternatives, or a combination thereof: (a) the Regional Board or the State Board changes the permit, (b) EPA withdraws the objection, or (c) EPA acquires exclusive NPDES jurisdiction over the discharge.

RECEIVED BY
JAN 7 1992
OFFICE OF THE
CHIEF COUNSEL
SWRCB

a. Timing of EPA Objections

(1) If the Regional Board or the State Board receives an initial objection from EPA within 36 days of the postmark on the prenotice draft permit sent to EPA, the Regional Board or the State Board shall delay issuance of the public notice until one of the following events occur:

(a) The Regional Board has received EPA's formal objection;

(b) EPA withdraws the initial objection; or

(c) Ninety-six (96) days have passed from the postmark on the prenotice draft (See Section II.C.2 for timing of EPA objections to prenotice general permits).

(2) Whenever EPA files an initial objection to a prenotice draft permit, EPA shall expedite its effort to file the formal objection, in order to avoid undue delay of the permit's final issuance.

(3) EPA may not make an initial objection to the prenotice draft permit once its 30-day review period has lapsed.

(4) EPA may not make a formal objection to the prenotice draft permit, if it failed to make an initial objection within the 30-day period.

(5) EPA may not make a formal objection to the Preenotice draft permit once the 90-day objection period has lapsed.

(6) EPA may not modify the objection, after the 90-day formal objection period, to require more change to the prenotice draft permit than was required under the original objection.

(7) EPA may revise the objection within its allotted 90-day objection period to require additional changes to the prenotice draft permit than were required under its original objection. Such a change to an objection by EPA shall cause the State's allotted 90 day response period to restart upon the State's eceipt of the revised objection.

(8) If the Regional Board receives an EPA formal objection within the 96 days specified above, the State Board or the Regional Board may exercise one of the options described under II.C.4.c. and II.C.4.d. below.

b. Content of EPA Objections

(1) For initial objections that must be filed within 30 days, EPA may simply identify:

(a) The name of the facility and its NPDES umber; and

(b) The general nature of the objection.

(2) For formal objections that must be filed within 90 days, EPA shall specify:

(a) The reasons for the objections;

(b) The section of the CWA, the regulations or the guidelines which support the objection; and

(c) The changes to the permit that are required as a condition to elimination of the objection.

(3) Every EPA objection shall be based upon one or more of the grounds for objection described under 40 CFR 123.44(c). EPA shall:

(a) Cite each of the grounds which applies to the objection; and

(b) Explain how each citation applies to a deficiency of the prenotice draft permit.

(4) Correspondence from EPA which objects to a prenotice draft permit, but which fails to meet the substantive criteria of this part (II.C.4.b) does not constitute an objection and may be treated by the State as comments.

c. State Board Options

(1) If EPA and a Regional Board are unable to resolve a disagreement over provisions of a prenotice draft permit to which EPA has filed a formal objection, the State Board may mediate the disagreement to a resolution that is satisfactory to EPA and to the Regional Board.

(2) If the disagreement proves intractable, the State Board may:

(a) Revise and resubmit the prenotice draft permit in accordance with the required by the EPA objection (The State Board would then be obliged to continue the issuance process and adopt the permit if the Regional Board declines todo so);

(b) Request a public hearing pursuant to 40 CFR 123.44(e); or

(c) Hold a public hearing on the EPA objection.

d. Regional Board Options

(1) If the Regional Board changes the prenotice draft permit to eliminate the basis of the EPA formal objection within 90 days of the Regional Board's receipt of that objection, the permit will remain within the

Regional Board's jurisdiction (see 40 CFR 123.44(h)). The Regional Board may then continue on to the public notice of the permit.

(2) If EPA and a Regional Board are unable to resolve a disagreement over provisions of a prenotice draft permit to which EPA has filed a formal objection, the Regional Board may:

(a) Request that EPA conduct a public hearing, pursuant to 40 CFR 123.44(e); or

(b) Hold a public hearing on the EPA objection.

e. The State Board or a Regional Board Holds a Public Hearing

(1) If either the State Board or a Regional Board decide to hold a public hearing on an EPA objection, that Board shall:

(a) Prepare a written rebuttal describing the legal and environmental reasons why each each provision of the prenotice draft permit should not be changed to accomodate the objection.

(b) Issue a public notice in accordance with 40 CFR 124.10 and 40 CFR 124.57(a) to open the public comment period and announce the public hearing;

(c) Make available for public review:

- The permit application;
- The draft permit;
- The Fact Sheet or Statement of Basis;
- All comments received upon the draft permit;

- o The EPA objections; and
- o The Regional Board's rebuttal;

(d) Conduct the hearing in accordance with 40 CFR 124.11 and 124.12; and

(e) Decide whether to accommodate the EPA objection.

(2) A representative of EPA shall attend the hearing to explain EPA's objection.

f. State Board and Regional Board Failure to Respond within 90 days (see 40 CFR 123.44(h))

EPA shall acquire exclusive NPDES authority over the discharge pursuant to 40 CFR 123.44(h)(3), if within 90 days of their receipt of an EPA formal objection:

(1) Neither the State Board nor the Regional Board changes the permit to eliminate the basis of the EPA objection;

(2) Neither the State Board nor the Regional Board requests EPA to hold a public hearing pursuant to 40 CFR 123.44(e); and

(3) EPA does not withdraw the objection.

This applies whether or not the State Board or a Regional Board holds a public hearing on the EPA objection.

g. EPA Public Hearing of an EPA Objection

(1) If the State Board or a Regional Board requests a public hearing pursuant to 40 CFR 123.44(e) within the 90-day response period, EPA shall hold a public hearing in accordance with the procedures of 40 CFR Part 124.

(a) If the State Board or Regional Board withdraws its request for

a public hearing before EPA has issued the public notice, EPA shall cancelthe hearing unless third party interest otherwise warrants a hearing pursuant to 40 CFR 123.44(e).

(b) If the State Board or Regional Board withdraws its request for a public hearing after EPA has issued the public notice of the hearing, and EPA determines that there is not sufficient third party interest pursuant to 40 CFR 123.44(e), the State Board or Regional Board shall publish a public notice and send a cancellation to everyone on the EPA mailing list.

(2) Within 30 days after the EPA public hearing, EPA shall:

(a) Reaffirm, withdraw, or modify the original objection; and

(b) Send notice of its action to:

- o The State Board;
- o The Regional Board;
- o The applicant; and
- o Each party who submitted comments at the hearing.

(3) If EPA does not withdraw the objection, the State Board or Regional Board shall have 30 days from its receipt of the EPA notice to change the permit to eliminate the basis of the objection.

(4) If EPA modifies the objection to require less change to the prenotice draft permit than was required under the original objection, the State Board or Regional Board shall have 30 days from its receipt of the EPA notice to change the permit to eliminate the basis of the objection.

(5) EPA may not modify the objection to require more change to the prenotice draft permit than was required by the original objection.

(6) If the State Board or Regional Board fails to send a revised draft permit to EPA within 30 days of its receipt of the EPA notification, EPA acquires exclusive NPDES authority over the discharge pursuant to 40 CFR 123.44(h)(3).

h. Resolved Objections

(1) Whenever EPA has filed a formal objection to a prenotice draft permit and the State Board or Regional Board has changed the permit to eliminate the basis of the objection, or EPA has withdrawn the objection, EPA shall send notice to:

(a) The State Board;

(b) The Regional Board;

(c) The applicant; and

(d) Every other party who has submitted comments upon the EPA objection.

(2) EPA shall send the notice within 30 days of its receipt of the revised State permit, or upon its withdrawal of the objection.

D. Public Notice

1. If the State Board or Regional Board does not receive an EPA initial objection within 36 days of the postmark on the individual prenotice draft permit or within 96 days of the postmark of the prenotice draft general permit, the State Board or Regional Board may proceed with the public notice process.

2. The State Board or Regional Board shall issue the public notice and conduct all public

participation activities for NPDES permits in accordance with the provisions of 40 CFR Part 124 applicable to State Programs.

(a) The Regional Boards and State Board shall make electronic or stenographic recordings of each of the EIR public hearings, pursuant to 23 California Administrative Code Section 847.4(a).

(b) The Regional Board or the State Board shall make a copy of all comments, including tapes or transcripts of oral comments presented at Board Hearings, and the Board's written responses to the comments, available to EPA and the public upon request, pursuant to 40 CFR 124.17(a) and (c).

3. All EPA comments upon and objections to a prenotice draft permit, draft permit or both, and all correspondence, public comments and other documents associated with any EPA objections shall become part of the administrative record/permit file and shall be available for public review.

E. <u>Draft Permits</u>

1. The State Board and Regional Boards shall send a copy of each draft permit and its Statement of Basis or Fact Sheet to EPA as part of the public notice process. A copy of each draft general permit, and accompanying fact sheet except those for stormwater point sources, shall be sent to EPA and:

   Director
   Office of Water Enforcement
   and Permits (EN 335)
   U.S. Environmental Protection Agency
   401 M Street SW
   Washington, DC 20460

2. EPA may not object to a draft permit which it had an opportunity to review as a prenotice draft permit, except to the extent that it includes changes to the prenotice draft permit, or the bases of the objection were not reasonably ascertainable during the prior review period (e.g., because of new facts, new science, or new law).

3. If EPA issues an objection to a draft permit, the procedures described under II.C.4. shall apply.

F. Final Permits

1. Final Permits Become Effective Upon Adoption

NPDES permits other than general permits, adopted by the State Board or Regional Boards shall become effective upon the adoption date only when:

a. EPA has made no objections to the permit;

b. There has been no significant public comment;

c. There have been no changes made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments); and

d. The State Board or Regional Board does not specify a different effective date at the time of adoption.

2. Permit Becomes Effective 50 Days after Adoption

NPDES permits, other than general permits, adopted by the State Board or Regional Board shall become effective on the 50th day after the date of adoption, if EPA has made no objection to the permit; if:

a. There has been significant public comment; or

b. Changes have been made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments).

3. Permit Becomes Effective 100 days after Adoption

General permits adopted by the State Board or the Regional Boards shall become effective on the 100th day after the date of adoption, if EPA has made no objection to the permit, if:

a. There has been significant public comment; or

b. Changes have been made to the latest version of thet draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments).

4. EPA Review of Adopted Permits

a. Transmittal of Adopted Permits to EPA

The Regional Boards shall send copies of the following documents to EPA and the State Board, upon adoption of each NPDES permit identified under II.A.2:

(1) Each significant comment made upon the draft permit, including a transcript or tape of all comments made at public hearings;

(2) The response to each significant comment made upon the draft permit;

(3) Recommendations of any other affected states, including any written comments prepared by this State te explaining the reasons for rejecting any other states' written recommendations.

(4) The Executive Officer (or State Board Executive Director) summary sheet;

(5) The Fact Sheet or Statement of Basis, if it has been changed; and

(6) The final permit.

For general permits, except those for stormwater point sources, the State Board also shall send copies of these documents to:

Director
Office of Water Enforcement
and Permits (EN 335)
U.S. Environmental Protection Agency
401 M Street SW
Washington, DC 20460

b. EPA Review Period

EPA shall have 30 days from its receipt of these materials to review and comment upon or object to an NPDES permit which becomes effective 50 days after the date of adoption under II.F.2.

EPA shall have 90 days from its receipt of these materials to review and comment upon or object to a general permit which becomes effective 100 days after the date of adoption under II.F.2.

c. EPA Comments upon Adopted Permits.

If EPA comments upon an adopted permit pursuant to II.F.3.b. above, the State Board or Regional Board must either change the permit to accommodate the comments, or respond to the comments as follows:

(1) If, the State Board or Regional Board changes the permit, the permit will have to be readopted unless the only changes fall within the definition of minor modifications under 40 CFR 122.63, in which case the permit may take effect as originally scheduled (at least 50 days after the date of adoption); or

(2) If the State Board or Regional Board responds to the EPA comment instead of changing the permit, the permit may take effect as originally scheduled (at least 50 days after the date of adoption).

d. EPA Objection to Adopted Permits

If EPA mails an initial objection to an adopted permit within 30 days of its receipt pursuant to II.F.3.b., the full objection process will have begun, as described under II.C.4. and the permit effective date shall be stayed until the basis of the EPA objection has been eliminated.

e. Restrictions upon EPA Comments and Objections

(1) EPA shall use this review period to make objections which pertain only:

(a) To changes made to the draft permit;

(b) To comments made upon the permit;

(c) To new information that was not reasonably ascertainable during the initial review period; or

(d) To objections made by EPA to the draft permit.

(2) EPA shall not use this review period to file comments or objections which it neglected to file during the prenotice comment period or during the public notice comment period.

G. Permit Modification

1. When a Regional Board or State Board decides to modify an NPDES permit, a prenotice draft permit shall be given public notice and issued in accordance with NPDES regulations.

2. Whenever a Regional Board or State Board decides to modify an NPDES permit, the Regional Board or State Board shall follow the EPA review procedures for prenotice draft permits described under II.C. through II.F.

3. Minor permit modifications (not the same as modifications to minor permits) as described under 40 CFR 122.63 may be accomplished by letter, and are not subject to public review prior to their issuance under NPDES. However, they are subject to notice and review provisions under State law The following protocol shall apply to "minor permit modifications":

a. The Regional Boards or State Board, as appropriate, shall send a copy of each

minor permit modification to EPA and the State Board.

b. If EPA or the State Board notice that a minor modification has been issued (by either a Regional Board or the State Board) which does not conform to the criteria of 40 CFR 122.63, the State Board shall notify the permittee and the Regional Board that the minor modification was improper. The State should initiate promptly any proceedings necessary to void or rescind the modification. The Regional Board or State Board may then initiate a formal permit modification that is subject to public review as specified by NPDES regulations.

4. No NPDES permit shall be modified to extend beyond the maximum term allowed by NPDES regulations. If a Regional Board or State Board decides to extend a permit expiration date to a date more than five years from the date of issuance of the permit, the Board shall revoke and reissue the permit in accordance with NPDES regulations.

H. Administrative or Court Action

If the terms of any permit, including any permit for which review has been waived pursuant to Part II.A.1. above, are affected in any manner by administrative or court action, the Regional Board or State Board shall immediately transmit a copy of the permit, with changes identified, to EPA and shall allow 30 days for EPA to make written objections to the changed permit pursuant to Section 402(d)(2) of the CWA.

I. Variance Requests

1. State Variance Authority

a. The State may approve applications for the following variances, subject to EPA objections under Section C.4 above:

(1) Compliance extension based on delay of a publicly owned treatment works (POTW), under Section 301(i) of the CWA;

(2) Compliance extension based upon the use of innovative technology, under Section 301(k) of the CWA; and

(3) Variances from thermal pollution requirements, under Section 316(a) of the CWA.

b. Unless the State denies the variance application, the State shall adopt approved modifications as either formal modifications to active permits or as provisions of reissued permits.

2. <u>State/EPA Shared Variance Authority</u>

a. The State may deny or forward to EPA, with or without recommendations, applications for the following variances:

(1) Variances based upon the presence of fundamentally different factors (FDF), under Section 301(n) of the CWA;

(2) Variances based upon the economic capabilities of the applicant, under Section 301(c) of the CWA;

(3) Variances based upon water quality factors, under Section 301(g) of the CWA; and

(4) Variances based on economic and social costs or upon the economic capabilities of the applicant for achieving EPA promulgated water quality related effluent limitations, under Section 302(b)(2) of the CWA.

b. Unless the State denies the variance application at the outset, the State will subsequently issue an NPDES permit based upon EPA's final decision.

3. <u>Certification and Concurrence in EPA Variance Decisions under Sections 301(h) and 301(m)</u>

a. The State may deny or forward to EPA, with or without recommendations, applications for the following variances:

(1) Variances based upon the quality of coastal marine waters under Section 301(h) of the CWA (these are addressed by a separate agreement.); and

(2) Variances based upon the energy and environmental costs of meeting requirements for wood processing waste discharged to the marine waters of Humboldt Bay, under Section 301(m) of the CWA.

b. If EPA decides to prepare a draft permit on the application for a variance, the State will issue or deny waste discharge requirements under its own authority as part of the concurrence process.

(1) The State's decision on issuance of waste discharge requirements shall constitute the State's decision on concurrence in the variance. Any amendment or rescission of the waste discharge requirements, and any State Board order finding that a Regional Board's action in issuing the waste discharge requirements was inappropriate or improper, shall constitute a modification of the State's concurrence if the amendment, rescission, or State Board order is issued before EPA issues a final permit authorizing the variance.

(2) Waste discharge requirements issued by the State shall require compliance with any condition EPA imposes in the final permit. Any authorization made by the waste discharge requirements to discharge under a variance will be contingent upon issuance of a permit by EPA authorizing the variance.

(3) EPA will not issue a final permit until the State issues waste discharge requirements. If the waste discharge requirements are issued by a Regional Board, EPA will not issue a final permit until at least 31 days after the Regional Board's decision.

While any timely petition is still pending before the State Board, EPA will not issue a final permit until after 10 months have passed without State Board action on the petition. After 10 months have passed without State Board action on the petition EPA may issue a 301(h) permit provided that the permit includes a reopener clause allowing EPA to revise the permit consistent with the State Board's order on the petition for review. If the State Board initiates action on the petition within 10 months, by notifying the parties involved that the petition is complete, EPA will not issue a 301 (h) permit until after the state Board has issued an order on the petition for review.

(4) A permit issued by EPA shall incorporate any condition of the State's concurrence, including any provisions of the waste discharge requirements issued to the discharge, unless EPA substitutes a more stringent requirement.

III. PRETREATMENT PROGRAM

A. General

This Section defines the State Board, the Regional Boards, and EPA responsibilities for the establishment, implementation, and enforcement of the National Pretreatment Program pursuant to Sections 307 and 402(b) of the CWA, and as described in Section VI of the "NPDES Program Description, January 1988".

B. Roles and Responsibilities

EPA will oversee California Pretreatment Program operations consistent with the requirements of 40 CFR Part 403, this Section of the MOA, and Section VI of the "NPDES Program Description, January 1988".

Consistent with State and federal law, and the State Clean Water Strategy, the State will administer the California Pretreatment Program.

The State Board will have primary responsibility for:

1. Developing, implementing, and overseeing the California Pretreatment Program;

2. Providing technical and legal assistance to the Regional Boards, publicly owned treatment works (POTWs), and industrial users;

3. Developing and maintaining a data management system;

4. Providing information to EPA or other organizations as required and/or requested; and

5. Reviewing and ruling on petitions for review of Regional Board decisions.

The Regional Boards, with the assistance and oversight of the State Board, will have primary responsibility for:

1. Enforcing the National pretreatment standards: prohibited discharges, established in 40 CFR 403.5;

2. Enforcing the National categorical pretreatment standards established by the EPA in accordance with Section 307 (b) and (c) of the CWA, and promulgated in 40 CFR Subchapter N, Effluent Guidelines and Standards;

3. Review, approval, or denial of POTW Pretreatment Programs in accordance with the procedures discussed in 40 CFR 403.8, 403.9, and 403.11;

4. Requiring a Pretreatment Program as an enforceable condition in NPDES permits or waste discharge requirements issued to POTWs as required in 40 CFR 403.8, and as provided in Section 402(b)(8) of the CWA;

5. Requiring POTWs to develop and enforce local limits as set forth in 40 CFR 403.5(c);

6. Review and, as appropriate, approval of POTW requests for authority to modify categorical pretreatment standards to reflect removal of pollutants by a POTW in accordance with 40 CFR

403.7, 403.9, and 403.11, and enforcing related conditions in the POTW's NPDES permit or waste discharge requirements;

7. Overseeing POTW Pretreatment Programs to ensure compliance with requirements specified in 40 CFR 403.8, and in the POTW's NPDES permit or waste discharge requirements;

8. Performing inspection, surveillance, and monitoring activities which will determine, independent of information supplied by the POTW, compliance or noncompliance by the POTW with pretreatment requirements incorporated into the POTW permit;

9. Providing the State Board and EPA, upon request, copies of all notices received from POTWs that relate to a new or changed introduction of pollutants to the POTW; and

10. Applying and enforcing all other pretreatment regulations as required by 40 CFR Part 403.

C. POTW Pretreatment Program and Removal Credits Approval

Each Regional Board shall review and approve POTW applications for POTW pretreatment program authority and POTW applications to revise discharge limits for industrial users who are, or may in the future be, subject to categorical pretreatment standards. It shall submit its findings together with the application and supporting information to the State Board and EPA for review. No POTW Pretreatment Program or request for revised discharge limits shall be approved by the Regional Boards if the State Board or EPA objects in writing to the approval of such submission in accordance with 40 CFR 403.11(d).

Note: No removal credits can be approved until EPA promulgates sludge regulations under Section 405 of the Clean Water Act.

D. Requests for Categorical Determination

Each Regional Board shall review requests for determinations of whether an industrial user does or does not fall within a particular industrial category or subcategory. The Regional Boards will make a written determination for each request

stating the reasons for the determinations. The Regional Board shall then forward its findings, together with a copy of the request and any necessary supporting information, to the State Board and EPA for concurrence. If the State Board or EPA does not modify the Regional Board's decision within 60 days after receipt thereof, the Regional Board finding is final. A copy of the final determination shall be sent to the requestor, the State Board, and EPA Region 9.

E. <u>Variances From Categorical Standards For Fundamentally Different Factors</u>

Each Regional Board shall make an initial finding on all requests from industrial users for fundamentally different factors variances from the applicable categorical pretreatment standard. If the Regional Board determines that the variance request should be denied, the Regional Board will so notify the applicant and provide reasons for its determination in writing. Where the Regional Board's initial finding is to approve the request, the finding, together with the request and supporting information, shall be forwarded to the State Board. If the State Board concurs with the Regional Board's finding, it will submit it to EPA for a final determination. The Regional Board may deny but not approve and implement the fundamentally different factor(s) variance request until written approval has been received from EPA.

If EPA finds that fundamentally different factors do exist, a variance reflecting this determination shall be granted. If EPA determines that fundamentally different factors do not exist, the variance request shall be denied and the Regional Board shall so notify the applicant and provide EPA's reasons for the denial in writing.

F. <u>Net/Gross Adjustments to Categorical Standards</u>

If the Regional Board receives a request for a net/gross adjustment of applicable categorical pretreatment standards in accordance with 40 CFR 403.15, the Regional Board shall forward the application to EPA for a determination. A copy of the application will be provided to the State Board. Once this determination has been made, EPA shall

notify the applicant, the applicant's POTW, the Regional Board, and State Board and provide reasons for the determination and any additional monitoring requirements the EPA deems necessary, in writing.

G. Miscellaneous

The State Board, with the assistance of the Regional Boards, will submit to the EPA a list of POTWs which are required to develop their own pretreatment program or are under investigation by a Regional Board for the possible need for a local pretreatment program. The State will document its reasons for all deletions from this list. Before deleting any POTW with a design flow greater than five-million gallons per day (mgd), the State will obtain an industrial survey from the POTW and determine: (1) that the POTW is not experiencing pass through or interference problems; and (2) that there are no industrial users of the POTW that are subject either to categorical pretreatment standards or specific limits developed pursuant to 40 CFR 403.5(c). The State will document all such determinations and provide copies to EPA. For deletions of POTWs with flows less than 5 mgd, the State will first determine (with appropriate documentation) that the POTW is not experiencing treatment process upsets, violations of POTW effluent limitations, or contamination of municipal sludge due to industrial users. The State will also maintain documentation on the total design flow and the nature and amount of industrial wastes received by the POTW.

The State Board and EPA will communicate, through the Section 106 Workplan process, commitments and priorities for program implementation including commitments for inspection of POTWs and industrial users. The Section 106 Workplan will contain, at a minimum, the following: (1) a list of NPDES permits or waste discharge requirements to be issued by the Regional Boards to POTWs subject to pretreatment requirements; and (2) the number of POTWs to be audited or inspected on a quarterly basis.

H. Other Provisions

Nothing in this agreement is intended to affect any pretreatment requirement, including any standards or prohibitions established by State or local law, as long as the State or local requirements are not less stringent than any set forth in the National Pretreatment Program, or other requirements or

prohibitions established under the CWA or Federal regulations. Nothing in this MOA shall be construed to limit the authority of the EPA to take action pursuant to Sections 204, 208, 301, 304, 306, 307, 308, 309, 311, 402, 404, 405, 501, or other Sections of the CWA (33 U.S.C. Section 1251 et seq).

IV. COMPLIANCE MONITORING AND ENFORCEMENT

This Section constitutes the State/EPA Enforcement Agreement. The State Board and EPA will review this section of the MOA each year.

A. Enforcement Management Systems (EMS)

The State Board will maintain compliance monitoring and enforcement procedures in the APM which are consistent with the seven principles of the EPA Enforcement Management System Guide (listed below), and this MOA. The APM shall constitute the State Enforcement Management System for the NPDES program, and shall describe criteria for:

1. Maintaining a source inventory (of information about discharges subject to NPDES permits) that is complete and accurate;

2. Processing and assessing the flow of information available on a systematic and timely basis;

3. Completing a preenforcement screening (of compliance-related information coming into the inventory) by reviewing the information as soon as possible after it is received;

4. Performing a more formal enforcement evaluation (of the same information) where appropriate;

5. Instituting formal enforcement action and follow-up wherever necessary;

6. Initiating field investigations based upon a systematic plan; and

7. Using internal management controls to provide adequate enforcement information to all levels of the organization.

These compliance and enforcement-related provisions of the APM shall constitute the framework (within which the circumstances of

noncompliance are reviewed) for making NPDES enforcement decisions, and evaluation of those decisions by others.

B. Inspections

1. State Inspections

a. The Regional Boards shall conduct compliance inspections to determine the status of compliance with permit requirements, including sampling and non-sampling inspections.

b. The State Board will maintain up-to-date procedures in the APM for conducting compliance inspections, which conform to NPDES regulations.

c. The State is responsible for inspecting annually all major dischargers. To enable this goal to be accomplished EPA may assist the State by inspecting some dischargers. The 106 workplan will specify the number of sampling inspections and the number of reconnaissance inspections to be conducted by the State each year.

2. EPA Inspections

a. EPA retains the authority to perform compliance inspections of any permittee at any time.

b. For those inspections scheduled more than 15 days in advance, EPA will notify the appropriate Regional Board and the State Board within 15 days in advance. For inspections scheduled less than 15 days in advance, EPA will provide as much advance notice as possible.

c. EPA will send copies of inspection reports to the Regional Board and State Board within 30 days of the inspection if there are no effluent samples to be analyzed. EPA will usually send copies of inspection results to the State within 60 days of the inspection if there are effluent samples to be analyzed.

3. Inspection Assistance

a. EPA and the State Board will provide technical assistance to the Regional Boards in their inspection programs whenever staff are available. This assistance may be requestedat any time by the Regional Boards.

b. If neither EPA nor the State Board are able to provide such assistance when it is requested, the State Board shall schedule the assistance at the earliest possible date, and so notify the Regional Board and EPA.

C. Discharger Reports

1. Review of Reports

The Regional Boards shall require each NPDES permittee to send copies of its Discharge Monitoring Reports (DMRs) to EPA and the Regional Boards for review.

a. Whenever a Regional Board cannot complete the review of DMRs and other compliance reports within 30 days of their arrival, the Regional Board shall follow the "exception procedures" in the APM.

b. For auditing and reporting purposes Regional Boards (or the State Board if it should undertake DMR review) shall track and document the date of receipt, the date of review, and the review results (i.e., compliance status) of each DMR and compliance report.

2. Quality Assurance Reviews

EPA routinely conducts technical studies of the accuracy of the reported effluent data from NPDES permittees. EPA send check samples to selected permittees for analysis as part of these studies. The permittees are required to return the results to EPA.

a. Delinquent Permittees

(1) EPA will send the State Board a list of permittees who declined to return

the analytical results of the check samples.

(2) The State Board shall transmit the list to the Regional Boards and assure that they require the permittee to participate in all subsequent studies.

(3) The State Board or Regional Board shall take other appropriate enforcement action against NPDES permittees that have failed to return the anlytical results of the sample.

b. Unacceptable Quality of Analysis

(1) EPA will send the State Board and Regional Boards a list of permittees who failed the analysis study.

(2) The Regional Boards will determine whether the causes of failure are due to clerical errors in report preparation or procedural errors in sample analysis.

(a) If the problem is due to clerical errors, the Regional Board will clarify the reporting procedures.

(b) If the problem is due to analytical errors,the Regional Board will assure that the problems are corrected immediately or that the permittee begins using another laboratory.

(c) If the permittee is using in-house laboratory facility, the Regional Board staff shall take action to assure compliance with NPDES requirements.

c. EPA Technical Assistance

Within the constraints of available staff time, EPA will provide technical assistance and guidance concerning acceptable analytical procedures.

D. Public Complaints

1. Telephone Complaints

a. Telephone complaints received by EPA or the State Board pertaining to a discharge to water of the United States will be referred to the appropriate Regional Board.

b. The Regional Boards shall maintain written documentation of each telephone complaint and its disposition.

2. Written Complaints

a. Written complaints pertaining toa discharge to waters of the United States may be responded to by telephone or by letter. All telephone responses shall be documented by memo.

b. Copies of each response prepared by EPA or the State Board shall be sent to the appropriate Regional Board.

c. The Regional Boards shall retain documentation of each written complaint and its disposition.

3. Complaint Resolution

a. The Regional Boards will investigate complaints and inform the complainant of the investigation results.

b. The Regional Boards shall place a copy of each NPDES-related complaint and a memo of recorddescribing the investigation results thereof into the permit file or compliance file of the appropriate facility.

E. State Enforcement

1. Basis of EPA/State Relationship

a. The Regional Boards pursue enforcement of NPDES permit requirements, and of all other provisions of the NPDES program under State authority.

b. The State Board shall assure that enforcement of the NPDES program is exercised aggressively, fairly, and consistently by all nine Regional Boards. The staff of the State Board will review enforcement practices and inform the Regional Board is not taking appropriate enforcement actions.

(1) The State Board will assure that Federal facilities are treated the same as other NPDES facilities within the constraints of Section 313 of the Clean Water Act.

(2) The State Board will keep a record of all penalties assessed and all penalties collected in NPDES enforcement cases.

c. EPA shall monitor the State's performance, and may take enforcement action under Section 309 of the CWA, whenever the State does not take timely and appropriate enforcement action.

d. EPA shall coordinate its enforcement actions with the State Board and with the appropriate Regional Board as described below.

e. The State Board and EPA will meet periodically to discuss the status of pending and adopted enforcement actions as well as other issues of concern.

2. <u>State Notice to EPA of Enforcement Actions</u>

The State shall send copies of proposed and final enforcement actions, settlements, and amendments thereto, against NPDES facilities to EPA within five working days after the date of signature.

F. <u>EPA Enforcement</u>

1. <u>EPA Initiation of Enforcement Action</u>

EPA will initiate enforcement action:

a. At the request of the State;

b. If the State response to the violation is not consistent with the APM and EPA policy or is otherwise determined by EPA not to be timely and appropriate; or

c. If there is an overriding federal interest.

2. <u>EPA Deferral of Enforcement Action</u>

EPA shall defer formal enforcement action whenever the State initiates an enforcement action determined by EPA to be timely and appropriate for the violation, except when there is an overriding federal interest.

G. <u>Enforcement Procedures</u>

If circumstnaces require EPA to pursue formal enforcement, EPA, and the State shall observe the following procedures:

1. <u>Enforcement Based on the Quarterly Noncompliance Report</u>

a. EPA shall notify the State Board and the appropriate Regional Boards by letter, of the facilities (the name and NPDES number) for which for which EPA policy requires formal enforcement action.

b. The State Board shall respond to EPA by letter within 30 days of its receipt of the EPA notice.

c. The response shall include:

(1) The name and NPDES number of:

(a) Each facility which has returned to compliance;

(b) Each facility for which the Regional Boards have scheduled formal enforcement actions;

(c) Each facility for which a Regional Board or the State Board has taken a formal enforcement action, if the

enforcement action was not shown on the QNCR as part of the response to the violation; and

(d) Each facility against which the State Board will pursue formal enforcement.

(2) Identification of the type of each formal enforcement action;

(3) A description of how each Regional Board plans to address the violations which have not been corrected by the faciilities, and for which they are not pursuing formal enforcement; and

(4) A description of the enforcement action State Board staff will recommend to take against any facility.

e. EPA shall notify the State Board either that the State response to the violation is sufficient to defer a formal action by EPA, or that EPA will proceed with a formal enforcement action pursuant to Section 309 of the CWA.

2. <u>Enforcement Based on Information Other than the Quarterly Noncompliance Report</u>

a. EPA shall notify the State Board and the appropriate Regional Board of each violation against which EPA intends to pursue formal enforcement. This notice shall include:

(1) The name and NPDES number of the facility;

(2) An identification of the violations which warrant formal enforcement;

(3) The reasons why EPA believes formal enforcement is necessary; and

(4) The reasons why past or pending State responses are insufficient.

b. Within ten working days of the notification by EPA, and after

consultation with the appropriate Regional Boards, the State Board will respond to the EPA notice. The State Board's response will include:

(1) A discussion of the circumstances of the identified violations;

(2) A description of the substance and timing of any past, pending, or planned responses to the violations by the Regional Board or the State Board; including identification of the office and staff responsible for the action;

(3) The amounts of any penalties sought or collected; and

(4) Whether or not the State Board believes the responses are appropriate and why.

c. EPA shall notify the State Board either that the State response to the violation is sufficient to defer a formal action by EPA, or that EPA will proceed with a formal enforcement action pursuant to Section 309 of the CWA.

d. Normal enforcement action until ten working days from the date of the EPA notice have passed.

3. Overriding Federal Interest:

a. For the purposes of this MOA, an overriding federal interest exists when:

(1) EPA enforcement can reasonably be expected to expedite the discharger's return to full compliance;

(2) EPA enforcement can reasonably be expected to increase program credibility; or

(3) The violation has significant implications for the success of the NPDES program beyond the borders of California;

b. EPA shall notify the State Board and the appropriate Regional Board when there is an overriding federal interest;

c. Within ten working days of the EPA notice, the State Board will inform EPA of any coordination between the federal action and a State action that the State believes to be appropriate;

d. EPA shall either:

(1) Contact the Regional Board and the State Board to work out the details of coordinating the State and federal enforcement actions. Usually, such coordination will entail the exchange of draft enforcement actions for review. Comments can usually be exchanged by telephone, or in a staff meeting at the Regional Board depending upon the complexity of the enforcement action; or

(2) Inform the State Board that such coordination is infeasible;

e. EPA shall not proceed with its enforcement action until ten working days after the date of the EPA notice; and

f. In any instance of overriding federal interest and upon request by the State, EPA shall send the State Board and the appropriate Regional Board a brief, written explanation of the reasons for overriding federal interest or the reasons for infeasibility of enforcement coordination.

4. Recovery of Additional Penalties

Nothing in this MOA shall be construed to limit EPA's authority to take direct enforcement action for the recovery of additional penalties, whenever the penalties recovered by the State are less than those prescribed by the EPA penalty policy.

5. EPA Enforcement Without Notice to the State

Not withstanding the provisions above for prior notification to the State of federal enforcement actions, nothing in this MOA limits EPA's authority to take enforcement action without any prior notice to the State. If EPA does take such an action, it shall send copies of its correspondence with the affected facility to the State Board and the appropriate Regional Board.

V. STATE REPORTING

A. The State will submit the following to EPA:

Item	Description	Frequency of Submission
1	A copy of all permit applications except those for which EPA has waived review	Within 5 days of receipt
2	Copies of all draft NPDES permits and permit modifications including fact sheets except those for which EPA has waived review	When placed on public notice
3	Copies of all public notices	As issued
4	A copy of all issued, draft NPDES permits and permit modifications	As issued
5	A copy of settlements and decisions in permit appeals	As issued

Item	Description	Frequency of Submission
6	A list of major facilities of the scheduled for compliance inspections	With submission annual program
7	Proposed revisions to the scheduled compliance inspections	As needed

Item	Description	Frequency of Submission
8	A list of compliance inspections performed during the previous quarter	Quarterly
9	Copies of all compliance inspection reports and data and transmittal letters to major permittees	Within 30 days of inspection
10	Copies of all compliance inspection reports and data transmittal letters to all other permittees	As requested
11	For major dischargers, a quarterly noncompliance report as specified in 40 CFR 123.45(a) and further qualified in EPA guidance	Quarterly, as specified in 40 CFR 123.45(c)
12	For minor dischargers, an annual noncompliance report as specified in 40 CFR 123.45(b)	Within 60 days of the end of the calendar as specified in 40 CFR 123.45(c)
13	Copies of all enforcement actions against NPDES violators (including letters, notices of violation, administrative orders, initial determinations, and referrals to the Attorney General)	As issued

Item	Description	Frequency of Submission
14	Copies of correspondence required to carry out the pretreatment program	As issued or received
15	Copies of Discharge Monitoring Report (DMR) and non-	Within 10 days of receipt

compliance notification from major permittees

B. Major Discharger List

The State annually shall submit to EPA an updated "major dischargers" list. The list shall include those dischargers mutually defined by the State Board and EPA as major dischargers plus any additional dischargers that in the opinion of the State or EPA, have a high potential for violation of water quality standards. The major discharger list for Federal facilities shall be jointly determined by EPA and the State. The schedule for submittal of the major discharger list shall be included in the 106 workplan.

C. Emergency Notification

1. The Regional Board shall telephone, or otherwise contact, EPA and the State Board immediately if it discovers a NPDES permit violation or threatening violation:

   a. That has significantly damaged or is likely to significantly damage the environment or the public health; or

   b. That has or is likely to cause significant public alarm.

2. The Regional Board will describe the circumstances and magnitude of the violation

VI. CONFIDENTIALITY OF INFORMATION

A. All information obtained or used by the State in the administration of the NPDES program shall be available to EPA upon request without restriction, and information in EPA's files which the State needs to implement its program shall be made available to the State upon request without restriction.

B. Whenever either party furnishes information to the other that has been claimed as confidential, the party furnishing the information will also furnish the confidentiality claim and the results of any legal review of the claim.

C. The party receiving the confidential information will treat it in accordance with the provisions of 40 CFR Part 2.

D. The State and EPA will deny all claims of confidentiality for effluent data, permit applications, permits, and the name and address of any permittee.

VII. PROGRAM REVIEW

A. To fulfill its responsibility for assuring the NPDES program requirements are met, EPA shall:

1. Review the information submitted by the State;

2. Meet with State officials from time to time todiscuss and observe the data handling, permit processing, and enforcement procedures, including both manual and automated processes;

3. Examine the files and documents of the State regarding selected facilities to determine: (a) whether permits are processed and issued consistent with federal requirements; (b) whether the State is able to discover permit violations when they occur; (c) whether State reviews are timely; and (d) whether State selection of enforcement actions is appropriate and effective. EPA shall notify the State in advance of any examination under this paragraph so that appropriate State officials may be available to discuss individual circumstances and problems.

   EPA need not reveal to the State in advance the files and documents to be examined. A copy of the examination report shall be transmitted to the State when available;

4. Review, from time to time, the legal authority upon which the State's program is based, including State statutes and regulations;

5. When appropriate, hold public hearings on the State's NPDES program; and

6. Review the State's public participation policies, practices and procedures.

B. Prior to taking any action to propose or effect any substantial amendment, recision, or repeal of any statute, regulations, or form which has been approved by EPA, and prior to the adoption of any statute, regulations, or form, the State shall notify the Regional Administrator and shall transmit the text of any such change or new form to the Regional Administrator (see 40 CFR 123.62 which provides that the change may trigger a program revision, which will not become effective until approved by EPA).

C. If an amendment, recision, or repeal of any statute, regulations, or form described in paragraph (B) above shall occur for any reason, including action by the State legislature or a court, the State shall within ten days of such event, notify the Regional Administrator and shall transmit a copy of the text of such revision to the Regional Administrator.

D. Prior to the approval of any test method as an alternative to those specified as required for NPDES permitting, the State shall obtain the approval of the Regional Administrator.

/III. TERM OF THE MOA

A. This MOA shall become effective upon the date of signature of the Regional Administrator and of the Chair of the State Water Resources Control Board after State Board approval. If it is signed by the two parties on different days, the latter date shall be the effective date.

B. This MOA shall be reviewed by EPA and the State, and revised as appropriate within five (5) years of its effective date.

C. Either EPA or the State may initiate action to change this MOA at any time.

1. No change to this MOA shall become effective without the concurrence of both agencies.

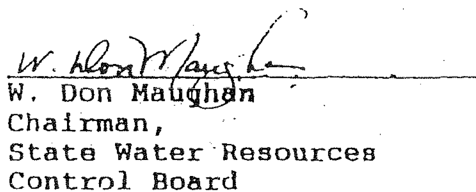
2. The STATE REPORTING (V) portion may be changed by the written consent of the Chief, Division of Water Quality, SWRCB, and the Director, Water Management Division, EPA, Region 9. The Director of Permits Division (EN-336) must consent to all substantial changes.

3. All other changes to this MOA must be approved by the State Board and approved by the Regional Administrator, with the prior concurrence of the Director of the Office of Water Enforcement and Permits (EN-335)and the Associate General Counsel for Water for all substantial changes. The Director of the Office of Water Enforcement and Permits and Associate General Counsel for Water shall also determine whether changes should be deemed substantial.

4. All changes to this MOA determined by EPA to be substantial shall be subject to public notice and comment in accordance with the requirements of 40 CFR 123.62 before being approved.

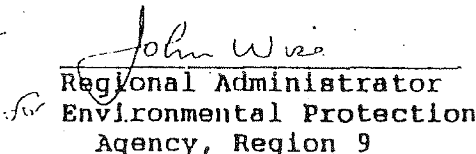
D. Either party may terminate this MOA upon notice to other party pursuant to 40 CFR 123.64.

E. In witness thereof, the parties execute this agreement.



W. Don Maughan
Chairman,
State Water Resources
Control Board

Dated: JUN - 8 1989



for Regional Administrator
Environmental Protection
Agency, Region 9

Dated: 22 SEP 1989

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 1

EXECUTIVE ORDER
&
RELATED DOCUMENTATION

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

VOLUME 1 – INDEX **Executive Order and Related Documentation**	
DOCUMENT NAME	**TAB NO.**
California Regional Water Quality Control Board Los Angeles Region – Order No. R4-2010-0108 (NPDES Permit No. CAS004002) (July 8, 2010) Including Order Attachments A-H	1
California Regional Water Quality Control Board Los Angles Region – Order No. 00-108 (NPDES Permit No. CAS004002) (July 27, 2000)	2

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 1

TAB 1

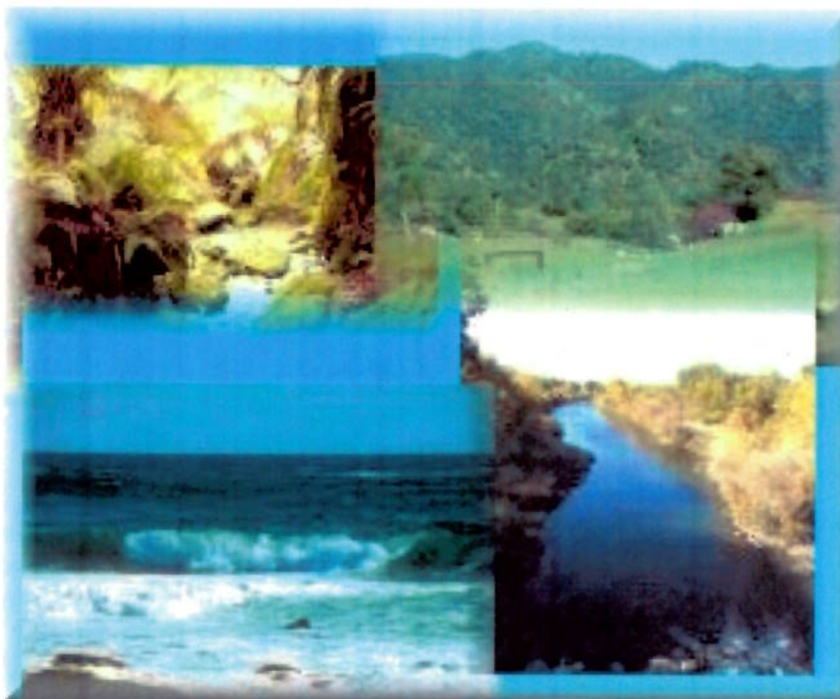
Received
August 26, 2011
Commission on
State Mandates

STATE OF CALIFORNIA

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION**

**ORDER R4-2010-0108
NPDES PERMIT NO. CAS004002
WASTE DISCHARGE REQUIREMENTS
FOR
STORM WATER (WET WEATHER) AND NON-STORM WATER (DRY WEATHER) DISCHARGES FROM
THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS WITHIN THE VENTURA COUNTY WATERSHED PROTECTION DISTRICT, COUNTY OF VENTURA AND THE INCORPORATED CITIES THEREIN.**

July 8, 2010



Received
August 26, 2011
Commission on
State Mandates

TABLE OF CONTENTS

WASTE DISCHARGE REQUIREMENTS

Page No.

FINDINGS ---------- 1
- A. Permit Parties and History ---------- 1
- B. Nature of Discharge ---------- 2
- C. Permit Background ---------- 12
- D. Permit Coverage ---------- 13
- E. Federal, State and Regional Regulations ---------- 14
- F. Implementation ---------- 26
- G. Public Notification ---------- 31

PART 1 DISCHARGE PROHIBITIONS ---------- 33
- A. Prohibitions – Non-Storm Water Discharges ---------- 33

PART 2 RECEIVING WATER LIMITATIONS ---------- 36

PART 3 STORM WATER QUALITY MANAGEMENT PROGRAM IMPLEMENTATION ---------- 37
- A. General Requirements ---------- 37
- B. Legal Authority ---------- 38
- C. Fiscal Resources ---------- 39
- D. Modification/ Revisions ---------- 40
- E. Designation and Responsibilities of the Principal Permittee ---------- 40
- F. Responsibilities of the Permittees ---------- 40

PART 4 SPECIAL PROVISIONS (BASELINE) ---------- 41
- A. General Requirements ---------- 41
- B. Watershed Initiative Participation ---------- 41
- C. Public Information and Participation Program ---------- 42
- D. Industrial/ Commercial Businesses Program ---------- 45
- E. Planning and Land Development Program ---------- 53
- F. Development Construction Program ---------- 68
- G. Public Agency Activities Program ---------- 77
- H. Illicit Connections and Illicit Discharges Elimination Program ---------- 85
- I. Reporting Program ---------- 87

Received
August 26, 2011
Commission on
State Mandates

Table of Contents
Waste Discharge Requirements

Page No.

PART 5 TOTAL MAXIMUM DAILY LOAD PROVISIONS ---------- 88

PART 6 DEFINITIONS ---------- 101

PART 7 STANDARD PROVISIONS ---------- 117
A. General Requirements ---------- 117
B. Regional Water Board Review ---------- 118
C. Public Review ---------- 118
D. Duty to Comply ---------- 118
E. Duty to Mitigate ---------- 118
F. Inspection and Entry ---------- 119
G. Proper Operation and Maintenance ---------- 119
H. Signatory Requirements ---------- 119
I. Reopener and Modification ---------- 120
J. Severability ---------- 120
K. Duty to Provide Information ---------- 120
L. Twenty-four Hour Reporting ---------- 121
M. Bypass ---------- 121
N. Upset ---------- 122
O. Property Rights ---------- 122
P. Enforcement ---------- 122
Q. Need to Halt or Reduce Activity not a Defense ---------- 124
R. Rescission of Board Order ---------- 124
S. Board Order Expiration Date ---------- 124
T. MS4 Annual Reporting Program ---------- 124

Received
August 26, 2011
Commission on
State Mandates

Table of Contents
Waste Discharge Requirements

Page No.

TABLES

Table 1 Required Conditions for Non-Storm Water Discharges ---------- 34
Table 2 BMPs at Restaurants ---------- 47
Table 3 BMPs at Automotive Service Facilities ---------- 48
Table 4 BMPs at Retail Gasoline Outlets ---------- 49
Table 5 BMPs at Nurseries ---------- 50
Table 6 BMPs at Construction sites less than 1 acre ---------- 69
Table 7 BMPs at Construction sites 1acre or greater but less than 5 acres---------- 69
Table 8 BMPs at Construction sites 5 acres or greater---------- 70
Table 9 Enhanced Construction BMP Implementation ---------- 71
Table 10 BMPs at Vehicle Maintenance/ Material Storage Facilities/ Corporation Yards--- 78
Table 11 Discharge Limitations for Dewatering Treatment BMPs ---------- 83
Table 12 Interim Sediment concentration WLAs (ng/g) ---------- 93
Table 13 Interim WLAs for Copper, Nickel and Selenium (ug/L)---------- 94
Table 14 Interim Mass-based WLAs for mercury ---------- 95
Table 15 Bacteria Targets ---------- 96
Table 16 Interim Dry Weather WLAs for Permitted Stormwater Dischargers ---------- 98
Table 17 Final Dry Weather WLAs for Permitted Stormwater Dischargers ---------- 98
Table 18 Interim WLAs for Single Sample Exceedance Days ---------- 100
Table 19 Final Allowable Exceedance Days by Location ---------- 100

Received
August 26, 2011
Commission on
State Mandates

Table of Contents
Waste Discharge Requirements

Page No.

FIGURE
Figure 1 Map of Areas Subject to Order Requirements ---------- Figure 1

ATTACHMENT A
Watershed Management Areas ---------- A-1

ATTACHMENT B
Calleguas Creek Watershed Pollutants of Concern ---------- B-1
Santa Clara River Watershed Pollutants of Concern ---------- B-2
Ventura River Watershed Pollutants of Concern ---------- B-3

ATTACHMENT C
Treatment BMP Performance Standards ---------- C-1
Effluent Concentrations as Median Values ---------- C-1

ATTACHMENT D
Critical Sources Categories ---------- D-1

ATTACHMENT E
Determination of Erosion Potential ---------- E-1

Received
August 26, 2011
Commission on
State Mandates

Table of Contents
Waste Discharge Requirements

Page No.

ATTACHMENT F - Monitoring Program
A. Mass Emissions ---------- F-1
B. Major Outfalls ---------- F-4
C. Dry Weather Analytical Monitoring ---------- F-6
D. Aquatic Toxicity Monitoring ---------- F-8
E. Pyrethroid Insecticides Study ---------- F-13
F. Hydromodification Control Study ---------- F-15
G. Low Impact Development ---------- F-16
H. Southern California Bight Project ---------- F-16
I. Bioassessment ---------- F-17
J. Volunteer Monitoring Programs ---------- F-17
K. Standard Monitoring Provisions ---------- F-17
L. Total Maximum Daily Load (TMDL) Monitoring ---------- F-20
M. Beach Water Monitoring ---------- F-21

ATTACHMENT G
Storm Water Monitoring Program's Constituents with Associated Minimum Levels ---------- G-1

ATTACHMENT H
Storm Water Monitoring Program's Major Outfall Stations ---------- H-1

Received
August 26, 2011
Commission on
State Mandates

Table of Contents
Waste Discharge Requirements

Page No.

ATTACHMENT I - Reporting Program Requirements
Part 1 MONITORING REPORT ---------- I-1
A. Included in the Annual Report ---------- I-1
1. Mass Emissions ---------- I-1
2. Major Outfalls ---------- I-1
3. Aquatic Toxicity Monitoring ---------- I-1
4. TMDL Compliance Monitoring ---------- I-2
5. Beach Water Quality Monitoring ---------- I-2
B. Submitted to the Regional Water Board Executive Officer ---------- I-2
1. Aquatic Toxicity Monitoring ---------- I-2
2. Pyrethroid Insecticides Study ---------- I-2
3. Hydromodification Control Study ---------- I-2
4. Non-Compliance ---------- I-2
C. Submitted electronically to the Regional Water Board ---------- I-2
1. Mass Emissions ---------- I-2
2. Major Outfalls ---------- I-2
3. Aquatic Toxicity Monitoring ---------- I-2
4. TMDL Compliance Monitoring ---------- I-2
5. Beach Water Quality Monitoring ---------- I-2
6. Non-Compliance ---------- I-2
7. Data Transmitted ---------- I-3

PART 2 PROGRAM REPORT ---------- I-3
Discharge Prohibitions ---------- I-3
Receiving Water Limitations ---------- I-3

PART 3 STORM WATER QUALITY MANAGEMENT PROGRAM IMPLEMENTATION ---------- I-4
Legal Authority ---------- I-4
Fiscal Resources ---------- I-4
Designation and Responsibilities of the Principal Permittee ---------- I-5
Responsibilities of the Permittees ---------- I-5

PART 4 SPECIAL PROVISIONS ---------- I-5
General Requirements ---------- I-5
Watershed Initiative Participation ---------- I-6
Public Information and Participation Program (PIPP) ---------- I-6
Industrial/ Commercial Facilities Program ---------- I-7
Planning and Land Development Program ---------- I-12
Development Construction Program ---------- I-18
Public Agency Activities Program ---------- I-20
Illicit Connections/ Illegal Discharge Program ---------- I-24

Received
August 26, 2011
Commission on
State Mandates

STATE OF CALIFORNIA

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION**

**ORDER R4-2010-0108
NPDES PERMIT NO. CAS004002
WASTE DISCHARGE REQUIREMENTS
FOR
STORM WATER AND NON-STORM WATER DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEM WITHIN THE VENTURA COUNTY WATERSHED PROTECTION DISTRICT, COUNTY OF VENTURA AND THE INCORPORATED CITIES THEREIN**

FINDINGS

The California Regional Water Quality Control Board, Los Angeles Region (hereinafter called Regional Water Board), finds that:

A. Permit Parties and History

1. Ventura County Watershed Protection District (Principal Permittee and Co-permittee), County of Ventura, cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley and Thousand Oaks (hereinafter referred to separately as Permittees) have joined together to form the Ventura Countywide Storm Water Quality Management Program to discharge wastes. The Permittees discharge or contribute to discharges of storm water and non-storm water from municipal separate storm sewer systems (MS4s), also called storm drain systems, into the Watershed Management Areas of Ventura River, Santa Clara River, Calleguas Creek, Malibu Creek and Miscellaneous Ventura Coastal all within Ventura County and Los Angeles County (see Attachment "A").

2. Prior to the issuance of this permit, storm water discharges from the Ventura County MS4 were covered under the countywide waste discharge requirements contained in Order No. 09-0057, adopted by the Regional Water Board on May 7, 2009, which replaced Order No. 00-108, adopted by the Regional Water Board on July 27, 2000, which replaced Order No. 94-082, adopted by the Regional Water Board on August 22, 1994. Order No. 09-0057 also served as a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of municipal storm water.

3. On June 8, 2009, the Building Industry Legal Defense Foundation, Construction Industry Coalition on Water Quality, and the Building Industry Association of Southern California, Inc. (collectively, "BIA") submitted a petition to the State Water Resources Control Board (State Water Board) challenging Order No. 09-0057. On

Received
August 26, 2011
Commission on
State Mandates

March 10, 2010, the State Water Board requested that the Regional Water Board agree to a voluntary remand of Order No. 09-0057 in order to address perceived procedural issues in connection with adoption of Order No. 09-0057. The State Water Board also requested that BIA agree to place its petition in abeyance. On March 11, 2010, the Regional Water Board agreed to a voluntary remand, and stated its intention to hold a hearing to reconsider the permit in July 2010. Since BIA did not agree to place its petition in abeyance, BIA's petition was thereafter dismissed by operation of law. On May 5, 2010, the Regional Water Board notified the Permittees, the parties and other interested persons of its intent to reconsider Order No. 09-0057 and has provided them with an opportunity to submit written comments on provisions of the permit that were not previously subject to notice and comment.

4. The Ventura County Board of Supervisors approved the concept of a countywide NPDES permit program and the use of the Flood Management District (presently the Watershed Protection District) benefit assessment authority to finance it on April 14, 1992. On June 30, 1992, the Ventura County Board of Supervisors adopted a benefit assessment levy for storm water and flood management in the unincorporated areas of Ventura County and the cities within the County, to be used in part to finance the implementation of a countywide NPDES municipal storm water permit program. The Ventura County MS4 Permittees have entered into an agreement with the Watershed Protection District to finance the activities related to the Ventura County MS4 Permit for shared and district wide expenses. The Permittees are also given the option to use the Benefit Assessment Program to finance their respective activities related to reducing the discharge of storm water pollutants under the MS4 Permit.

5. The Regional Water Board may require a separate NPDES permit for any entity that discharges storm water into the watersheds of Ventura County. Such an entity can be any State or Federal facility, special district or other public or private party.

B. Nature of Discharge

1. Storm water discharges consist of surface water runoff generated from various land uses in all the hydrologic drainage basins, which discharge into Waters of the State. The quality of these discharges varies and is affected by geology, land use, season, hydrology, and sequence and duration of hydrologic events. Based on the Ventura Countywide Storm Water Monitoring Program's Water Quality Monitoring Reports which were required under Order No. 00-108, the dry weather and wet weather Pollutants of Concern (POC) in urban stormwater include chloride, fecal indicator bacteria, conventional pollutants, metals, nitrogen, organic compounds, and pesticides. The POC are identified in Attachment "B" of this Order. Many of the POC listed are causing impairments identified on the federal Clean Water Act (CWA) § 303(d) list of impaired waterbodies.

The State Water Board submits a report (a list of water quality limited segments (§ 303[d] list)) on the State's water quality to the U.S. EPA pursuant to § 305(b) of the

Received
August 26, 2011
Commission on
State Mandates

1972 CWA, and Title 40, CFR 130.7, every 2 years. The Report provides water quality information to the general public and serves as the basis for the U.S. EPA's National Water Quality Inventory Report to Congress. Section 303(d) requires that all waters that are not attaining standards after the implementation of those controls required by 1977, shall be included on the list. Title 40 CFR 130.7(b)(3) defines "water quality standard applicable to such waters" as "those water quality standards established under § 303 of the Clean Water Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements."

2. Common pollutants in urban storm water and their respective sources include, but are not limited to: bacteria from illegal discharges, illicit connections and animal waste; Polycyclic Aromatic Hydrocarbons (PAHs) from the products of internal combustion engine operation and parking lot sealants; nitrogen compounds from fertilizer application; pesticides from pest mitigating applications and from plant mitigating applications; bis (2-ethylhexyl) phthalate from the break down of plastic products; mercury from atmospheric fallout and improper disposal of mercury switches; lead from fuels, paints and automotive parts; copper from brake pad wear and roofing materials; zinc from tire wear and galvanized sheeting and fencing; sediment from land disturbance and erosion; trash; and dioxins as products of combustion.

3. In general, the pollutants that are found in municipal storm water runoff can harm human health and aquatic ecosystems. In addition, the high volumes and high velocities of storm water discharged from MS4s into receiving waters can adversely impact aquatic ecosystems and stream habitat and cause stream bank erosion and physical modifications; these changes are collectively termed hydromodification. Hydromodification and discharges of runoff and stormwater from urbanized areas remain a leading cause of impairment of surface waters in California and nationwide (U.S. EPA 2009).

4. Ammonia as Nitrogen, and Nitrate plus Nitrite as Nitrogen are biostimulatory substances that can cause or contribute to eutrophic effects such as low dissolved oxygen and algae growth impairing aquatic and wildlife habitats as well as recreational uses. At elevated concentrations, ammonia is highly toxic to fish and other aquatic life.

5. Elevated bacterial indicator densities impair the water contact recreation (REC-1) beneficial use at beaches, creeks, lakes, estuaries, lagoons, and marinas. Swimming in waters with elevated bacterial indicator densities has been associated with adverse health effects. Specifically, local and national epidemiological studies indicate that there is a causal relationship between adverse health effects and recreational water quality, as measured by bacterial indicator densities (Pruss, 1998, Review of epidemiological studies on health effects from exposure to recreational waters, International Journal of Epidemiology; Haile et al., 1996, An epidemiological study of possible adverse health effects of swimming in Santa Monica Bay, Santa Monica Bay Restoration Project; and Haile et al., 1999, The health effects of swimming in

Received
August 26, 2011
Commission on
State Mandates

ocean water contaminated by storm drain runoff, Epidemiology). Sources of elevated bacteria to marine and fresh waters may also include illegal discharges from improperly maintained standard septic systems, on-site wastewater treatment systems (OWTS) and illicit discharges from private drains.

6. Pesticides are substances used to prevent, destroy, repel or mitigate pests such as insects, weeds, and microorganisms. Their effects can be direct (e.g. fish die from exposure to a pesticide entering waterways, or birds do not reproduce after ingesting contaminated fish), or indirect (a hawk becomes sick from eating a mouse dying from pesticide poisoning). Pesticide categories include: Organochlorine, Organophosphorus, Organophosphate, and Pyrethroid.

7. Polychlorinated Biphenyls (PCBs) are a subset of the synthetic organic chemicals known as chlorinated hydrocarbons. Concern over PCBs' toxicity, persistence (chemical stability) in the environment and bioconcentration in aquatic organisms has led to prohibitions on PCBs.

8. Rising groundwater and swimming pool water have been found to be sources of pollutants such as salts (chloride). Salts increase the salinity of otherwise freshwater systems and disrupt physiological processes. The Regional Water Board has waterbodies listed on the CWA § 303(d) list for impairment due to salts and has adopted Basin Plan amendments to include Total Maximum Daily Loads (TMDLs) for salts. This Order includes provisions to control the discharges from these activities in order to directly or indirectly reduce or eliminate the discharge of salts to fresh water systems where salts may impair water quality and beneficial uses.

9. Trash and debris are pervasive pollutants which accumulate in streams, rivers, bays, and the ocean throughout Southern California. They pose a serious threat to our oceans and coasts, navigation, biological resources, recreation, human health and safety, aesthetics, and economies.

10. Municipal storm water (wet weather) and non-storm water (dry weather) discharges may contain pollutants that cause or threaten to cause an exceedance of the water quality standards, as outlined in the Los Angeles Region's Basin Plan. Wet weather and dry weather discharges from the MS4 are subject to conditions and requirements established in the Basin Plan for point source discharges. Discharges from the MS4 may not cause or contribute to exceedances of water quality standards.

11. Biological communities act to integrate the effects of water quality conditions in a stream by responding with changes in their population abundances and species composition over time. These populations are sensitive to multiple aspects of water and habitat quality, and provide expressions of ecological health easier to understand than the results of chemical and toxicity tests. Biological assessments and criteria address the cumulative impacts of all stressors, especially habitat degradation, and chemical contamination, which result in a loss of biological diversity. Biological

Received
August 26, 2011
Commission on
State Mandates

information can help provide an ecologically based assessment of the status of a waterbody. Bioassessment is a cost-effective tool and protocol for assessing the biological and physical habitat conditions of streams and rivers for evaluation of the overall health of a watershed. The Principal Permittee consents to participate in the Southern California Storm Water Monitoring Coalition (SMC) Southern California Regional Bioassessment Monitoring Program.

12. Studies indicate that facilities with paved surfaces subject to frequent motor vehicular traffic (such as: strip malls, parking lots, commercial business parks, and fast food restaurants), or facilities that perform vehicle repair, maintenance, or fueling (automotive service facilities) are potential sources of POC in storm water (*California Stormwater Quality Association, Stormwater Best Management Practice Handbook, Municipal, January 2003).*

13. Retail Gasoline Outlets (RGOs) are points of convergence for vehicular traffic and are similar to parking lots and urban roads. Studies indicate that storm water discharges from RGOs have high concentrations of hydrocarbons and heavy metals (*California Stormwater Quality Association, Stormwater Best Management Practice Handbook, Municipal, January 2003).*

14. The industries and businesses listed in this Order that are to be inspected by Permittees have the potential to discharge contaminated storm water into the MS4. This storm water is an environmental threat because it can adversely impact public health and safety, and the quality of receiving waters. For example, pretreatment program compliance inspections and audits performed in the Los Angeles and Ventura Counties indicate that automotive service and food service facilities sometimes discharge polluted storm water to the MS4s. The POC in such wash waters include oil and grease, toxic chemicals, and food waste. Spills from clogged sanitary sewer lines have a high likelihood to reach the receiving waters via MS4s. Overall, the most common POC identified in storm water discharge to the MS4s are: (i) heavy metals, (ii) oil and grease/ PAHs, (iii) sediments, (iv) oxygen demanding substances, (v) litter/ trash/ debris, (vi) nutrients, (vii) other toxic materials, such as pesticides. Municipal storm water monitoring data and industrial storm water monitoring data indicate that industrial and commercial sites continue to contribute significant quantities of pollutants in storm water runoff.

15. Development and urbanization increase pollutant loads, volume, and discharge velocity. First, natural vegetated pervious ground cover is converted to impervious surfaces (paved) such as highways, streets, rooftops and parking lots. While natural vegetated soil can both absorb rainwater and remove pollutants providing an effective natural purification process, in contrast, impervious surfaces (such as pavement and concrete) can neither absorb water nor remove pollutants, and thus the natural purification characteristics are lost. Second, urban development creates new pollution sources as the increased density of human population brings proportionately higher levels of vehicle emissions, vehicle maintenance wastes, municipal sewage waste,

Received
August 26, 2011
Commission on
State Mandates

pesticides, household hazardous wastes, pet wastes, trash, and other anthropogenic pollutants. Development and urbanization especially threaten environmentally sensitive areas. Such areas have a much lower capacity to withstand pollutant shocks than might be acceptable in the general circumstance. In essence, development that is ordinarily insignificant in its impact on the environment may become significant in a particularly sensitive environment. These environmentally sensitive areas (ESAs) designated by the State in the Ventura County watershed are defined in Part 6 (Definitions).

16. The increased volume, increased velocity, and discharge duration of storm water runoff from developed areas has the potential to accelerate downstream erosion and impair stream habitat in natural drainages. Studies have demonstrated a direct relationship between the degree of imperviousness of an area and waterbody degradation *(Impacts of Impervious Cover on Aquatic Systems, Center for Watershed Protection, March 2003; Management Strategies for Urban Stream Rehabilitation, Booth, D. et al., February 2003).* Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as 3-10 percent conversion from natural to impervious surfaces in a subwatershed. Recent studies conducted in California indicate that intermittent and ephemeral streams are even more susceptible to the effects of hydromodification than streams from other regions of the U.S. with stream degradation being recognized when the associated catchment's impervious cover is as little as 3-5% *(Managing Runoff to Protect Natural Streams: The Latest Development on Investigation and Management of Hydromodification in California, Stein, E. and Zaleski, S., December 2005*; *Effect of Increase in Peak Flows and Imperviousness on the Morphology of Southern California Streams, Coleman, D., April 2005).* The percentage of impervious cover is one indicator and predictor of potential water quality degradation expected from new development.

17. The Order requires projects where it has been demonstrated to be technically infeasible to achieve less than 30% Effective Impervious Area, to mitigate off-site 1.5 times the volume that would normally be required to be retained on site. The increase in off-site mitigation is warranted because it has been concluded that, at impervious land cover over 30%, impacts on streams and wetlands become more severe, and degradation is almost unavoidable without special measures (Prince George's County, MD 1999; BASMAA 1999; Center for Watershed Protection 2003). The off-site mitigation volume requirement may be met through retention and/or biofiltration.

18. Low Impact Development (LID) is an effective approach to minimizing the adverse effects of urbanization and development on waterbodies and their beneficial uses that has been endorsed by California and other states. The California Ocean Protection Council (OPC), in a resolution adopted on May 15, 2008, found that LID is a practicable and superior approach that new and redevelopment projects can implement to minimize and mitigate increases in runoff and runoff pollutants and the resulting impacts on downstream uses, coastal resources and communities. In its

Received
August 26, 2011
Commission on
State Mandates

Strategic Plan Update 2008-2012, the State Water Board reiterated sustainability as a key principle, stating its commitment to "enhancing and encouraging sustainability within the administration of Water Board programs and activities by promoting water management strategies such as low impact development..." (SWRCB 2008).

19. LID is a comprehensive source control strategy first pioneered by Prince George's County, Maryland in 1997 to help address the growing economic and environmental limitations of conventional stormwater management practices. As LID was developed by a local government, it is sensitive to addressing local government's unique environmental and regulatory needs in the most economical manner possible by reducing costs associated with stormwater infrastructure design, construction, maintenance and enforcement. LID also provides for local government's need for economic vitality through reasonable and continued growth and redevelopment. LID allows for greater development potential with less environmental impacts through the use of smarter designs and advanced technologies to achieve a better balance between conservation, growth, ecosystem protection and public health / quality of life. (Low Impact Development: Smart Technology For Clean Water Definitions, Issues, Roadblocks, and Next Steps, Coffman, Larry)

20. The implementation of LID techniques across the United States and Canada has demonstrated that the proper implementation of LID techniques results in more benefits than single purpose stormwater and flood control infrastructure, including increased water quality protection, enhanced property values, improved aquatic and terrestrial habitat, aesthetic amenities, and improved quality of life (Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices, USEPA Doc No. EPA 841-F-07-006, December 2007). Further, properly implemented LID techniques can help mimic the pre-project runoff volume and time of concentration, thus minimizing the adverse effects of hydromodification on stream habitat and biological condition (A Review of Low Impact Development Policies: Removing Institutional Barriers to Adoption, Low Impact Development Center and State of California, State Water Resources Control Board, December 2007). The requirements of this Order facilitate the implementation of LID strategies to protect water quality, reduce runoff volume, and to garner additional benefits.

21. The implementation of LID techniques have been associated with the following environmental benefits: improved air quality due to the increased use of trees and vegetation, reduced urban temperatures due to the shade offered by increased vegetation and the reduction of heat absorbing materials (concrete, etc.), the moderation of climate change due to reduced urban temperatures, increased energy efficiency due to lower ambient temperatures when LID practices are implemented on and around buildings, and aesthetic benefits due to the increased use of trees and vegetation (U.S. EPA Technical Guidance on Implementing the Storm Water Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act).

Received
August 26, 2011
Commission on
State Mandates

22. Furthermore, the implementation of LID not only benefits water quality, but also enhances water supply. LID is consistent with and supports the Governor's 20 x 2020 Water Conservation Plan (February 2010); the State Board's 2008-2012 Strategic Plan Update (i.e. to promote sustainable local water supplies); the State Board's Recycled Water Policy (Resolution No. 2009-0011) objective to increase [beneficial] use of stormwater; requirements of the Water Conservation in Landscaping Act of 2006 (AB 1881, Laird), which requires cities and counties to adopt landscape water conservation ordinances by January 1, 2010; and the Department of Water Resources' Water Efficient Landscape Ordinance (Cal. Code Regs. §492.15).

23. This Order requires specified New Development and Redevelopment projects to control pollutants, pollutant loads, and runoff volume emanating from impervious surfaces by specifying a 5% Effective Impervious Area (EIA) site limitation and a fixed runoff volume to be retained on site. There is a growing acceptance by stormwater professionals and local governments to integrate LID strategies that limit impervious area, and associated onsite retention criteria, into stormwater management programs and MS4 permits. For example, West Virginia's Small MS4 Permit # WV0116025, requires the on-site retention of the volume of runoff produced from the first inch of a 24-hour storm; the U.S. EPA's Technical Guidance on Implementing the Storm Water Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act, requires the on-site retention of the volume of runoff produced from the 95th percentile storm event where technically feasible; the City of Philadelphia requires the onsite retention of the volume of runoff produced from the first inch of a 24-hour storm; and the City of Portland, Oregon requires the onsite infiltration of the runoff volume from a 10-year, 24-hour design storm.

24. Based on a study conducted by Horner (2007) in Ventura County, it was found that a 5% EIA threshold can be met in typical developments. This result was reached assuming the use of native soils typical to Ventura County; soil enhancements can further increase onsite infiltration potential. Using six different development types, the Horner study tested the feasibility of draining all but 3% of impervious area to pervious land on the sites. Five of the six sites had adequate or greater capacity to infiltrate the full annual runoff volume from the "Not-Connected Impervious Area" (NCIA) and pervious areas where EIA is limited to 3% of the total site area. By showing that it is possible to retain all runoff from pervious areas where EIA is limited to 3% of the total site area under typical site conditions (i.e. native soils) and a wide range of development types, the study results provide support for the feasibility of the 5% EIA threshold.

25. Horner (2007) also found that developments implementing low impact strategies can achieve significant reductions in pollutant loading and runoff volume as well as greatly enhanced recharge rates compared to both developments with no BMPs and developments with traditional treatment BMPs.

Received
August 26, 2011
Commission on
State Mandates

26. In some circumstances, however, site conditions and the type of development can limit the feasibility of retaining, infiltrating, and reusing stormwater at sites due to a variety of site specific conditions. Factors that affect the feasibility of a fixed volume capture standard include, but are not limited to: successive storms, soil infiltration capacity, subsurface pollution, and infill in urban core centers (e.g. R. Horner, *Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices ("LID") for Ventura County* (February 2007); E. Strecker, A. Poresky, D. Christsen, *Memorandum: Rainwater Harvesting and Reuse Scenarios and Cost Consideration* (April, 2009)).

27. A major concern expressed by commenters is the 30% EIA limitation may not allow some projects to be built. Part of the rationale supporting the feasibility of on site retention in Order 09-0057 was derived from the Richard Horner (2007) study. The Horner study purports to demonstrate that stormwater infiltration is feasible throughout Ventura County and is the key study for an upper-bound EIA requirement. Horner's approach to demonstrate feasibility is to estimate stormwater runoff volume and compare it to infiltration capacity. While the Horner report has value at a general level and complements findings of other studies in Southern California and elsewhere. Staff has the following concerns with the Horner study conclusions with regard to the universal feasibility of achieving less than 30% EIA:

    - The Horner analysis is based on engineered infiltration basins rather than undisturbed pervious cover.
    - The Horner analysis cites the UCSB infiltration studies which are based on a relatively high permeability soils. However, the EIR cited in the study by Horner shows a significant quantity percentage of the Ventura County soils are described as sandy loamy and are classified as "low permeability and slow draining.
    - The Horner analysis normalizes runoff rates and infiltration capacity to an annual basis which may not address the critical conditions appropriate for the seasonal precipitation patterns in Ventura County.
    - Horner states the study was limited in scope such that its universal applicability throughout Ventura County is not well supported.

    Staff recognizes the significance of the 30% EIA threshold but cannot justify a strict cap.

28. In a letter dated April 10, 2009, the Ventura County Permittees, NRDC and Heal the Bay presented an agreement to the Regional Water Board proposing new development/redevelopment criteria, including on-site retention requirements, a 5% EIA limitation, infeasibility criteria, a 30% EIA cap, and off-site mitigation provisions; the elimination of Municipal Action Levels (MALs); and weekly, year-round beach water quality monitoring at 10 sites. The letter was signed by representatives of the parties, including NRDC, Heal the Bay, Ventura, Oxnard, Simi Valley, and the County of Ventura. At the Regional Board hearing on May 7, 2009,

Received
August 26, 2011
Commission on
State Mandates

the Ventura County Permittees, NRDC, and Heal the Bay reiterated their support for the agreement set forth in their joint April 10, 2009 comment letter and advocated that the agreement be incorporated into the permit in its entirety.

29. Specific LID strategies include bioretention and rainwater harvesting for reuse. Bioretention is a method of treating stormwater by pooling water on the surface and allowing filtering and settling of suspended solids and sediment at the mulch layer, prior to entering the plant/soil/microbe complex media for infiltration and pollutant removal. Rain Gardens / bioretention techniques are used to accomplish water quality improvement and water quantity reduction. Prince George's County, Maryland, and Alexandria, Virginia have used this BMP since 1992 with success in many urban and suburban settings. Rain Gardens can be integrated into a site with a high degree of flexibility and can balance nicely with other structural management systems, including porous asphalt parking lots, infiltration trenches, as well as non-structural stormwater BMPs. The Rain Garden vegetation serves to filter (water quality) and transpire (water quantity) runoff, and the root systems can enhance infiltration. The plants take up pollutants; the soil medium filters out pollutants and allows storage and infiltration of stormwater runoff; and the infiltration bed provides additional volume control ("Rain Gardens", River-Friendly Landscaping Coalition, Sacramento, CA). Properly designed bioretention techniques mimic natural forest ecosystems through species diversity, density and distribution of vegetation, and the use of native species, resulting in a system that is resistant to insects, disease, pollution, and climatic stresses (Draft - Pennsylvania Stormwater Management Manual).

    As an alternative to redirection of stormwater to functional landscape, rain gutter flows can be directed into rain barrels or cisterns for later use in irrigating lawns and gardens. Disconnections of rain gutters can effectively be implemented on existing properties with little change to present site designs. The benefits of urban area rainwater harvesting can be huge, providing supplemental water for many local uses. Such as irrigating a vegetable garden and surrounding landscape, which also leaves more treated water in the municipal water supply to help cities through times of drought or other shortages. A number of cities in the Los Angeles Region, including Los Angeles, Long Beach and Santa Monica, have implemented successful rainwater harvesting incentive programs.

30. Traditional approaches to stormwater management involve conveying runoff off-site to receiving waters, to a combined sewer system, or to a regional facility that treats runoff from multiple sites. These designs typically include hard infrastructure, such as curbs, gutters, and piping. LID-based designs, in contrast, are designed to use natural drainage features or engineered swales and vegetated contours for runoff conveyance and treatment. In terms of costs, LID techniques like conservation design can reduce the amount of materials needed for paving roads and driveways and for installing curbs and gutters. Conservation designs can be used to reduce the total amount of impervious surface, which results in reduced road and driveway lengths and reduced costs. Other LID techniques, such as grassed swales, can be used to infiltrate roadway

Received
August 26, 2011
Commission on
State Mandates

runoff and eliminate or reduce the need for curbs and gutters, thereby reducing infrastructure costs. Also, by infiltrating or evaporating runoff, LID techniques can reduce the size and cost of flood-control structures (Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices, U.S. EPA).

The U.S. EPA looked at 17 case studies throughout the country to determine if LID strategies were a cost effective alternative to conventional storm water control measures. They found that the use of LID practices can be both fiscally and environmentally beneficial to communities. They found total capital cost savings ranging from 15% to 80% when LID strategies were used compared with traditional stormwater control measures, with only a few cases noted where LID projects resulted in higher costs than traditional storm water controls. In the majority of the cases, costs for projects implementing LID strategies were found to be less due to reduced costs for site grading and preparation, stormwater infrastructure, site paving, and landscaping (Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices, U.S. EPA).

31. The use of LID strategies also has the potential to create larger economic benefits, including but not limited to, reduced need for flood control, which could save up to $400 million; increased property values, which could amount to up to $5 billion; and creation of additional groundwater supplies worth up to $7.2 billion (Devinny et al. 2004; MacMullan, E., Assessing Low Impact Developments Using a Benefit-Cost Approach, 2nd National Low Impact Development Conference, March 12-14, 2007).

32. The Regional Water Board adopted a Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (Order No. R4-2005-0080) on November 3, 2005. The objective of the program is to monitor runoff from irrigated agriculture facilities in the coastal watersheds of Ventura and Los Angeles Counties. The Basin Plan, which designates beneficial uses and establishes water quality objectives for the Region, recognizes that agricultural activities can generate pollutants such as sediment, pesticides, and nutrients that upon discharge to receiving water can degrade water quality and impair beneficial uses. A category identified by the Conditional Waiver as a source of pollutants is nursery operations. This Order includes requirements for the municipal operator to confirm that nursery operators implement pollutant reduction and control measures with the objective of reducing pollutants in storm water runoff discharges.

33. Research conducted on the contribution of aerial deposition of trace heavy metals in Los Angeles County watersheds indicates that dry indirect deposition may account for a significant load of pollutants into surface waters. Similar patterns of aerial deposition likely occur in Ventura County. Of the atmospherically deposited pollutants on the watersheds, ten to twenty percent may account for the total load for copper, zinc, nickel, lead, and chromium to the waterbodies. Land reservoirs and sequestration may account for the remaining eighty to ninety percent of the atmospherically deposited pollutants on the watersheds. Emissions of semi-volatile

Received
August 26, 2011
Commission on
State Mandates

organics such as polycyclic aromatic hydrocarbons (PAHs) and pesticides and their subsequent deposition may contribute to the contamination of receiving waters but appear to be less significant. The remaining percentage is stored in land reservoirs and eventually shows up in receiving waters.

C. Permit Background

1. The essential components of the Storm Water Management Program, as required by the Code of Federal Regulations (CFR) [40 CFR 122.26(d)] are:
   (a) Adequate Legal Authority.
   (b) Fiscal Resources.
   (c) Storm Water Quality Management Program (SMP)
      (1) Public Information and Participation Program
      (2) Industrial/ Commercial Facilities Program
      (3) Planning and Land Development Program
      (4) Development Construction Program
      (5) Public Agency Activities Program
      (6) Illicit Connection and Illicit Discharges Elimination Program
   (d) Reporting Program (Monitoring Report and Program Report)

2. The Ventura County SMP, dated November 2001 (revision 2) identifies seven program areas, which are listed below and were previously approved under Board Order No. 00-108. For purposes of consistency, they are titled as follows:
   (a) Ventura County SMP.
      (1) Program Management
      (2) Programs for Residents
      (3) Programs for Industrial/ Commercial Businesses
      (4) Programs for Planning and Land Development
      (5) Programs for Construction Sites
      (6) Programs for Public Agency Activities
      (7) Programs for Illicit Connections/ Illegal Discharges
   (b) For purposes of region-wide consistency, the program titles are revised and consolidated into the six areas listed in the preceding C.1(c). All Permittee storm water documents submitted to the Regional Water Board are to follow the organization enumerated in C.1(c).

3. The Permittees filed a Report of Waste Discharge (ROWD), dated January 26, 2005. The Permittees applied for renewal of their waste discharge requirements for a 5-year period, which serves as an NPDES permit to discharge wastes to surface waters.

4. The Regional Water Board reviewed the ROWD and determined it to be partially complete under the reapplication policy for MS4s issued by the United States Environmental Protection Agency (U.S. EPA) (61 Fed. Reg. 41697). The Regional Water Board has prepared this Order so that implementation of provisions contained

Received
August 26, 2011
Commission on
State Mandates

in this Order by Permittees will meet the requirements of the federal NPDES regulations at 40 CFR 122.26.

5. The Permittees ROWD contained a proposed Storm Water Management Program and a Monitoring Program to be considered by the Regional Water Board for incorporation into an MS4 NPDES Permit as permit conditions and to demonstrate compliance with federal law.

6. To-date, the monitoring program has consisted of mass emission, receiving water (tributaries), and land-use monitoring stations, toxicity testing, special studies for bioassessment of the Ventura River and hydrology, identification of ESAs, implementation of the Storm Water Quality Urban Impact Mitigation Plan (SQUIMP), and has provided support for volunteer monitoring programs. This Order requires a monitoring program consisting of mass emission, toxicity, TMDL storm water (wet weather) MS4 water quality-based effluent limits, TMDL non-storm water (dry weather) MS4 water quality-based effluent limits, Pyrethroid assessment study, continuation of the hydromodification study, low impact development study, and participation in the Southern California Regional Bioassessment Program and Southern California Bight Project (SCBP).

7. The Principal Permittee is a member of the Southern California Coastal Water Research Project (SCCWRP) Commission. The Principal Permittee also participates in the Regional Monitoring Programs and research partnerships, such as the Southern California Storm Water Monitoring Coalition (SMC) and the Bioassessment Working Group.

D. Permit Coverage

1. The area covered by this Order includes all areas within Ventura County boundaries and all areas within each co-permittee's boundaries (see Figure 1) that drain into the MS4.

2. The Permittees covered under this Order were designated on a system-wide basis under Phase I of the CWA § 402(p)(3)(B)(i). The action of covering all Ventura County municipalities under a single MS4 permit on a system-wide basis was consistent with the provisions of 40 CFR 122.26(a)(3)(iv), which states that one permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems; and the Regional Water Board may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

3. Federal, State, Regional, or local entities within the Permittees' boundaries or in jurisdictions outside the Ventura County Watershed Protection District, and not currently named in this Order, may operate storm drain facilities and/ or discharge

Received
August 26, 2011
Commission on
State Mandates

storm water to storm drains and receiving waters covered by this Order. The Permittees may lack legal jurisdiction over these entities under State and Federal constitutions. The Regional Water Board will coordinate with these entities to implement programs that are consistent with the requirements of this Order. The Regional Water Board may consider such facilities for coverage under its NPDES permitting scheme pursuant to USEPA Phase II storm water regulations. Permittees have expressed their intention to work cooperatively to control the contribution of pollutants from one portion of the MS4 to another portion of the system. Permittees shall make good faith efforts to control the contribution of pollutants to the MS4 from non-permittee dischargers such as Caltrans, the U.S. Department of Defense, and other state and federal facilities.

4. TMDLs are numerical calculations of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources. A TMDL is the sum of the allowable loads of a single pollutant from all contributing point sources (Waste Load Allocation (WLA)) and non-point sources (Load Allocation (LA)). Discharges from the MS4s are considered point sources discharges, because the MS4 is a point source.

5. This Order incorporates applicable WLAs that have been adopted by the Regional Water Board and have been approved by the Office of Administrative Law and the U.S. EPA. The TMDL WLAs in the Order are expressed as water quality-based effluent limits in a manner consistent with the assumptions and requirements of the TMDL from which they are derived.

6. The CWA and the California Water Code contain specific provisions on how wastewater discharges from point sources are to be permitted. Stormwater discharges (both dry weather and wet weather) are considered point source discharges.

7. Permittees should work cooperatively to control the contribution of pollutants from one portion of the MS4 to another portion of the system through inter-agency agreements or other formal arrangements.

E. Federal, State and Regional Regulations

1. The Water Quality Act of 1987 added § 402(p) to the CWA (33U.S.C. § 1251-1387). This section requires the U.S. EPA to establish regulations setting forth NPDES requirements for storm water discharges in 2 phases.
   (a) U.S. EPA Phase I storm water regulations were directed at MS4s serving a population of 100,000 or more, including interconnected systems and storm water discharges associated with industrial activities, including construction activities. The Phase 1 Final Rule was published on November 16, 1990 (55 Fed. Reg. 47990).
   (b) U.S. EPA Phase II storm water regulations are directed at storm water discharges not covered in Phase I, including small MS4s (population of less than 100,000),

Received
August 26, 2011
Commission on
State Mandates

small construction projects (less than 5 acres), municipal facilities with delayed coverage under the Intermodal Surface Transportation Efficiency Act of 1991, and other discharges for which the U.S. EPA Administrator or the State determines that the storm water discharge contributes to a violation of a water quality standard, or is a significant contributor of pollutants to waters of the U.S. The Phase II Final Rule was published on December 8, 1999 (64 Fed. Reg. 68722).

2. The U.S. EPA published an Interpretative Policy Memorandum on Reapplication Requirements for MS4 permits on August 9, 1996 (61 Fed. Reg. 41697). This policy requires that MS4 reapplication for reissuance for a subsequent five-year permit term contain certain basic information and information for proposed changes and improvements to the storm water management program and monitoring program.

3. The U.S. EPA has entered into a Memorandum of Agreement (MOA) with the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service for enhancing coordination regarding the protection of endangered and threatened species under section 7 of the Endangered Species Act, and the CWA's water quality standards and NPDES programs. Among other actions, the MOA establishes a framework for coordination of actions by the U.S. EPA, the Services, and CWA delegated States on CWA permit issuance under § 402 of the CWA [66 Fed. Reg. 11202-11217].

4. The CWA allows the U.S. EPA to authorize states with an approved environmental regulatory program to administer the NPDES program in lieu of the U.S. EPA. The State of California is a delegated State. The Porter-Cologne Water Quality Control Act (California Water Code) authorizes the State Water Resources Control Board (State Water Board), through the Regional Water Boards, to regulate and control the discharge of wastes that could affect the quality of waters of the State, including waters of the United States, and tributaries thereto.

5. Under CWA § 303(d) of the CWA, States are required to identify a list of impaired water-bodies and develop and implement TMDLs for these waterbodies (33 USC § 1313 (d)(1)). The most recent 303(d) list's U.S. EPA approval date was June 28, 2007. The U.S. EPA entered into a consent decree with the Natural Resources Defense Council (NRDC), Heal the Bay, and the Santa Monica Baykeeper on March 22, 1999, under which all TMDLs for the Los Angeles Region must be adopted within 13 years from that date. This Order incorporates provisions incorporating approved WLAs for municipal storm water discharges and requires amending the SMP after subsequent pollutant loads have been allocated and approved.

6. Collectively, the restrictions contained in the TMDL Provisions for Storm Water (Wet Weather) Discharges and Non-Storm Water (Dry Weather) Discharges of this Order on individual pollutants are no more stringent than required to implement the provisions of the TMDL, which have been adopted and approved in a manner that is consistent with the CWA. Where a TMDL has been approved, NPDES permits must

Received
August 26, 2011
Commission on
State Mandates

contain effluent limits and conditions consistent with the assumptions and requirements of the available WLAs in TMDLs (40 CFR 122.44(d)(1)(vii)(B)).

7. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. This Order implements federally mandated requirements under CWA § 402, subdivision (p)(3)(B)(33 U.S.C. § 1342(p)(3)(B)) This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (Natural Resources Defense Council, Inc. v. U.S. E.P.A. (9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.) The authority exercised under this Order is not reserved state authority under the Clean Water Act's savings clause (cf. Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region (2006) 135 Cal.App.4th 1377, 1389; Building Industry Ass'n of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 882-883.)

Likewise, the provisions of this Order to implement TMDLs are federal mandates. The CWA requires TMDLs to be developed for waterbodies that do not meet federal water quality standards (33 U.S.C. § 1313(d)). Once the U.S. EPA or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 CFR 122.44(d)(1)(vii)(B)).

Second, the local agency Permittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges. With a few inapplicable exceptions, the Clean Water Act regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Wat. Code, § 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].)

Received
August 26, 2011
Commission on
State Mandates

The Clean Water Act and the Porter-Cologne Water Quality Control Act largely regulate storm water with an even hand, but to the extent there is any relaxation of this even-handed regulation, it is in favor of the local agencies. Generally, the Clean Water Act requires point source dischargers, including discharges of storm water associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1165 [noting that industrial storm water discharges must strictly comply with water quality standards].) As discussed in prior State Water Resources Control Board decisions, certain provisions of this Order do not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) Therefore, certain provisions of this Order regulate the discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

Third, the local agency Permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order subject to certain voting requirements contained in the California Constitution. (See California Constitution XIII D, section 6, subdivision (c); see also *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal. App. 4th 1351, 1358-1359.). The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the municipal separate storm sewer system. Local agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The ability of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487-488.)

Fourth, the Permittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their discharges. (See finding C.5., supra.) To the extent that the local agencies have voluntarily availed themselves of the permit, the program is not a state mandate. (Accord *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 107-108.) Likewise, where MS4 Permittees are regulated under a Best Management Practices (BMP) based storm water management program rather than end-of-pipe numeric limits, there exists no compulsion of a specific regulatory scheme that would violate the 10th Amendment to the United States Constitution. (See *City of Abilene v. U.S. E.P.A.* (5th Cir. 2003) 325 F.3d 657, 662-663 [noting that municipalities can choose between a management permit or a permit with numeric limits].) The local agencies' voluntary decision to file a report of waste discharge proposing a program-based permit is a voluntary decision not subject to subvention. (See *Environmental Defense Center v. USEPA* (9th Cir. 2003) 344 F.3d 832, 845-848.)

Received
August 26, 2011
Commission on
State Mandates

Fifth, the local agencies' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under state law predates the enactment of Article XIIIB, Section (6) of the California Constitution.

8. Under § 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), Coastal States with approved coastal zone management programs are required to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: 1) agriculture; 2) silviculture; 3) urban; 4) marinas; and 5) hydromodification. This Waste Discharge Requirement addresses the management measures required for the urban category and the hydromodification category, with the exception of septic systems.

9. The Regional Water Board addresses septic systems through the administration of non-Chapter 15 regulatory programs and the implementation of Regional Water Board Order No.R4-2004-0146. Septic systems are also addressed under State Assembly Bill (AB) 885 (2000). The Regional Water Board will implement and enforce regulations issued by the State Board pursuant to AB 885. Taken together, these State and Local agency requirements when imposed on septic system operators are expected to reduce the bacterial contamination of storm water from improperly maintained septic systems.

10. The State Water Board has issued waste discharge requirements for discharges from utility vaults (CAG990002). The Regional Water Board has issued waste discharge requirements for discharges from well heads and hydrostatic pipe testing (CAG674001). These discharges to the MS4 shall be conducted under coverage of a separate NPDES permit specific to that activity.

11. On May 18, 2000, the U.S. EPA established numeric criteria for priority toxic pollutants for the State of California (California Toxics Rule (CTR) 65 Fed. Reg. 31682 (40 CFR 131.38)) for the protection of human health and aquatic life. These apply as ambient water quality criteria for inland surface waters, enclosed bays and estuaries.

12. The State Water Board adopted a revised Water Quality Control Plan for Ocean Waters of California (Ocean Plan) in 2005. The California Ocean Plan establishes water quality objectives for California's ocean waters and provides the basis for regulation of wastes discharged into the State's coastal waters. It applies to point and nonpoint source discharges. The Ocean Plan identifies the applicable beneficial uses of marine waters that include preservation and enhancement of designated Areas of Special Biological Significance (ASBS) (now called "State Water Quality Protection Areas") and establishes a set of narrative and numerical water quality objectives designed to protect beneficial uses. The SWRCB adopted the California Ocean Plan, and both the SWRCB and the six coastal Regional Water Quality Control Boards (RWQCBs) implement and interpret the California Ocean Plan..

Received
August 26, 2011
Commission on
State Mandates

13. This Regional Water Board adopted a revised Water Quality Control Plan (Basin Plan) for the Los Angeles Region on June 13, 1994. The Basin Plan specifies the beneficial uses of Ventura County waterbodies and their tributary streams, and contains both narrative and numerical water quality objectives for these receiving waters. The following beneficial uses identified in the Basin Plan apply to all or portions of each watershed covered by this Order:
    (a) Municipal and domestic supply
    (b) Agricultural supply
    (c) Industrial service supply
    (d) Industrial process supply
    (e) Ground water recharge
    (f) Freshwater replenishment
    (g) Navigation
    (h) Hydropower generation
    (i) Water contact recreation
    (j) Non-contact water recreation
    (k) Ocean commercial and sport fishing
    (l) Warm freshwater habitat
    (m) Cold freshwater habitat
    (n) Preservation of Areas of Special Biological Significance
    (o) Saline water habitat
    (p) Wildlife habitat
    (q) Preservation of rare and endangered species
    (r) Marine habitat
    (s) Fish migration
    (t) Fish spawning
    (u) Shellfish harvesting

14. On March 22, 1999 the Consent Decree in Heal the Bay, Inc.; Santa Monica Baykeeper, Inc. v. Browner, Case No. 98-4825 SBA was approved. Under Establishment of TMDLs- The parties understand that California has the initial opportunity pursuant to § 303(d) of the CWA to adopt and submit to U.S. EPA for approval TMDLs to be established under this Consent Decree. TMDLs developed by Regional Water Boards are generally adopted through Basin Plan amendments. Basin plan amendments adopted by the State Board pursuant to Water Code section 13246, and the regulatory portions must be approved by the Office of Administrative Law pursuant to Government Code section 11353(b). TMDLs established pursuant to CWA section 303(d)(1) must be submitted to U.S. EPA for approval pursuant to section 303(d)(2), and incorporated into the state's water quality management plan.

15. The Regional Water Board has adopted amendments to the Basin Plan, to incorporate TMDLs for the following:
    (a) The following TMDLs have been or will be incorporated into the Basin Plan within the term of the Order.

Received
August 26, 2011
Commission on
State Mandates

(1) Santa Clara River - Nitrogen Compounds
  (A) Regional Water Board Resolution No. 2003-011
  (B) State Water Board Resolution No. 2003-0073
  (C) OAL file No. 04-0123-35
  (D) U.S. EPA approval date March 18, 2004
  (E) Final fee exemption date March 23, 2004 (effective date).
  (F) Compliance is 1 year after effective date (March 23, 2005)

(2) Malibu Creek and Lagoon - Bacteria.
  (A) Regional Water Board Resolution No. 2004-019
  (B) State Water Board Resolution No. 2005-0072
  (C) OAL file No. 05-1018-03 S
  (D) U.S. EPA approval date January 10, 2006
  (E) Final fee exemption date January 24, 2006 (effective date)
  (F) Compliance for Summer Dry is 3 years after effective date (January 24, 2009)
  (G) Compliance for Winter Dry is 6 years after effective date (January 24, 2012)
  (H) Compliance for Wet Weather is 10 years after effective date (January 24, 2016), which is beyond the term of this Order

(3) Toxicity, Chlorpyrifos and Diazinon in the Calleguas Creek, Its Tributaries and Mugu Lagoon.
  (A) Regional Water Board Resolution No. 2005-009
  (B) State Water Board Resolution No. 2005-0067
  (C) OAL file No. 05-1110-02 S
  (D) U.S. EPA approval date March 14, 2006
  (E) Final fee exemption date March 24, 2006 (effective date)
  (F) Compliance for Toxicity and Interim WLA is effective date (March 24, 2006)
  (G) Compliance for Final WLA is 2 years after effective date (March 24, 2008)

(4) Organochlorine (OC) Pesticides, Polychlorinated Biphenyls (PCBs), and Siltation in Calleguas Creek, Its Tributaries and Mugu Lagoon.
  (A) Regional Water Board Resolution No. 2005-010
  (B) State Water Board Resolution No. 2005-0068
  (C) OAL file No. 05-1206-03 S
  (D) U.S. EPA approval date March 14, 2006
  (E) Final fee exemption date March 24, 2006 (effective date)
  (F) Compliance for Interim WLA is effective date (March 24, 2006)
  (G) Compliance for Final WLA is 20 years after effective date (March 24, 2026), which is beyond the term of this Order

(5) Calleguas Creek Watershed Metals

Received
August 26, 2011
Commission on
State Mandates

(A) Regional Water Board Resolution No. 2006-012
(B) State Water Board Resolution No. 2006-0078
(C) OAL file No. 06-1222-015 S
(D) U.S. EPA approval date March 26, 2007
(E) Final fee exemption date March 27, 2007 (effective date)
(F) Compliance for Interim WLA is effective date (March 27, 2007)
(G) Compliance for Final WLA is Within 15 years after the effective date (March 27, 2022), which is beyond the term of this Order

(6) Revolon Slough & Beardsley Wash Trash TMDL
(A) Regional Water Board Resolution No. 2007-007
(B) State Water Board Resolution No 2007-0076
(C) OAL file No 2007-1227-05 S
(D) U.S. EPA approval date February 27, 2008
(E) Final fee exemption date March 6, 2008 (effective date)
(F) Compliance for Trash Monitoring & Reporting Plan Submittal is 6 months from effective date (September 6, 2008)
(G) Compliance for Final WLA is 8 years from effective date (March 6, 2016)

(7) Ventura River Estuary Trash TMDL
(A) Regional Water Board Resolution No. 2007-008
(B) State Water Board Resolution No 2007-0072
(C) OAL file No 2007-1227-01 S
(D) U.S. EPA approval date February 27, 2008
(E) Final fee exemption date March 6, 2008 (effective date)
(F) Compliance for Trash Monitoring & Reporting Plan Submittal is 6 months from effective date (September 6, 2008)
(G) Compliance for Final WLA is 8 years from effective date (March 6, 2016)

(8) Harbor Beaches of Ventura County Bacteria TMDL
(A) Regional Water Board Resolution No. 2007-017
(B) State Water Board Resolution No 2008-0072
(C) OAL file No 2007-1023-01 S
(D) U.S. EPA approval date December 18, 2008
(E) Final fee exemption date January 17, 2009 (effective date)

16. The Regional Water Board adopted and approved requirements for new development and significant redevelopment projects in Ventura County to control the discharge of storm water pollutants in post-construction storm water, on January 26, 2000, in Board Resolution No. R-00-02. The Regional Water Board Executive Officer issued the approved Standard Urban Storm Water Mitigation Plans (SUSMPs) on March 8, 2000 for Los Angles County and the Cities in Los Angeles County. Since 2000, new development and redevelopment water quality criteria have been implemented by the Permittees to be consistent with SUSMP. The State Board affirmed the Regional

Received
August 26, 2011
Commission on
State Mandates

Water Board action and SUSMPs in State Board Order No. WQ 2000-11, issued on October 5, 2000.

(a) A statewide policy memorandum (dated December 26, 2000), which interprets the Order to provide broad discretion to Regional Water Boards and identifies potential future areas for inclusion in SUSMPs and the types of evidence and findings necessary. Such areas include ministerial projects, projects in environmentally sensitive areas, and water quality design criteria for Retail Gasoline Outlets (RGOs, see Part 6 for definition). The Regional Water Board properly justified the extensions of SUSMPs and water quality criteria to ministerial projects, projects in environmentally sensitive areas, and RGOs, during the adoption of Regional Water Board Order 01-182. The Regional Water Board's action was upheld by the County of Los Angeles Superior Court (In Re: *County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985).

(b) The State Water Board's Chief Counsel interpreted the Order to encourage regional solutions and endorsed a mitigation fund or "bank" as alternatives for new development and significant redevelopment. The Regional Water Board has included provisions for regional solutions and the establishment of a mitigation bank in this Order.

17. The Regional Water Board supports Watershed Management planning to address water quality protection in the region. The objective of the Watershed Management planning is to provide a comprehensive and integrated strategy towards water resource protection, enhancement, and restoration while balancing economic and environmental impacts within a hydrologically defined drainage basin or watershed. It emphasizes cooperative relationships between regulatory agencies, the regulated community, environmental groups, and other stakeholders in the watershed to achieve the greatest environmental improvements with available resources.

18. To facilitate compliance with federal regulations, the State Water Board has issued the following 4 Statewide General NPDES Permits associated with storm water:

(a) Industrial General Permit (IASGP- Industrial Activities Storm Water General Permit), NPDES No. CAS000001, issued on November 19, 1991, reissued on September 17, 1992 and April 17, 1997, currently under review for reissuance.

(b) Construction General Permit (CASGP- Construction Activities Storm Water General Permit), NPDES No. CAS000002, issued on August 20, 1992, reissued August 19, 1999, and September 2, 2009.

(c) Small Linear Underground/ Overhead Construction Projects General Permit (small LUPs), NPDES No. CAS000005, issued on June 18, 2003.

(d) Small MS4 Permit WQ Order No. 2003-0005-DWQ, NPDES No. CAS000004, adopted on April 30, 2003.

19. Facilities discharging storm water associated with industrial activities, construction projects that disturb one or more acres of soil, or construction projects that disturb less than one acre but are part of a larger common plan of development or sale that in

Received
August 26, 2011
Commission on
State Mandates

total disturbs 1 or more acres, and construction activities associated with small linear underground/ overhead projects that result in land disturbances greater than one acre, but less than five acres (small LUPs), are all required to obtain individual NPDES permits for storm water discharges, or be covered by the statewide General Permits by completing and filing a Notice of Intent (NOI) with the State Board. The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in storm water discharges to the MS4.

20. State Water Board Resolution No. 68-16 contains the state Antidegradation Policy, titled "Statement of Policy with Respect to Maintaining High Quality Waters in California" (Resolution 68-16), which applies to all waters of the state, including ground waters of the state, whose quality meets or exceeds (is better than) water quality objectives. Resolution No. 68-16 is considered to incorporate the federal Antidegradation Policy (40 CFR 131.12) where the federal policy applies, (State Water Board Order WQO 86-17). Administrative policies that implement both, federal and state antidegradation policies acknowledge that an activity that results in a minor water quality lowering, even if incrementally small, can result in violation of Antidegradation Policies through cumulative effects, for example, when the waste is a cumulative, persistent, or bioaccumulative pollutant.

(a) Federal Antidegradation Policy (40 CFR 131.12) states that the State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

Received
August 26, 2011
Commission on
State Mandates

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.

(b) State Water Board Resolution No. 68-16 establishes essentially a 2-step process for compliance with the policy.

(1) Step 1- if a discharge will degrade high quality water, the discharge may be allowed if any change in water quality:
  (A) Will be consistent with maximum benefit to the people of the State.
  (B) Will not unreasonably affect present and anticipated beneficial use of such water.
  (C) Will not result in water quality less than that prescribed in state policies (e.g., water quality objectives in Water Quality Control Plans).

(2) Step 2- any activities that result in discharges to high quality waters are required to:
  (A) Meet waste discharge requirements that will result in the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance.
  (B) Maintain the highest water quality consistent with the maximum benefit to the people of the State.

21. The State Water Board on June 17, 1999, adopted Order No. WQ 99-05, which specifies standard receiving water limitation language to be included in all municipal storm water permits issued by the State and Regional Water Boards.

22. Cal. Water Code § 13263(a) requires that waste discharge requirements issued by Water Boards shall implement any relevant water quality control plans that have been adopted; shall take into consideration the beneficial uses to be protected and the water quality objectives reasonably required for that purpose; other waste discharges; and the need to prevent nuisance.

23. Clean Water Act section 402(p)(3)(B)(iii) requires municipal separate storm sewer system (MS4) operators to reduce the discharge of pollutants to the "maximum extent practicable" (MEP). The MEP requirement is analogous to a technology-based requirement in that it focuses upon the feasibility of pollutant reduction measures rather than achievement of water quality standards in the receiving waters to achieve improvements in the quality of the storm water that is discharged. Compliance with the MEP requirement can range from implementation of structural and nonstructural best management practices to installation of end-of-pipe treatment systems. MEP generally provides the MS4 operators the flexibility to determine what controls should be implemented through the development of a storm water management plan, subject to the Regional Water Board's approval. Nevertheless, MEP does not define the limits of pollution control measures that may be required of MS4 operators, and the requirement to implement controls that reduce pollutants to the MEP is not limited by the goal of attaining water quality standards. In some circumstances, compliance with MEP may result in controls more stringent than applicable WQS,

Received
August 26, 2011
Commission on
State Mandates

and in others, less stringent. The Regional Water Board may use its discretion to impose other provisions beyond MEP, as it determines appropriate for the control of pollutants, including ensuring strict compliance with water quality standards. (Defenders of Wildlife v. Browner (1999) 191 F.3d 1159, 1168.)

24. The California Supreme Court has ruled that although Water Code section 13263 requires the Water Boards to consider the factors set forth in Water Code section 13241 when issuing an NPDES permit, the Water Boards may not consider the factors to justify imposing pollutant restrictions that are less stringent than the applicable federal regulations require (City of Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613). However, when the pollutant restrictions in an NPDES are more stringent than federal law requires, Water Code section 13263 requires that the Water Boards consider the factors described in section 13241 as they apply to those specific restrictions.

25. The City of Burbank case related to NPDES permits for publicly owned treatment works, not permits for municipal separate storm sewer systems (MS4s). Among other requirements, federal law requires MS4 permits to include requirements to effectively prohibit non-storm water discharges into the storm sewers, in addition to requiring controls to reduce the discharge of pollutants to the maximum extent practicable. Therefore, a 13241 analysis is not required for permit requirements that implement the effective prohibition on the discharge of non-storm water into the MS4, or for practicable controls to reduce the discharge of pollutants to the maximum extent, as those requirements are mandated by federal law.

26. The requirements in this Order may be more specific or detailed than those enumerated in federal regulations under 40 CFR 122.26 or in U.S. EPA guidance. However, the requirements have been designed to be consistent with and within the federal statutory mandates described in CWA § 402(p)(3)(B)(ii) and (iii) and the related federal regulations. Consistent with federal law, all of the conditions in this permit could have been included in a permit adopted by U.S. EPA in the absence of the in lieu authority of California to issue NPDES permits.

27. The Board finds that all requirements in this order are practicable. Moreover, while commenters have alleged that the permit requirements are "beyond MEP," no commenter has presented evidence that demonstrates that any particular permit requirement is not actually practicable.

28. Notwithstanding findings 23 through 27, the Regional Water Board has developed an economic analysis of the permit's requirements, consistent with Water Code section 13241. That analysis is contained in the "Economic Considerations of the Proposed Storm Water (Wet Weather) and Non-Storm Water (Dry Weather) Discharges form the Municipal Separate Storm Sewer Systems within the Ventura County Watershed Protection District, County of Ventura and the Incorporated Cities Therein, June 2, 2008, which is contained in the administrative record for this Order. The Regional

Received
August 26, 2011
Commission on
State Mandates

Water Board has considered all of the evidence that has been presented regarding the 13241 factors in adopting this permit, both as contained in the economic analysis and as reflected in the fact sheet and comments (and responses thereto) submitted to the many drafts of this permit. The Regional Water Board finds that the requirements in this Order are reasonably necessary to protect beneficial uses identified in the Basin Plan, and the economic information related to costs of compliance and other 13241 factors are not sufficient to justify failing to protect those beneficial uses. Where appropriate, additional time to implement certain measures and achieve water quality objectives can be provided through the iterative storm water management plan process.

F. Implementation

1. The California Environmental Quality Act (CEQA) (Cal. Pub. Resources Code § 2100 et seq.) requires that public agencies consider the environmental impacts of the projects they approve for development. CEQA applies to projects that are considered discretionary (a governmental agency can use its judgment in deciding whether and how to carry out or approve a project, § 15357) and does not apply to ministerial projects (the law requires a governmental agency to act on a project in a set way without allowing the agency to use its own judgment, § 15369). A ministerial project may be made discretionary by adopting local ordinance provisions or imposing conditions to create decision-making discretion in approving the project. In the alternative, Permittees may establish standards and objective criteria administratively for storm water mitigation for ministerial projects. For water quality purposes regardless of whether a project is discretionary or ministerial, the Regional Water Board considers that all new development and significant redevelopment activity in specified categories, that receive approval or permits from a municipality, are subject to storm water mitigation requirements in a manner that is consistent with and complies with the provisions of CEQA.

2. The objective of this Order is to ensure that discharges from the MS4 in Ventura County comply with water quality standards, including protecting the beneficial uses of receiving waters. To meet this objective, the Order requires that Best Management Practices (BMPs) will be implemented to reduce the discharge of pollutants in storm water to the maximum extent practicable (MEP), and achieve water quality objectives and standards. The U.S. EPA envisioned that municipal storm water programs would be implemented in an iterative manner and improved with each iteration by using information and experience gained during the previous permit term (*Interpretative Policy Memorandum on Reapplication Requirements for MS4 permits* - 61 Fed. Reg. 41697). Municipalities are required to evaluate what is effective and make improvements in order to protect beneficial uses of receiving waters. This Order requires implementation of an effective combination of pollution control and pollution prevention measures, education, public outreach, planning, and implementation of source control BMPs and Structural and Treatment Control BMPs.

Received
August 26, 2011
Commission on
State Mandates

The better–tailored BMPs combined with the performance objectives outlined in this Order have the purpose of attaining water quality objectives and standards (*Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*- 61 Fed. Reg. 43761). Where WLAs have been adopted for storm water (wet weather) and non-storm water (dry weather) discharges from MS4s, this Order requires Permittees to implement controls to achieve the WLAs within the compliance schedule provided in the TMDLs.

3. The implementation of measures set forth in this Order are reasonably expected to reduce the discharge of pollutants conveyed in storm water discharges into receiving waters, and to meet the TMDL WLAs for discharges from MS4s that have been adopted by the Regional Water Board.

4. The U.S. EPA has recommended that all future TMDLs and TMDL amendments be expressed as daily increments consistent with a federal court ruling (*Friends of the Earth, Inc. v. EPA, et al.* No. 05-5015 (D.C. Cir. 2006)). However, this interpretation does not affect the discretionary authority of the Regional Water Board to express NPDES permit limits and conditions in non daily terms because there is no express or implied statutory limitation (CWA §502(11)) (*Establishing TMDL "Daily Loads" in Light of the Decision by the U.S. Court of Appeals for the D.C. Circuit in Friends of the Earth, Inc. v. EPA, et al. (April 2006) and Implications for NPDES Permits*, U.S. EPA Office of Water, memorandum, Nov 15, 2006). This Order translates MS4 TMDL WLAs adopted by the Regional Water Board into forms "consistent with the assumptions and requirements of the TMDL".

5. During the term of the Order, the Permittees shall implement all necessary control measures to reduce pollutant(s) which cause or continue to cause or contribute to water quality impairments, but for which TMDLs have not yet been developed or approved, to eliminate the water quality impairment(s). Successful efforts to reverse the wet weather impairments during the permit term for such pollutants, may avoid the need for a WLA for wet weather or the need to develop a TMDL in the future.

6. This Order promotes land development and redevelopment strategies that consider water quality and water management benefits associated with smart growth techniques. Such measures may include hydromodification mitigation requirements, minimization of effective impervious area, integrated water resources planning, and low impact development guidelines. (Reference: *Protecting Water Resources with Smart Grow*th, EPA 231-R- 04-002, U.S. EPA 2004; *Using Smart Growth Techniques as Storm Water Best Management Practices,* EPA 231-B-05-002, U.S. EPA 2005; *Parking Spaces/Community Places: Finding the Balance through Smart Growth Solutions*, EPA 231-K-06-001, U.S. EPA 2006; *Protecting Water Resources with Higher-Density Development*, EPA 231-R-06-001, U.S. EPA 2006.)

7. The implementation of an effective Public Information and Participation Program is a critical component of a storm water management program. While commercial and

Received
August 26, 2011
Commission on
State Mandates

industrial facilities are traditionally subject to multiple environmental regulations and receive environmental protection guidance from multiple sources, the general public, in comparison, receives significantly less education in environmental protection. An effective Public Information and Participation Program is required because:

(a) Activities conducted by the public such as vehicle maintenance, improper household waste materials disposal, improper pet waste disposal and the improper application of fertilizers and pesticides have the potential to generate a significant amount of pollutants that could be discharged in storm water.

(b) An increase in public knowledge of storm water regulations, proper storage and disposal of household wastes, proper disposal of pet wastes and appropriate home vehicle maintenance practices can lead to a significant reduction of pollutants discharged in storm water.

8. This Order also provides flexibility for Permittees to seek authorization from the Regional Water Board Executive Officer to substitute a BMP under this Order with an alternative BMP, if they can provide information and documentation on the effectiveness of the alternative, equal to or greater than the prescribed BMP in meeting the objectives of this Order.

9. This Order contemplates that the Permittees are responsible for considering potential storm water impacts when making planning decisions in order to fulfill the Permittees' CWA requirement to reduce the discharge of pollutants in municipal storm water to the MEP and attain water quality objectives from new development and redevelopment activities. However, the Permittees retain authority to make the final land-use decisions and retain full statutory authority for deciding what land uses are appropriate at specific locations within each Permittee's jurisdiction. This Order and its requirements are not intended to restrict or control local land use decision-making authority.

10. The State Water Board amended the Policy for the Implementation of Toxics Standards In Inland Surface Waters, Enclosed Bays and Estuaries of California (State Implementation Policy – SIP) on February 24, 2005. The SIP does not apply directly to the stormwater discharges. However, this Order includes a Monitoring Program that incorporates Minimum Levels (MLs) established under the State Implementation Policy. The MLs represent the lowest quantifiable concentration for priority toxic pollutants that is measurable with the use of proper method-based analytical procedures and factoring out matrix interference. The SIP's MLs therefore represent the best available science for determining MLs and are appropriate for a storm water monitoring program. The use of MLs allows the detection of toxic priority pollutants at concentrations of concern using recent advances in chemical analytical methods.

11. The International Storm Water Best Management Practices (BMP) Database was established in 1996 as a cooperative initiative between the U.S. EPA and the American Society of Civil Engineers (ASCE) to provide scientifically sound information to improve the design, selection and performance of storm water BMPs.

Received
August 26, 2011
Commission on
State Mandates

The BMP database includes standardized BMP monitoring and reporting protocols, a storm water BMP database, BMP performance evaluation protocols, and BMP monitoring guidance. The storm water BMP database is updated approximately semi-annually to add new BMP studies and performance data. The International Storm Water Database is now maintained by the Water Environment Research Foundation (WERF).

12. This Order is not intended to prohibit the inspection for or abatement of vectors by the State Department of Public Health or local vector agencies in accordance with CA Health and Safety Code, § 116110 et seq. Certain Treatment Control BMPs if not properly designed, operated or maintained may create habitats for vectors (e.g. mosquitoes and rodents). This Order contemplates that the Permittees will closely cooperate and collaborate with local vector control agencies and the State Department of Public Health for the implementation, operation, and maintenance of Treatment Control BMPs in order to minimize the risk to public health from vector borne diseases.

13. This Order contemplates that Permittees will ensure that implemented Treatment Control BMPs will not pose a safety or health hazard to the public. This Order contemplates that Permittees will ensure that the maintenance of implemented Treatment Control BMPs will comply with all applicable health and safety regulations, such as, but not limited to requirements for worker entry into confined spaces under OSHA Safety and Training education, § 1926.21(b)(6)(i).

14. This Order incorporates presumptive BMPs to reduce pollutants in storm water discharges from construction sites to the MEP. The BMPs are identified in Table 6 (BMPs at Construction sites less than 1 acre), Table 7 (BMPs at Construction Sites 1 acre or greater but less than 5 acres), and Table 8 (BMPs at Construction sites 5 acres or greater). These BMPs include erosion control, sediment control, and construction site waste management practices. The BMPs listed in part 4.F of the Order were selected based on the Water Boards' experience of regulating such sites since 1992, and are referenced in the *California Stormwater Quality Association (CASQA) Storm Water Best Management Practice Handbook Construction (January 2003)* and from the *Stormwater Quality Handbooks, Project Planning and Design Guide, Stormwater Pollution Prevention Plan (SWPPP) and Water Pollution Control Plan (WPCP) Preparation Manual, Construction Site Best Management Practices (BMPs) Reference Manual, March 2007* (Caltrans Document Number CTSW-RT-06-171.11-1) which serve as an industry standard for California. The BMPs identified in the Tables are technically feasible, practicable, and cost-effective. Where an identified BMP may be impracticable on a particular site, this Order includes a provision to select and implement an alternative BMP, through the BMP substitution provisions in subpart 4.A.2.

15. This Order incorporates presumptive BMPs to reduce pollutants in storm water discharges from commercial and industrial sites to the MEP. The BMPs are

Received
August 26, 2011
Commission on
State Mandates

identified in Table 2 (BMPs at Restaurants), Table 3 (BMPs at Automotive Service Facilities), Table 4 (BMPs at Retail Gasoline Outlets), and Table 5 (BMPs at Nurseries). These BMPs include the implementation of good housekeeping practices designed to control pollutants at the source, promote the use of proper waste management practices, and implement control practices to keep pollutants away from any entrance to the storm drainage system. The BMPs listed in part 4.D of the Order were selected based on the Water Boards' experience of regulating such sites since 1992 and referenced in the California Stormwater Quality Association (CASQA) Storm Water Best Management Practice Handbook Commercial/Industrial Activity (January 2003) and from the Caltrans Storm Water Quality Handbook Maintenance Staff Guide May 2003 (Caltrans Document Number CTSW-RT-02-057), which serve as an industry standard for California. The BMPs identified in the Tables are technically feasible, practicable, and cost-effective. Where an identified BMP may be impracticable, this Order includes a provision to select and implement an alternative BMP, through the BMP substitution provisions in subpart 4.A.2.

16. This Order incorporates presumptive BMPs to reduce pollutants in storm water discharges from Public Agency Activities to the MEP. The BMPs are identified in Table 10 (BMPs at Vehicle Maintenance/ Material Storage Facilities/ Corporation Yards). These BMPs include the implementation of good housekeeping practices designed to control pollutants at the source, promote the use of proper waste management practices, implement control practices to keep pollutants away from any entrance to the storm drainage system and from being deposited or discharged directly into waters of the U.S. The BMPs listed in part 4.G of the Order were selected based on the Water Boards' experience of regulating such sites since 1990, and are referenced in the Caltrans Storm Water Quality Handbook Maintenance Staff Guide May 2003 (Caltrans Document Number CTSW-RT-02-057), which serves as a statewide standard for the California Department of Transportation (Caltrans). The BMPs identified in the Table are technically feasible, practicable, and cost-effective, and are the standard of practice for Caltrans sites statewide. Where an identified BMP may be impracticable, this Order includes a provision to select and implement an alternative BMP, through the BMP substitution provisions in subpart 4.A.2.

17. This Order incorporates BMPs to ensure that authorized Non-Storm Water Discharges are not a source of pollutants to the MS4, Table 1 (Required Conditions for Non-Storm Water Discharges). The BMPs included are for the purpose of dechlorination and/or for prevention of erosion and sediment loss, or to reduce other harmful pollutants during the discharge of authorized non-storm water discharges to the MS4. The BMPs listed in part 1.A of the Order were selected from the *American Water Works Association AWWA Guidelines For The Development Of Your Best Management Practices (BMP) Manual For Drinking Water System Releases Developed by the CA-NV AWWA Environmental Compliance Committee (2005)* which serves as an industry standard for California, from the results of studies directed by the Los Angeles Water Board, - *Evaluation of Non-Storm Water Discharges to California Storm Drains and Potential Policies for Effective*

Received
August 26, 2011
Commission on
State Mandates

Prohibition Methods, Final Report, University of California, Los Angeles, Contract No. 5-104-140-0 (1997), and *Water Quality Concerns and Regulatory Controls for Non Storm Water Discharges to Storm Drains*, Duke L.D. and M. Kihara, Journal of the American Water Resources Association, Vol. 34: 661-676, (1998), and from the Water Boards' experience of controlling authorized non-storm discharges to the MS4 since 1990. The BMPs identified in the Table are technically feasible, practicable, and cost-effective. Where an identified BMP may be impracticable, this Order includes a provision to select and implement an alternative BMP, through the BMP substitution provisions in subpart 4.A.2.

18. In accordance with Federal regulations at 40 CFR 124.8, a Fact Sheet has been prepared to explain the principal facts and the significant factual, legal, methodological, policy, and economic matters considered in preparing the Order. This Fact Sheet has been made a part of the Administrative Record.

19. The State Water Board adopted statewide General Waste Discharge Requirements for Sanitary Sewer Systems, (WQ Order No. 2006-0003) on May 2, 2006, to provide a consistent, statewide regulatory framework to address sanitary sewer overflows ("SSO Orders"). The SSO Order establishes requirements for public agencies that own or operate sanitary sewer systems to develop and implement sewer system management plans and to report SSOs. SSOs that enter MS4s have the potential to impair the recreational use of receiving waters, and to harm public health. This Order establishes coordination, response, and notification requirements for MS4 Permittees when SSOs result in a discharge to the MS4 system.

20. This Order takes into consideration the housing needs in the area under the Permittees' jurisdiction by balancing the implementation of Smart Growth and Low Impact Development techniques with the protection of the water resources of the region. Although not required, the Regional Water Board considered the need for housing and the appropriate techniques to allow for reasonable development while protecting the receiving waters from degradation.

21. This Order may have an effect on costs required for compliance with the provisions contained herein. Although not required, the Regional Water Board has considered costs in preparing this Order. Though also not required, the Regional Water Board has also considered the factors set forth in Water Code section 13241.

G. Public Notification

1. The issuance of waste discharge requirements pursuant to California Water Code section 13370 et seq. is exempt from the California Environmental Quality Act in accordance with California Water Code section 13389. *County of Los Angeles et al., v. California Water Boards et al.*, (2006), 143 Cal.App.4th 985.

Received
August 26, 2011
Commission on
State Mandates

2. The Regional Water Board has notified the Permittees, and interested agencies and persons of its intent to reconsider Order No. 09-0057 and issue waste discharge requirements for this discharge, and has provided them with an opportunity to make statements and submit their comments.

3. The Regional Water Board staff has conducted more than 35 meetings from February 9, 2007 through December 19, 2008, with Permittees, their representatives (Larry Walker Associates, and Somach, Simmons & Dunn), and various stakeholders (Building Industry Association of Southern California/Greater Los Angeles Ventura Chapter (BIA/LAV), California State Dept. of Public Health, Calleguas Municipal Water District, California Stormwater Quality Association (CASQA), City of Downey, City of Los Angeles-EMD, Coalition for Practical Regulation (CPR), Construction Industry Coalition on Water Quality (CICWQ), County of Orange, Geosyntec Consultants, Golden State, Heal the Bay; Local Government Commission, Los Angeles City; Los Angeles County Department of Public Works, Los Angeles County-SD, Los Angeles Department of Water and Power, Metropolitan Water District, Natural Resources Defense Council (NRDC), Richard Watson and Associates, San Bernardino Flood Control District, Santa Monica Bay Restoration Commission, Southern California Coastal Water Research Project, University of California Sea Grant, Ventura CoastKeeper). On April 5, 2007 and September 20, 2007, the Regional Water Board conducted workshops to discuss drafts of the NPDES Order and received input from the Permittees and the public regarding proposed changes.

4. This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.

5. Pursuant to Cal. Water Code § 13320, any aggrieved party may seek review of this Order by filing a petition with the State Board within 30 days of the date of adoption of the Order by the Regional Water Board. A petition must be sent to:

   State Water Resources Control Board
   Office of the Chief Counsel
   P.O. Box 100
   Sacramento, CA 95812-0100

6. This Order may be modified or alternatively revoked or reissued prior to its expiration date or any administrative extension thereto, in accordance with 40 CFR 122.41(f) and 122.62.

IT IS HEREBY ORDERED that the Permittees, in order to meet the provisions contained in Division 7 of the Cal. Water Code and regulations adopted thereunder, and the provisions of the CWA and regulations adopted thereunder, shall comply with the following:

Received
August 26, 2011
Commission on
State Mandates

PART 1 - DISCHARGE PROHIBITIONS

A. Prohibitions - Non-Storm Water Discharges

1. The Permittees shall, within their respective jurisdictions, effectively prohibit non-storm discharges into the MS4 and receiving waters, except where such discharges:
   (a) Originate from a State, Federal, or other source for which they are pre-empted from regulating by State or Federal law; or
   (b) Are covered by a separate individual or general NPDES permit, or conditional waiver for irrigated lands; or
   (c) Flows from fire fighting activities.
   (d) Fall within one of the categories below, are not a source of pollutants that exceed water quality standards, and meet all conditions where specified by the Regional Water Board Executive Officer:
      (1) Category A – Natural flows
         (A) Stream diversions authorized by the State Water Board
         (B) Natural springs and rising ground water
         (C) Uncontaminated ground water infiltration [as defined by 40 CFR 35.2005(20)][1]
         (D) Flows from riparian habitats or wetlands
      (2) Category B – Flows incidental to urban activities, providing conditions listed in table below:
         (A) Discharges from potable water sources[2]
         (B) Gravity flow from foundation, footing and crawl space drains.
         (C) Air conditioning condensate
         (D) Reclaimed and potable landscape irrigation runoff
         (E) Dechlorinated/ debrominated swimming pool discharges [see def. part 6]
         (F) Non-commercial car washing by residents or non-profit organizations
         (G) Sidewalk rinsing
         (H) Pooled non-storm water from treatment BMPs[3]

---

[1] NPDES permit for ground water dewatering is required within the Los Angeles Region including Ventura County.

[2] The term applies to low volume, incidental and infrequent releases that are innocuous from a water quality perspective. Those releases for dewatering or hydro-testing or flushing of water supply and distribution mains and incidental and infrequent releases from well heads shall be allowed with the implementation of appropriate BMPs until such time as a new General Permit is adopted that addresses those types of releases. Discharges from hydrostatic pipe testing shall be subject to separate NPDES general permit coverage (CAG674001) and discharges from utility vaults shall be conducted under coverage of a separate NPDES permit specific to that activity.

[3] All storm water BMPs shall at a minimum be maintained at a frequency as specified by the manufacturer, and designed to drain within 72 hours of the end of a rain. Storm water treatment BMPs may be drained to the MS4 under this Order if the discharge is not a source of pollutants. Sediments shall be disposed of properly, in compliance with all applicable local, state, and federal policies, acts, laws, regulations, ordinances, and statutes.

Received
August 26, 2011
Commission on
State Mandates

Table 1 – Required Conditions for Non-Storm Water Discharges

Type of Discharges:	Conditions under which allowed:	Required conditions for discharge to occur:
Stream diversions permitted by the State Board	Authorization by the State Water Board	Permittees shall comply with all conditions in the authorization.
Natural springs and rising ground water	1. Ground water dewatering requires a separate NPDES permit. 2. Segregate flow to prevent introduction of pollutants.	Permittees shall comply with all conditions in the authorization.
Uncontaminated ground water infiltration [as defined by 40 CFR 35.2005(20)] (Utility vault dewatering requires a separate NPDES permit.)	NPDES permit for ground water dewatering is required within the Los Angeles Region including Ventura County	Permittees shall comply with all conditions in the authorization.
Flows from riparian habitats or wetlands	Provided that all necessary permits or authorizations are received prior to diverting the stream flow.	Permittees shall comply with all conditions in the authorization.
Discharges from potable water sources	See Footnote #2. Provided discharges from water lines and potable water sources shall be dechlorinated, pH adjusted if necessary, reoxygenated, and volumetrically and velocity controlled to prevent resuspension of sediments.	See Footnote #2. To be discharged, this type of water shall be dechlorinated using aeration and/ or sodium thiosulfate and/ or other appropriate means and/or be allowed to infiltrate to the ground. BMPs such as sand bags or gravel bags, or other appropriate means shall be utilized to prevent sediment transport. All sediments shall be collected and disposed of in a legal and appropriate manner.
Drains for foundation, footing and crawl drains	Dewatering requires a separate NPDES permit.	Permittees shall comply with all conditions in the authorization.
Air conditioning condensate	Segregation of flow to prevent introduction of pollutants. Percolation whenever possible.	Permittees shall comply with all conditions in the authorization.
Water from crawl space pumps	Dewatering requires a separate NPDES permit within the Los Angeles Region including Ventura County	Permittees shall comply with all conditions in the authorization.
Reclaimed and potable landscape irrigation runoff	Segregation of flow to prevent introduction of pollutants.	Implement conservation programs to minimize this type of discharge by using less water.
Dechlorinated/ debrominated	Where the discharge is not excepted by the sanitary sewer operator. Swimming pool	Pool water may be dechlorinated using time,

Received
August 26, 2011
Commission on
State Mandates

Type of Discharges:	Conditions under which allowed:	Required conditions for discharge to occur:
swimming pool discharges [see definition Part 6]	discharges are to be dechlorinated, pH adjusted if necessary, aerated to remove chlorine if necessary, and volumetrically and velocity controlled to prevent resuspension of sediments. Cleaning waste water and filter back wash shall not be discharged to municipal separate storm sewers. No discharges are allowed containing salts in excess of Water Quality Standards. Chlorine residual in discharge shall not exceed 0.1mg/L.	aeration, and/ or sodium thiosulfate.
Non-commercial car washing by residents or non-profit organizations	Preferably at a commercial carwash or designated area where wash water can percolate. Pumps or vacuums may be used to direct water to pervious areas.	Permittees shall comply with all conditions in the authorization.
Sidewalk rinsing	This may be undertaken only if high pressure low volume is used as described in the glossary under "Sidewalk Rinsing".	
Pooled storm water from treatment BMPs	All storm water BMPs shall at a minimum be maintained at a frequency as specified by the manufacturer. All storm water BMPs shall be designed to drain within 72 hours of the end of the rain event to avoid the breeding of vectors. Storm water treatment BMPs may be drained to the MS4 under this Order if the discharge is not a source of pollutants. The discharge shall cease before the discharge has become a source of a pollutant(s), (bottom sediment included). Sediments shall be disposed of properly, in compliance with all applicable local, state, and federal policies, acts, laws, regulations, ordinances, and statutes.	

2. If the Regional Water Board Executive Officer determines that any of the preceding categories of non-storm water discharges 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 require implementation of appropriate or additional BMPs to ensure that the discharge will not be a source of pollutants; or
   (c) Require or obtain coverage under a separate RWQCB or SWRCB permit for discharge into the MS4.

Received
August 26, 2011
Commission on
State Mandates

PART 2 – RECEIVING WATER LIMITATIONS

1. Discharges from the MS4 that cause or contribute to a violation of water quality standards are prohibited.

2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible, shall not cause or contribute to a condition of nuisance.

3. The Permittee shall comply with Receiving Water Limitations 1 and 2 through timely implementation of control measures and other actions to reduce pollutants in the storm water discharges in accordance with the requirements of this Order including any modifications. The Permittees' Program shall be designed to achieve compliance with Receiving Water Limitations 1 and 2. If exceedance(s) of water quality objectives or water quality standards (collectively WQS) persist, notwithstanding implementation of this permit, the Permittees shall ensure compliance with Receiving Water Limitations 1 and 2 by complying with the following procedure:
   (a) Upon determination by either the Permittees or the Regional Water Board that discharges are causing or contributing to an exceedance of an applicable WQS, the Permittee(s) upstream of the point of discharge shall promptly notify and thereafter submit a report to the Regional Water Board Executive Officer that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of WQSs. The report may be included with the Annual Report, unless the Regional Water Board Executive Officer directs an earlier submittal. The Regional Water Board Executive Officer may require modifications to the report.
   (b) Submit any modifications to the report required by the Regional Water Board Executive Officer within 30 days of notification.
   (c) Within 30 days following approval of the Report described above by the Regional Water Board Executive Officer, the Permittees shall revise their Program and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required.
   (d) Implement the revised Program and monitoring program according to the approved schedule.

4. Permittees shall annually report the effectiveness of BMPs in reducing exceedances of receiving water limitations. The Regional Water Board Executive Officer may direct implementation of additional BMPs if there are continuing or recurring exceedances of the same receiving water limitation.

Received
August 26, 2011
Commission on
State Mandates

PART 3 - STORM WATER QUALITY MANAGEMENT PROGRAM IMPLEMENTATION

A. General Requirements

1. Each Permittee shall, at a minimum, adopt and implement applicable terms of this Order within its jurisdictional boundary. The Principal Permittee shall be responsible for program coordination as described in this Order as well as compliance with applicable portions of the permit within its jurisdiction. This Order shall be implemented no later than July 8, 2010, unless a later date has been specified for a particular provision in this Order and provided the Regional Administrator of the U.S. EPA has no objections.

2. Each Permittee shall comply with the requirements of 40 CFR 122.26(d)(2) and implement programs and control measures so as to reduce the discharges of pollutants in storm water to the MEP and achieve water quality standards.

3. Each Permittee shall require that treatment control BMPs being implemented under the provisions of this Order shall be designed, at a minimum, to achieve the BMP performance criteria for storm water pollutants likely to be discharged as identified in Attachment "C", for an 85th percentile 24-hour runoff event determined as the maximized capture storm water volume for the area using a 48 to 72-hour draw down time, from the formula recommended in Urban Runoff Quality Management, WEF Manual of Practice No. 23/ASCE Manual of Practice No. 87, (1998). Expected BMP pollutant removal performance for effluent quality was developed from the WERF-ASCE/ U.S. EPA International BMP Database. Permittees shall select Treatment BMPs based on the primary class of pollutants likely to be discharged from the site/facility (e.g. metals from an auto repair shop). Permittees may develop guidance for appropriate Treatment BMPs for project type based on Attachment "C". For the treatment of pollutants causing impairments within the drainage of the impaired waterbody, permittees shall select BMPs from the top three performing BMP categories or alternative BMPs that are designed to meet or exceed the performance of the highest performing BMP for the pollutant causing impairment.

4. Each Permittee shall implement programs and measures to comply with the TMDLs' WLAs for the MS4 as specified in Part 5.

5. If TMDL requirements, including Implementation Plans and Reports, address substantially similar requirements as the MS4 permit, the Executive Officer may approve the applicable reports, plans, data or submittals under the applicable TMDL as fulfilling requirements under the MS4.

Received
August 26, 2011
Commission on
State Mandates

B. Legal Authority

1. Permittees shall possess the necessary legal authority to prohibit, including, but not limited to:
   (a) Illicit connections and illicit discharges, and to remove illicit connections.
   (b) The discharge of non-storm water to the MS4 from:
      (1) Washing or cleaning of gas stations, auto repair garages, or other types of automotive service facilities
      (2) Mobile auto washing, carpet cleaning, steam cleaning, sandblasting and other such mobile commercial and industrial operations
      (3) Areas where repair of machinery and equipment which are visibly leaking oil, fluid or antifreeze, is undertaken
      (4) Storage areas for materials containing grease, oil, or other hazardous substances, and uncovered receptacles containing hazardous materials
      (5) Swimming pools[1] that have a concentration greater than:
         (A) Chlorine/ bromine- 0.1mg/L
         (B) Chloride- 250mg/L
      (6) Swimming pool filter backwash
      (7) Decorative fountains and ponds
      (8) Industrial/ Commercial areas, including restaurant mats
      (9) Concrete truck cement, pumps, tools, and equipment washout
      (10) Spills, dumping, or disposal of materials other, such as:
         (A) Litter, landscape and construction debris, garbage, food, animal waste, fuel or chemical wastes, batteries, and any other materials which have the potential to adversely impact water quality; and
         (B) Any pesticide, fungicide or herbicide
      (11) Stationary and mobile pet grooming facilities
      (12) Trash container leachate

2. The Permittees shall possess adequate legal authority to:
   (a) Control through interagency agreement, the contribution of pollutants from one portion of the MS4 to another portion of the MS4.
   (b) Require persons within their jurisdiction to comply with conditions in the Permittees' ordinances, permits, contracts, model programs, or orders (i.e. hold dischargers to its MS4 accountable for their contributions of pollutants and flows).
   (c) Utilize enforcement measures (e.g., stop work orders, notice of violations, fines, referral to City, County, and/ or District Attorneys, referral to strikeforces, etc.) by ordinances, permits, contracts, orders, administrative authority, and civil and criminal prosecution.[2]

---

[1] MS4s discharging directly to the ocean are not subject to this prohibition.
[2] In the case of private responsible parties such as, HOAs, the Permittee must retain enforcement authority.

Received
August 26, 2011
Commission on
State Mandates

(d) Control pollutants, including potential contribution[1] in discharges of storm water runoff associated with industrial activities, including construction activities to its MS4, and control the quality of storm water runoff from industrial sites, including construction sites.
(e) Carry out all inspections, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions including the prohibition on illicit discharges to the MS4.
(f) Require the use of control measures to prevent or reduce the discharge of pollutants to achieve water quality objectives.
(g) Require that Treatment Control BMPs be properly operated and maintained.

3. Each Permittee has adopted a Storm Water Quality Ordinance based upon a countywide model. Each Permittee shall ensure, no later than [two years after Order adoption date], that its Storm Water Quality Ordinance authorizes the Permittee to enforce all requirements of this Order.

4. Each Permittee shall submit no later than (two years after Order adoption date), a statement by its legal counsel that the Permittee has obtained and possesses all necessary legal authority to comply with this Order through adoption of ordinances and/ or municipal code modifications.

C. Fiscal Resources

1. The Permittees shall implement the activities required to comply with the provisions of this Order.[2] Each Permittee shall:
   (a) Submit an Annual Budget Summary that shall include:
      (1) Budgets for the upcoming report year (estimated expenditure) for the following specific categories (estimated percentages and written explanations where necessary):
         (A) Program Management Activities.
            (i) Overall Administrative costs
         (B) Program Implementation Activities (permit related activities only). Provide figures breakdown of expenditures for the categories below:
            (i) Illicit connection/ illicit discharge program.
            (ii) Development planning and approval
            (iii) Construction program including inspection activities
            (iv) Industrial/ Commercial program including inspection activities
            (v) Public Agency Activities
               (I) Maintenance and inspection of Treatment Control BMPs
               (II) Municipal Street Sweeping

[1] "Potential contributions" and "potential to discharge," means adequate legal authority to prevent an actual discharge of pollutants to the municipal separate storm sewer system.
[2] The sources of funding may be the general funds, and/or Benefit Assessment, plan review fees, permit fees, industrial/ commercial user fee, revenue bonds, grants or other similar funding mechanism.

Received
August 26, 2011
Commission on
State Mandates

(III) Municipal Drainage Maintenance including catch basin clean-outs
(IV) Other costs associated with storm water management (describe)

(vi) Public Information and Participation.
(vii) Monitoring Program
(viii) Miscellaneous Expenditures (describe)

D. Modifications/ Revisions

1. No later than (two years after the Order adoption date), each Permittee shall modify its storm water management programs, protocols, practices, and municipal codes to make them consistent with the requirements herein.

E. Designation and Responsibilities of the Principal Permittee

1. The Ventura County Watershed Protection District is hereby designated as the Principal Permittee. The Principal Permittee shall:
   (a) Participate in the County Environmental Crimes Task Force
   (b) Coordinate and facilitate activities necessary to comply with the requirements of this Order, but the Principal Permittee is not responsible for ensuring compliance of any other individual Permittee
   (c) Coordinate permit activities among Permittees and act as liaison between the Permittees and the Regional Water Board on permitting issues
   (d) Provide technical and administrative support for committees that will be organized to implement this Order and its requirements
   (e) Evaluate, assess, and synthesize the results of the monitoring program and the effectiveness of the implementation of BMPs
   (f) Convene the Committee Meetings constituted pursuant to subpart 4.F.1., below, upon designation of representatives
   (g) Implement the Countywide Monitoring Program required under the Order and evaluate, assess and synthesize the results of the monitoring program
   (h) Provide personnel and fiscal resources for the collection, processing and submittal to the Regional Water Board of monitoring and annual reports, and summaries of other reports required under this Order

F. Responsibilities of the Permittees

1. Each Permittee is required to comply with the requirements of this Order applicable to discharges within its boundaries (see Findings- Permit Coverage D.1 and D.2). Permittees are not responsible for the implementation of the provisions applicable to the Principal Permittee or other Permittees. Each Permittee shall:
   (a) Comply with the requirements of this Order and any modifications thereto

Received
August 26, 2011
Commission on
State Mandates

(b) Coordinate among its internal departments and agencies, as necessary, to facilitate the implementation of the requirements of this Order applicable to such Permittees in an efficient and cost-effective manner
(c) Participate in intra-agency coordination (e.g., Planning Department, Fire Department, Building and Safety, Code Enforcement, Public Health, Parks and Recreation, and others) necessary to successfully implement the provisions of this Order
(d) Report, in addition to the Budget Summary, any supplemental dedicated budgets for the same categories
(e) Participate in Committee Meetings, as necessary

PART 4 - SPECIAL PROVISIONS (BASELINE)

A. General Requirements

1. This Order and the provisions herein are intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the MEP and not cause or contribute to exceedances of water quality standards for the permitted areas in the County of Ventura.

2. Best Management Practice Substitution
   (a) The Regional Water Board Executive Officer may approve any site-specific BMP substitution upon written request by a Permittee(s) and after public notice, if the Permittee can document that:
      (1) The proposed alternative BMP or program will meet or exceed the objective of the original BMP or program in the reduction of storm water pollutants.
      (2) The fiscal burden of the original BMP or program is greater than the proposed alternative and does not achieve a greater improvement in storm water quality.
      (3) The proposed alternative BMP or program will be implemented within a similar period of time.
      (4) BMP substitution will be in accordance with the public review provisions of the Order (Part 7.C.1 and Part 7.C.2).

B. Watershed Initiative Participation

1. The Principal Permittee shall participate in water quality meetings for watershed management and planning, including but not limited to the following:
   (a) Southern California Stormwater Monitoring Coalition (SMC)
   (b) Other Watershed planning groups as appropriate

2. The Principal Permittee shall participate in the following regional water quality programs, and projects for watershed management and planning:

Received
August 26, 2011
Commission on
State Mandates

(a) SMC Regional Monitoring Programs
(1) Southern California Regional Bioassessment
(A) Level of effort per watershed
(i) Probabilistic sites per watershed
(I) Ventura River - Six
(II) Santa Clara River - Three
(III) Calleguas Creek - Six
(ii) Integrator sites per watershed
(I) Ventura River - One
(II) Santa Clara River - One
(III) Calleguas Creek – One
(iii) Fixed bioassessment sites
(I) The Permittees shall perform bioassessment at one fixed urban site in each major watershed. Site selection shall be determined by the results of the first year SMC results, as approved by the Executive Officer.
(b) Southern California Bight Projects
(1) Regional Monitoring Survey – 2008, and successive years.

C. Public Information and Participation Program (PIPP)

1. The Principal Permittee shall implement a Public Information and Participation Program (PIPP) that includes, but is not limited to, the requirements listed in this part. The Principal Permittee shall coordinate with Permittees to implement specific PIPP requirements. The objectives of the PIPP are as follows:

(a) To increase the knowledge of the target audience about the MS4, the adverse impacts of storm water pollution on receiving waters and potential solutions to mitigate the impacts

(b) To change the waste disposal and storm water pollution generation behavior of target audiences by encouraging implementation of appropriate solutions

(c) To involve and engage communities in Ventura County to participate in mitigating the impacts of storm water pollution

2. Residential Program
(a) "No Dumping" Message
Each Permittee shall label all storm drain inlets that they own with a legible "no dumping" message. In addition, signs with prohibitive language discouraging illegal dumping shall be posted at designated public access points to creeks, other relevant waterbodies, and channels. Signage and storm drain messages shall be legible and maintained.
(b) Public Reporting
Each Permittee shall identify staff who will serve as the contact person(s) for reporting clogged catch basin inlets and illicit discharges/dumping, faded or missing catch basin labels, and general storm water management information.

Received
August 26, 2011
Commission on
State Mandates

Permittees shall include this information, updated by July 1 of each year, in public information media such as the government pages of the telephone book, and internet web sites. The Principal Permittee shall compile a list of the general public reporting contacts submitted by all Permittees and make this information available on the web site (http://www.vcstormwater.org/contact.htm) and upon request. Each Permittee is responsible for providing current, updated information to the Principal Permittee.

(c) Outreach and Education

(1) Collaboratively, the Permittees shall implement the following activities:

(A) Conduct a Storm Water pollution prevention advertising campaign.

(B) Conduct Storm Water pollution prevention public service announcements.

(C) Distribute storm water pollution prevention public education materials no later than (365 days after Order adoption date) to:

(i) Automotive parts stores

(ii) Home improvement centers/ lumber yards/ hardware stores

(iii) Pet shops/ feed stores

(D) Public education materials shall include, but are not limited to information on the proper disposal, storage, and use of:

(i) Vehicle waste fluids

(ii) Household waste materials

(iii) Construction waste materials

(iv) Pesticides and fertilizers (including integrated pest management practices-IPM)

(v) Green waste (including lawn clippings and leaves)

(vi) Animal wastes

(E) Work with existing local watershed groups or organize watershed Citizen Advisory Groups/ Committees to develop effective methods to educate the public about storm water pollution no later than (365 days after Order adoption date).

(F) Organize events targeted to residents and population subgroups; and

(G) Maintain the Countywide storm water website (www.vcstormwater.org), which shall include educational material listed in the preceding subpart C.2(c)(1)(D).

(2) The Principal Permittee shall develop a strategy to educate ethnic communities through culturally effective methods. Details of this strategy should be incorporated into the PIPP, and implemented, no later than (365 days after Order adoption date).

(3) Each Permittee shall continue the existing outreach program to residents on the proper disposal of litter, green waste, pet waste, proper vehicle maintenance, lawn care and water conservation practices.

(4) Each Permittee shall conduct educational activities within its jurisdiction and participate in countywide events.

(5) The Permittees shall make a minimum of 5 million impressions per year to the general public related to storm water quality, with a minimum of 2.5

Received
August 26, 2011
Commission on
State Mandates

million impressions via newspaper, local TV access, local radio and/ or internet access.

(6) The Principal Permittee, in cooperation with the Permittees, shall provide schools within each School District in the County with materials, including, but not limited to, videos, live presentations, and other information necessary to educate a minimum of 50 percent of all school children (K-12) every 2 years on storm water pollution. Alternatively, a Permittee may submit a plan to the Regional Water Board Executive Officer for consideration no later than (90 days after Order adoption date), to provide outreach in lieu of the school curriculum. Pursuant to Water Code section 13383.6, the Permittees, in lieu of providing educational materials/ funding to School Districts in the County, may opt to provide an equivalent amount of funds or fraction thereof to the Environmental Education Account established within the State Treasury.

(7) Each Permittee shall provide the contact information for their appropriate staff responsible for storm water public education activities to the Principal Permittee and contact information changes no later than 30 days after a change occurs.

(8) The Permittees shall develop and implement a behavioral change assessment strategy no later than (365 days after Order adoption date) in order to determine whether the PIPP is demonstrably effective in changing the behavior of the public. The strategy shall be developed based on current sociological data and studies.

(d) Pollutant-Specific Outreach

The Principal Permittee, in cooperation with the Permittees, shall coordinate to develop outreach programs that focus on metals, urban pesticides, bacteria and nutrients as the pollutants of concern no later than (365 days after Order adoption date). Metals may be appropriately addressed through the Industrial/ Commercial Facilities Program (e.g. the distribution of educational materials on appropriate BMPs for metal fabrication and recycling facilities that have been identified as a potential source). Region-wide pollutants may be included in the Principal Permittee's mass media outreach program.

3. Businesses Program

(a) Corporate Outreach

(1) The Permittees shall work with other regional or statewide agencies and, associations such as the California Storm Water Quality Association (CASQA), to develop and implement a Corporate Outreach program to educate and inform corporate franchise operators and/or local facility managers about storm water regulations and BMPs. Once developed, the program shall target a minimum of four Retail Gasoline Outlets (RGO) franchisers and cover a minimum of 80% of RGO franchisees in the county, four retail automotive parts franchisers, two home improvement center franchisers and six restaurant franchisers. Corporate outreach for all target facilities shall be conducted not less than twice during the term of this

Received
August 26, 2011
Commission on
State Mandates

Order, with the first outreach contact to begin no later than two years after Order adoption date. At a minimum, this program shall include:

(A) Confer with franchise operators and/or local facility managers to explain storm water regulations.

(B) Distribution and discussion of educational material regarding storm water pollution and BMPs, and provide managers with recommendations to facilitate employee and facility compliance with storm water regulations.

(b) Business Assistance Program

(1) The Permittees shall implement a Business Assistance Program to provide technical information to small businesses to facilitate their efforts to reduce the discharge of pollutants in storm water. The Program shall include:

(A) On-site, telephone or e-mail consultation regarding the responsibilities of businesses to reduce the discharge of pollutants, procedural requirements, and available guidance documents.

(B) Distribution of storm water pollution prevention education materials to operators of auto repair shops, car wash facilities (including mobile car detailing), mobile carpet cleaning services, commercial pesticide applicator services and restaurants.

D. Industrial/ Commercial Facilities Program

I. Each Permittee shall require implementation of pollutant reduction and control measures, unless precluded by local ordinances, at industrial and commercial facilities, with the objective of reducing pollutants in storm water. Except where specified otherwise in this Order, pollutant reduction and control measures may be used alone or in combination, and may include Treatment Control, Source Control BMPs, and operation and maintenance procedures, which may be applied before, during, and/ or after pollutant generating activities. At a minimum, the Industrial/ Commercial Facilities Control Program shall include requirements to:

(a) Track

(b) Inspect

(c) Ensure compliance with municipal ordinances at industrial and commercial facilities that are critical sources of pollutants in storm water

1. Inventory of Critical Sources

(a) Each Permittee shall maintain a watershed-based inventory or database of all facilities within its jurisdiction that are critical sources of storm water pollution. Critical Sources to be tracked are summarized below, and specified in Attachment "D":

(1) Commercial Facilities

(A) Restaurants

(B) Automotive service facilities

(C) RGOs and automotive dealerships

Received
August 26, 2011
Commission on
State Mandates

(D) Nurseries and nursery centers

(2) U.S. EPA Phase I, II Facilities

(3) Other Federally-mandated Facilities [as specified in 40 CFR 122.26(d)(2)(iv)(C)]

(A) Municipal landfills

(B) Hazardous waste treatment, disposal, and recovery facilities

(C) Facilities subject to SARA Title III (also known as the Emergency Planning and Community Right-to-Know Act (EPCRA))

(b) Each Permittee shall include the following minimum fields of information for each critical source industrial and commercial facility

(1) Name of facility and name of owner/ operator.

(2) Address of facility

(3) Coverage under the IASGP or other individual or general NPDES permits or any applicable waiver issued by the Regional or State Board pertaining to runoff discharges.

(4) A narrative description including Standard Industrial Classification (SIC) System/ North American Industry Classification System (NAICS) codes that best describe the industrial activities performed and principal products used at each facility and status of exposure to storm water.

(c) The Regional Water Board recommends that Permittees include additional fields of information, such as material usage and/ or industrial output, and discrepancies between SIC System/ NAICS Code designations (as reported by facility operators) and identify the actual type of industrial activity that has the potential to pollute storm water. In addition, the Regional Water Board recommends the use of an automated database system, such as a Geographical Information System (GIS) or Internet-based system.

(d) Each Permittee shall update its inventory of critical sources at least annually. The update may be accomplished through collection of new information obtained through field activities or through other readily available inter and intra-agency informational databases (e.g. business licenses, pretreatment permits, sanitary sewer hook-up permits, and similar information).

2. Inspect Critical Sources

(a) Commercial Facilities

Permittee shall inspect all facilities identified in subpart 4.D.1. twice during the 5-year term of the Order, provided that the first inspection occurs no later than (2 years after Order adoption date). A minimum interval of 6 months between the first and the second mandatory compliance inspection is required. In addition, each Permittee shall implement the activities outlined in the following subparts. At each facility, inspectors shall verify that the operator is implementing the source control BMPs. The Permittees may require implementation of additional BMPs where storm water flows from the MS4 discharge to an environmentally sensitive area (ESA, see Part 6 for definition) or a CWA § 303(d) listed waterbody (see subpart 3(b) below).

Received
August 26, 2011
Commission on
State Mandates

(1) Restaurants-
Level of inspections: Each Permittee shall inspect all restaurants within its jurisdiction to confirm that storm water BMPs are being effectively implemented in compliance with State law, County and municipal ordinances. BMPs in Table 2 (BMPs at Restaurants) shall be implemented, unless the pollutant generating activity does not occur.

Table 2 - BMPs at Restaurants

Pollutant-Generating Activity	**BMP Narrative Description**	**2003 California Stormwater BMP Handbook Industrial and Commercial BMP Identification #**
Waste/ Hazardous Materials Storage, Handling and Disposal	Implementation of effective storage, handling and disposal procedures for hazardous materials.	By Municipality
Unauthorized Non-Storm Water Discharges	Effective elimination of non-storm water discharges.	SC-10
Accidental Spills/ Leaks	Implementation of effective spills/ leaks prevention and response procedures.	SC-11
Outdoor Storage of Raw Materials	Implementation of effective source control practices and structural devices.	SC-33
Storage and Handling of Solid Waste	Implementation of effective solid waste storage/ handling practices and appropriate control measures	SC-34
Parking/ Storage Area Maintenance	Implementation of effective parking/ storage area designs and housekeeping/ maintenance practices	SC-43
Storm Water Conveyance System Maintenance	Implementation of proper conveyance system operation and maintenance protocols.	SC-44

Received
August 26, 2011
Commission on
State Mandates

(2) Automotive Service Facilities-
Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each facility within its jurisdiction, in compliance with County and municipal ordinances. The inspections shall verify that BMPs in Table 3 (BMPs at Automotive Service Facilities) are being implemented, unless the pollutant generating activity does not occur.

Table 3 - BMPs at Automotive Service Facilities

Pollutant-Generating Activity	BMP Narrative Description	2003 California Stormwater BMP Handbook Industrial and Commercial BMP Identification #
Unauthorized Non-Storm Water Discharges	Effective elimination of non-storm water discharges.	SC-10
Accidental Spills/ Leaks	Implementation of effective spills/ leaks prevention and response procedures.	SC-11
Vehicle/ Equipment Fueling	Implementation of effective fueling source control devices and practices.	SC-20
Vehicle/ Equipment Cleaning	Implementation of effective equipment/ vehicle cleaning practices and appropriate wash water management practices	SC-21
Vehicle/ Equipment Repair	Implementation of effective vehicle/ equipment repair practices and source control devices.	SC-22
Outdoor Liquid Storage	Implementation of effective outdoor liquid storage source controls and practices.	SC-31
Outdoor Storage of Raw Materials	Implementation of effective source control practices and structural devices.	SC-33
Storage and Handling of Solid Waste	Implementation of effective solid waste storage/ handling practices and appropriate control measures	SC-34
Parking/ Storage Area Maintenance	Implementation of effective parking/ storage area designs and housekeeping/ maintenance practices	SC-43
Storm Water Conveyance System Maintenance Practices	Implementation of proper conveyance system operation and maintenance protocols.	SC-44

Received
August 26, 2011
Commission on
State Mandates

(3) Retail Gasoline Outlets and Automotive Dealerships-
Level of Inspections: Each Permittee shall confirm that BMPs are being effectively implemented at each facility within its jurisdiction, in compliance with County and municipal ordinances. The inspections shall verify that BMPs in Table 4 (BMPs at Retail Gasoline Outlets) are being implemented, unless the pollutant generating activity does not occur.

Table 4 - BMPs at Retail Gasoline Outlets

Pollutant-Generating Activity	BMP Narrative Description	2003 California Stormwater BMP Handbook Industrial and Commercial BMP Identification #
Unauthorized Non-Storm Water Discharges	Effective elimination of non-storm water discharges.	SC-10
Accidental Spills/ Leaks	Implementation of effective spills/ leaks prevention and response procedures.	SC-11
Vehicle/ Equipment Fueling	Implementation of effective fueling source control devices and practices.	SC-20
Vehicle/ Equipment Cleaning	Implementation of effective wash water control devices.	SC-21
Outdoor Storage of Raw Materials	Implementation of effective source control practices and structural devices.	SC-33
Storage and Handling of Solid Waste	Implementation of effective solid waste storage/ handling practices and appropriate control measures	SC-34
Building and Grounds Maintenance	Implementation of effective facility maintenance practices.	SC-41
Parking/ Storage Area Maintenance	Implementation of effective parking/ storage area designs and housekeeping/ maintenance practices	SC-43

Received
August 26, 2011
Commission on
State Mandates

(4) Commercial Nurseries and Nursery Centers (Merchant Wholesalers, Nondurable Goods, and Retail Trade)-

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each facility within its jurisdiction, in compliance with County and municipal ordinances. The inspections shall verify that BMPs in Table 5 (BMPs at Nurseries) are being implemented, unless the pollutant generating activity does not occur.

Table 5 - BMPs at Nurseries

Pollutant-Generating Activity	BMP Narrative Description	2003 California Stormwater BMP Handbook Industrial and Commercial BMP Identification #
Unauthorized Non-Storm Water Discharges	Effective elimination of non-storm water discharges.	SC-10
Outdoor Loading/ Unloading	Implementation of effective outdoor loading/ unloading practices.	SC-30
Outdoor Liquid Storage	Implementation of effective outdoor liquid storage source controls and practices.	SC-31
Outdoor Equipment Operations	Implementation of effective outdoor equipment source control devices and practices.	SC-32
Outdoor Storage of Raw Materials	Implementation of effective source control practices and structural devices.	SC-33
Building and Grounds Maintenance	Implementation of effective facility maintenance practices.	SC-41

(b) Industrial Facilities

Each Permittee shall conduct compliance inspections as specified below.

(1) **Frequency of Inspection**

(A) Each Permittee shall perform an initial inspection at all industrial facilities identified by the U.S. EPA in 40 CFR 122.26(c) no later than (2 years after Order adoption date). After the initial inspection, all facilities determined as having exposure of industrial activities to storm water are subject to a second mandatory compliance inspection. A minimum interval of 6 months between the first and the second compliance inspection is required.

(B) Following the first mandatory compliance inspection, a Permittee shall perform a second mandatory compliance inspection yearly at a minimum of 20% of the facilities determined not to have exposure of industrial activities to storm water. The purpose of this inspection is to verify the continuity of the no exposure status. Facilities determined

Received
August 26, 2011
Commission on
State Mandates

as having exposure will be notified that they must obtain coverage under the IASGP. A facility need not be inspected more than twice during the term of the Order unless subject to an enforcement action. A minimum interval of 6 months in between the first and the second compliance inspection is required.

(C) Applicable to all facilities: A Permittee need not inspect facilities that have been inspected by the Regional Water Board within the previous 24 month interval. However, if the Regional Water Board performed only one inspection, the Permittee shall conduct the second required mandatory compliance inspection.

(2) **Level of Inspection:** Each Permittee shall confirm that each operator:

(A) Has a current Waste Discharge Identification (WDID) number for facilities discharging storm water associated with industrial activity, and that a Storm Water Pollution Prevention Plan (SWPPP) is available on-site.

(B) Is effectively implementing BMPs in compliance with County and municipal ordinances. Facilities must implement the source control BMPs identified in subpart 4.D.2. and Appendix D, *California Stormwater Industrial and Commercial BMP Handbook (2003)*; or

(C) Has applied and has a current No Exposure Certification (and WDID number) for facilities subject to this requirement.

3. Ensure Compliance of Critical Sources

(a) **BMP Implementation:** Facilities must implement the source control BMPs identified in Part 4.D.2. and, as applicable, Appendix D, *California Stormwater Industrial and Commercial BMP Handbook (2003)*. In the event that a Permittee determines that a BMP is infeasible at any site, the Permittee shall require implementation of similar BMPs that will achieve the equivalent reduction of pollutants in the storm water discharges. Likewise, for those BMPs that are not protective of water quality standards, Permittees may require additional site-specific controls.

(b) **Environmentally Sensitive Areas (ESAs) and Impaired Waters:** For critical sources that discharge to MS4s that directly discharge to ESAs or to CWA § 303(d) listed impaired waterbodies, the Permittees shall require operators to implement additional pollutant specific controls to reduce pollutants in storm water runoff that are causing or contributing to exceedances of water quality objectives. A Regional Water Board approved TMDL Implementation Plan for the receiving water will substitute for this requirement.

(c) **Progressive Enforcement:** Each Permittee shall implement a progressive enforcement policy to ensure that facilities are brought into compliance with all storm water requirements within a reasonable time period as specified below.

(1) In the event that a Permittee determines, based on an inspection conducted, that an operator has failed to adequately implement all necessary BMPs, that Permittee shall take progressive enforcement actions which, at a minimum,

Received
August 26, 2011
Commission on
State Mandates

shall include a follow-up inspection within 4 weeks from the date of the initial inspection.

(2) In the event that a Permittee determines that an operator has failed to adequately implement BMPs after a follow-up inspection, that Permittee shall take enforcement action as established through authority in its municipal code and ordinances or through the judicial system.

(3) Each Permittee shall maintain records and make them available on request to the Regional Water Board, including inspection reports, warning letters, notices of violations, and other enforcement records, demonstrating a good faith effort to bring facilities into compliance.

4. Interagency Coordination

(a) **Referral of Violations of the Municipal Storm Water Ordinances and California Water Code § 13260:** A Permittee may refer a violation(s) of § 13260 by Industrial and Commercial facilities to the Regional Water Board provided that under its municipal storm water ordinance the Permittee has made a good faith effort of progressive enforcement. At a minimum, a Permittee's good faith effort must be documented with:

(1) Two follow-up inspections
(2) Two warning letters or notices of violation

(b) **Referral of Violations of the Industrial Activities Storm Water General Permit (IASGP), including Requirements to File a Notice of Intent or No Exposure Certification:** For those facilities in violation of the municipal storm water ordinance and subject to the IASGP, Permittees may escalate referral of such violations to the Regional Water Board (electronically on a quarterly basis to the Regional Water Board's Storm Water Site at MS4stormwaterrb4@waterboards.ca.gov) after one inspection and one written notice (copied to the Regional Water Board) to the operator regarding the violation. In making such referrals, Permittees shall include, at a minimum, the following documentation:

(1) Name of the facility
(2) Operator of the facility
(3) Owner of the facility
(4) WDID Number (if applicable)
(5) Industrial activity being conducted at the facility that is subject to the IASGP
(6) Records of communication with the facility operator regarding the violation, which shall include at least an inspection report
(7) The written notice of the violation copied to the Regional Water Board

Received
August 26, 2011
Commission on
State Mandates

(c) **Investigation of Complaints Regarding Facilities – Transmitted by the Regional Water Board Staff:** Each Permittee shall initiate, within one business day,[1] investigation of complaints (other than non-storm water discharges) to the MS4 from facilities within its jurisdiction. The initial investigation shall include, at a minimum, a limited inspection of the facility to confirm the complaint to determine if the facility is effectively complying with the municipal storm water urban runoff ordinances and, if necessary, to oversee corrective action.

(d) **Assistance of Regional Water Board Enforcement Actions:** As directed by the Regional Water Board Executive Officer, Permittees shall assist Regional Water Board enforcement actions by: helping in identification of current owners, operators, and lessees of facilities; providing staff, when available, for joint inspections with Regional Water Board inspectors; appearing as witnesses in Regional Water Board enforcement hearings; and providing copies of inspection reports and other progressive enforcement documentation.

(e) **Participation in a Task Force:** The Permittees shall participate with the Regional Water Board, and other public agencies on an enforcement task force such as the Storm Water Task Force, to communicate concerns regarding special cases of storm water violations by industrial and commercial facilities and to develop a coordinated approach to enforcement action.

E. Planning and Land Development Program

I. Purpose

1. The Permittees shall implement a Planning and Land Development Program pursuant to part 4.E. for all New Development and Redevelopment projects subject to this Order to:
   (a) Lessen the water quality impacts of development by using smart growth practices such as compact development, directing development towards existing communities via infill or redevelopment, safeguarding of environmentally sensitive areas, mixing of land uses (e.g., homes, offices, and shops), transit accessibility, and better pedestrian and bicycle amenities.
   (b) Minimize the adverse impacts from storm water runoff on the biological integrity of Natural Drainage Systems and the beneficial uses of waterbodies in accordance with requirements under CEQA (Cal. Pub. Resources Code § 21100).
   (c) Minimize the percentage of effective impervious surfaces on land developments to mimic predevelopment water balance through infiltration, evapotranspiration and reuse.

[1] Permittees may comply with the Permit by taking initial steps (such as logging, prioritizing, and tasking) to "initiate" the investigation within that one business day. However, the Regional Water Board would expect that the initial investigation, including a site visit, to occur within four business days.

Received
August 26, 2011
Commission on
State Mandates

(d) Minimize pollutant loadings from impervious surfaces such as roof-tops, parking lots, and roadways through the use of properly designed, technically appropriate BMPs (including Source Control BMPs such as good housekeeping practices), Low Impact Development Strategies, and Treatment Control BMPs.
(e) Properly select, design and maintain Treatment Control BMPs and Hydromodification Control BMPs to address pollutants that are likely to be generated, assure long-term function, and to avoid the breeding of vectors.[1]
(f) Prioritize the selection of BMPs suites to remove storm water pollutants, reduce storm water runoff volume, and beneficially reuse storm water to support an integrated approach to protecting water quality and managing water resources in the following order of preference:
  (1) Infiltration BMPs
  (2) BMPs that store and reuse storm water runoff.
  (3) BMPs that incorporate vegetation to promote pollutant removal and runoff volume reduction and integrate multiple uses
  (4) BMPs which percolate runoff through engineered soil and allow it to discharge downstream slowly
  (5) Approved modular/ proprietary treatment control BMPs that are based on LID concepts and that meet pollution removal goals

II. Applicability

1. New Development Projects.
(a) Development projects subject to Permittee conditioning and approval for the design and implementation of post-construction controls to mitigate storm water pollution, prior to completion of the project(s), are:
  (1) All development projects equal to 1 acre or greater of disturbed area and adding more than 10,000 square feet of impervious surface area
  (2) Industrial park 10,000 square feet or more of surface area
  (3) Commercial strip mall 10,000 square feet or more of impervious surface area
  (4) Retail gasoline outlet 5,000 square feet or more of surface area
  (5) Restaurant (SIC 5812) 5,000 square feet or more of surface area
  (6) Parking lot 5,000 square feet or more of impervious surface area, <u>or</u> with 25 or more parking spaces
  (7) Streets, roads, highways, and freeway construction of 10,000 square feet or more of impervious surface area shall incorporate USEPA guidance regarding Managing Wet Weather with Green Infrastructure: Green Streets to the maximum extent practicable.
  (8) Automotive service facilities (SIC 5013, 5014, 5511, 5541, 7532-7534 and 7536-7539) [5,000 square feet or more of surface area]

---

[1] Treatment BMPs when designed to drain within 72 hours of the end of rainfall minimize the potential for the breeding of vectors.

Received
August 26, 2011
Commission on
State Mandates

(9) Redevelopment projects in subject categories that meet Redevelopment thresholds (identified in subpart E.II.2 below)

(10) Projects located in or directly adjacent to, or discharging directly to an Environmentally Sensitive Area (ESA), where the development will:
  (A) Discharge storm water runoff that is likely to impact a sensitive biological species or habitat; <u>and</u>
  (B) Create 2,500 square feet or more of impervious surface area

(11) Single-family hillside homes. To the extent that a Permittee may lawfully impose conditions, mitigation measures or other requirements on the development or construction of a single-family home in a hillside area as defined in the applicable Permittee's Code and Ordinances, each Permittee shall require that during the construction of a single-family hillside home, the following measures to be implemented:
  (A) Conserve natural areas
  (B) Protect slopes and channels
  (C) Provide storm drain system stenciling and signage
  (D) Divert roof runoff to vegetated areas before discharge unless the diversion would result in slope instability
  (E) Direct surface flow to vegetated areas before discharge unless the diversion would result in slope instability

2. Redevelopment Projects

(a) Redevelopment projects subject to Permittee conditioning and approval for the design and implementation of post-construction controls to mitigate storm water pollution, prior to completion of the project(s), are:

  (1) Land-disturbing activity that results in the creation or addition or replacement of 5,000 square feet or more of impervious surface area on an already developed site on development categories identified in subpart 4.E.III.1.
  (2) Where Redevelopment results in an alteration to more than fifty percent of impervious surfaces of a previously existing development, and the existing development was not subject to post development storm water quality control requirements, the entire project must be mitigated.
  (3) Where Redevelopment results in an alteration to less than fifty percent of impervious surfaces of a previously existing development, and the existing development was not subject to post development storm water quality control requirements, only the alteration must be mitigated, and not the entire development.

(b) Redevelopment does not include routine maintenance activities that are conducted to maintain original line and grade, hydraulic capacity, original purpose of facility or emergency redevelopment activity required to protect public health and safety. Impervious surface replacement, such as the reconstruction of parking lots and roadways which does not disturb additional area and maintains the original grade and alignment, is considered a routine maintenance activity. Redevelopment does not include the repaving of existing roads to maintain original line and grade.

Received
August 26, 2011
Commission on
State Mandates

(c) Existing single-family dwelling and accessory structures are exempt from the Redevelopment requirements unless such projects create, add, or replace 10,000 square feet of impervious surface area.

3. Effective Date –The New Development and Redevelopment requirements contained in Section E of the Order shall begin (90 calendar days) after Regional Water Board Executive Officer approval of the changes to the Technical Guidance Manual needed to comply with this permit. After that date all discretionary permit projects or project phases that have not been deemed complete for processing, or discretionary permit projects without vesting tentative maps that have not requested and received an extension of previously granted approvals must comply with the requirements in Section E. Projects that have been deemed complete prior to the update of the technical design manual are not subject to this section. For Permittee's projects the effective date shall be the date the governing body or their designee approves initiation of the project design.

III. New Development/ Redevelopment Performance Criteria

1. Integrated Water Quality/ Flow Reduction/Resources Management Criteria

(a) Except as provided in subpart 4.E.III.1.(c) below, Permittees shall require all New Development and Redevelopment projects identified in subpart 4.E.II to control pollutants, pollutant loads, and runoff volume emanating from impervious surfaces through infiltration, storage for reuse, evapotranspiration, or bioretention/ biofiltration by reducing the percentage of Effective Impervious Area (EIA) to 5 percent or less of the total project area.

(b) Impervious surfaces may be rendered "ineffective", and thus not count toward the 5 percent EIA limitation, if the stormwater runoff from those surfaces is fully retained on-site for the design storm event specified in provision (c), below. To satisfy the EIA limitation and low-impact development requirements, the permittees must require stormwater runoff to be infiltrated, reused, or evapotranspired on-site through a stormwater management technique allowed under the terms of this permit and implementing documents. If on-site retention is determined to be technically infeasible pursuant to 4.E.III.2(b), an on-site biofiltration system that achieves equivalent stormwater volume and pollutant load reduction as would have been achieved by on-site retention shall satisfy the EIA limitation. An on-site biofiltration system that releases above the design volume shall achieve 1.5 times the amount of stormwater volume and pollutant load reduction as would have been achieved by on-site retention and, thereby, shall satisfy the EIA limitation.

(c) The permittees shall require all features constructed or otherwise utilized to render impervious surfaces "ineffective", as described in provision (b), above, to be properly sized to infiltrate, store for reuse, or evapotranspire, without any runoff at least the volume of water, or in the case of biofiltration with release above the design volume, 1.5 times the volume of water, that results from:

Received
August 26, 2011
Commission on
State Mandates

(1) The 85th percentile 24-hour runoff event determined as the maximized capture stormwater volume for the area using a 48 to 72-hour draw down time, from the formula recommended in Urban Runoff Quality Management, WEF Manual of Practice No. 23/ASCE Manual of Practice No. 87, (1998);
(2) The volume of annual runoff based on unit basin storage water quality volume, to achieve 80 percent or more volume treatment by the method recommended in the Ventura County Technical Guidance Manual for Storm Water Quality Control Measures (July 2002 and its revisions); or
(3) The volume of runoff produced from a 0.75 inch storm event.

(d) To address any impervious surfaces that may not be rendered "ineffective", surface discharge of stormwater runoff if any, that results from New Development and Redevelopment projects identified in subpart 4.E.II which have complied with subparts 4.E.III.1.(a)-(c), above, shall be mitigated in accordance with subpart 4.E.III.4.

2. Alternative Compliance for Technical Infeasibility

(a) To encourage smart growth and infill development of existing urban centers where on-site compliance with post-construction requirements may be technically infeasible, the permittees may allow projects that are unable to meet the Integrated Water Quality/Flow Reduction/Resources Management Criteria in subpart 4.E.III.1, above, to comply with this permit through the alternative compliance measures described in subpart 4.E.III.2.(c), below.

(b) To utilize alternative compliance measures, the project applicant must demonstrate that compliance with the applicable post-construction requirements would be technically infeasible by submitting a site-specific hydrologic and/or design analysis conducted and endorsed by a registered professional engineer, geologist, architect, and/or landscape architect. Technical infeasibility may result from conditions including the following:
(1) Locations where seasonal high groundwater is within 5 feet of the surface
(2) Locations within 100 feet of a groundwater well used for drinking water
(3) Brownfield development sites or other locations where pollutant mobilization is a documented concern
(4) Locations with potential geotechnical hazards
(5) Smart growth and infill or redevelopment locations where the density and/ or nature of the project would create significant difficulty for compliance with the on-site volume retention requirement
(6) Other site or implementation constraints identified in the LID Technical Guidance document required by subpart 4.E.IV.4.

(c) Alternative Compliance Measures. When a permittee finds that a project applicant has demonstrated technical infeasibility, the permittee shall identify alternative compliance measures that the project will need to comply with as a substitute for the otherwise applicable post-construction requirements listed in subparts 4.E.III.1.(a)-(c) of this permit. The Ventura County Technical Guidance Manual shall be revised to identify the alternative compliance measures and shall include the following requirement:

Received
August 26, 2011
Commission on
State Mandates

(1) Minimum on-site requirement. The project must take all feasible measures to reduce the percentage of Effective Impervious Area to no more than 30 percent of the total project area and treat all remaining runoff pursuant to the design and sizing requirements of subparts 4.E.III.1.(b)-(d).

(2) Offsite mitigation volume. The difference in volume between the amount of stormwater infiltrated, reused, and/ or evapotranspired and/or biofiltered by the project on-site and the otherwise applicable requirements of subparts 4.E.III.1.(a)-(c) (the "offsite mitigation volume'), above, must be mitigated by the project applicant either by performing offsite mitigation that is approved by the permittee or by providing sufficient funding for public or private offsite mitigation to achieve equivalent stormwater volume and pollutant load reduction through infiltration, reuse, evapotranspiration and/ or biofiltration.
   - For projects with demonstrable technical infeasibility that cannot reduce the Effective Impervious Area to 5% or less of the total project, but are able to reduce the Effective Impervious Area to no more than 30 percent of the total project, mitigation or payment in lieu must be equivalent to the amount of stormwater not managed on site.
   - For projects with demonstrable technical infeasibility that cannot reduce the Effective Impervious Area to 30% of the total project or less, mitigation or payment in lieu must be for 1.5 times the amount of stormwater not managed on site

(3) Location of off site mitigation. Offsite mitigation projects must be located in the same sub-watershed (defined as draining to the same hydrologic area in the Basin Plan) as the new development or redevelopment project. A list of eligible public and private offsite mitigation projects available for funding shall be identified by the Permittees and provided to the project applicant. Off site mitigation projects include green streets projects, parking lot retrofits, other site specific LID BMPs, and regional BMPs. Project applicants seeking to utilize these alternative compliance provisions may propose other offsite mitigation projects, which the Permittees may approve if they meet the requirements of this subpart.

(4) Timing and Reporting Requirements for Offsite Mitigation Projects. The Permittee(s) shall develop a schedule for the completion of offsite mitigation projects, including milestone dates to identify fund, design, and construct the projects. Offsite mitigation projects shall be completed as soon as possible, and at the latest, within 4 years of the certificate of occupancy for the first project that contributed funds toward the construction of the offsite mitigation project, unless a longer period is otherwise authorized by the Executive Officer. For public offsite mitigation projects, the permittees must provide in their annual reports a summary of total offsite mitigation funds raised to date and a description (including location, general design concept, volume of water expected to be retained, and total estimated budget) of all pending public offsite mitigation projects. Funding sufficient to address the offsite mitigation volume must be

Received
August 26, 2011
Commission on
State Mandates

transferred to the permittee (for public offsite mitigation projects) or to an escrow account (for private offsite mitigation projects) within one year of the initiation of construction.

(5) The project applicant must demonstrate that the EIA achieved on-site is as close to 5 percent EIA as technically feasible, given the site's constraints.

(d) Watershed equivalence. Regardless of the methods through which permittees allow project applicants to implement alternative compliance measures, the sub-watershed -wide (defined as draining to the same hydrologic area in the Basin Plan) result of all development must be at least the same level of water quality protection as would have been achieved if all projects utilizing these alternative compliance provisions had complied with subparts 4.E.III.1.(a)-(d) of the permit. The permittees shall provide in their annual report to the Regional Board a list of mitigation project descriptions and pollutant and flow reduction analyses (compiled from design specifications submitted by project applicants and approved by the permittee(s)) comparing the expected aggregate results of alternative compliance projects to the results that would otherwise have been achieved by meeting the 5 percent EIA requirement on-site.

3. Hydromodification (Flow/ Volume/ Duration) Control Criteria

(a) Each Permittee shall require all New Development and Redevelopment projects identified in subpart 4.E.II to implement hydrologic control measures, to prevent accelerated downstream erosion and to protect stream habitat in natural drainage systems. The purpose of the hydrologic controls is to minimize changes in post-development hydrologic storm water runoff discharge rates, velocities, and duration. This shall be achieved by maintaining the project's pre-project storm water runoff flow rates and durations.

(1) Description

(A) Hydromodification control in natural drainage systems shall be achieved by maintaining the Erosion Potential (E_p) in streams at a value of 1, unless an alternative value can be shown to be protective of the natural drainage systems from erosion, incision, and sedimentation that can occur as a result of flow increases from impervious surfaces and damage stream habitat (see Attachment "E" - Determination of Erosion Potential)

(B) Hydromodification control may include one, or a combination of on-site, regional subregional hydromodification control BMPs, LID strategies, or stream restoration measures, with preference given to LID strategies and hydromodification control BMPs. Any in-stream restoration measure shall not adversely affect the beneficial uses of the natural drainage systems

(C) Natural drainage systems, which include unlined or unimproved (not engineered) creeks, streams, rivers and their tributaries, are located in the following watersheds:

(i) Ventura River

(ii) Santa Clara River

Received
August 26, 2011
Commission on
State Mandates

(iii) Calleguas Creek
(iv) Malibu Creek
(v) Miscellaneous Ventura Coastal

(D) The Southern California Storm Water Monitoring Coalition (SMC) is developing a regional methodology to eliminate or mitigate the adverse impacts of hydromodification as a result of urbanization, including hydromodification assessment and management tools.
(i) The SMC has identified the following objectives for the Hydromodification Control Study (HCS):
(I) Establishment of a stream classification for Southern California streams
(II) Development of a deterministic or predictive relationship between changes in watershed impervious cover and stream-bed/ stream bank enlargement
(III) Development of a numeric model to predict stream-bed/ stream bank enlargement and evaluate the effectiveness of mitigation strategies

(E) The Permittees shall participate in the SMC HCS to develop:
(i) A regional stream classification system
(ii) A numerical model to predict the hydrological changes resulting from new development
(iii) A numerical model to identify effective mitigation strategies

(F) Until the completion of the SMC HCS, Permittees shall implement the Interim Hydromodification Control Criteria, described in subpart 4.E.III.3(a)(3)(A) below, to control the potential adverse impacts of changes in hydrology that may result from new development and redevelopment projects identified in subpart 4.E.II

(G) Existing single-family structures are exempt from the Hydromodification control requirements unless such projects disturb one acre or more of land or create, add, or replace 10,000 square feet or more of impervious surface area

(2) Exemptions to Hydromodification Controls. Permittees may exempt the following New Development and Redevelopment projects from implementation of Hydromodification controls where assessments of downstream channel conditions and proposed discharge hydrology indicate that adverse Hydromodification effects to present and future beneficial uses of Natural Drainage Systems are unlikely:
(A) All projects that disturb less than one acre.
(B) Projects that are replacement, maintenance or repair of a Permittee's existing flood control facility, storm drain, or transportation network.
(C) Redevelopment Projects in the Urban Core that do not increase the effective impervious area or decrease the infiltration capacity of pervious areas compared to the pre-project conditions.

Received
August 26, 2011
Commission on
State Mandates

(D) Projects that have any increased discharge go directly or via a storm drain to a sump, lake, area under tidal influence, into a waterway that has a 100-year peak flow (Q100) of 25,000 cfs or more, or other receiving water that is not susceptible to Hydromodification impacts;

(E) Projects that discharge directly or via a storm drain into concrete or improved (not natural) channels (e.g., rip rap, sackcrete, etc.), which, in turn, discharge into receiving water that is not susceptible to Hydromodification impacts (as in D above).

(3) Interim Hydromodification Control Criteria

(A) The Interim Hydromodification Control Criteria to protect natural drainage systems until Permittees complete Hydromodification Control Plans (HCPs), described in subpart 4.E.III.3(a)(4) below, are as follows:

(i) **Projects disturbing land area of less than fifty acres** will be subject to LID and/or source or treatment BMPs as addressed in this permit. The combined effects of LID and the treatment BMPs are considered adequate for Hydromodification control for projects that disturb less than 50 acres.

(ii) **Projects disturbing land areas of fifty acres or greater** Projects in this category shall develop and implement a Hydromodification Analysis Study (HAS) that demonstrates that post development conditions are expected to approximate the pre-project erosive effect of sediment transporting flows in receiving waters. The HAS must lead to the incorporation into the project design features intended to approximate, to the extent feasible, an Erosion Potential value of 1 or any alternative value that can be shown to be protective of the natural drainage systems from erosion, incision, and sedimentation that can occur as a result of flow increases from impervious surfaces and damage stream habitat in natural drainage systems, or

(I) Alternatively, project proponents in this category may elect to develop, in partnership with Permittees, an equivalent implementation method based on flow duration control in the form of nomographs relating planned impervious area and local soil type (infiltration rates) to determine hydromodification control BMP volume and land area requirements for the proposed project. The nomographs shall be derived from continuous simulation modeling using Ventura County specific rain gauge records and soil types, and calibrated using data from a local undeveloped watershed with similar conditions; or

(II) Alternatively, the Co-Permittees may revise the Ventura County Technical Guidance Manual for Stormwater

Received
August 26, 2011
Commission on
State Mandates

Quality Control Measures to address projects that disturb more than 50 acres.

(4) Final Criteria

(A) The Permittees shall develop and implement watershed specific HCPs no later than (180 days) after the completion of the SMC HCS.

(i) The HCP shall identify:

(I) Stream classifications

(II) Flow rate and duration control methods

(III) Sub-watershed mitigation strategies

(IV) Stream restoration measures, which will maintain the stream and tributary Erosion Potential at 1 unless an alternative value can be shown to be protective of the natural drainage systems from erosion, incision, and sedimentation that can occur as a result of flow increases from impervious surfaces and damage stream habitat in natural drainage system tributaries

(B) The HCP shall contain the following elements:

(i) Hydromodification Management Standards

(ii) Natural Drainage Areas and Hydromodification Management Control Areas

(iii) New Development and Redevelopment Projects subject to the HCP

(iv) Description of authorized Hydromodification Management Control BMPs

(v) Hydromodification Management Control BMP Design Criteria.

(vi) For flow duration control methods, the range of flows to control for, and goodness of fit criteria

(vii) Allowable low critical flow, Q_c, which initiates sediment transport

(viii) Description of the approved Hydromodification Model.

(ix) Any alternate Hydromodification Management Model and Design

(x) Stream Restoration Measures Design Criteria

(xi) Monitoring and Effectiveness Assessment

(xii) Record Keeping

(C) The HCP shall be deemed in effect upon Executive Officer approval.

4. Water Quality Mitigation Criteria

(a) Each Permittee shall require all New Development and Redevelopment projects identified in subpart 4.E.II to implement post-construction storm water treatment BMPs and control measures to mitigate storm water pollution as follows:

(1) Projects disturbing land areas less than 50 acres

(A) Volumetric Treatment Control BMP

(i) The 85th percentile 24-hour runoff event determined as the maximized capture storm water volume for the area using a 48 to

Received
August 26, 2011
Commission on
State Mandates

72-hour draw down time, from the formula recommended in *Urban Runoff Quality Management, WEF Manual of Practice No. 23/ASCE Manual of Practice No. 87, (1998)*; or

(ii) The volume of annual runoff based on unit basin storage water quality volume, to achieve 80 percent or more volume treatment by the method recommended in the Ventura County Technical Guidance Manual for Storm Water Quality Control Measures (July 2002 and its revisions); or

(iii) The volume of runoff produced from a 0.75 inch storm event, prior to its discharge to a storm water conveyance system;[1] and/ or

(B) Flow Based Treatment Control BMP

(i) The flow of runoff produced from a rain event equal to at least 0.2 inches per hour intensity; or

(ii) The flow of runoff produced from a rain event equal to at least 2 times the 85th percentile hourly rainfall intensity as determined from local rainfall records; or

(iii) Eight percent of the 50-year storm design flow rate as determined from the method recommended in the Ventura County Technical Guidance Manual for Storm Water Quality Control Measures (July 2002 and its revisions)

(2) Projects disturbing land area of 50 acres or greater

(A) Eighty percent of the average runoff volume using an appropriate public domain continuous flow model (such as Storm Water Management Model (SWMM) or Hydrologic Engineering Center – Hydrologic Simulation Program – Fortran (HEC-HSPF), using the local rainfall record and relevant BMP Performance data.

IV. Implementation

1. Maintenance Agreement and Transfer

(a) Prior to issuing approval for final occupancy each Permittee shall require that all new development and redevelopment projects subject to post-construction BMP requirements provide an operation and maintenance plan and verification of ongoing maintenance provisions for LID practices, Treatment Control BMPs, and Hydromodification Control BMPs including but not limited to: final map conditions, legal agreements, covenants, conditions or restrictions, CEQA mitigation requirements, conditional use permits, and/ or other legally binding maintenance agreements.

(1) Verification at a minimum shall include the developer's signed statement accepting responsibility for maintenance until the responsibility is legally transferred; and either

[1] This option is available only for construction projects that disturb land area less than 5 acres.

Received
August 26, 2011
Commission on
State Mandates

(A) A signed statement from the public entity assuming responsibility for BMP maintenance; or
(B) Written conditions in the sales or lease agreement, which require the property owner or tenant to assume responsibility for BMP maintenance and conduct a maintenance inspection at least once a year; or
(C) Written text in project covenants, conditions, and restrictions (CCRs) for residential properties assigning BMP maintenance responsibilities to the Home Owners Association (HOA); or
(D) Any other legally enforceable agreement or mechanism that assigns responsibility for the maintenance of BMPs.

(b) Each Permittee shall require all development projects subject to post-construction BMP requirements to provide a plan for the operation and maintenance of all structural and treatment controls. The Operation and Maintenance plan shall follow the Technical Guidance Manual Appendix D "Maintenance Plan Guidance" (or subsequent guidance manual) for each BMP component. The plan shall be submitted for examination of relevance to keeping the BMPs in proper working order. Where BMPs are transferred to Permittee for ownership and maintenance, the plan shall also include all relevant costs for upkeep of BMPs in the transfer. Operation and Maintenance plans for private BMPs shall be kept on-site for periodic review by Permittee inspectors.

2. Tracking, Inspection, and Enforcement of Post-Construction BMPs

(a) Each Permittee shall implement a tracking system and an inspection and enforcement program for new development and redevelopment post-construction storm water BMPs as set forth in part 4.E. no later than (one year after Order adoption date).

(1) Implement a GIS or other electronic system for tracking projects that have been conditioned for post-construction BMPs. The electronic system, at a minimum, should contain the following information:

(A) Municipal Project ID
(B) State WDID No
(C) Project Acreage
(D) BMP Type and Description
(E) BMP Location (coordinates)
(F) Date of Acceptance
(G) Date of Maintenance Agreement
(H) Maintenance Records
(I) Inspection Date and Summary
(J) Corrective Action
(K) Date Certificate of Occupancy Issued
(L) Replacement or Repair Date

(b) Inspect all development sites upon completion of construction and prior to the issuance of occupancy certificates to ensure proper installation of LID measures,

Received
August 26, 2011
Commission on
State Mandates

structural BMPs, treatment control BMPs and Hydromodification control BMPs. The inspection may be combined with other inspections provided it is conducted by trained personnel.

(c) Verify proper maintenance and operation of post-construction BMPs previously approved for new development and redevelopment and operated by the Permittees. The post construction BMP maintenance inspection program shall incorporate the following elements:
  (1) Post-construction BMP Maintenance Inspection checklist.
  (2) Inspection at least once every 2 years, beginning (Order adoption date), of post-construction BMPs to assess operation conditions with particular attention to:
  (3) Criteria and procedures for post construction Treatment Control and Hydromodification Control BMP repair, replacement, or re-vegetation.

(d) For post construction BMPs operated and maintained by parties other than the Permittees, the Permittees shall require annual reports by the other parties demonstrating proper maintenance and operations.

(e) Undertake enforcement as appropriate based on the results of the inspection.

3. Alternative Post Construction Storm Water Mitigation Programs

(a) A Permittee or a coalition of Permittees may apply to the Regional Water Board for approval of a Redevelopment Project Area Master Plan (RPAMP) for redevelopment projects within the Redevelopment Project Areas, in consideration of exceptional site constraints that inhibit site-by-site or project-by-project implementation of post-construction requirements.

(b) Upon review and a determination by the Regional Water Board Executive Officer that the proposal is technically valid and appropriate, the Regional Water Board may consider for approval such a program if its implementation will:
  (1) Result in equivalent or superior reduction of storm water pollutant loads in comparison to individual projects regulated by this permit.
  (2) Satisfy, on a Redevelopment Project Area-wide basis, the hydromodification criteria of this section.
  (3) Reduce the percentage of Effective Impervious Area (EIA) to a target of 5 percent or less of the Redevelopment Project Area, using properly sized storm water treatment/ collection features, as described in this Section.
  (4) Be fiscally sustainable and have secure funding; and
  (5) Be completed in four years of the adoption date of this permit.

(c) The RPAMP should prioritize the implementation of LID storm water mitigation measures, as described in this section.

(d) A Permittee or a coalition of Permittees may apply to the Regional Water Board for approval of a Redevelopment Project Area Master Plan (RPAMP) that takes into consideration the balancing of water quality protection with the needs for adequate housing, population growth, public transportation and management, land recycling, and urban revitalization.

(e) For the RPAMP to be considered, a technical panel of the Local Government Commission or an equivalent state or regional planning agency must have

Received
August 26, 2011
Commission on
State Mandates

reviewed and approved the proposed RPAMP, prior to its submittal to the Regional Water Board. The Regional Water Board Executive Officer may then consider the RPAMP for approval, or elect to submit it to the Regional Water Board for consideration.

(f) The RPAMP, on approval, may substitute in part or wholly for post-construction requirements.

(g) Redevelopment Project Areas include the following:
- (1) City Center areas
- (2) Historic District areas
- (3) Brownfield areas
- (4) Infill Development areas
- (5) Urban Transit Villages
- (6) Any other redevelopment area so designated by the Regional Water Board

(h) Nothing in these provisions shall be construed as to delay the implementation of post-construction control requirements, as approved in this Order.

4. Developer Technical Guidance and Information

(a) The Permittees shall update the Ventura County Technical Guidance Manual for Storm Water Quality Control Measures to include, at a minimum, the following:
- (1) Hydromodification Control criteria described in this Order, including numerical criteria.
- (2) Expected BMP pollutant removal performance including effluent quality (ASCE/ U.S. EPA International BMP Database, CASQA New Development BMP Handbook, technical reports, local data on BMP performance, and the scientific literature appropriate for southern California geography and climate).
- (3) Selection of appropriate BMPs for storm water pollutants of concern.
- (4) Data on Observed Local Effectiveness and performance of implemented BMPs.
- (5) BMP Maintenance and Cost Considerations.
- (6) Guiding principles to facilitate integrated water resources planning and management in the selection of BMPs, including water conservation, groundwater recharge, public recreation, multipurpose parks, open space preservation, and redevelopment retrofits.
- (7) LID principles and specifications, including the objectives and specifications for integration of LID strategies in the areas of:
  - (A) Site Assessment.
  - (B) Site Planning and Layout.
  - (C) Vegetative Protection, Revegetation, and Maintenance.
  - (D) Techniques to Minimize Land Disturbance.
  - (E) Techniques to Implement LID Measures at Various Scales
  - (F) Integrated Water Resources Management Practices.
  - (G) LID Design and Flow Modeling Guidance.
  - (H) Hydrologic Analysis.
  - (I) LID Credits.

Received
August 26, 2011
Commission on
State Mandates

(b) Permittees shall update the Technical Guidance Manual within (120 days after Order adoption date).
(c) The Permittees shall facilitate implementation of LID by providing key industry, regulatory, and other stakeholders with information regarding LID objectives and specifications contained in the LID Technical Guidance Section through a training program. The LID training program will include the following:
(1) LID targeted sessions and materials for builders, design professionals, regulators, resource agencies, and stakeholders
(2) A combination of awareness on national efforts and local experience gained through LID pilot projects and demonstration projects
(3) Materials and data from LID pilot projects and demonstration projects including case studies
(4) Guidance on how to integrate LID requirements into the local regulatory program(s) and requirements
(5) Availability of the LID Technical Guidance regarding integration of LID measures at various project scales
(6) Guidance on the relationship among LID strategies, Source Control BMPs, Treatment Control BMPs, and Hydromodification Control requirements
(d) The Permittees shall submit revisions to the Ventura County Technical Guidance Manual to the Regional Water Board for Executive Officer approval.

5. Project Coordination
(a) Each Permittee shall facilitate a process for effective approval of post-construction storm water control measures. The process shall include:
(1) Detailed BMP review including BMP sizing calculations, BMP pollutant removal performance, and municipal approval; and
(2) An established structure for communication and delineated authority between and among municipal departments that have jurisdiction over project review, plan approval, and project construction through memoranda of understanding (MOU) or an equivalent agreement.

V. State Statute Conformity

1. California Environmental Quality Act (CEQA) Document Update
(a) Each Permittee shall incorporate into its CEQA process no later than (365 days after Order adoption date) those additional procedures necessary for considering potential storm water quality impacts and providing for appropriate mitigation when preparing and reviewing CEQA documents.
(1) The procedures shall require consideration of the following:
(A) Potential impact of project construction on storm water runoff.
(B) Potential impact of project post-construction activity on storm water runoff.
(C) Potential for discharge of storm water from areas from material storage, vehicle or equipment fueling, vehicle or equipment

Received
August 26, 2011
Commission on
State Mandates

maintenance (including washing), waste handling, hazardous materials handling or storage, delivery areas or loading docks, or other outdoor work areas.

(D) Potential for discharge of storm water to impair the beneficial uses of the receiving waters.

(E) Potential for the discharge of storm water to cause significant harm on the biological integrity of the waterways and waterbodies.

(F) Potential for significant changes in the flow velocity or volume of storm water runoff to cause harm to or impair the beneficial uses of natural drainage systems.

(G) Potential for significant increases in erosion at the project site or surrounding areas.

2. General Plan Update

(a) Each Permittee shall amend, revise or update its General Plan to include watershed and storm water quality and quantity management considerations and policies when any of the following General Plan elements are updated or amended:

(1) Land Use
(2) Housing
(3) Conservation
(4) Open Space

(b) Each Permittee shall provide the Regional Water Board with the draft amendment or revision when a listed General Plan element or General Plan is noticed for comment in accordance with Cal. Govt. Code § 65350 *et seq.*

F. Development Construction Program

(I) Each Permittee shall implement a construction program that prevents illicit construction-related discharges of pollutants into the MS4, implements and maintains structural and non-structural BMPs to reduce pollutants in stormwater runoff from construction sites, reduces construction site discharges of pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards.

1. BMP Implementation - Construction Sites Less Than One Acre

(a) Each Permittee shall require the implementation of an effective combination of erosion and sediment control BMPs from Table 6 to prevent erosion and sediment loss, and the discharge of construction wastes.[1]

---

[1] The BMPs are taken from the *California BMP Handbook, Construction, January 2003* and the *Caltrans Stormwater Quality Handbooks, Construction Site Best Management Practices (BMPs) Manual, March 2003*, and addenda.

Received
August 26, 2011
Commission on
State Mandates

Table 6 - BMPs at Construction sites less than 1 acre

Minimum Set of BMPs for All Construction Sites	CASQA Handbook	Caltrans Handbook
For Erosion Control		
Scheduling	EC-1	SS-1
Preservation of Existing Vegetation	EC-2	SS-2
Sediment Controls		
Silt Fence	SE-1	SC-1
Sand Bag Barrier	SE-8	SC-8
Stabilized Construction Site Entrance/Exit	TC-1	TC-1
Non-Storm Water Management		
Water Conservation Practices	NS-1	NS-1
Dewatering Operations (Groundwater dewatering only under NPDES Permit No. CAG994004).[1]	NS-2	NS-2
Waste Management		
Material Delivery and Storage	WM-1	WM-1
Stockpile Management	WM-3	WM-2
Spill Prevention and Control	WM-4	WM-4
Solid Waste Management	WM-5	WM-5
Concrete Waste Management	WM-8	WM-8
Sanitary/ Septic Waste Management	WM-9	WM-9

2. BMP Implementation - Construction Sites One Acre but Less than 5 acres.
   (a) Each Permittee shall require the implementation of an effective combination of appropriate erosion and sediment control BMPs from Table 7 in addition to the ones identified in Table 6 to prevent erosion and sediment loss, and the discharge of construction wastes:

Table 7 - BMPs at Construction sites 1 acre or greater but less than 5 acres

BMPs	CASQA Handbook	Caltrans Handbook
For Erosion Control		
Hydraulic Mulch	EC-3	SS-3
Hydroseeding	EC-4	SS-4
Soil Binders	EC-5	SS-5
Straw Mulch	EC-6	SS-6
Geotextiles and Mats	EC-7	SS-7
Wood Mulching	EC-8	SS-8
Sediment Controls		
Fiber Rolls	SE-5	SC-5
Gravel Bag Berm	SE-6	SC-6
Street Sweeping and/ or Vacuum	SE-7	SC-7
Storm Drain Inlet Protection	SE-10	SC-10
Additional Controls		
Wind Erosion Controls	WE-1	WE-1

[1] Ponded storm water may be discharged at a concentration of Total Suspended Solids (TSS) of 100mg/L or less.

Received
August 26, 2011
Commission on
State Mandates

BMPs	CASQA Handbook	Caltrans Handbook
Stabilized Construction Entrance/ Exit	TC-1	TC-1
Stabilized Construction Roadway	TC-2	TC-2
Entrance/ Exit Tire Wash	TC-3	TC-3
Non-Storm Water Management		
Vehicle and Equipment Washing	NS-8	NS-8
Vehicle and Equipment Fueling	NS-9	NS-9

3. BMP Implementation - Construction Sites 5 acres and Greater
   (a) Each Permittee shall require the implementation of an effective combination of the following BMPs in Table 8 (BMPs at Construction sites 5 acres or greater) in addition to the ones identified in Table 6 (BMPs at Construction sites less than 1 acre) and Table 7 (BMPs at Construction sites 1acre or greater but less than 5 acres) at all construction sites 5 acres and greater to prevent erosion and sediment loss, and the discharge of construction wastes. Erosion control BMPs shall be preferred to sediment control BMPs.

Table 8 - BMPs at Construction sites 5 acres or greater

BMPs	CASQA Handbook	Caltrans Handbook
Sediment Controls		
Sediment Basin	SE-2	SC-2
Check Dam	SE-4	SC-4
Tracking Control BMPs		
Stabilized Construction Entrance/ Exit	TR-1	TC-1
Non-Storm Water Management		
Vehicle and Equipment Maintenance	NS-10	NS-10
Waste Management		
Material Delivery and Storage	WM-1	WM-1
Spill Prevention and Control	WM-4	WM-4
Concrete Waste Management	WM-8	WM-8
Sanitary/ Septic Waste Management	WM-9	WM-9

Received
August 26, 2011
Commission on
State Mandates

4. Enhanced Construction BMP Implementation.
   (a) Each Permittee shall implement, or require implementation of, enhanced practices that preclude impacts to water quality posed by all construction sites on hillsides as defined in this Order and construction sites that directly discharge to a waterbody listed on the CWA § 303 (d) list for siltation or sediment, or that occur within or directly adjacent to an Environmentally Sensitive Area (ESAs). Construction sites located on hillsides, adjacent to CWA 303(d) listed waters for siltation or sediment, and directly adjacent to ESAs are termed "High risk sites."
   (b) Each Permittee shall require implementation of enhanced practices for high risk sites which shall include increased BMP inspection and maintenance requirements.
      (1) Each Permittee shall require that high risk sites shall be inspected by the project proponent's Qualified SWPPP Developer or Qualified SWPPP Practitioner or personnel or consultants who are Certified Professionals in Erosion and Sediment Control (CPESC) at the time of BMP installation, at least weekly during the wet season, and at least once each 24 hour period during a storm event that generates runoff from the site, to identify BMPs that need maintenance to operate effectively, that have failed or could fail to operate as intended.
      (2) During the wet season, the area of disturbance shall be limited to the area that can be controlled with an effective combination of erosion and sediment control BMPs. Enhanced sediment controls should be used in combination with erosion controls and should target portions of the site that cannot be effectively controlled by standard erosion controls described above. Effective sediment and erosion control BMPs proposed by the proponent shall include the BMPs listed in Table 9 below. The project proponents are responsible to implement the BMPs below unless shown unnecessary. The Permittee shall require that the project proponent retain records of the inspection and a determination and rationale of the BMPs selected to control runoff.

Table 9 - Enhanced Construction BMP Implementation.

CONSTRUCTION SITE BMPs	CASQA Handbook	Caltrans Handbook
Erosion Controls		
Scheduling	EC-1	SS-1
Preservation of Existing Vegetation	EC-2	SS-2
Hydraulic Mulch	EC-3	SS-3
Hydroseeding	EC-4	SS-4
Soil Binders	EC-5	SS-5
Straw Mulch	EC-6	SS-6
Geotextiles and Mats	EC-7	SS-7
Wood Mulching	EC-8	SS-8
Slope Drains	EC-11	SS-11
Sediment Controls		

Received
August 26, 2011
Commission on
State Mandates

CONSTRUCTION SITE BMPs	CASQA Handbook	Caltrans Handbook
Silt Fence	SE-1	SC-1
Fiber Rolls	SE-5	SC-5
Sediment Basin	SE-2	SC-2
Check Dam	SE-4	SC-4
Gravel Bag Berm	SE-6	SC-6
Street Sweeping and/or Vacuum	SE-7	SC-7
Sand Bag Barrier	SE-8	SC-8
Storm Drain Inlet Protection	SE-10	SC-10
Additional Controls		
Wind Erosion Controls	WE-1	WE-1
Stabilized Construction Entrance/Exit	TC-1	TC-1
Stabilized Construction Roadway	TC-2	TC-2
Entrance/Exit Tire Wash	TC-3	TC-3
Advanced Treatment Systems[1]		
Non-Storm Water Management		
Water Conservation Practices	NS-1	NS-1
Dewatering Operations (Groundwater dewatering only under NPDES Permit No. CAG994004).19	NS-2	NS-2
Vehicle and Equipment Washing	NS-8	NS-8
Vehicle and Equipment Fueling	NS-9	NS-9
Vehicle and Equipment Maintenance	NS-10	NS-10
Waste Management		
Material Delivery and Storage	WM-1	WM-1
Stockpile Management	WM-3	WM-2
Spill Prevention and Control	WM-4	WM-4
Solid Waste Management	WM-5	WM-5
Concrete Waste Management	WM-8	WM-8
Sanitary/Septic Waste Management	WM-9	WM-9

5. Local Agency Requirements
   (a) Each Permittee shall require for all construction sites 1 acre or greater, compliance with all conditions identified in the preceding subparts F.1 - F.4, and the following requirements:
      (1) Local Storm Water Pollution Prevention Plan (Local SWPPP),
         (A) Each Permittee shall require the preparation and submittal of a Local SWPPP, for the Permittee's review and written approval prior to issuance of a grading or construction permit for construction or demolition projects. The Permittees' approval signature shall be contained within the first pages of the Local SWPPP

[1] If appropriate given natural background stormwater runoff and receiving water quality conditions.

Received
August 26, 2011
Commission on
State Mandates

(i) The Permittee shall not approve any Local SWPPP unless it contains appropriate site-specific construction site BMPs, specific locations, and maintenance schedules.

(ii) The Local SWPPP must include the rationale used for selecting or rejecting BMPs for various construction phases and weather conditions. The project architect, or engineer of record, or authorized qualified designee, must sign a statement on the Local SWPPP to the effect:

(I) *"As the architect/ engineer of record, I have selected appropriate BMPs to effectively minimize the negative impacts of this project's construction activities on storm water quality. The project owner and contractor are aware that the selected BMPs must be installed, monitored, and maintained to ensure their effectiveness. The BMPs not selected for implementation are redundant or deemed not applicable to the proposed construction activity."*

(2) Certification Statement

(A) Each Permittee shall require that each landowner or the landowner's agent sign a statement on the Local SWPPP to the effect:

(i) *"I certify that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to ensure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, to the best of my knowledge and belief, the information submitted is true, accurate, and complete. I am aware that submitting false and/ or inaccurate information, failing to update the Local SWPPP to reflect current conditions, or failing to properly and/ or adequately implement the Local SWPPP may result in revocation of grading and/ or other permits or other sanctions provided by law."*

(ii) The Local SWPPP certification shall be signed by the property owner or owner's representative/designee. If the Local SWPPP or SWPPP is being prepared by the local agency then the appropriate authority of the local agency shall sign the document.

6. Roadway Paving or Repaving Operations (For Private or Public Projects)

(a) Each Permittee shall require that for any project that includes roadbed or street paving, repaving, patching, digouts, or resurfacing roadbed surfaces, that the following BMPs be implemented for each project:

(1) Restrict paving and repaving activity to exclude periods of rainfall or predicted rainfall unless required by emergency conditions

(2) Install sand bags or gravel bags and filter fabric at all susceptible storm drain inlets and at manholes to prevent spills of paving products and tack coat

Received
August 26, 2011
Commission on
State Mandates

(3) Prevent the discharge of release agents including soybean oil, other oils, or diesel to the storm water drainage system or receiving waters.
(4) Minimize non storm water runoff from water use for the roller and for evaporative cooling of the asphalt
(5) Clean equipment over absorbent pads, drip pans, plastic sheeting or other material to capture all spillage and dispose of properly
(6) Collect liquid waste in a container, with a secure lid, for transport to a maintenance facility to be reused, recycled or disposed of properly
(7) Collect solid waste by vacuuming or sweeping and securing in an appropriate container for transport to a maintenance facility to be reused, recycled or disposed of properly
(8) Cover the "cold-mix" asphalt (i.e., pre-mixed aggregate and asphalt binder) with protective sheeting during a rainstorm
(9) Cover loads with tarp before haul-off to a storage site, and do not overload trucks
(10) Minimize airborne dust by using water spray during grinding
(11) Avoid stockpiling soil, sand, sediment, asphalt material and asphalt grindings materials or rubble in or near storm water drainage system or receiving waters
(12) Protect stockpiles with a cover or sediment barriers during a rain

7. Electronic Site Tracking System
(a) Each Permittee shall use an electronic system to track grading permits, encroachment permits, demolition permits, building permits, or construction permits (and any other municipal authorization to move soil and/ or construct or destruct that involves land disturbance) issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

8. Inspections
(a) Each Permittee shall inspect all construction sites for the implementation of storm water quality controls a minimum of once during the wet season. Concurrently, each Permittee shall ensure that:
(1) The Local SWPPP is reviewed for compliance with local codes, ordinances, and permits.
(2) A follow-up inspection takes place within two weeks for inspected sites that have not adequately implemented their Local SWPPP.
(b) Each Permittee shall take additional enforcement actions to achieve compliance as specified in municipal codes, if compliance with municipal codes, ordinances, or permits has not been attained.
(c) Each Permittee can refer sites to the Regional Water Board for joint enforcement actions for violation of municipal storm water ordinances and the Construction Activities Storm Water General Permit (CASGP), or Small Linear Underground/ Overhead Construction Projects General Permit (small LUPs), after conducting a minimum of 2 site inspections and issuing a minimum of 2 written notices to the operator regarding the violation (copied to the Regional Water Board). In making

Received
August 26, 2011
Commission on
State Mandates

such referrals, Permittees shall include, at a minimum, the following documentation:
(1) Name of the site
(2) WDID number
(3) Site developer
(4) Site owner
(5) Records of communication with the site operator regarding the violation(s), which shall include at least an inspection report
(6) Written notice of the violation copied to the Regional Water

(d) Prior to approving and/ or signing off for occupancy and issuing the Certificate of Occupancy for all construction projects subject to post-construction controls, each Permittee shall inspect the constructed site design, source control and treatment control BMPs to verify that they have been constructed in compliance with all specifications, plans, permits, ordinances, and this Order. The initial/ acceptance BMP verification inspection does not constitute a maintenance and operation inspection, as required in the preceding subpart E.IV.2(c).

9. State Conformity Requirements

(a) Each Permittee shall ensure that no grading permit, encroachment permit, demolition permit, building permit, electrical permit, or construction permit (or any other municipal authorization to move soil and/ or construct or destruct that involves land disturbance) is issued for any project requiring coverage under the CASGP or Small LUP General Permit[1] unless:
(1) Proof of filing a Notice of Intent for coverage under a State NPDES permit is demonstrated).
(2) Demonstration or Certification that a SWPPP has been prepared by the project developer.
(3) Proof of Change of Information form (COI) and a copy of the modified SWPPP(s) at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.

10. Interagency Coordination

(a) **Referral of Violations:**
A Permittee may refer a violator of the municipal storm water ordinance and CWC § 13260 to the Regional Water Board provided that the Permittee has made a good faith effort at progressive enforcement consistent with the preceding subpart F.8(c). At a minimum, the Permittee's good faith effort shall be documented with:

[1] NPDES Permit No. CAS000005, Waste Discharge Requirements For Discharges of Storm Water Runoff Associated with Small Linear Underground/ Overhead Construction Projects (Small LUP General Permit) for any linear land disturbing activity or activities (cumulatively) that will cause one acre or more of land disturbance but not more than 5 acres.

Received
August 26, 2011
Commission on
State Mandates

(1) A minimum of 2 follow-up inspection reports (inspections completed within 3 months).
(2) A minimum of two warning letters or NOVs.

(b) **Referral of Non-filers under the CASGP or the Small LUP General Permit:** Each Permittee shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) under the CASGP or Small LUP General Permit, to the Regional Water Board, no later than 15 days after making a determination of failure to file. In making such referrals, Permittees shall include, at a minimum, the following documentation:
(1) Project location address
(2) Project description
(3) Developer or owners name with complete mailing address
(4) Project size
(5) Records of communication with the developer or owner regarding filing requirements

(c) **Investigation of Complaints Regarding Facilities – Transmitted by the Regional Water Board Staff:**
(1) Each Permittee shall initiate, within one business day,[1] an initial investigation of complaint(s) (other than non-storm water discharges) on the construction site(s) within its jurisdiction.
(A) The initial investigation shall include, at a minimum, an inspection on the facility and its perimeter to confirm the complaint and to determine if the site operator is effectively complying with the municipal storm water/ urban runoff ordinances, and to oversee corrective action.

(d) **Support of Regional Water Board Enforcement Actions – As directed by the Regional Water Board Executive Officer:**
(1) Each Permittee shall support Regional Water Board enforcement actions by:
(A) Assisting in identification of current owners, operators, and lessees of properties and sites.
(B) Providing staff, when available, for joint inspections with Regional Water Board inspectors.
(C) Appearing to testify as witnesses in Regional Water Board enforcement hearings.
(D) Providing copies of inspection reports and other progressive enforcement documentation.

---

[1] Permittees may comply with the Permit by taking initial steps (such as logging, prioritizing, and tasking) to "initiate" the investigation within that one business day. However, the Regional Water Board would expect that the initial investigation, including a site visit, to occur within four business days.

Received
August 26, 2011
Commission on
State Mandates

G. Public Agency Activities Program

I. Each Permittee shall implement a Public Agency Activities Program to minimize storm water pollution impacts from public agency activities. Public Agency requirements consist of:

   i. Public Construction Activities Management.
   ii. Vehicle Maintenance/ Material Storage Facilities/ Corporation Yards Management/ Municipal Operations.
   iii. Vehicle and Equipment Wash Areas
   iv. Landscape and Recreational Facilities Management
   v. Storm Drain Operation and Management
   vi. Streets and Roads Maintenance
   vii. Public Industrial Activities Management
   viii. Emergency Procedures
   ix. Employee Training
   x. Infrastructure Maintenance

1. Public Construction Activities Management
   (a) Each Permittee shall implement and comply with the Planning and Land Development Program requirements in part 4.E. of this Order at Permittee owned or operated public construction projects for project types identified in part 4.E of this Order.
   (b) Each Permittee shall implement and comply with the appropriate Development Construction Program requirements in part 4.F. of this Order at Permittee owned or operated construction projects as applicable.
   (c) For public projects including those under a Capital Improvement Project Plan that disturb less than one acre of soil the Permittees shall require the development and implementation of a Storm Water Pollution Control Plan. The SWPCP shall include BMPs as identified in Table 6.
2. Vehicle Maintenance/ Material Storage Facilities/ Corporation Yards Management/ Long Term Maintenance Programs
   (a) Each Permittee shall implement the activity specific BMPs[1] listed in Table 10 when such activities occur at Permittee owned/leased facilities and job sites including but not limited to vehicle/ equipment maintenance facilities, material storage facilities, and corporation yards, and at any area that includes the activities as described in the following Tables. Additionally, for any activity or area described in the footnote below,[2] each Permittee shall also implement the BMPs in the Caltrans Storm Water Quality Handbook Maintenance Staff Guide

[1] These BMPs are identified in Appendix B of the *Caltrans Storm Water Quality Handbook Maintenance Staff Guide, May 2003*, and its addenda. Other BMPs may be substituted upon approval by the Executive Officer.
[2] Scheduling and Planning; Spill Prevention and Control; Sanitary/ Septic Waste Management; Material Use; Safer Alternative Products; Vehicle/ Equipment Cleaning, Fueling, and Maintenance; Illicit Connections Detection, Reporting and Removal; Illegal Spill / Discharge Control and Maintenance Facility Housekeeping Practices.

Received
August 26, 2011
Commission on
State Mandates

described as B-4 in Table 10 (BMPs at Vehicle Maintenance/ Material Storage Facilities/ Corporation Yards).

Table 10 - BMPs at Vehicle Maintenance/ Material Storage Facilities/ Corporation Yards

From the Caltrans Storm Water Quality Handbook Maintenance Staff Guide **Appendix B**

Activity Specific BMPs	**Page**
General BMPs	B-4
Flexible Pavement	B-9
Asphalt Cement Crack and Joint Grinding/ Sealing	B-9
Asphalt Paving	B-10
Structural Pavement Failure (Digouts) Pavement Grinding and Paving	B-11
Emergency Pothole Repairs	B-13
Sealing Operations	B-14
Rigid Pavement	B-15
Portland Cement Crack and Joint Sealing	B-15
Mudjacking and Drilling	B-16
Concrete Slab and Spall Repair	B-17
Slope/ Drains/ Vegetation	B-19
Shoulder Grading	B-19
Nonlandscaped Chemical Vegetation Control	B-21
Nonlandscaped Mechanical Vegetation Control/ Mowing	B-23
Nonlandscaped Tree and Shrub Pruning, Brush Chipping, Tree and Shrub Removal	B-24
Fence Repair	B-25
Drainage Ditch and Channel Maintenance	B-26
Drain and Culvert Maintenance	B-28
Curb and Sidewalk Repair	B-30
Litter/ Debris/ Graffiti	B-32
Sweeping Operations	B-32
Litter and Debris Removal	B-33
Emergency Response and Cleanup Practices	B-34
Graffiti Removal	B-36
Landscaping	B-37
Chemical Vegetation Control	B-37
Manual Vegetation Control	B-39
Landscaped Mechanical Vegetation Control/ Mowing	B-40
Landscaped Tree and Shrub Pruning, Brush Chipping, Tree and Shrub Removal	B-41
Irrigation Line Repairs	B-42
Irrigation (Watering), Potable and Nonpotable	B-43
Environmental	B-44
Storm Drain Stenciling	B-44
Roadside Slope Inspection	B-45
Roadside Stabilization	B-46
Storm Water Treatment Devices	B-48
Traction Sand Trap Devices	B-49
Public Facilities	B-50
Public Facilities	B-50
Bridges	B-52
Welding and Grinding	B-52
Sandblasting, Wet Blast with Sand Injection and Hydroblasting	B-54
Painting	B-56
Bridge Repairs	B-57

Received
August 26, 2011
Commission on
State Mandates

Activity Specific BMPs	Page
Other Structures	B-59
Pump Station Cleaning	B-59
Tube and Tunnel Maintenance and Repair	B-61
Tow Truck Operations	B-63
Toll Booth Lane Scrubbing Operations	B-64
Electrical	B-65
Sawcutting for Loop Installation	B-65
Traffic Guidance	B-67
Thermoplastic Striping and Marking	B-67
Paint Striping and Marking	B-68
Raised/ Recessed Pavement Marker Application and Removal	B-70
Sign Repair and Maintenance	B-71
Median Barrier and Guard Rail Repair	B-73
Emergency Vehicle Energy Attenuation Repair	B-75
Snow and Ice Control	B-76
Snow Removal	B-76
Ice Control	B-77
Storm Maintenance	B-78
Minor Slides and Slipouts Cleanup/ Repair	B-78
Management and Support	B-80
Building and Grounds Maintenance	B-80
Storage of Hazardous Materials (Working Stock)	B-82
Material Storage Control (Hazardous Waste)	B-84
Outdoor Storage of Raw Materials	B-85
Vehicle and Equipment Fueling	B-86
Vehicle and Equipment Cleaning	B-87
Vehicle and Equipment Maintenance and Repair	B-88
Aboveground and Underground Tank Leak and Spill Control	B-90

3. Vehicle and Equipment Wash Areas
   (a) Each Permittee shall eliminate discharges of wash waters from vehicle and equipment washing no later than (365 days after Order adoption date) by implementing any of the following measures at existing facilities with vehicle or equipment wash areas:
      (1) Self-contain, and haul off for disposal
      (2) Equip with a clarifier
      (3) Equip with an alternative pre-treatment device; or
      (4) Plumb to the sanitary sewer
   (b) Each Permittee shall ensure that any municipal facilities constructed, redeveloped, or replaced has all vehicle and equipment wash areas plumbed to the sanitary sewer or be self contained and all wastewater/ washwater hauled for legal disposal.

4. Landscape, Park, and Recreational Facilities Management
   (a) Integrated Pest Management (IPM)
   IPM is an ecosystem-based strategy that focuses on long-term prevention of pests or their damage through a combination of techniques such as biological control,

Received
August 26, 2011
Commission on
State Mandates

habitat manipulation, modification of cultural practices, and use of resistant varieties. Each Permittee shall implement an IPM program within (365 days after Order adoption date) that includes the following:

(1) Pesticides are used only if monitoring indicates they are needed according to established guidelines.
(2) Treatments are made with the goal of removing only the target organism.
(3) Pest controls are selected and applied in a manner that minimizes risks to human health, beneficial, non-target organisms, and the environment.
(4) Its use of pesticides, including Organophosphates and Pyrethroids do not threaten water quality.
(5) Partner with other agencies and organizations to encourage the use of IPM.
(6) Adopt and verifiably implement policies, procedures, and/ or ordinances requiring the minimization of pesticide use and encouraging the use of IPM techniques (including beneficial insects) in the Permittees' overall operations and on municipal property.
(7) Policies, procedures, and ordinances shall include commitments and timelines to reduce the use of pesticides that cause impairment of surface waters by implementing the following procedures:
    (A) Quantify pesticide use by its staff and hired contractors.
    (B) Prepare and annually update an inventory of pesticides used by all internal departments, divisions, and other operational units.
    (C) Demonstrate reductions in pesticide use.

(b) Each Permittee shall implement the following requirements no later than (180 days after Order adoption date):

(1) Use a standardized protocol for the routine and non-routine application of pesticides (including pre-emergents), and fertilizers.
(2) Ensure no application of pesticides or fertilizers are applied to an area immediately prior to, during, or immediately after a rain event, or when water is flowing off the area.
(3) Ensure that no banned or unregistered pesticides are stored or applied.
(4) Ensure that all staff applying pesticides are certified in the appropriate category by the California Department of Pesticide Regulation, or are under the direct supervision of a pesticide applicator certified in the appropriate category.
(5) Implement procedures to encourage the retention and planting of native vegetation to reduce water, pesticide and fertilizer needs; and
(6) Store pesticides and fertilizers indoors or under cover on paved surfaces or use secondary containment.
    (A) Reduce the use, storage, and handling of hazardous materials to reduce the potential for spills.
    (B) Regularly inspect storage areas.
(7) Comply with the provisions and the monitoring requirements for application of aquatic pesticides to surface waters (WQ Order No. 2004-0008-DWQ) (Vector Control) and Order No. 2004-0009-DWQ (Weed Control).

Received
August 26, 2011
Commission on
State Mandates

5. Storm Drain Operation and Management
   (a) Catch Basin Cleaning
      (1) Each Permittee shall designate catch basin inlets within its jurisdiction as one of the following:
         Priority A: Catch basins that are designated as consistently generating the highest volumes of trash.
         Priority B: Catch basins that are designated as consistently generating moderate volumes of trash.
         Priority C: Catch basins that are designated as generating low volumes of trash.
         Within one year of Order adoption (July 8, 2011), Permittees shall submit a map or list of Catch Basins with their GPS coordinates and their designations. The map or list shall contain the rationale or data to support designations.
      (2) Each Permittee shall inspect catch basins according to the following schedule:
         Priority A: A minimum of 3 times during the wet season and once during the dry season every year.
         Priority B: A minimum of once during the wet season and once during the dry season every year.
         Priority C: A minimum of once per year.
         Catch basins shall be cleaned as necessary on the basis of inspections. Permittees shall maintain inspection records for Regional Water Board review.
      (3) In addition to the preceding schedule, Permittees shall ensure that any catch basin that is determined to be at least 25% full of trash shall be cleaned out.

   (b) Trash Management at Public Events
      (1) Each Permittee shall require for any event in the public right of way or wherever it is foreseeable that substantial quantities of trash and litter may be generated, the following measures:
         (A) Proper management of trash and litter generated; and
         (B) Arrangement for temporary screens to be placed on catch basins; or
         (C) Provide clean out of catch basins, trash receptacles, and grounds in the event area within 24 hours subsequent to the event.
   (c) Trash Receptacles
      (1) Each Permittee shall install trash receptacles, or equivalent trash capturing devices in areas subject to high trash generation within its jurisdiction no later than one year after Order adoption date (July 8, 2011).
      (2) Each Permittee shall ensure that all trash receptacles are cleaned out and maintained as necessary to prevent trash overflow.
   (d) Catch Basin Labels
      (1) Each Permittee shall inspect the legibility of the catch basin stencil or label nearest each catch basin and inlet before the wet season begins.

Received
August 26, 2011
Commission on
State Mandates

(2) Each Permittee shall record and re-stencil or re-label within 15 days of inspection, catch basins with illegible stencils.

(e) Additional Trash Management Practices

(1) Each Permittee shall install trash excluders, or equivalent devices on or in catch basins or outfalls to prevent the discharge of trash to the storm drain system or receiving water no later than two years after Order adoption date in areas defined as Priority A (subpart 5.(a)(1)) except in sites where the application of such BMP(s) alone will cause flooding. Lack of maintenance that causes flooding is not an acceptable exception to the requirement to install BMPs. Alternatively the Permittee may implement alternative or enhanced BMPs beyond the provisions of this permit (such as but not limited to increased street sweeping, adding trash cans near trash generation sites, prompt enforcement of trash accumulation, increased trash collection on public property, increased litter prevention messages or trash nets within the MS4) that provide substantially equivalent removal of trash. Permittees shall demonstrate that BMPs, which substituted for trash excluders provide equivalent trash removal performance as excluders. When outfall trash capture is provided, revision of the schedule for inspection and cleanout of catch basins in task 5.(a)(2) may be proposed by the Permittee for approval by the Executive Officer.

(f) Storm Drain Maintenance

(1) Each Permittee shall implement a program for Storm Drain Maintenance no later than 90 days after Order adoption (October 6, 2010) that includes the following:

(A) Visual monitoring of Permittee-owned open channels and other drainage structures for debris at least annually.

(B) Remove trash and debris from open channel storm drains a minimum of once per year before the wet season.

(C) Eliminate the discharge of contaminants during MS4 maintenance and clean outs.

(D) Quantify the amount of materials removed using techniques appropriate for quantifying solid waste and ensure the materials are properly disposed of.

(g) Spill Response Plan

(1) Each Permittee shall implement a response plan for spills to the MS4 within their respective jurisdiction. The response Plan shall clearly identify agencies responsible and telephone numbers and e-mail address for contact and shall contain at a minimum the following:

(A) Investigation of all complaints received within 24 hours of the incident report.

(B) Response within 2 hours to spills for containment upon notification, except where such overflows occur on private property, in which case the response should be within 2 hours of gaining legal access to the property.

Received
August 26, 2011
Commission on
State Mandates

(C) Notification to appropriate public health agencies and the Office of Emergency Services (OES).

(h) Permittee Owned Treatment Control BMPs

(1) Each Permittee shall implement an inspection and maintenance program for all Permittee owned treatment control BMPs, including post-construction treatment control BMPs.

(2) Each Permittee shall ensure proper operation of all treatment control BMPs and maintain them as necessary for proper operation, including all post-construction treatment control BMPs.

(3) Any residual water produced by a treatment control BMP and not being internal to the BMP performance when being maintained shall be:

(A) Hauled away and legally disposed of; or

(B) Applied to the land without runoff; or

(C) Discharged to the sanitary sewer system (with permits or authorization); or

(D) Treated or filtered to remove bacteria, sediments, nutrients, and meet the limitations set in Table 11 (Discharge Limitations for Dewatering Treatment BMPs) prior to discharge to the MS4.

Table 11 - Discharge Limitations for Dewatering Treatment BMPs[1]

Parameter	Units	Limitation
Total Suspended Solids	mg/L	100
Turbidity	NTU	50
Oil and Grease	mg/L	10

6. Streets and Roads Maintenance

(a) Maintenance

(1) Each Permittee shall perform street sweeping of curbed streets in commercial areas and areas subject to high trash generation to control trash and debris at least two times per month.

(b) Road Reconstruction

(1) Each Permittee shall require that for any project that includes roadbed or street paving, repaving, patching, digouts, or resurfacing roadbed surfaces, that the following BMPs be implemented for each project.

(A) Restrict paving and repaving activity to exclude periods of rainfall or predicted rainfall[2] unless required by emergency conditions.

(B) Install sand bags or gravel bags and filter fabric at all susceptible storm drain inlets and at manholes to prevent spills of paving products and tack coat;

(C) Prevent the discharge of release agents including soybean oil, other oils, or diesel to the storm water drainage system or receiving waters.

[1] Technology based effluent limits.
[2] A probability of precipitation (POP) of 50% is required.

Received
August 26, 2011
Commission on
State Mandates

(D) Minimize non storm water runoff from water use for the roller and for evaporative cooling of the asphalt.
(E) Clean equipment over absorbent pads, drip pans, plastic sheeting or other material to capture all spillage and dispose of properly.
(F) Collect liquid waste in a container, with a secure lid, for transport to a maintenance facility to be reused, recycled or disposed of properly.
(G) Collect solid waste by vacuuming or sweeping and securing in an appropriate container for transport to a maintenance facility to be reused, recycled or disposed of properly.
(H) Cover the "cold-mix" asphalt (i.e., pre-mixed aggregate and asphalt binder) with protective sheeting during a rainstorm.
(I) Cover loads with tarp before haul-off to a storage site, and do not overload trucks.
(J) Minimize airborne dust by using water spray during grinding.
(K) Avoid stockpiling soil, sand, sediment, asphalt material and asphalt grindings materials or rubble in or near storm water drainage system or receiving waters.
(L) Protect stockpiles with a cover or sediment barriers during a rain.

7. Emergency Procedures
(a) Each Permittee may conduct repairs of essential public service systems and infrastructure in emergency situations with a self-waiver of the provisions of this Order.
(1) Where the self-waiver has been invoked, the Permittee shall submit to the Regional Water Board Executive Officer a statement of the occurrence of the emergency, an explanation of the circumstances, and the measures that were implemented to reduce the threat to water quality, no later than 30 business days after the situation of emergency has passed.
(2) Minor repairs of essential public service systems and infrastructure in emergency situations (can be completed in less than one day) are not subject to the notification provisions. Appropriate BMPs to reduce the threat to water quality shall be implemented.

8. Municipal Employee and Municipal Contractor Training
(a) Each Permittee shall, no later than one year after Order adoption (July 8, 2011) and annually thereafter before June 30, train all of their employees and contractors in targeted positions (whose interactions, jobs, and activities affect storm water quality) on the requirements of the overall storm water management program to:
(1) Promote a clear understanding of the potential for activities to pollute storm water.
(2) Identify opportunities to require, implement, and maintain appropriate BMPs in their line of work.
(b) Each Permittee shall, no later than one year after Order adoption (July 8, 2011) and annually thereafter before June 30, train all of their employees and

Received
August 26, 2011
Commission on
State Mandates

contractors who use or have the potential to use pesticides or fertilizers (whether or not they normally apply these as part of their work). Training programs shall address:

(1) The potential for pesticide-related surface water toxicity.
(2) Proper use, handling, and disposal of pesticides.
(3) Least toxic methods of pest prevention and control, including IPM.
(4) Reduction of pesticide use.

(c) Each Permittee shall, no later than one year after Order adoption (July 8, 2011) and annually thereafter before June 30, train all of their employees and contractors who are responsible for illicit connections and illicit/ illegal discharges. Training programs shall address:

(1) Identification
(2) Investigation
(3) Termination
(4) Cleanup
(5) Reporting of Incidents
(6) Documentation of Incidents

H. Illicit Connections and Illicit Discharges Elimination Program

I. Each Permittee shall implement an Illicit Connections and Illicit Discharges (IC/ IDs) program to eliminate IC/IDs to the storm drain system, and shall document, track, and report all such cases in accordance with the elements and performance measures specified in the following subsections.

1. General

(a) Implementation - Each Permittee shall implement an IC/ ID Program. The IC/ ID procedures shall be documented and made available for public review.

(b) Tracking - All Permittees shall, no later than May 7, 2012, map at a scale and in a format specified by the Principal Permittee all known connections to their storm drain system. All Permittees shall map at a scale and in a format specified by the Principal Permittee incidents of illicit connections and discharges since January 2009 on their baseline maps, and shall transmit this information to the Principal Permittee no later than May 7, 2012. Permittees shall use this information to identify priority areas for further investigation and elimination of IC/ ID.

2. Public Reporting

(a) Permittees shall establish and maintain a phone hotline and internet site to receive all reports of IC/ ID complaints.

(b) Permittees shall document the location of the reported IC/ ID and the actions undertaken in response to all IC/ ID complaints.

3. Illicit Connections

(a) Screening for Illicit Connections

(1) Each Permittee shall submit to the Principal Permittee:

Received
August 26, 2011
Commission on
State Mandates

(A) A map at a scale and in a format specified by the Principal Permittee showing the location and length of underground pipes 18 inches and greater in diameter, and channels within their permitted area and operated by the Permittee in accordance with the following schedule:
(i) All channeled portions of the storm drain system no later than 90 days after Order adoption date (October 6, 2010).
(ii) All portions of the storm drain system consisting of storm drain pipes 36 inches in diameter or greater, no later than May 7, 2012.
(iii) All portions of the storm drain system consisting of storm drain pipes 18 inches in diameter or greater, no later than May 7, 2014.
(B) The status of suspected, confirmed, and terminated illicit connections.

(2) Permittees shall conduct field screening of their storm drain systems in accordance with screening procedures described in the Illicit Discharge Detection and Elimination, A Guidance Manual for Program Development and Technical Assessments (2004)[1] or other equally effective alternative methods not listed in the manual. Permittees shall conduct field screening of their storm drain system that has not been previously screened and reported to the Regional Water Board, for illicit connections in accordance with the following schedule:
(A) All portions of the storm drain system consisting of storm drain pipes 36 inches in diameter or greater, no later than May 7, 2012.
(B) High priority areas identified during the mapping of illicit connections and discharges, no later than May 7, 2012.
(C) All portions of storm drain systems 50 years or older in age, no later than May 7, 2012.

(3) Each Permittee shall maintain a list containing all connections under investigation for possible illicit connection and their status.

(b) Response to Illicit Connections
(1) Investigation -
Each Permittee, upon discovery or upon receiving a report of a suspected illicit connection, shall complete an investigation within 21 days, to determine the following:
(A) Source of the connection.
(B) Nature and volume of discharge through the connection.
(C) Responsible party for the connection.
(2) Termination -
Each Permittee, upon confirmation of an illicit storm drain connection, shall ensure the following:
(A) Termination of the connection within 180 days of completion of the investigation, using formal enforcement authority to eliminate the illicit connection.
(3) Documentation -

[1] *Illicit Discharge Detection and Elimination, A Guidance Manual for Program Development and Technical Assessments*. The Center for Watershed Protection, Pitt R., October 2004. Chapter 13, 13.1,13.2, 13.3, 13.4

Received
August 26, 2011
Commission on
State Mandates

Each Permittee shall keep records of all illicit connection investigations and the formal enforcement taken to eliminate all illicit connections.

4. Illicit Discharges
   (a) Investigation -
   Each Permittee shall investigate an illicit/ illegal discharge during or immediately following containment and cleanup activities, and shall take appropriate enforcement action to eliminate the illegal discharge.
   (b) Abatement and Cleanup -
   Each Permittee shall respond, within 1 business day of discovery or a report of a suspected illicit/ illegal discharge, with actions to abate, contain, and/or clean up all illegal discharges, including hazardous waste.
   (c) Documentation -
   Each Permittee shall maintain records of all illicit/ illegal discharge discoveries, reports of suspected illicit/ illegal discharges, their response to the illicit/ illegal discharges and suspected illicit/ illegal discharges, and the formal enforcement taken to eliminate all illicit/ illegal discharges.

I. REPORTING PROGRAM

1. The Principal Permittee in consultation with the Permittees and Regional Water Board staff shall convene an adhoc working group to develop an Electronic Reporting Program, the basis of which shall be the requirements in this Order. The Committee shall no later than one year after Order adoption date (July 8, 2011) submit the electronic reporting form in each subsequent year.

2. Each Permittee shall submit information required in the Reporting Program in a method as appropriate to the format approved by the Regional Water Board Executive Officer.

3. The Principal Permittee shall submit by December 15th of each year, an Annual Report to the Regional Water Board Executive Officer in the form one hard copy and three compact disk (CD) copies (or an electronic equivalent).

4. The Annual Report shall document the status of the Municipal Storm Water Program, an integrated summary of the results of analyses from:
   (a) The monitoring program described under Part 1- Monitoring Report.
   (b) The requirements described under Part 2- Program Report.

5. Plans shall be submitted to the Regional Water Board Executive Officer in the form of one hard copy and three compact disk (CD) copies (or an electronic equivalent).

Received
August 26, 2011
Commission on
State Mandates

6. Study Reports shall be submitted to the Regional Water Board Executive Officer in the form of one hard copy and three compact disk (CD) copies (or an electronic equivalent).

7. Progress Reports shall be submitted to the Regional Water Board Executive Officer in the form of one hard copy and three compact disk (CD) copies (or an electronic equivalent).

PART 5 - TOTAL MAXIMUM DAILY LOAD PROVISIONS

I. Part 5 of this Order incorporates provisions to assure that Ventura County MS4 Permittees comply with WLAs and other requirements of TMDLs covering impaired waters impacted by the Permittees' discharges.

II. Each Permittee shall attain the storm water WLAs incorporated into this Order by implementing BMPs in accordance with the TMDL Technical Reports, Implementation Plans, or as identified as a result of TMDL special studies specified in the Basin Plan Amendment.

III. The Permittees shall comply with the following Wasteload Allocations, consistent with the assumptions and requirements of the Wasteload Allocations documented in the Implementation Plans, including compliance schedules, associated with the State adoption and approval of the TMDL at compliance monitoring points established in each TMDL (40 CFR 122.44(d)(1)(vii)(B).

IV. TMDLs in effect and covered in this Order are the following:
1. TMDL for Nutrients for Malibu Creek Watershed (Effective date: March 21, 2003)
2. TMDL for Nitrogen Compounds and Related Effects in Calleguas Creek (Effective date: July 16, 2003)
3. TMDL for Nitrogen Compounds for the Santa Clara River (Effective date: March 23, 2004).
4. TMDL for Chloride in Santa Clara River, Reach 3 (Effective date: June 18, 2003)
5. TMDL for Chloride in Upper Santa Clara River (Effective date: May 4, 2005)
6. TMDL for Toxicity, Chlorpyrifos and Diazinon in the Calleguas Creek, its Tributaries and Mugu Lagoon - (Effective date: March 24, 2006).
7. TMDL for Organochlorine Pesticides, Polychlorinated Biphenyls, and Siltation in Calleguas Creek, its Tributaries and Mugu Lagoon (Effective date: March 24, 2006).
8. TMDL for Bacteria in Malibu Creek and Lagoon (Effective date: January 24, 2006).
9. TMDL for Metals and Selenium in the Calleguas Creek, its Tributaries and Mugu Lagoon (Effective date: March 26, 2007)
10. TMDL for Trash in Revolon Slough and Beardsley Wash (Effective date: March 6, 2008).
11. TMDL for Boron, Chloride, Sulfate, and TDS in Calleguas Creek Watershed (Effective date: December 2, 2008)

Received
August 26, 2011
Commission on
State Mandates

12. TMDL for Trash in the Ventura River Estuary (Effective date: March 6, 2008).
13. TMDL for Bacteria in Harbor Beaches of Ventura County (Effective date: September 23, 2008).

V. TMDL Interim WLAs incorporated into this Order due to compliance dates which exceed the term of this Order are the following:

1. Final Wet Weather Bacteria WLAs for Malibu Creek and Lagoon – (Compliance date: January 24, 2016).
2. Final Chloride WLAs for Upper Santa Clara River – (Compliance date: May 4, 2016)
3. Final Organochlorine Pesticides, Polychlorinated Biphenyls, and Siltation WLAs for Calleguas Creek, its Tributaries and Mugu Lagoon – (Compliance date: March 24, 2026).
4. Final Metals and Selenium WLAs for Calleguas Creek, its Tributaries and Mugu Lagoon (Compliance date: March 26, 2022)
5. Final Boron, Chloride, Sulfate, and TDS WLAs for Calleguas Creek watershed (Compliance date: December 2, 2023)

VI. TMDL WLAs and Other TMDL Provisions Incorporated into this Order are as follows:

1. TMDL for Nutrients for Malibu Creek Watershed

(a) Summer Load Allocations

	Nitrogen (lbs/day)	Phosphorus (lbs/day)
- Runoff from developed areas	26	2.6
- Golf Course Fertilization	37	6.6
- Dry Weather Urban Runoff	52	4.6
- Other	56	4.1

(b) Winter concentration-based Load Allocations

	Nitrogen (Nitrate-N + Nitrite-N) (mg/L)
- Runoff from Developed Areas	8
- Golf Course Fertilization	8
- Dry Weather Urban Runoff	8
- Other	8

(c) Compliance Monitoring:
This TMDL was established and approved by U.S. EPA and did not include an implementation plan.

(d) Actions and Special Studies required for Malibu Creek MS4 permittees
(1) Extent of algal impairment. EPA recommends studies to investigate the current extent of impairment due to excessive algal growth in the creek by

Received
August 26, 2011
Commission on
State Mandates

surveying algal biomass and species composition at multiple sites within the creek.
(2) Limiting factor analysis. EPA recommends further study to assess whether total nitrogen or total phosphorus or other parameters such as flow and light limit algal growth in the Malibu Creek watershed.
(3) Fate of nutrients in Malibu Lagoon. EPA recommends this special study to determine if the expected upstream reductions in nutrient loadings would result in desired improvements in water quality in the lagoon.

2. TMDL for Nitrogen Compounds and Related Effects in Calleguas Creek Watershed

The stormwater permitted discharges were considered minor sources of nitrogen to the Calleguas Creek. Therefore, WLAs are not assigned to storm water permitted discharges. The monitoring program of this TMDL includes data collection to quantify loadings and associated WLAs from these sources.

3. TMDL for Nitrogen Compounds in the Santa Clara River

(a) Waste Load Allocations:
(1) The Ventura County MS4 permittees discharging to the Santa Clara River (the cities of Fillmore and Santa Paula) ("Santa Clara MS4 permittees") shall implement BMPs to achieve the following MS4 wasteload allocations applicable to River Reach 3:

Ammonia nitrogen 30-day average	2.0 mg/L
Ammonia nitrogen 1-hour average	4.2 mg/L
Nitrate + Nitrite nitrogen 30-day average	8.1 mg/L

(b) Compliance Monitoring:
(1) Compliance with the WLAs is to be determined through receiving water monitoring conducted in accordance with the Santa Clara River Nitrogen TMDL Monitoring Program approved by the Executive Officer.
(2) If any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports, Implementation Plans or as identified as a result of TMDL special studies identified in the Basin Plan Amendment. Following these actions, Regional Water Board staff will evaluate the need for enforcement action.
(c) Actions and Special Studies required of Santa Clara MS4 permittees:
(1) Annual Progress Reports. Santa Clara River MS4 permittees, either independently or in conjunction with other stakeholders, shall submit an annual progress report with respect to achievement of the WLAs.

4. TMDL for Chloride in Santa Clara River, Reach 3

(a) Waste Load Allocation:
MS4 permittees discharging to Santa Clara River, Reach 3 shall implement BMPs to achieve the following MS4 WLAs:

Received
August 26, 2011
Commission on
State Mandates

Chloride (mg/L) 80

(b) Compliance Monitoring: This TMDL was established and approved by U.S. EPA and did not include an implementation plan.

(c) Actions and Special Studies required of Santa Clara MS4 permittees:

(1) Annual Progress Reports. Santa Clara River MS4 permittees, either independently or in conjunction with other stakeholders, shall submit an annual progress report with respect to achievement of the WLAs.

5. TMDL for Chloride in Upper Santa Clara River

(a) Waste Load Allocation:
MS4 permittees discharging to Upper Santa Clara River shall implement BMPs to achieve the following WLAs
Chloride (mg/L) 100

(b) Compliance monitoring:

(1) Compliance with the WLAs is to be determined through receiving water monitoring conducted in accordance with the Santa Clara River Chloride TMDL Monitoring Program approved by the Executive Officer.

(2) If any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports and Implementation Plans. Following these actions, Regional Water Board staff will evaluate the need for enforcement action.

(c) Actions and Special Studies required of Santa Clara MS4 permittees:

(1) Annual Progress Reports. Santa Clara River MS4 permittees, either independently or in conjunction with other stakeholders, shall submit an annual progress report with respect to achievement of the WLAs.

6. TMDL for Toxicity, Chlorpyrifos, and Diazinon in the Calleguas Creek, its Tributaries and Mugu Lagoon.

(a) Waste Load Allocations:

(1) MS4 permittees discharging to Calleguas Creek, its tributaries and Mugu Lagoon (Ventura County Watershed Protection District, County of Ventura and the cities of Camarillo, Moorpark, Oxnard, Simi Valley and Thousand Oaks) ("Calleguas MS4 permittees") shall implement BMPs to achieve the following MS4 WLAs:

Toxicity WLA	1.0 TUc
Chlorpyrifos WLA	0.014 ug/L
Diazinon WLA	0.10 ug/L

(2) Pursuant to the TMDL, the final storm water WLAs for Toxicity, Chlorpyrifos and Diazinon, listed above, are receiving water concentrations measured in-stream at the base of each subwatershed within the Calleguas Creek watershed.

(b) Compliance Monitoring:

Received
August 26, 2011
Commission on
State Mandates

(1) Compliance with the WLAs is to be determined through the measurement of in-stream water quality at the base of each of the Calleguas Creek subwatersheds, in accordance with the Calleguas Creek Watershed TMDL Monitoring Program approved by the Executive Officer.

(2) If any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports, Implementation Plans or as identified as a result of TMDL special studies identified in the Basin Plan Amendment. Following these actions, Regional Water Board staff will evaluate the need for enforcement action.

(3) If as a result of compliance monitoring and subsequent investigations it is determined that a Calleguas MS4 permittee is responsible for exceedance of the in-stream Toxicity WLA, that permittee shall initiate the TRE/TIE process as outlined in U.S. EPA's "Understanding and Accounting for Method Variability in Whole Effluent Toxicity Applications Under the National Pollutant Discharge Elimination System Program" (2000) or the approved Toxicity TMDL monitoring plan, and take appropriate action to eliminate the identified source of the toxicity.

(c) Actions and Special Studies required of Calleguas MS4 permittees:

(1) Special Study #1. Together with Calleguas POTW permittees, investigate the pesticides that will replace diazinon and chlorpyrifos in the urban environment, their potential impact on receiving waters and potential control measures. Special Study #1 was completed by March 24, 2008.

(2) Special Study #2. Together with Calleguas Agricultural Dischargers, consider results of monitoring of sediment concentrations by source/land use type through the special study required in the Calleguas OC Pesticide, PCB and Siltation TMDL Implementation Plan. Complete within 6 months of completion of the OCs TMDL special study #1.

(3) Pesticide Collection Program. Together with Calleguas POTW permittees, develop and implement a collection program for diazinon and chlorpyrifos and an educational program. Collection and education could occur through existing programs such as household hazardous waste collection events. The Pesticide Collection Program is to be implemented by March 24, 2009.

(4) Special Study #3. Together with Calleguas Agricultural Dischargers, consider the findings of transport rates developed through the OC Pesticide, PCB and Siltation TMDL Implementation Plan. Complete within 6 months of completion of the OCs TMDL special study #1.

7. TMDL for Organochlorine (OC) Pesticides, Polychlorinated Biphenyls (PCBs) and Siltation in the Calleguas Creek, its Tributaries and Mugu Lagoon.

(a) Waste Load Allocations:

(1) MS4 permittees discharging to Calleguas Creek, its tributaries or Mugu Lagoon (Ventura County Watershed Protection District, County of Ventura and the cities of Camarillo, Moorpark, and Simi Valley) ("Calleguas MS4 permittees") shall implement BMPs to achieve the interim WLAs listed in Table 12.

Received
August 26, 2011
Commission on
State Mandates

Table 12 - Interim Sediment Concentration WLAs (ng/g)

Constituent	Subwatershed					
	Mugu Lagoon	Calleguas Creek	Revolon Slough	Arroyo Las Posas	Arroyo Simi	Conejo Creek
Chlordane	25	17	48	3.3	3.3	3.4
4,4-DDD	69	66	400	290	14.0	5.3
4,4-DDE	300	470	1600	950	170	20
4.4-DDT	39	110	690	670	25	2
Dieldrin	19	3	5.7	1.1	1.1	3
PCBs	180	3800	7600	25700	25700	3800
Toxaphene	22900	260	790	230	230	260

(2) Pursuant to the TMDL, the interim storm water WLAs for OC Pesticides, PCBs and Siltation, listed above, are annual average, sediment-based concentrations measured in surface waters at the base of each subwatershed within the Calleguas Creek watershed.

(b) Compliance Monitoring:

(1) Compliance with the WLAs is to be determined through the measurement of in-stream water quality at the base of each of the Calleguas Creek subwatersheds, in accordance with the Calleguas Creek Watershed TMDL Monitoring Program approved by the Executive Officer.

(2) If any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports, Implementation Plans or as identified as a result of TMDL special studies identified in the Basin Plan Amendment. Following these actions, Regional Water Board staff will evaluate the need for enforcement action.

(c) Actions and Special Studies required of Calleguas MS4 permittees:

(1) Pesticide Collection Program. Together with Calleguas POTW permittees, implement a collection program and source control measures pursuant to a work plan approved by the Executive Officer. The Pesticide Collection Program is to be implemented by March 24, 2011.

(2) Special Study #1. Together with Calleguas POTW permittees, Calleguas Agricultural Dischargers, and the Point Mugu Naval Base, submit a work plan to quantify sedimentation in the Calleguas Creek Watershed, evaluate management methods to control siltation and contaminated sediment transport to Calleguas Creek, identify appropriate BMPs to reduce sediment loadings and evaluate the effect of sediment on habitat preservation in Mugu Lagoon for approval by the Executive Officer. This special study is also to evaluate the concentration of OC pesticides and PCBs in sediments from various sources/land use types. Special Study #1 is to be completed by March 24, 2014.

(3) Special Study #2. Together with Calleguas Agricultural Dischargers, identify areas of high OC concentrations and evaluate the effects of watershed protection and land use practices on water quality. Such practices

Received
August 26, 2011
Commission on
State Mandates

include but are not limited to management of sediment reduction practices and structures, streambank stabilization, and other projects related to stormwater conveyance and flood control improvements in the Calleguas Creek watershed. Special Study #2 is to be completed based on the schedule provided in the workplan, submitted in March, 2007

(4) Special Study #3 – Together with Calleguas POTW permittees, Calleguas Agricultural Dischargers, and the Point Mugu Naval Base, evaluate natural attenuation rates and evaluate methods to accelerate organochlorine pesticide and polychlorinated biphenyl attenuation and examine the attainability of wasteload and load allocations in the Calleguas Creek Watershed. Special Study #3 is to be completed by March 24, 2016.

8. TMDL for Metals and Selenium in the Calleguas Creek, its Tributaries and Mugu Lagoon.

(a) Waste Load Allocations:

(1) MS4 permittees discharging to Calleguas Creek, its tributaries or Mugu Lagoon (Ventura County Watershed Protection District, County of Ventura and the cities of Camarillo, Moorpark, Oxnard, Simi Valley and Thousand Oaks) ("Calleguas MS4 permittees") shall implement BMPs to achieve the interim WLAs listed in Table 13 and Table 14.

Table 13 - Interim WLAs for Copper, Nickel and Selenium (ug/L)

Constituent	Calleguas and Conejo Creek (a)			Revolon Slough		
	Dry Daily Maximum (ug/L)	Dry Monthly Average (ug/L)	Daily Maximum (ug/L)	Dry Daily Maximum (ug/L)	Dry Monthly Average (ug/L	Daily Maximum (ug/L)
Copper	23	19	204	23	19	204
Nickel	15	13	(a)	15	13	(a)
Selenium	(b)	(b)	(b)	14(c)	13(c)	(a)

(A) The current loads do not exceed the TMDL under wet conditions, interim limits are not required

(B) Selenium allocations have not been developed for this reach as it is not on the 303(d) list

(C) Attainment of interim limits will be evaluated in consideration of background loading data, if available

(2) Pursuant to the TMDL, the interim storm water WLAs for copper, nickel, and selenium are receiving water concentrations measured in-stream at the base of Calleguas Creek and Revolon Slough and in Mugu Lagoon.

Received
August 26, 2011
Commission on
State Mandates

Table 14 – Interim Mass-based WLAs for mercury

Annual Cumulative Flow (million gallons per year)	Calleguas Creek (lbs/yr)	Revolon Slough (lbs/yr)
0-15,000	3.3	1.7
15,000-25,000	10.5	4
Above 25,000	64.6	10.2

(3) Pursuant to the TMDL, the interim storm water WLAs for mercury are suspended sediment loads measured in-stream at the base of Calleguas Creek and Revolon Slough and in Mugu Lagoon.
(4) Determination of the applicable interim WLA will be determined by calculating the total annual flow (October 1-September 30) in the Calleguas Creek watershed as measured by the flow gage at CSUCI.

(b) Compliance Monitoring:
(1) Compliance with the WLAs is to be determined through the measurement of in-stream water quality and total suspended solids (TSS) at the base of Calleguas Creek, Revolon Slough and in Mugu Lagoon, in accordance with the Calleguas Creek Watershed TMDL Monitoring Program approved by the Executive Officer.
(2) If any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports, Implementation Plans or as identified as a result of TMDL special studies identified in the Basin Plan Amendment. Following these actions, Regional Water Board staff will evaluate the need for enforcement action.

(c) Actions and Special Studies required of Calleguas MS4 permittees:
(1) Conduct a source control study, develop and submit an Urban Water Quality Management Program (UWQMP) for copper, mercury, nickel, and selenium. Complete by March 26, 2009.
(2) Implement the UWQMP within one year of approval by Executive Officer.
(3) In cooperation with agricultural dischargers, evaluate the results of the OCs TMDL special study on sediment transport rates for applicability to the metals and selenium TMDL. Complete within 6 months of completion of the OCs TMDL special study #1.
(4) In cooperation with agricultural dischargers, include monitoring for copper, mercury, nickel and selenium in the OC pesticides TMDL special study – Monitoring of Sediment by Source and Land Use Type. The special study is to be completed by March 26, 2014.
(5) Evaluate the results of the OC Pesticides TMDL Special Study – Effects of BMPs on Sediment and Siltation, to determine the impacts on metals and selenium. Complete within 6 months of completion of the OC Pesticides special study #1.

Received
August 26, 2011
Commission on
State Mandates

(6) Evaluate the effectiveness of BMPs implemented under the UWQMP in controlling metals and selenium discharges. This is to be completed by March 26, 2013.
(7) Re-evaluate agricultural and urban waste load allocations for copper, mercury, nickel and selenium based on the evaluation of BMP effectiveness. By March 26, 2012, urban dischargers will have a required 25% reduction in the difference between the loadings at the time of the TMDL preparation and the final WLAs effective in 2022.
(8) In cooperation with POTW permittees and agricultural dischargers, conduct a study to identify selenium contaminated groundwater sources. Special Study is to be completed within one year of the approval of the workplan.
(9) In cooperation with agricultural dischargers, conduct a study to investigate metals "hot spots" and natural soils concentrations. This special study is to be completed within 2 years of the approval of the workplan.

9. TMDL for Bacteria in Malibu Creek and Lagoon
(a) Waste Load Allocations:
(1) MS4 permittees discharging to Malibu Creek or its tributaries (Ventura County Watershed Protection District, County of Ventura and the cities of Thousand Oaks and Simi Valley) ("Malibu MS4 permittees") shall achieve the WLAs identified in Resolution 2004-19. These WLAs are expressed as the number of daily or weekly sample days that may exceed the single sample limits or 30-day geometric mean bacteria targets in Resolution 2004-19.

Table 15 - Bacteria Targets

Parameters	Unit	Fresh Water Targets	
		Geometric Mean	Single Sample
E. coli	mg	126/ 100	235/ 100
Fecal coliform	mg	200/ 100	400/ 100

(2) The summer dry weather wasteload allocations are to be achieved no later than January 24, 2009. The winter dry weather wasteload allocations are to be achieved no later than January 24, 2012.
(b) Compliance Monitoring:
(1) Achievement of the WLAs is to be determined through receiving water monitoring conducted in accordance with the Malibu Creek and Lagoon Bacteria TMDL Compliance Monitoring Program approved by the Executive Officer.
(2) If any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports, Implementation Plans or as identified as a result of TMDL special studies identified in the Basin Plan Amendment. Following these actions, Regional Water Board staff will evaluate the need for enforcement action.
(c) Actions and Special Studies required of Malibu MS4 permittees:

Received
August 26, 2011
Commission on
State Mandates

(1) If TMDL compliance monitoring indicates that the Malibu MS4 permittees are causing or contributing to an exceedance of the WLAs in the receiving waters, the permittees shall conduct a source identification study and implement additional controls sufficient to achieve the WLAs in the receiving waters.

10. TMDL for Trash in Revolon Slough and Beardsley Wash
   (a) Wasteload Allocations
      (1) MS4 permittees discharging to Revolon Slough and Beardsley Wash (Ventura County Watershed Protection District, County of Ventura and the cities of Camarillo and Oxnard) shall implement BMPs to achieve the WLAs of zero trash.
   (b) Compliance Monitoring
      (1) Responsible jurisdictions will develop a TMRP for Executive Officer approval that describes the methodologies that will be used to assess and monitor trash in Revolon Slough and Beardsley Wash and/or within responsible jurisdiction land areas. The TMRP shall include a plan to establish the trash Baseline WLAs.
      (2) If any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports, Implementation Plans or as identified as a result of TMDL special studies identified in the Basin Plan Amendment. Following these actions, Regional Water Board staff will evaluate the need for enforcement action.
   (c) Actions and Special Studies required of Revolon Slough and Beardsley Wash MS4 permittees
      (1) Per the adopted Basin Plan Amendment, compliance with the TMDL may be either through a progressive implementation schedule of full capture devices or implementation of other measures to attain the required trash reduction.

11. TMDL for Trash in the Ventura River Estuary
   (a) Wasteload Allocations
      (1) MS4 permittees discharging to the Ventura River Estuary (Ventura County Watershed Protection District, County of Ventura and the City of Ventura) shall implement BMPs to achieve the WLAs of zero trash.
   (b) Compliance Monitoring
      (1) Responsible jurisdictions will develop a TMRP for Executive Officer approval that describes the methodologies that will be used to assess and monitor trash in the Ventura River Estuary and/or within responsible jurisdiction land areas. The TMRP shall include a plan to establish the trash Baseline WLAs.
      (2) If any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports, Implementation Plans or as identified as a result of TMDL special studies

Received
August 26, 2011
Commission on
State Mandates

identified in the Basin Plan Amendment. Following these actions, Regional Water Board staff will evaluate the need for enforcement action.

(c) Actions and Special Studies required of Revolon Slough and Beardsley Wash MS4 permittees

(1) Per the adopted Basin Plan Amendment, compliance with the TMDL may be either through a progressive implementation schedule of full capture devices or implementation of other measures to attain the required trash reduction.

12. TMDL for Boron, Chloride, Sulfate and TDS in Calleguas Creek Watershed

(a) Waste Load Allocation

Table 16 - Interim Dry Weather WLAs for Permitted Stormwater Dischargers

Constituent	Interim Limit 30-day average (mg/L)
Boron Total	1.3
Chloride Total	230
Sulfate Total	1289
TDS Total	1720

Table 17 - Final Dry Weather WLAs for Permitted Stormwater Dischargers

Subwatershed	Critical Condition Flow Rate (mgd)	Chloride Allocation (lb/day)	TDS Allocation (lb/day)	Sulfate Allocation (lb/day)	Boron Allocation (lb/day)
Simi	1.39	1,738	9,849	2,897	12
Las Posas	0.13	157	887	261	N/A
Conejo	1.26	1,576	8,931	2,627	N/A
Camarillo	0.06	72	406	119	N/A
Pleasant Valley (Calleguas)	0.12	150	850	250	N/A
Pleasant Valley (Revolon)	0.25	314	1,778	523	2

(b) Compliance Monitoring

(1) A monitoring plan will be submitted to the RWQCB for Executive Officer approval on June 2, 2009. Monitoring will begin one year after Executive Officer approval of the monitoring plan to allow time for the installation of automated monitoring equipment.

(2) Compliance with the WLAs is to be determined through the measurement of in-stream water quality at the base of each of the Calleguas Creek

Received
August 26, 2011
Commission on
State Mandates

subwatersheds, in accordance with the Calleguas Creek Watershed TMDL Monitoring Program approved by the Executive Officer.

(3) If any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports, Implementation Plans or as identified as a result of TMDL special studies identified in the Basin Plan Amendment. Following these actions, Regional Water Board staff will evaluate the need for enforcement action.

(c) Actions and Special Studies required of Calleguas Creek Watershed MS4 permittees

Responsible jurisdictions including MS4 permittees shall submit compliance monitoring plan to the Los Angeles Regional Water Board for Executive Officer approval on June 2, 2009. Monitoring shall begin as outlined in the approved monitoring plan one year after approval of the work plan.

Responsible jurisdictions including MS4 permittees shall demonstrate that implementation actions have reduced the boron, sulfate, TDS, and chloride imbalance by 20%, 40%, 70% by December 2 of 2011, 2015, and 2018 respectively. Stormwater dischargers shall achieve WLAs, which shall be expressed as NPDES mass-based limits specified in accordance with federal regulations and state policy on water quality control by December 2, 2023.

13. TMDL for Bacteria in Harbor Beaches of Ventura County

(a) Waste Load Allocations

(1) MS4 permittees discharging to the Channel Islands Harbor Beaches (the County of Ventura, the Ventura County Watershed Protection District (VCWPD) and associated Municipal Separate Storm Sewer System (MS4) permittees in the Channel Islands Harbor subwatershed, and the City of Oxnard shall implement BMPs to achieve the interim WLAs listed in Table 18. All WLAs for summer dry-weather single sample bacteria densities at the Harbor Beaches of Ventura County are zero (0) days of allowable exceedances; winter dry weather and wet weather final WLAs are listed in Table 19 below.

The Basin Plan objectives that serve as the numeric targets for this TMDL are (single sample limits):

a. Total coliform density shall not exceed 10,000/100 ml.
b. Fecal coliform density shall not exceed 400/100 ml.
c. Enterococcus density shall not exceed 104/100 ml.
d. Total coliform density shall not exceed 1,000/100ml, if the ratio of fecal-to-total coliform exceeds 0.1.

Received
August 26, 2011
Commission on
State Mandates

Table 18 - Interim WLAs for Single Sample Exceedance Days

Location	Summer Dry Weather		Winter Dry Weather		Wet Weather	
	Daily Sampling	Weekly Sampling	Daily Sampling	Weekly Sampling	Daily Sampling	Weekly Sampling
Kiddie Beach	54	8	23	4	32	5
Hobie Beach	40	6	25	4	38	6

Table19 - Final Allowable Exceedance Days by Location

Location	Summer Dry-weather		Winter Dry-weather		Wet-weather	
	Daily Sampling	Weekly Sampling	Daily Sampling	Weekly Sampling	Daily Sampling	Weekly Sampling
Hobie Beach	0	0	3	1	17	3
Kiddie Beach	0	0	3	1	17	3

(2) Pursuant to the TMDL, the interim storm water WLAs for bacteria are from samples taken at existing monitoring sites in ankle to knee- high depths.

(b) Compliance Monitoring

(1) Compliance and monitoring for Harbor Beaches of Ventura County is based on existing monitoring protocols and locations. Monitoring shall continue at sampling locations (VCEHD 36000 and VCEHD37000) and at the current weekly monitoring frequency, consistent with AB411 compliance monitoring. Monitoring shall be conducted on a year-round basis at the current monitoring locations including the summer months (i.e., April to October) and winter months (i.e., November to March). Bacteria sampling shall be conducted in ankle- to knee-high water, consistent with AB411. However, if additional monitoring stations are added or if changes are made to the sampling frequencies or existing monitoring locations, then submittal of a monitoring plan is required for Executive Officer approval.

(2) If any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports, Implementation Plans or as identified as a result of TMDL special studies identified in the Basin Plan Amendment. Following these actions, Regional Water Board staff will evaluate the need for enforcement action.

(c) Actions and Special Studies required of Harbor Beaches of Ventura County MS4 permittees

(1) Per the adopted Basin Plan Amendment, compliance with the TMDL may be either through structural and non-structural BMPs or implementation of other measures to attain the required source control.

(2) Special studies are not required for implementation of the TMDL though conducting special studies is within the discretion of the responsible parties.

Received
August 26, 2011
Commission on
State Mandates

PART 6 - DEFINITIONS

The following are definitions for terms in this Order:

Adverse Impact - means a detrimental effect upon water quality or beneficial uses caused by a discharge or loading of a pollutant or pollutants.

Agriculture - means the science, art, and business of cultivating the soil, producing crops, and raising livestock.

Antidegradation Policies - means policies which protect surface and ground waters from degradation, and federal policies, which protect high quality surface waters. In particular, this policy protects waterbodies where existing quality is higher than that necessary for the protection of beneficial uses including the protection of fish and wildlife propagation and recreation on and in the water. (*Statement of Policy with Respect to Maintaining High Quality Water in California*, State Board Resolution No. 68-16; 40 CRF 131.12).

Applicable Standards and Limitations - means all State, interstate, and Federal standards and limitations to which a "discharge" or a related activity is subject under the CWA, including effluent limitations, water quality standards, standards of performance, toxic effluent standards or prohibitions, best management practices, and pretreatment standards under § 301, § 302, § 303, § 304, § 306, § 307, § 308, § 403, and § 404 of CWA.

Areas of Special Biological Significance (ASBS) - means all those areas of this state listed as ASBS, listed specifically within the California Ocean Plan or so designated by the State Board which, among other areas, includes the area from Mugu Lagoon to Latigo Point: Ocean water within a line originating from Laguna Point at 34° 5' 40" north, 119° 6'30" west, thence southeasterly following the mean high tideline to a point at Latigo Point defined by the intersection of the mean high tide line and a line extending due south of Benchmark 24; thence due south to a distance of 1000 feet offshore or to the 100 foot isobath, whichever distance is greater; thence northwesterly following the 100 foot isobath or maintaining a 1,000-foot distance from shore, whichever maintains the greater distance from shore, to a point lying due south of Laguna Point, thence due north to Laguna Point.

Authorized Discharge - means any discharge that is authorized pursuant to an NPDES permit, waste discharge requirement, conditional waiver from waste discharge requirements, or meets the conditions set forth in this Order.

Automotive Repair Shop - means a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

Automotive Service Facilities - means a facility that is categorized in any one of the following Standard Industrial Classification (SIC) and North American Industry Classification System (NAICS) codes. For inspection purposes, Permittees need not inspect facilities with SIC codes

Received
August 26, 2011
Commission on
State Mandates

5013, 5014, 5541, 5511, provided that these facilities have no outside activities or materials that may be exposed to storm water.

SIC Code	Corresponding NAICS Code
5013	425120, 441310, 425110, & 423120
5014	425120, 425110, 423130, & 441320
5511	441110
5541	447110, & 447190
7532	811121
7533	811112
7534	326212, & 811198
7536	811122
7537	811113
7538	811111
7539	811198, & 811118

Bacteria Total Maximum Daily Load (TMDL) Dry Weather - defined in the Bacteria TMDLs as those days with less than 0.1 inch of rainfall and those days occurring more than 3 days after a rain.

Bacteria Total Maximum Daily Load (TMDL) Wet Weather - defined in the Bacteria TMDLs as a day with 0.1 inch or more of rain and 3 days following the rain event.

Basin Plan - means the Water Quality Control Plan, Los Angeles Region, Basin Plan for the Coastal Watersheds of Los Angeles and Ventura Counties, adopted by the Regional Water Board on June 13, 1994 and subsequent amendments.

Beneficial Uses - means the existing or potential uses of receiving waters in the permit area as designated by the Regional Water Board in the Basin Plan.

Best Management Practices (BMPs) - means methods, measures, or practices designed and selected to reduce or eliminate the discharge of pollutants to surface waters from point and nonpoint source discharges including storm water. BMPs include structural and nonstructural controls, and operation and maintenance procedures, which can be applied before, during, and/or after pollution producing activities.

California Environmental Quality Act (CEQA) - means a California statute that requires state and local agencies to identify significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible (Reference: California Public Resources Code § 21000 et seq.)

Channel - means an open conduit either naturally or artificially created which periodically or continuously contains moving water, or which forms a connecting link between two waterbodies.

Chronic Toxicity - means a measurement of a sublethal effect (e.g., reduced growth, reproduction) to experimental test organisms exposed to an effluent or ambient waters compared to that of the control organisms.

Received
August 26, 2011
Commission on
State Mandates

Commercial Area(s) - means any geographic area of the Permittees' jurisdiction that is not heavy industrial or residential. A commercial area includes, but is not limited to areas surrounding: commercial activity, hospitals, laboratories and other medical facilities, educational institutions, recreational facilities, plant nurseries, car wash facilities, mini-malls and other business complexes, shopping malls, hotels, office buildings, public warehouses and other light industrial complexes.

Commercial Development - means any development on private land that is not heavy industrial or residential. The category includes, but is not limited to: hospitals, laboratories and other medical facilities, educational institutions, recreational facilities, plant nurseries, car wash facilities, mini-malls and other business complexes, shopping malls, hotels, office buildings, public warehouses and other light industrial complexes.

Construction - Construction activity includes any construction or demolition activity, clearing, grading, grubbing, or excavation or any other activity that results in a land disturbance. Construction does not include emergency construction activities required to immediately protect public health and safety or routine maintenance activities required to maintain the integrity of structures by performing minor repair and restoration work, maintain original line and grade, hydraulic capacity, or original purpose of the facility. See "Routine Maintenance" definition for further explanation. Where clearing, grading or excavating of underlying soil takes place during a repaving operation, State General Construction Permit coverage is required if more than one acre is disturbed or the activities are part of a larger plan.

Construction Activities Storm Water General Permit (CASGP) - means the general NPDES permit adopted by the State Board, which authorizes the discharge of storm water from construction activities under certain conditions.

Control - means to minimize, reduce, eliminate, or prohibit by technological, legal, contractual or other means, the discharge of pollutants from an activity or activities.

Critical Sources - means commercial facilities and businesses that have a potential to contribute pollutants to stormwater runoff if effective BMPs are not implemented. Attachment "D" specifies the commercial facilities and businesses that have been identified as Critical Sources.

Dechlorinated/ Debrominated Swimming Pool Discharge - means any swimming pool discharge with a residual chlorine or bromine level of 0.1mg/L or less; and does not contain any detergents, wastes, algaecides, or cyanuric acid in excess of 50 ppm, or any other chemicals including salts from pools commonly referred to as "salt water pools". The term does not include swimming pool filter backwash or swimming pool water containing bacteria.

Development - means any construction, rehabilitation, redevelopment or reconstruction of any public or private residential project (whether single-family, multi-unit or planned unit development); industrial, commercial, retail and any other non-residential projects, including public agency projects; or mass grading for future construction.

Received
August 26, 2011
Commission on
State Mandates

Directly Adjacent - means situated within 200 feet of the contiguous zone required for the continued maintenance, function, and structural stability of the environmentally sensitive area.

Directly Discharging - means outflow from a drainage conveyance system that is composed entirely or predominately of flows from the subject, property, development, subdivision, or industrial facility and not commingled with the flows from adjacent lands.

Discharge - means when used without qualification the "discharge of a pollutant."

Discharging Directly - means outflow from a drainage conveyance system that is composed entirely or predominantly of flows from the subject, property, development, subdivision, or industrial facility, and not commingled with the flows from adjacent lands.

Discharge of a Pollutant - means any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source" or, any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft, which is being used as a means of transportation. The term discharge includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.

Disturbed Area - means any area that is altered as a result of land disturbance. Examples include but are not limited to: clearing, grading, grubbing, stockpiling and/ or excavation, etc...

Dry Day - means a non-wet day for Malibu Creek and Lagoon Bacteria TMDL WLA. A wet day is defined as a day with a 0.1 inch or more of rain and 3 days following the rain event.

Effect Concentration (EC) - means a point estimate of the toxicant concentration that would cause an observable adverse effect (e.g., death, immobilization, or serious incapacitation) in a given percent of the test organisms, calculated from a continuous model (e.g., Probit Model). EC_{25} is a point estimate of the toxicant concentration that would cause an observable adverse effect in 25 percent of the test organisms.

Effective Impervious Surface - means that portion of the surface area that is hydrologically connected via sheet flow over a hardened conveyance or impervious surface without any intervening medium to mitigate flow volume.

Effluent limitation - means any restriction imposed by the Permitting Authority (PA) on quantities, discharge rates, concentrations, and/ or mass loadings of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.

Received
August 26, 2011
Commission on
State Mandates

Emergency - means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage. (Reference: California Public Resources Code § 21060.3. Emergency).

End-of-Pipe - means the end of the major outfall as defined in 40 CFR 122.26 (b)(5) and 40 CFR 122.26 (b)(6).

Endpoint - means a biological measurement used to quantify the results obtained from analytical methods such as whole effluent toxicity testing [e.g., lethal concentration (LC_{50}); inhibition concentration (IC_{25}); and no observed effect concentration (NOEC)]. Such endpoints are quantitative measurements of the responses of test organisms (e.g., survival, growth, mobility, reproduction, and weight gain or loss) in response to exposure to a serial dilution of effluent.

Environment - means the physical conditions, which exist within the area and which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historical or aesthetic significance. The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project. The "environment" includes both natural and man-made conditions.

Environmentally Sensitive Area (ESA) - means an area "in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which would be easily disturbed or degraded by human activities and developments" (Reference: California Public Resources Code § 30107.5). ESAs will include Clean Water Act 303d Listed Water Bodies in all reaches that are unimproved, all California Coastal Commission's Environmentally Sensitive Habitat Areas as delineated on maps in Local Coastal Plans and Regional Water Quality Control Board's Basin Plan Rare, Threatened or Endangered Species (RARE) and Preservation of Biological Habitats (BIOL) designated waterbodies. The California Department of Fish and Game's Significant Natural Areas map will be considered for inclusion as the department field verifies the designated locations. Watershed restoration projects will be considered for inclusion as the department field verifies the designated locations.

Erosivity Factor - The Erosivity Factor is a criterion that to assess the risk of erosion on disturbed land. It is described in "Predicting soil erosion by water: A guide to conservation planning with the Revised Universal Soil Loss Equation (RUSLE), Agricultural Handbook 703, USDA-ARS, U.S. Government Printing Office, Washington, D.C., 1997 by Renard, K.C., G.R. Foster, G.A. Weesies, D.K. McCool, and D.C. Yoder.

Federal Clean Water Act (CWA) - means (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Public Law 92—500, as amended by Public Law 95—217, Public Law 95—576, Public Law 96—483 and Public Law 77—117, codified at 33 U.S.C. 1251 et seq.

Received
August 26, 2011
Commission on
State Mandates

First Storm Event - means the first storm event of the wet season that produces at least 0.25 inches of rain.

Forest Land - means land at least 10 percent stocked with live trees, or land that had this minimum tree stocking in the past and is not currently developed for nonforest use. The minimum area recognized is 1 acre.

Groundwater Dewatering - means the active practice of removing standing water from soil excavations using a pump(s) or other means.

Hillside - means property located in an area with known erosive soil conditions, where the development will result in grading on any slope that is 20% or greater or an area designated by the Municipality under a General Plan or ordinance as a "hillside area".

Horse Stables - means a property where at least one horse is stabled at least part of the year.

Hydromodification - means the alteration away from a natural state of stream flows or the beds or banks of rivers, streams, or creeks, including ephemeral washes, which results in hydrogeomorphic changes.

Illegal Discharge - means any discharge to the municipal separate storm sewer (storm drain system) that is prohibited under local, state, or federal statutes, ordinances, codes, or regulations. The term illegal discharge includes all non-storm water discharges not composed entirely of storm water except discharges pursuant to an NPDES permit, discharges that are identified in part 1, “Discharge Prohibitions” of this order, or discharges authorized by the Regional Water Board Executive Officer.

Illicit Connection - means any engineered conveyance that is connected to the storm drain system without a permit or municipal authorization. It also means any engineered conveyance through which discharges of pollutants to the separate storm drainage systems, which are not composed entirely of storm water or are not authorized by an NPDES permit, may occur.

Illicit Discharge - means any discharge to a municipal separate storm sewer (storm drain system) that is prohibited under local, state, or federal statutes, ordinances, codes, or regulations. The term illicit discharge includes all non-storm water discharges not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges that are identified in part 1, “Discharge Prohibitions” of this order, or authorized by the Regional Water Board Executive Officer.

Illicit Disposal - means any disposal, either intentionally or unintentionally, of material(s) or waste(s) that can pollute storm water.

Industrial/ Commercial Facility - means any facility involved and/ or used in the production, manufacture, storage, transportation, distribution, exchange or sale of goods and/ or

Received
August 26, 2011
Commission on
State Mandates

commodities, and any facility involved and/ or used in providing professional and non-professional services. This category of facilities includes, but is not limited to, any facility defined by either the Standard Industrial Classifications (SIC) or the North American Industry Classification System (NAICS). Facility ownership (federal, state, municipal, private) and profit motive of the facility are not factors in this definition.

Industrial Activities Storm Water General Permit (IASGP) - means the general NPDES permit adopted by the State Board, which authorizes the discharge of storm water from certain industrial activities under certain conditions.

Industrial Park - means a land development that is set aside for industrial development. Industrial parks are usually located close to transport facilities, especially where more than one transport modalities coincide: highways, railroads, airports, and navigable rivers. It includes office parks, which have offices and light industry.

Inhibition Concentration (IC) - means a point estimate of the toxicant concentration that would cause a given percent reduction in a non-lethal biological measurement (e.g., reproduction or growth), calculated from a continuous model (i.e., Interpolation Method). IC25 is a point estimate of the toxic concentration that would cause a 25-percent reduction in a non-lethal biological measurement.

Inspection - means entry and the conduct of an on-site review of a facility and its operations, at reasonable times, to determine compliance with specific municipal or other legal requirements. The steps involved in performing an inspection, include, but are not limited to:

1. Pre-inspection documentation research
2. Request for entry
3. Interview of facility personnel
4. Facility walk-through
5. Visual observation of the condition of facility premises
6. Examination and copying of records as required
7. Sample collection (if necessary or required)
8. Exit conference (to discuss preliminary evaluation)
9. Report preparation, and if appropriate, recommendations for coming into compliance

Integrated Pest Management (IPM) - means a sustainable approach to managing pests by combining biological, cultural, physical and chemical tools in a way that minimizes economic, health, and environmental risks.

Large Municipal Separate Storm Sewer System (MS4) - means all MS4s that serve a population greater than 250,000 (1990 Census) as defined in 40 CFR 122.26 (b)(4). The Regional Water Board designated Ventura County as a large MS4 in 1990, based on: (i) the U.S. Census Bureau 1990 population count of 669,016 thousand, and (ii) the interconnectivity of the MS4s in the incorporated and unincorporated areas within the County.

Received
August 26, 2011
Commission on
State Mandates

Local SWPPP - means the Local Storm Water Pollution Prevention Plan (LSWPPP) required by the local agency for a project that disturbs one or more acres of land. Shall mean a plan identifying potential pollutant sources from a construction site and describing proposed design, placement and implementation of BMPs, to effectively prevent non-storm water discharges and reduce pollutants in storm water discharges to the storm drain system, during construction activities. Also referred as a Storm Water Pollution Control Plan (SWPCP).

Low Impact Development (LID) – means a design strategy with the goal of maintaining or replicating the pre-development hydrologic regime through the use of design techniques to create a functionally equivalent hydrologic site design. Hydrologic functions of storage, infiltration and ground water recharge, as well as the volume and frequency of discharges are maintained through the use of integrated and distributed micro-scale storm water retention and detention areas, reduction of impervious surfaces, and the lengthening of runoff flow paths and flow time. Other strategies include the preservation/protection of environmentally sensitive site features such as riparian buffers, wetlands, steep slopes, valuable (mature) trees, flood plains, woodlands, and highly permeable soils.

Major Municipal Separate Storm Sewer Outfall ("or major outfall") - means a major municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more), as defined in 40 CFR 122.26 (b)(5).

Major Outfall - means a major municipal separate storm sewer outfall, as defined in 40 CFR 122.26 (b)(6).

Maximum Extent Practicable (MEP) – The technology-based permit requirement established by Congress in CWA section 402(p)(3)(B)(iii) that municipal dischargers of storm water must meet. Technology-based requirements, including MEP, establish a level of pollutant control that is derived from available technology or other controls. MEP requires municipal dischargers to perform at maximum level that is practicable. Compliance with MEP may be achieved by emphasizing pollution prevention and source control BMPs in combination with structural and treatment methods where appropriate. The MEP approach is an ever evolving and advancing concept, which considers technical and economic feasibility.

Method Detection Limit (MDL) - means the minimum concentration of a substance that can be measured and reported with 99 percent confidence that the analyte concentration is greater than zero, as defined in 40 CFR 136, Appendix "G" of this Order.

Received
August 26, 2011
Commission on
State Mandates

Minimum Level (ML) - means the concentration at which the entire analytical system must give a recognizable signal and acceptable calibration point. The ML is the concentration in a sample that is equivalent to the concentration of the lowest calibration standard analyzed by a specific analytical procedure, assuming that all the method specified sample weights, volumes, and processing steps have been followed. The ML value represents the lowest quantifiable concentration in a sample based on the proper application of all method-based analytical procedures and the absence of any matrix interferences. Assuming that all method-specific analytical steps are followed, the ML value will also represent, after the appropriate application of method-specific factors, the lowest standard in the calibration curve for that specific analytical technique.

Minimum Significant Difference (MSD) - means a measure of test sensitivity that establishes the minimum difference required between a control and a test treatment in order for that difference to be considered statistically significant.

Municipal Separate Storm Sewer System (MS4) - means a conveyance or system of conveyances (including roads w/ drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains), as defined in 40 CFR 122.26(b)(8):

1. Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under § 208 of the Federal Clean Water Act (CWA) that discharges into waters of the United States
2. Designed or used for collecting or conveying storm water
3. Which is not a combined sewer
4. Which is not part of a Publicly Owned Treatment Works (POTW), as defined in 40 CFR 122.2

NAICS - means North American Industry Classification System.

National Pollutant Discharge Elimination System (NPDES) - means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under CWA § 307, 402, 318, and 405.

Natural Drainage Systems - means unlined or unimproved (not engineered) creeks, streams, rivers or similar waterways.

New Development - means land disturbing activities; structural development, including construction or installation of a building or structure, creation and replacement of impervious surfaces; and land subdivision.

Non-Storm Water Discharge - means any discharge to a storm drain that is not composed entirely of storm water.

Received
August 26, 2011
Commission on
State Mandates

No Observed Effect Concentration (NOEC) - means the highest tested concentration of an effluent or toxicant that causes no observable adverse effect on the test organisms (i.e., the highest concentration of toxicant at which the values for the observed responses are not statistically different from the controls).

Nuisance - means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes.

Nursery - means nursery operations that are generally classified under 4 broad NAICS classification sectors: (a) 111xxx - Crop Production – Agriculture; (b) 424xxx - Merchant Wholesalers, Nondurable Goods; (c) 44xxxx - Retail Trade; and (d) 454xxx - Non-store retailers. Retail nursery operations shall be covered by this Order. This Order does not cover wholesale nursery stock operations or agricultural nursery operations, unless such operations are not covered by another Regional Water Board Order.

(1) **Retail Nursery Operations** - means Nursery, Garden Center, and Farm Supply Stores typically classified under NAICS Code 444220 and non-store retailers typically classified under NAICS Code 454xxx. Retail nursery operations are primarily engaged in retailing nursery and garden products, such as trees, shrubs, plants, seeds, bulbs, floriculture products and sod, which are predominantly grown elsewhere. These establishments may sell a limited amount of a product they grow themselves.

Open Channel - means a storm drainage channel that is not a natural water course.

Parking Lot - means land area or facility for the parking or storage of motor vehicles used for businesses, commerce, industry, or personal use.

Percent Minimum Significant Difference (PMSD) - means the minimum significant difference divided by the control mean, expressed as a percent (see minimum significant difference).

Permit - means an authorization, license, or equivalent control document issued by U.S. EPA or an "approved State" to implement the requirements of 40 CFR Parts 122, 123, and 124. "Permit" includes an NPDES "general permit" (§ 122.28). Permit does not include any permit, which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Permittee(s) - means co-permittee(s) and any agency named in this Order as being responsible for permit conditions within its jurisdiction, as defined by Federal Regulation. Permittees to this Order include the Ventura Water Protection District, Ventura County, and the

Received
August 26, 2011
Commission on
State Mandates

cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura, Santa Paula, Simi Valley and Thousand Oaks.

Point Source - means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.

Point Zero - means in the context of the TMDLs, the point at which water from the storm drain or creek initially mixes with water.

Pollutants - means those "pollutants" defined in CWA § 502(6) (33.U.S.C.§ 1362(6)), and incorporated by reference into California Water Code § 13373.

Pollutants of Concern - means constituents that have exceeded Basin Plan Objectives, and CTR- Chronic or Acute Objectives during monitoring at Mass Emission, Receiving Water, and Land Use stations.

Potable Water Sources - means the potable water system for the treatment, distribution, and provision of water for residential, commercial, industrial, or institutional use that meets all California safe drinking water regulatory standards for human consumption.

Pre-Developed Condition - means native vegetation and soils that existed at a site prior to first development. The pre-developed condition may be assumed to be an area with the typical vegetation, soil, and storm water runoff characteristics of open space areas in coastal Southern California unless reasonable historic information is provided that the area was atypical.

Priority Pollutants - means those constituents referred to in 40 CFR 401.15 and listed in the U.S. EPA NPDES Application Form 2C, pp. V-3 through V-9.

Project - means all development, redevelopment, and land disturbing activities. The term is not limited to "Project" as defined under CEQA (Reference: California Public Resources Code § 21065).

Qualified SWPPP Developer or Qualified SWPPP Practitioner – refer to State of California General Construction Stormwater Permit for definition.

Rare, Threatened, or Endangered Species (RARE) - means a beneficial use for waterbodies in the Los Angeles Region, as designated in the Basin Plan (Tables 2-1, 2-3, and 2-4), that supports habitats necessary, at least in part, for the survival and successful maintenance of plant or animal species established under state or federal law as rare, threatened, or endangered.

Redevelopment - means land-disturbing activity that results in the creation, addition, or replacement of 5,000 square feet or more of impervious surface area on an already developed

Received
August 26, 2011
Commission on
State Mandates

site. Redevelopment includes, but is not limited to: the expansion of a building footprint; addition or replacement of a structure; replacement of impervious surface area that is not part of a routine maintenance activity; and land disturbing activities related to structural or impervious surfaces. It does not include routine maintenance to maintain original line and grade, hydraulic capacity, or original purpose of facility, nor does it include emergency construction activities required to immediately protect public health and safety.

Regional Administrator - means the Regional Administrator of the Regional Office of the U.S. EPA or the authorized representative of the Regional Administrator.

Report of Waste Discharge (ROWD) - means an application for renewal of the NPDES Permit for Waste Discharge Requirements for Municipal Separate Storm Sewer Discharges Within the Ventura County Watershed Protection District, County of Ventura and the Incorporated Cities Therein.

Restaurant - means a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC Code 5812).

Restoration - means the reestablishment of predisturbance aquatic functions and related physical, chemical and biological characteristics (Reference: National Research Council. 1992. Restoration of Aquatic Ecosystems: Science, Technology and Public Policy. National Academy Press, Washington, D.C.).

Retail Gasoline Outlet (RGO) - means any facility engaged in selling gasoline and lubricating oils- SIC 5541 and NAICS 447110 & 447190.

1. RGOs: 447190 Other Gasoline Stations:
   This industry comprises establishments known as gasoline stations (except those with convenience stores) primarily engaged in one of the following: (1) retailing automotive fuels (e.g., diesel fuel, gasohol, gasoline) or (2) retailing these fuels in combination with activities, such as providing repair services; selling automotive oils, replacement parts, and accessories; and/ or providing food services.
2. RGOs: 447110 Gasoline Stations with Convenience Stores:
   Retailing automotive fuels in combination with a convenience store or food mart.

Routine Maintenance – Routine maintenance projects include, but are not limited to projects conducted to:

1. Maintain the original line and grade, hydraulic capacity, or original purpose of the facility.
2. Perform as needed restoration work to preserve the original design grade, integrity and hydraulic capacity of flood control facilities.
3. Includes road shoulder work, regrading dirt or gravel roadways and shoulders and performing ditch cleanouts.
4. Update existing lines* and facilities to comply with applicable codes, standards, and regulations regardless if such projects result in increased capacity.
5. Repair leaks

Received
August 26, 2011
Commission on
State Mandates

Routine maintenance does not include construction of new** lines or facilities resulting from compliance with applicable codes, standards and regulations.
* Update existing lines includes replacing existing lines with new materials or pipes.
** New lines are those that are not associated with existing facilities and are not part of a project to update or replace existing lines.

Screening - means using proactive methods to identify illicit connections through a continuously narrowing process. The methods may include: performing baseline monitoring of open channels, conducting special investigations using a prioritization approach, analyzing maintenance records for catch basin and storm drain cleaning and operation, and verifying all permitted connections into the storm drains. Special investigation techniques may include: dye testing, visual inspection, smoke testing, flow monitoring, infrared, aerial and thermal photography, and remote control camera operation.

Sidewalk Rinsing - means only sidewalk rinsing using high pressure and low volume of water with no additives and at an average usage of 0.006 gallons per square foot of surface area to be rinsed. Any waste generated from the activity must be collected and properly and legally disposed of. It does not mean hosing of any sidewalk or street with a garden hose with a pressure nozzle.

Site - means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

Small Construction - means any soil disturbing activities less than 5 acres.

Smart Growth - development in or near cities intended to lessen or reverse suburban sprawl, decrease the use of automobiles, and shorten daily travel. It uses compact building design to cluster together residential, shopping, and work areas and encourages walking and public transportation. Smart Growth is considered a stormwater BMP in the 2005 publication *Using Smart Growth Techniques as Stormwater Best Management Practices*, EPA 231-B-05-002.

Source Control BMP - means any schedules of activities, prohibitions of practices, maintenance procedures, managerial practices or operational practices that aim to prevent storm water pollution by reducing the potential for contamination at the source of pollution.

Southern California Stormwater Monitoring Coalition (SMC) - means the Stormwater Monitoring Coalition, which is a collaborative research/ monitoring partnership of the Southern California Water Boards, Municipal Storm Water Agencies, and municipalities to develop the methodologies and assessment tools to more effectively understand urban storm water and non-storm water (anthropogenic) impacts to receiving waters and to conduct research/ monitoring through Subsequent Research Implementation Agreements. The first original cooperative agreement was entered into on February 8, 2001.

Received
August 26, 2011
Commission on
State Mandates

Stream - means a body of flowing water; natural water course containing water at least part of the year. In hydrology, it is generally applied to the water flowing in a natural channel as distinct from a canal (Reference: US Geological Survey).

Strip Mall - means a commercial development that is a shopping center where the stores are arranged in a row, with a sidewalk in front. Strip malls are typically developed as a unit and have large parking lots in front. They face major traffic arterials and tend to be self-contained with few pedestrian connections to surrounding neighborhoods. It is also called a plaza.

Storm Event Monitoring - means a rainfall event that produces more than 0.25 inch of precipitation and is separated from the previous storm event by at least 1 week of dry weather, for the purpose of monitoring.

Storm Water - means storm water runoff, snow melt runoff, and surface runoff and drainage, as defined in 40 CFR 122.26(b)(13).

Storm Water Discharge Associated with Industrial Activity - means industrial discharge, as defined in 40 CFR 122.26(b)(14).

Storm Water Quality Management Program - means the Ventura Countywide Storm Water Quality Management Plan, which includes descriptions of programs, collectively developed by the Permittees in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law, as the same is amended from time to time.

Structural BMP - means any structural facility designed and constructed to mitigate the adverse impacts of storm water runoff pollution (e.g. canopy, structural enclosure). The category may include both Treatment Control BMPs and Source Control BMPs.

Summer Dry Weather - means dry weather days occurring from April 1 through October 31 of each year.

t-Test (formally Student's t-test) - means a statistical analysis comparing two sets of replicate observations, in the case of WET, only two test concentrations (e.g., a control and 100% effluent). The purpose of this test is to determine if the means of the two sets of observations are different [e.g., if the 100% effluent concentration differs from the control (i.e., the test pass or fails)].

Targeted Employees - means management and staff who perform or direct activities that directly or indirectly have an effect of storm water quality. The employees generally are employed in the following areas: department of public works, engineering, sanitation, storm water maintenance, drainage and flood control, transportation, streets and roads, parks and recreation, public landscaping and corporation yards, planning or community development, code enforcement, building and safety, harbor or port departments, airports, or general services and fleet services.

Received
August 26, 2011
Commission on
State Mandates

Total Maximum Daily Load (TMDL) - means the sum of the individual waste load allocations for point sources and load allocations for nonpoint sources and natural background.

Toxicity Identification Evaluation (TIE) - means a set of procedures to identify the specific chemical(s) responsible for toxicity through a process of chemical/ physical manipulations of samples followed by toxicity tests. These procedures are performed in 3 phases (Phase I- Toxicity Characterization Procedure, Phase II- Toxicity Identification Procedure, and Phase III- Toxicity Confirmation Procedure) using aquatic organism toxicity tests.

Toxicity Reduction Evaluation (TRE) - means a study conducted in a step-wise process to identify the causative agents of effluent or ambient toxicity, isolate the sources of toxicity, evaluate the effectiveness of toxicity control options, and then confirm the reduction in toxicity.

Toxicity Test - means a procedure using living organisms to determine whether a chemical or an effluent is toxic. A toxicity test measures the degree of the effect of a specific chemical or effluent on exposed test organisms.

Toxic Unit (TU) - means a measure of toxicity in an effluent as determined by the acute toxicity units (TUa) or chronic toxicity units (TUc) measured. The larger the TU, the greater the toxicity.

Toxic Unit - Chronic (TUc) - means 100 times the reciprocal of the effluent concentration that causes no observable effect on the test organisms in a chronic toxicity test (TUc = 100/NOEC or 100/EC25) (see NOEC).

Treatment - means the application of engineered systems that use physical, chemical, or biological processes to remove pollutants. Such processes include, but are not limited to, filtration, gravity settling, media absorption, biodegradation, biological uptake, chemical oxidation and UV radiation.

Treatment Control BMP - means any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants, filtration, biological uptake, media absorption or any other physical, biological, or chemical process.

Urbanization - means the process of changing of land use and land patterns from rural characteristics to urban (city-like) characteristics. These changes include (i) the replacement of pervious surfaces with impervious surfaces such as rooftops and buildings, and impervious materials such as asphalt and concrete; and (ii) the conversion of rural land to house new residents, support new businesses, and facilitate vehicular traffic flow.

U.S. EPA Phase I Facilities - means facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include:

1. Facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N)
2. Manufacturing facilities

Received
August 26, 2011
Commission on
State Mandates

3. Oil and gas/ mining facilities
4. Hazardous waste treatment, storage, or disposal facilities
5. Landfills, land application sites, and open dumps
6. Recycling facilities
7. Steam electric power generating facilities
8. Transportation facilities
9. Sewage of wastewater treatment works
10. Light manufacturing facilities

Vehicle Maintenance/ Material Storage Facilities/ Corporation Yards - means any Permittee owned or operated facility or portion thereof that:
1. Conducts industrial activity, operates or stores equipment or materials, and provides services similar to Federal Phase I facilities;
2. Performs fleet vehicle service/ maintenance including repair, maintenance, washing, or fueling;
3. Performs maintenance and/ or repair of machinery/ equipment; or
4. Stores chemicals, raw materials, or waste materials.

Waste Load Allocations (WLAs) - means a portion of a receiving water's Total Maximum Daily Pollutant Load (TMDL) that is allocated to one of its existing or future point sources of pollution (Reference: 40 CFR 130.2(h)).

Water Quality Objectives - means water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federally approved surface water quality plans. Such plans are used by the Regional Water Board to regulate all discharges, including storm water discharges.

Water Quality Standards - means the State Water Quality Standards, which are comprised of beneficial uses, water quality objectives and the State's Antidegradation Policy.

Waters of the State - means any surface water or groundwater, including saline waters, within boundaries of the state (Reference: California Water Code § 13050).

Waters of the United States or Waters of the US - means:
1. All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters, including interstate "wetlands";
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds where the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
   a. Which are or could be used by interstate or foreign travelers for recreational or other purposes
   b. From which fish or shellfish are or could be taken and sold in interstate or

Received
August 26, 2011
Commission on
State Mandates

foreign commerce; or
c. Which are used or could be used for industrial purposes by industries in interstate commerce
4. All impoundments of waters otherwise defined as waters of the United States under this definition;
5. Tributaries of waters identified in the preceding paragraph (1) through (4) of this definition;
6. The territorial sea; and
7. "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in the preceding paragraph (1) through (6) of this definition.
(Reference: 33 CFR 328)

Watercourse - means any natural or artificial channel for passage of water, including the VCFCD jurisdictional channels included in the List of Channels within the Comprehensive Plan of the VCFCD, as approved by the Board of Supervisors of the VCFCD on October 4, 1993, and any amendments thereto.

Watershed Management - means approach for water resources protection. It is a strategy for integrating and managing resources, both human and fiscal that focuses on regulation of point sources, to a more regional approach that acknowledges environmental impacts from other activities.

Watershed Management Areas (WMA) - means the geographically-defined watershed areas where the Regional Water Board will implement the watershed approach. These generally involve a single large watershed within which exists smaller subwatersheds but in some cases may be an area that does not meet the strict hydrologic definition of a watershed e.g., several small Ventura coastal waterbodies in the region are grouped together into one WMA.

Wet Season - means the calendar period beginning October 1 through April 15.

Winter Dry Weather - means dry weather days occurring from November 1 - March 31 of each year.

Whole Effluent Toxicity - means the aggregate toxic effect of an effluent measured directly by a toxicity test.

PART 7 - STANDARD PROVISIONS

A. General Requirements

1. The Permittee shall comply with all provisions and requirements of this Order.

2. Should the Permittee discover that it failed to submit any relevant facts or that it submitted incorrect information in a report it shall promptly submit the missing or correct information.

Received
August 26, 2011
Commission on
State Mandates

3. The Permittee shall report all instances of non-compliance not otherwise reported at the time monitoring reports are submitted.

4. This Order includes Attachment "I", the Reporting Program, which is a part of this Order and must be complied with.

B. Regional Water Board Review

1. The Regional Water Board may review any formal determinate or approval made by the Regional Water Board Executive Officer pursuant to the provisions of this Order.
   (a) Permittee(s) or a member of the public may request such review upon petition within 30 day of the effective date of the notification of such decision to the Permittee(s) and interested parties on file at the Regional Water Board.

C. Public Review

1. All documents submitted to the Regional Water Board in compliance with the terms and conditions of this Order shall be made available to members of the public pursuant to the Freedom of Information Act (5 U.S.C. § 552), as amended, and the Public Records Act (California Government Code § 6250 et seq.).

2. All documents submitted to the Regional Water Board Executive Officer for approval shall be made available to the public for a 30-day period to allow for public comment.

D. Duty to Comply [40 CFR 122.41(a)]

1. Each Permittee must comply with all of the terms, requirements, and conditions of this Order. Any violation of this order constitutes a violation of the Clean Water Act, its regulations and the California Water Code, and is grounds for enforcement action, Order termination, Order revocation and reissuance, denial of an application for reissuance, or a combination thereof [40 CFR 122.41(a), Cal. Wat. Code § 13261, 13263, 13265, 13268, 13300, 13301, 13304, 13340, 13350].

2. A copy of these waste discharge specifications shall be maintained by each Permittee so as to be available during normal business hours to Permittee employees and members of the public.

3. Any discharge of wastes at any point(s) other than specifically described in this Order is prohibited, and constitutes a violation of the Order.

E. Duty to Mitigate [40 CFR 122.41 (d)]

Received
August 26, 2011
Commission on
State Mandates

1. Each Permittee shall take all reasonable steps to minimize or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment.

F. Inspection and Entry; Investigations; Responsibilities [40 CFR 122.41(i), Cal. Water Code § 13225 and § 13267]

1. The Regional Water Board, U.S. EPA, and other authorized representatives shall be allowed:
   (a) Entry upon premises where a regulated facility is located or conducted, or where records are kept under conditions of this Order;
   (b) Access to copy any records, at reasonable times that are kept under the conditions of this Order;
   (c) To inspect at reasonable times any facility, equipment (including monitoring and control equipment), practices, or operations regulated or required under this Order;
   (d) To photograph, sample, and monitor at reasonable times for the purpose of assuring compliance with this Order, or as otherwise authorized by the CWA and the CAL. WATER CODE;
   (e) To review any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement to investigate the quality of any waters of the state within its region; and,
   (f) To require as necessary any state or local agency to investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water.

G. Proper Operation and Maintenance [40 CFR 122.41 (e), Cal. Water Code § 13263(f)]

1. The Permittees shall at all times properly operate and maintain all facilities and systems of treatment (and related appurtenances) that are installed or used by the Permittees to achieve compliance with this Order. Proper operation and maintenance includes:
   (a) Adequate laboratory controls; and
   (b) Appropriate quality assurance procedures.

2. This provision requires the operation of backup or auxiliary facilities or similar system that are installed by a Permittee only when necessary to achieve compliance with the conditions of this Order.

H. Signatory Requirements [40 CFR 122.41(k) & 122.22]

1. Except as otherwise provided in this Order, all applications, reports, or information submitted to the Regional Water Board shall be signed by the City Manager or Mayor, or authorized designee and certified as set forth in 40 CFR 122.22.

Received
August 26, 2011
Commission on
State Mandates

I. Reopener and Modification [40 CFR 122.41(f) & 122.62]

1. This Order may only be modified, revoked, or reissued, prior to the expiration date, by the Regional Water Board, in accordance with the procedural requirements of the Cal. Water Code and CCR Title 23 for the issuance of waste discharge requirements, 40 CFR 122.62, and upon prior notice and hearing, to:
   (a) Address changed conditions identified in the required reports or other sources deemed significant by the Regional Water Board;
   (b) Incorporate applicable requirements or statewide water quality control plans adopted by the State Board or amendments to the Basin Plan, including TMDLs;
   (c) Comply with any applicable requirements, guidelines, and/ or regulations issued or approved pursuant to CWA § 402(p); and/ or,
   (d) Consider any other federal, or state laws or regulations that became effective after adoption of this Order.

2. After notice and opportunity for a hearing, this Order may be terminated or modified for cause, including, but not limited to:
   (a) Violation of any term or condition contained in this Order;
   (b) Obtaining this Order by misrepresentation, or failure to disclose all relevant facts; or,
   (c) A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

3. The filing of a request by the Principal Permittee or Permittees for a modification, revocation and re-issuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any condition of this Order.

4. This Order may be modified to make corrections or allowances for changes in the permitted activity listed in this section, following the procedures at 40 CFR 122.63, if processed as a minor modification. Minor modifications may only:
   (a) Correct typographical errors; or
   (b) Require more frequent monitoring or reporting by the Permittee.

J. Severability

1. The provisions of this Order are severable; and if any provision of this Order or the application of any provision of this Order to any circumstance is held invalid, the application of such provision to other circumstances and the remainder of this Order shall not be affected.

K. Duty to Provide Information [40 CFR 122.41(h)]

Received
August 26, 2011
Commission on
State Mandates

1. The Permittees shall furnish, within a reasonable time, any information the Regional Water Board or U.S. EPA may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Order.

2. The Permittees shall also furnish to the Regional Water Board, upon request, copies of records required to be kept by this Order.

L. Twenty-Four Hour Reporting [40 CFR 122.41(l)(6)][1]

1. The Permittees shall report to the Regional Water Board any noncompliance that may endanger health or the environment. Any information shall be provided orally within 24 hours from the time any Permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the Permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times and, if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

2. The Regional Water Board may waive the required written report on a case-by-case basis.

M. Bypass [40 CFR 122.41(m)][2]

1. Bypass (the intentional diversion of waste streams from any portion of a treatment facility) is prohibited. The Regional Water Board may take enforcement action against Permittees for bypass unless:
   (a) Bypass was unavoidable to prevent loss of life, personal injury or severe property damage. (Severe property damage means substantial physical damage to property, damage to the treatment facilities that causes them to become inoperable, or substantial and permanent loss of natural resources that can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.);
   (b) There were no feasible alternatives to bypass, such as the use of auxiliary treatment facilities, retention of untreated waste, or maintenance during normal periods of equipment down time. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that could occur during normal periods of equipment downtime or preventive maintenance;

---

[1] This provision applies to incidents where effluent limitations (numerical or narrative) as provided in this Order or in the Ventura County SMP are exceeded, and which endanger public health or the environment.
[2] This provision applies to the operation and maintenance of storm water controls and BMPs as provided in this Order or in the Ventura County SMP.

Received
August 26, 2011
Commission on
State Mandates

(c) The Permittee submitted a notice at least ten days in advance of the need for a bypass to the Regional Water Board; or,
(d) Permittees may allow a bypass to occur that does not cause effluent limitations to be exceeded, but only if it is for essential maintenance to assure efficient operation. In such a case, the above bypass conditions are not applicable. The Permittee shall submit notice of an unanticipated bypass as required.

N. Upset [40 CFR 122.41(n)][1]

1. Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the Permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.
2. A Permittee that wishes to establish the affirmative defense of an upset in an action brought for non compliance shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
   (a) An upset occurred and that the Permittee can identify the cause(s) of the upset;
   (b) The permitted facility was being properly operated by the time of the upset;
   (c) The Permittee submitted notice of the upset as required; and,
   (d) The Permittee complied with any remedial measures required.
3. No determination made before an action for noncompliance, such as during administrative review of claims that non-compliance was caused by an upset, is final administrative action subject to judicial review.
4. In any enforcement proceeding, the Permittee seeking to establish the occurrence of an upset has the burden of proof.

O. Property Rights [40 CFR 122.41(g)]

1. This Order does not convey any property rights of any sort, or any exclusive privilege.

P. Enforcement

1. Violation of any of the provisions of the NPDES permit or any of the provisions of this Order may subject the violator to any of the penalties described herein, or any combination thereof, at the discretion of the prosecuting authority; except that only one kind of penalties may be applied for each kind of violation. The CWA provides the following:
   (a) Criminal Penalties for:

[1] This provision applies to incidents where effluent limitations (numerical or narrative) as provided in this Order or in the Ventura County SMP are exceeded, and which endanger public health or the environment.

Received
August 26, 2011
Commission on
State Mandates

(1) Negligent Violations [CWA § 309 (c)(1)(B)]:
The CWA provides that any person who negligently violates permit conditions implementing CWA § 301, 302, 306, 307, 308, 318, or 405 is subject to a fine of not less than $2,500 nor more than $25,000 per day for each violation, or by imprisonment for not more than 1 year, or both.

(2) Knowing Violations [CWA § 309 (c)(2)(B)]:
The CWA provides that any person who knowingly violates permit conditions implementing CWA § 301, 302, 306, 307, 308, 318, or 405 is subject to a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or both.

(3) Knowing Endangerment [CWA § 309 (c)(3)(A)]:
The CWA provides that any person who knowingly violates permit conditions implementing CWA § 301, 302, 307, 308, 318, or 405 and who knows at that time that he is placing another person in imminent danger of death or serious bodily injury is subject to a fine of not more than $250,000, or by imprisonment for not more than 15 years, or both.

(4) False Statement [CWA § 309 (c)(4)]:
The CWA provides that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act or who knowingly falsifies, tampers with, or renders inaccurate, any monitoring device or method required to be maintained under the Act, shall upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than two years, or by both. If a conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four years, or by both.

(b) Civil Penalties [[CWA § 309 (d)]
The CWA provides that any person who violates a permit condition implementing CWA § 301, 302, 306, 307, 308, 318, or 405 is subject to a civil penalty not to exceed $27,500 per day for each violation.

2. Violation of any of the provisions of the NPDES permit or any of the provisions of this Order may subject the violator to any of the penalties described herein, or any combination thereof, at the discretion of the prosecuting authority; except that only one kind of penalties may be applied for each kind of violation. The Cal. Water Code §13885 provides the following:
(a) Any person who violates any of the following shall be liable civilly in accordance with this section:
(1) Section 13375 or 13376.
(2) Any waste discharge requirements or dredged or fill material permit issued pursuant to this chapter or any water quality certification issued pursuant to Section 13160.
(3) Any requirements established pursuant to Section 13383.

Received
August 26, 2011
Commission on
State Mandates

(4) Any order or prohibition issued pursuant to Section 13243 or Article 1 (commencing with Section 13300) of Chapter 5, if the activity subject to the order or prohibition is subject to regulation under this chapter.
(5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.
(6) Any requirement imposed in a pretreatment program approved pursuant to waste discharge requirements issued under Section 13377 or approved pursuant to a permit issued by the administrator.

Q. Need to Halt or Reduce Activity not a Defense [40 CFR 122.41(c)]

1. It shall not be a defense for a Permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this Order.

R. Termination of Board Order

1. Except for enforcement purposes, Regional Water Board Order No. 09-0057 is hereby terminated.

S. Board Order Expiration Date

1. This Order expires on July 8, 2015. The Permittees must submit a Report of Waste Discharge (ROWD) and a proposed Storm Water Quality Management Program in accordance with CCR Title 23 as application for reissuance of waste discharge requirements no later than 180 days in advance of such date.

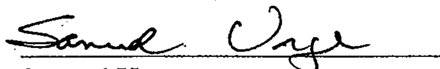
T. MS4 Annual Reporting Program [40 CFR 122.42(c)]

1. The Annual Program Reporting shall include the following information:
(a) *Municipal separate storm sewer systems.*
The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under 40 CFR 122.26(a)(1)(v) of this part must submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include:
(1) The status of implementing the components of the storm water management program that are established as permit conditions;
(2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with 40 CFR 122.26(d)(2)(iii) of this part;
(3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (d)(2)(v) of this part;
(4) A summary of data, including monitoring data that is accumulated throughout the reporting year;

Received
August 26, 2011
Commission on
State Mandates

(5) Annual expenditures and budget for year following each annual report;
(6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; and
(7) Identification of water quality improvements or degradation.

I, Samuel Unger, Interim Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the California Regional Water Quality Control Board, Los Angeles Region, on July 8, 2010.



Samuel Unger
Interim Executive Officer

Received
August 26, 2011
Commission on
State Mandates

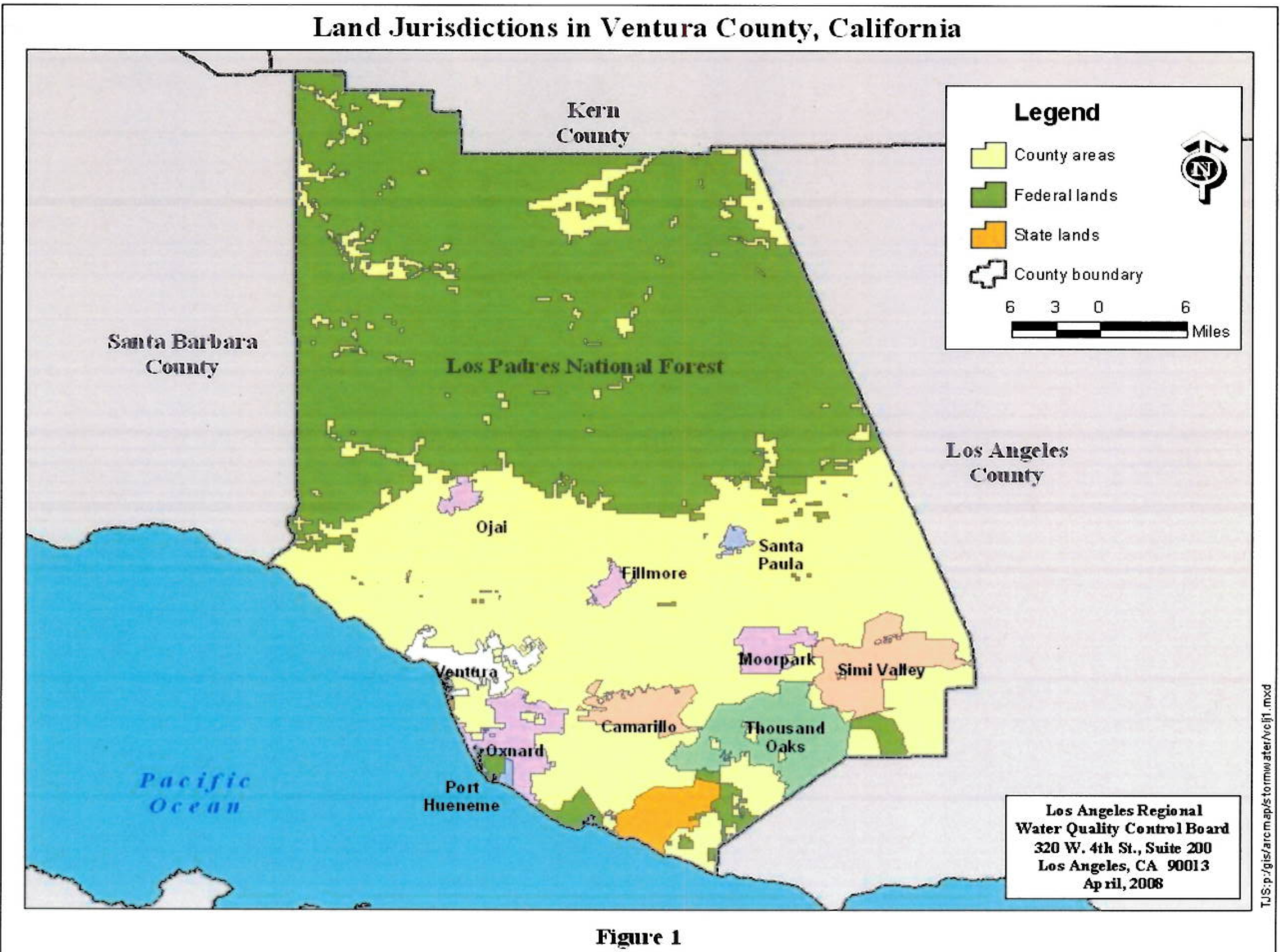


Figure 1

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENTS

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT A
Watershed Management Areas

Watershed Management Area	Hydrologic Units(s)	Major Surface Water Bodies	303(d) Pollutant(s) of Concern	Permittees
Ventura River	402.10 402.20 402.31 402.32	Ventura River Ventura River Estuary Canada Larga Matilija Creek Matilija Creek Reservoir San Antonio Creek	Algae Coliform (fecal, total) Eutrophic Low DO Nitrogen Trash	City of Ojai City of San Buenaventura Ventura County Watershed Protection District
Santa Clara River	403.11 403.21 403.22 403.31 403.32 403.41 403.42 403.43 403.44 403.51 403.52 403.53 403.54 403.55	Santa Clara River Santa Clara River Estuary Brown Barranca/Long Canyon Elizabeth Lake Hopper Creek Lake Hughes Mint Canyon Creek Munz Lake Piru Creek Pole Creek Sespe Creek Torrey Canyon Creek Wheeler Canyon/Todd Barranca	Algae Ammonia ChemA* (tissue) Chloride Coliform Enrichment Eutrophic Fish kills Low DO/Organic Enrichment Nitrate + Nitrite Odors pH Sulfate Trash Total Dissolved Solids Toxaphene	City of Fillmore City of Oxnard City of San Buenaventura City of Santa Paula Ventura County Watershed Protection District

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT A
Watershed Management Areas

Watershed Management Area	Hydrologic Units(s)	Major Surface Water Bodies	303(d) Pollutant(s) of Concern	Permittees
Calleguas Creek	403.11	Calleguas Creek	Algae	City of Camarillo
	403.12	Calleguas Creek Estuary	Ammonia	City of Moorpark
	403.61	Arroyo Conejo	Boron	City of Oxnard
	403.62	Arroyo Las Posas	ChemA* (tissue)	City of Simi Valley
	403.63	Arroyo Simi	Chlordane (tissue, sediment)	City of Thousand Oaks
	403.64	Beardsley Channel	Chloride	Ventura County
	403.67	Conejo Creek	Chlorpyrifos (tissue)	Watershed Protection District
	403.66	Fox Barranca	Coliform, fecal	
	403.68	Mugu Lagoon	Copper (total, dissolved)	
		Mugu Drain/Oxnard Drain	Dacthal (sediment)	
		Rio de Santa Clara/Oxnard Drain	DDT (tissue, sediment)	
		Revolon Slough	Dieldrin (tissue)	
		Tapo Canyon	Endosulfan (tissue, sediment)	
			Hexachlorocyclohexane (tissue)	
			Mercury	
			Nickel	
			Nitrate + Nitrite	
			Nitrate as Nitrogen (NO3)	
			Nitrogen	
			Organophosphorus Pesticides	
			PCBs (tissue)	
			Sediment Toxicity	
			Sedimentation/Siltation	
			Selenium	
			Sulfate	
			Total Dissolved Solids	
			Toxaphene (tissue, sediment)	
			Toxicity	
			Trash	
			Zinc	

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT A
Watershed Management Areas

Watershed Management Area	Hydrologic Units(s)	Major Surface Water Bodies	303(d) Pollutant(s) of Concern	Permittees
Malibu Creek	401.00 403.11 404.21 404.22 404.23 404.24 404.25 404.26 404.47 404.45	Malibu Creek Malibu Creek Lagoon Lake Lindero Lake Sherwood Las Virgenes Creek Linero Creek Malibou Lake Medea Creek Palo Comado Santa Monica Bay Westlake Lake Triunfo Creek	Algae Ammonia Coliform DDT (tissue, sediment) Enteric viruses Eutrophic Lead Low DO/Organic Enrichment Nutrients (algae) PAHs (sediment) PCBs (tissue, sediment) PH Mercury Scum/foam Sedimentation/Siltation Sediment Toxicity Selenium Specific Conductance Trash	City of Simi Valley City of Thousand Oaks Ventura County Watershed Protection District

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT A
Watershed Management Areas

Watershed Management Area	Hydrologic Units(s)	Major Surface Water Bodies	303(d) Pollutant(s) of Concern	Permittees
Miscellaneous Ventura Coastal	401.00 403.11	Channel Islands Harbor Channel Islands Beach Hobie Beach Mandalay Beach McGrath Lake McGrath Beach Ormond Beach Port Hueneme Harbor Promenade Park Beach Rincon Beach San Buenaventura Beach Santa Clara River Estuary Beach/Surfers Knoll Ventura Harbor: Ventura Keys	Beach closures Coliform (fecal) Chlordane (sediment) DDT (tissue, sediment) Dieldrin (sediment) PCBs (tissue, sediment) Lead (sediment) Sediment Toxicity Zinc (sediment)	City of Oxnard City of Port Hueneme City of San Buenaventura Ventura County Watershed Protection District

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT B

Calleguas Creek Watershed Pollutants of Concern (2003 through 2007)[1]

Mass Emission (ME-CC), Receiving Water (W-3 & W-4), and Land Use (A-1) Sites

Wet Weather	
Bacteriological	
E. Coli	
Fecal Coliform	
Conventional	
Residual Chlorine	
TDS	
Metal	
Aluminum - Total	Chromium - Total
Barium -Total	Cooper - Dissolved
Beryllium - Total	Mercury - Total
Cadmium - Total	Nickel - Total
Nutrient	
Nitrate as Nitrogen	
Organic	
Benzo(a)anthracene	
Benzo(a)pyrene	
Benzo(b)fluoranthene	
Benzo(k)fluoranthene	
Bis(2-ethylhexyl)phthalate	
Chrysene	
Dibenz(a,h)anthracene	
Hexachlorobenzene	
Indeno(1,2,3-cd)pyrene	
Pentachlorophenol	
Pesticide	
4,4'-DDD	
4,4'-DDE	

[1] Mass Emission, Receiving Water, and Land Use wet weather monitoring data was compared to Basin Plan Objectives and CTR-Acute Objectives, to obtain exceedences (Pollutants of Concern). Monitoring data is from the Ventura Countywide NPDES Stormwater Monitoring Program Water Quality Monitoring Reports (2003/04 through 2006/07), data for 2000/01 through 2002/03 was either presented with exceedences not analyzed or by percent exceedence, so data could not be compared to 2003/04 through 2006/07 exceedence data. See definitions for Pollutants of Concern

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT B

Santa Clara River Watershed Pollutants of Concern (2003 through 2007)[1]

Mass Emission (ME-SCR) and Land Use (I-2 & R-1) Sites

Wet Weather	
Anion	
Chloride	
Bacteriological	
E. Coli	
Fecal Coliform	
Conventional	
Ph	
TDS	
Metal	
Aluminum - Total	Cooper - Dissolved
Arsenic - Total	Mercury - Total
Barium - Total	Nickel - Total
Cadmium - Total	Selenium - Total
Chromium - Total	Zinc - Dissolved
Organic	
Benzo(a)anthracene	
Benzo(a)pyrene	
Benzo(b)fluoranthene	
Benzo(k)fluoranthene	
Bis(2-ethylhexyl)phthalate	
Chrysene	
Dibenz(a,h)anthracene	
Indeno(1,2,3-cd)pyrene	
Pesticide	
4,4'-DDE	

[1] Mass Emission and Land Use wet weather monitoring data was compared to Basin Plan Objectives and CTR-Acute Objectives, to obtain exceedences (Pollutants of Concern). Monitoring data is from the Ventura Countywide NPDES Stormwater Monitoring Program Water Quality Monitoring Reports (2003/04 through 2006/07), data for 2000/01 through 2002/03 was either presented with exceedences not analyzed or by percent exceedence, so data could not be compared to 2003/04 through 2006/07 exceedence data. See definitions for Pollutants of Concern.

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT B

Ventura River Watershed Pollutants of Concern (2003 through 2007)[1]

Mass Emission (ME- VR & ME- VR2) Sites

Wet Weather
Anion
Chloride
Bacteriological
E. Coli
Fecal Coliform
Conventional
TDS
Metal
Aluminum -Total
Cadmium - Total
Chromium - Total
Mercury - Total
Nickel - Total
Zinc - Dissolved
Organic
Benzo(a)pyrene
Benzo(b)fluoranthene
Bis(2-ethylhexyl)phthalate
Chrysene
Hexachlorobenzene
Pesticide
4,4'-DDD
4,4'-DDE

[1] Mass Emission wet weather monitoring data was compared to Basin Plan Objectives and CTR-Acute Objectives, to obtain exceedences (Pollutants of Concern). Monitoring data is from the Ventura Countywide NPDES Stormwater Monitoring Program Water Quality Monitoring Reports (2003/04 through 2006/07). Monitoring data for 2000/01 through 2002/03 was either presented with exceedences not analyzed or by percent exceedence, so data could not be compared to 2003/04 through 2006/07 exceedence data. See definitions for Pollutants of Concern.

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT C
Treatment BMP Performance Standards

Effluent Concentrations as Median Values

BMP Category	Total Suspended Solids mg/L	Total Nitrate-Nitrogen mg/L	Total Copper, ug/L	Total Lead, ug/L	Total Zinc, ug/L
Detention Pond	27	0.48	15.9	14.6	58.7
Wet Pond	10	0.2	5.8	3.4	21.6
Wetland Basin	13	0.13	3.3	2.5	29.2
Biofilter	18	0.36	9.6	5.4	27.9
Media Filter	11	0.66	7.6	2.6	32.2
Hydrodynamic Device	23	0.29	11.8	5	75.1

Expected BMP pollutant removal performance for effluent quality was developed from the WERF-ASCE/ U.S. EPA International BMP Database, 2007.

See Part 3.A.3 (Storm Water Quality Management Program Implementation- General Requirements).

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT D
Critical Sources Categories[1]

Municipal Landfills (SIC 4953)

Hazardous Waste Treatment, Disposal and Recovery Facilities[1]

Facilities Subject to SARA Title III (also known as EPCRA)[2]

Restaurants[3]

Wholesale trade (scrap, auto dismantling) (SIC 50)

Automotive service facilities[2]

Fabricated metal products (SIC 34)

Motor freight (SIC 42)

Chemical/allied products (SIC 28)

Automotive Dealers/Gas Stations (SIC 55)

Primary Metals Products (SIC 33)

Nursery[3]

Electric/Gas/Sanitary (SIC 49)

Air Transportation (SIC 45)

Water Transportation (SIC 44)

Rubbers/Miscellaneous Plastics (SIC 30)

Local/Suburban Transit (SIC 41)

Railroad Transportation (SIC 40)

Oil & Gas Extraction (SIC 13)

Lumber/Wood Products (SIC 24)

Machinery Manufacturing (SIC 35)

Transportation Equipment (SIC 37)

[1] Non-underlined categories belong to Industrial Facilities.
[2] Various categories subject to these requirements.
[3] See Definition in Part 6. of the Order.

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT D

Critical Sources Categories[1]

Stone, Clay, Glass, Concrete (SIC 32)

Leather/Leather Products (SIC 31)

Miscellaneous Manufacturing (SIC 39)

Food and kindred Products (SIC 20)

Mining of Nonmetallic Minerals (SIC 14)

Printing and Publishing (SIC 27)

Electric/Electronic (SIC 36)

Paper and Allied Products (SIC 26)

Furniture and Fixtures (SIC 25)

Laundries *(SIC 72)*

Instruments (SIC 38)

Textile Mills Products (SIC 22)

Apparel (SIC 23)

[1] Non-underlined categories belong to Industrial Facilities.

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT E
Determination of Erosion Potential

E_p is determined as follows- The *total effective work* done on the channel boundary is derived and used as a metric to predict the likelihood of channel adjustment given watershed and stream hydrologic and geomorphic variables. The index under urbanized conditions is compared to the index under pre-urban conditions expressed as a ratio (E_p). The effective work index (*W*) is computed as the excess shear stress that exceeds a critical value for streambed mobility or bank material erosion integrated over time and represents the total work done on the channel boundary:

$$W = \sum_{i=1}^{n} (\tau_i - \tau_c)^{1.5} \cdot V \cdot \Delta t_i \qquad (1)$$

Where τ_c = critical shear stress that initiates bed mobility or erodes the weakest bank layer, τ_i = applied hydraulic shear stress, Δt = duration of flows (in hours), and n = length of flow record. The effective work index for presumed stable stream channels under pre-urban conditions is compared to stable and unstable channels under current urbanized conditions. The comparison, expressed as a ratio, is defined as the Erosion Potential (Ep)[1] (McRae (1992, 1996).

$$Ep = \frac{W_{post}}{W_{pre}} \qquad (2)$$

where:

W_{post} = work index estimated for the post-urban condition
W_{pre} = work index estimated for the pre-urban condition

[1] MacRae, C.R. 1992. The Role of Moderate Flow Events and Bank Structure in the Determination of Channel Response to Urbanization. Resolving conflicts and uncertainty in water management: Proceedings of the 45th Annual Conference of the Canadian Water Resources Association. Shrubsole, D, ed. 1992, pg. 12.1-12.21; MacRae, C.R. 1996. Experience from Morphological Research on Canadian Streams: Is Control of the Two-Year Frequency Runoff Event the Best Basis for Stream Channel Protection. Effects of Watershed Development and Management on Aquatic Ecosystems, ASCE Engineering Foundation Conference, Snowbird, Utah, pg. 144-162

Received
August 26, 2011
Commission on
State Mandates

STATE OF CALIFORNIA

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

MONITORING PROGRAM - No. CI 7388
FOR
ORDER R4-2010-0108
NPDES PERMIT NO. CAS004002
WASTE DISCHARGE REQUIREMENTS

MUNICIPAL SEPARATE STORM SEWER SYSTEM DISCHARGES WITHIN THE VENTURA COUNTY WATERSHED PROTECTION DISTRICT, COUNTY OF VENTURA AND THE INCORPORATED CITIES THEREIN.

July 8, 2010

Received
August 26, 2011
Commission on
State Mandates

TABLE OF CONTENTS

Page No.

Monitoring Program
A. Mass Emissions ---------- F-1
B. Major Outfalls ---------- F-4
C. Dry Weather Analytical Monitoring---------- F-6
D. Aquatic Toxicity Monitoring ---------- F-8
E. Pyrethroid Insecticides Study ---------- F-13
F. Hydromodification Control Study---------- F-15
G. Low Impact Development ---------- F-16
H. Southern California Bight Project ---------- F-16
I. Bioassessment----------F-17
J. Volunteer Monitoring Programs ---------- F-17
K. Standard Monitoring Provisions ---------- F-17
L. Total Maximum Daily Load (TMDL) Monitoring---------- F-20
M. Beach Water Quality Monitoring---------- F-21

Received
August 26, 2011
Commission on
State Mandates

MONITORING PROGRAM

1. The primary objectives of the Monitoring Program include, but are not limited to:
   (a) Assessing the chemical, physical, and biological impacts of municipal storm water sewer system discharges on receiving waters.
   (b) Assessing the overall health and evaluating long-term trends in receiving water quality.
   (c) Assessing compliance with TMDL targets and water quality objectives.
   (d) Characterization of the quality of storm water discharges.
   (e) Identifying sources of pollutants.
   (f) Measuring and improving the effectiveness of measures implemented under this Order.

2. The results of the monitoring requirements outlined below shall be used to refine BMPs for the reduction of pollutant loading and the protection and enhancement of the beneficial uses of the receiving waters in Ventura County.

3. The Permittees shall implement the Monitoring Program as follows:

CORE MONITORING

A. Mass Emissions

I. The Principal Permittee shall monitor mass emissions to accomplish the following objectives:
   i. Estimate the mass emissions from the MS4 to the watershed.
   ii. Assess trends in the mass emissions over time.
   iii. Determine if the MS4 is contributing to exceedances of water quality objectives by comparing results to applicable water quality objectives in the Water Quality Control Plan Los Angeles Region (Basin Plan) and the California Toxics Rule (CTR).

1. The Principal Permittee shall monitor mass emissions from the following 3 mass emission stations:
   (a) ME-VR2 for Ventura River
   (b) ME-SCR for Santa Clara River
   (c) ME-CC for Calleguas Creek

2. The Principal Permittee shall monitor the 3 mass emission stations on an annual basis as per A.3. below.

Received
August 26, 2011
Commission on
State Mandates

3. The Principal Permittee shall monitor each mass emission station each year as follows:
   (a) The first storm event of the wet season that produces a 20% or greater increase in base stream flow, and 2 additional storm events; all storm events shall be separated by 7 days of dry weather (less than 0.1 inch of rainfall) from the previously measurable storm event (0.25 inches of rain).
   (b) A total of 4 monitoring events (3 wet-weather storm events, 1 dry-weather) per mass emission station.

4. Samples for mass emission monitoring may be taken with the same type of automatic sampler used under Order 00-108. Sampling shall be in accordance with USEPA "NPDES Storm Water Sampling Guidance Document, EPA 833-8-92-001, July 1992" or other protocol approved by the Executive Officer.

5. Samplers shall be set to monitor storms that produce a 20% or greater increase in base stream flow.

6. Samples shall be flow-weighted composites, collected during the first 24 hours or for the duration of the storm if it is less than 24 hours.

7. Samples shall be collected from the discharge resulting from a storm event that is 0.25 inches or greater, samples may be analyzed if a predicted storm event produces between 0.15 and 0.24 inches of rain.

8. The flow-weighted composite sample for a storm water discharge shall be taken with a continuous sampler, or it shall be taken as a combination of a minimum of 3 sample aliquots, taken in each hour of discharge for the first 24 hours of the discharge or for the entire discharge if the storm event is less than 24 hours, with each aliquot being separated by a minimum of 15 minutes within each hour of discharge, unless the Regional Water Board Executive Officer approves an alternate protocol.

9. Flow may be estimated using U.S. EPA methods at sites where flow measurement devices are not in place.

10. Grab samples shall be taken only for pathogen indicators, oil & grease, cyanide, and volatile organics. Field measurements shall be taken for pH, temperature, and DO.

11. Each mass emission shall analyze for all of the Pollutants of Concern (POC) in its specific watershed listed in Attachment "B" (Calleguas Creek Watershed, Santa Clara River Watershed, and Ventura River Watershed Pollutants of Concern).

Received
August 26, 2011
Commission on
State Mandates

12. Each mass emission station shall screen for all constituents listed in Attachment "G" (Storm Water Monitoring Program's Constituents with Associated Minimum Levels), during the first storm event of the wet season for each year sampled. If a constituent is not detected at the Method Detection Limit (MDL) for its respective test method it need not be further analyzed unless the observed occurrence shows concentrations greater than the state water quality objective, and/ or the California Toxics Rule (CTR) for chronic criteria. If a constituent is detected exceeding a Basin Plan objective, and/ or CTR criteria then the constituent shall be analyzed for the remainder of the Order, at the mass emission station where it was detected.

13. At a minimum, a sufficient sample volume must be collected to perform all of the required biological and chemical tests.

14. When monitoring can not be performed to comply with the requirements of this Order due to circumstances beyond the Permittee's control, then within two working days the following shall be submitted to the Regional Water Board Executive Officer:
    (a) Statement of situation.
    (b) Explanation of circumstance(s) with documentation.
    (c) Statement of corrective action for the future.

15. Monitoring results submitted to the Regional Water Board shall include:
    (a) Rain totals and hydrographs for monitoring events in both narrative and graphic formats.
    (b) A narrative description of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable storm event.
    (c) All applicable Standard Monitoring Provisions listed in part "K".

16. Results of monitoring from each mass emission station conducted in accordance with the Standard Operating Procedure submitted under Standard Provision 14 of this Attachment shall be sent electronically to the Regional Water Board's Storm Water site at MS4stormwaterRB4@waterboards.ca.gov, no later than 90 days from sample collection date, highlighting exceedances (Pollutants of Concern, POC) to the Basin Plan objectives for all test results, and the CTR for acute criteria with corresponding sampling dates per mass emission station. The sample data transmitted shall be in the most recent update of the Southern California Municipal Storm Water Monitoring Coalition's (SMC) Standardized Data Transfer Formats (SDTFs).

Received
August 26, 2011
Commission on
State Mandates

17. A summary of the annual mass emission monitoring results highlighting exceedances (POC) of the Basin Plan objectives and the CTR for acute criteria, with corresponding sampling dates per mass emission station, shall be included with the Annual Storm Water Report.

B. Major Outfalls

I. The Principal Permittee shall monitor major storm drain outfalls to accomplish the following objectives:
   - i. Estimate the annual pollutant load of the cumulative discharges to waters of the State.
   - ii. Estimate the event mean concentration of the cumulative discharges to waters of the State.
   - iii. Assess trends in the major outfalls over time.
   - iv. Estimate the annual pollutant load of discharges to Waters of the U.S.
   - v. Estimate the event mean concentration of discharges to Waters of the U.S.
   - vi. Assess trends in the major outfalls over time.
   - vii. Determine if the MS4 is contributing to exceedences of water quality objectives in the Water Quality Control Plan Los Angeles Region (Basin Plan), and the California Toxics Rule (CTR).

1. The Principal Permittee shall monitor:
   - (a) End-of-pipe of major outfalls, identified in Attachment I, transporting representative discharges from each Permittee's Municipal drainage area to:
     - (1) Major outfalls listed in Attachment "I" (Storm Water Monitoring Program's Major Outfall Stations).
   - (b) The first storm event of the wet season that produces at least 0.25 inches of rain, and 2 additional storm events per year, all storm events shall be separated by 7 days of dry weather (less than 0.1 inch) from the previously measurable storm event (0.25 inches).
   - (c) A total of 4 monitoring events (3 wet-weather storm events, 1 dry-weather) shall be sampled per identified major outfall.
   - (d) In the first year after permit adoption, 4 major outfall stations shall be monitored. Thereafter, all major outfall stations listed in Attachment "I" are to be monitored annually according to the schedule above.

2. If an identified monitoring site is found to be unworkable due to immitigable factors the sampling location may be relocated upon Executive Officer's approval of another location. Best professional judgment shall be used to balance the site selection rationale and criteria to determine the most appropriate site. Due to limited potential locations of urban outfalls to be monitored, there may be no sites that satisfy all criteria and rationale. Sites will be selected to satisfy the following criteria:

Received
August 26, 2011
Commission on
State Mandates

(a) Maximize urban runoff contribution;
(b) Greater than 60% of catchment shall be Permittee's MS4;
(c) Attempt shall be made to avoid outfalls that contain discharge from extra-jurisdictional areas (e.g. agriculture land and other NPDES discharges).
(d) Drainage area should contain representative land uses in a ratio of use as similar as reasonably possible to that found in the Permittee's jurisdiction.
(e) Drainage areas with a higher percentage of the Permittee's MS4 are preferred;
(f) Ability to accurately measure flow
(g) Safety of monitoring personnel is the highest priority. Specific location of sampling collection may be upstream of the actual outfall if field safety or accurate flow measurement require it.

3. Samples shall be collected from the discharge resulting from a storm event that is 0.25 inches or greater, samples may be analyzed if a predicted storm event produces between 0.15 inches and 0.24 inches of rain.

4. Samples shall be collected during the first 24 hours of storm water discharge or for the entire storm water discharge if it is less than 24 hours.

5. Samples shall be flow-weighted composites and can be collected automatically or manually (see subparts A.7 and A.8) in accordance with U.S. EPA protocol or other procedure approved by the Executive Officer.

6. Grab samples shall be taken only for pathogen indicators, oil & grease, cyanide, and volatile organics. Field measurements shall be taken for pH, temperature, and DO.

7. Major outfall samples taken within a subwatershed shall be analyzed for the biological and chemical parameters listed in the preceding subpart B.6.

8. Each major outfall station shall screen for all constituents listed in Attachment "G" (Storm Water Monitoring Program's Constituents with Associated Minimum Levels) twice per wet season, per year, (1st storm event of the wet season and one other storm event of the wet season). If a constituent is not detected at the Method Detection Limit (MDL) for its respective test method it need not be further analyzed unless the observed occurrence shows concentrations greater than the state water quality objective, and/ or the California Toxics Rule (CTR) acute criteria. If a constituent is detected exceeding a Basin Plan objective, and/or chronic CTR criteria then the constituent shall be sampled for the remainder of the Order, at the major outfall station where it was detected.

Received
August 26, 2011
Commission on
State Mandates

9. At a minimum, a sufficient sample volume must be collected to perform all of the required biological and chemical tests. Sampling shall be in accordance with USEPA "NPDES Storm Water Sampling Guidance Document, EPA 833-8-92-001, July 1992" or other protocol approved by the Executive Officer.

10. When monitoring can not be performed to comply with the requirements of this Order due to circumstances beyond the Permittee's control, then within 2 working days the following shall be submitted to the Regional Water Board Executive Officer:
    (a) Statement of situation
    (b) Explanation of circumstance(s) with documentation
    (c) Statement of corrective action for the future

11. Monitoring results submitted to the Regional Water Board shall include:
    (a) Rain totals and hydrographs for monitoring events in both narrative and graphic formats.
    (b) A narrative description of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable storm event.
    (c) All applicable Standard Monitoring Provisions listed in part "K".

12. Results of monitoring from each major outfall station conducted in accordance with the Standard Operating Procedure submitted under Standard Provision 14 of this Attachment shall be sent electronically to the Regional Water Board's Storm Water Site at MS4stormwaterRB4@waterboards.ca.gov, no later than 90 days from sample collection date, highlighting exceedances to the Basin Plan objectives for all test results, and the CTR for acute criteria with corresponding sampling dates per major outfall station. The sample data transmitted shall be in the most recent update of the Southern California Municipal Storm Water Monitoring Coalition's (SMC) Standardized Data Transfer Formats (SDTFs).

13. A summary of the annual major outfall monitoring results, highlighting exceedences (pollutants of concern POC) to the Basin Plan objectives, and the CTR for acute criteria with corresponding sampling dates per major outfall station, shall be included with the Annual Storm Water Report.

C. Dry Weather Analytical Monitoring

I. The Principal Permittee shall develop and implement a monitoring program to characterize pollutant discharges from representative MS4 outfalls in each municipality and in the unincorporated County area during dry weather. This monitoring program shall be implemented within each jurisdiction and shall begin within the 2010-2011 monitoring year.

Received
August 26, 2011
Commission on
State Mandates

1. Dry weather analytical monitoring shall include:
   (a) Analytical monitoring, field measurements and observations at selected stations.
   (b) Reports of analytical data in a SWAMP comparable format.

2. Selection of Dry Weather Analytical Monitoring stations: Based upon a review program data, the storm drain system and land uses, the Co-Permittees shall select dry weather analytical monitoring stations within their jurisdiction. At least 5 dry weather analytical monitoring stations need to be identified per Co-Permittee. The dry weather analytical monitoring stations shall be established using the following guidelines and criteria:
   (a) Stations should be located downstream of municipal land uses where illegal or illicit activity may occur;
   (b) Stations shall be located at accessible downstream locations within the storm drain system of each municipality or at major outfalls;
   (c) Hydrological conditions, total drainage area of the site, traffic density, age of the structures or buildings in the area, history of the area, and land use types shall be considered in locating stations;
   (d) Each Co-Permittee shall determine a primary station and at least 4 alternate stations to be sampled in case primary stations do not have flow in dry weather. The dry weather monitoring may utilize the same outfalls as those used for wet weather monitoring, if such outfalls are found to discharge during dry weather.
   (e) Fact sheets of general information such as site descriptions (i.e., conveyance type, dominant watershed land uses) shall be created.

3. The Principal and Co-Permittees shall develop and/or update written procedures for dry weather analytical monitoring (these procedures must be consistent with 40 CFR part 136), including field observations, monitoring, and analyses to be conducted. At a minimum, the procedures must meet the following guidelines and criteria:
   (a) Dry weather analytical monitoring shall be conducted at each identified station at least once between May 1st and September 30th of each year.
   (b) If flow or ponded runoff is observed at a dry weather analytical monitoring station and there has been at least seventy-two (72) hours of dry weather, make observations and collect at least one (1) grab sample.
   (c) Record general information such as site descriptions (i.e., conveyance type, dominant watershed land uses), flow estimation (i.e., width of water surface, approximate depth of water, approximate flow velocity, flow rate), and visual observations (i.e., odor, color, clarity, floatables, deposits/stains, vegetation condition, structural condition, and biology).

Received
August 26, 2011
Commission on
State Mandates

4. At a minimum, collect samples for analytical laboratory analysis of the following constituents:
   (a) Total Hardness
   (b) Total Organic Carbon or Oil and Grease
   (c) Lead (Dissolved)
   (d) Zinc (Dissolved)
   (e) Copper (Dissolved)
   (f) Total Coliform bacteria
   (g) E. Coli bacteria

5. Other required field observations include:
   (a) Flow Estimation
   (b) Temperature
   (c) pH
   (d) Odor
   (e) Color
   (f) Turbidity
   (g) Floatables (foam, oil sheen)
   (h) Staining
   (i) Algal growth

6. If the station is dry (no flowing or ponded runoff), make and record all applicable observations and select another station from the list of alternate stations for monitoring.

7. Visually assess the presence of trash in receiving waters and urban runoff. Assessments of trash shall provide information on the spatial extent and amount of trash present, as well as the nature of the types of trash present.

8. Develop and/or update procedures for source identification follow up investigations in the event elevated levels are found. These procedures shall be consistent with procedures required in IC/ID section.

D. Aquatic Toxicity Monitoring

I. The objective of aquatic toxicity monitoring is to evaluate if storm water (wet weather) discharges are causing or contributing to chronic toxic impacts on aquatic life by the following:
   i. Toxicity testing at mass emission and major outfall stations to assess impacts on the marine and freshwater environments.

1. The Principal Permittee shall collect and analyze mass emission and major outfall samples for toxicity to evaluate the extent and causes of toxicity in receiving waters. Permittees shall utilize documents such as: Ventura County's

Received
August 26, 2011
Commission on
State Mandates

Technical Guidance Manual for Storm Water Quality Control Measures and U.S. EPA's National Management Measures to Control Nonpoint Source Pollution from Urban Areas to implement measures to eliminate or reduce sources of toxicity in storm water.

2. Toxicity samples may be flow-weighted composite samples or grab samples for both wet and dry event sampling (see subparts A.7 and A.8).

3. Volume of sample shall be determined by specific test methods to be used. At a minimum it is suggested to collect 5 gallons for baseline testing, and an additional 5 gallons for TIE studies. Sufficient sample volume shall be collected to perform the required toxicity tests.

4. All toxicity tests shall be conducted as soon as possible following sample collection. The 36-hour sample holding time for test initiation shall be targeted. However, no more than 72 hours shall elapse before initial use of a sample.

5. When toxicity tests can not be performed to comply with the requirements of this Order due to circumstances beyond the Permittee's control, then the following shall be submitted to the Regional Water Board Executive Officer within 2 working days:
   (a) Statement of situation
   (b) Explanation of circumstance(s) with documentation
   (c) Statement of corrective action for the future

6. The Principal Permittee shall conduct critical life stage chronic toxicity tests on undiluted samples in accordance with:
   (a) U.S. EPA's Short Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to *West Coast* Marine and Estuarine Organisms, (EPA/600/R-95/136, 1995) for all mass emission stations, and for major outfalls discharging to marine and estuarine environments, or
   (b) U.S. EPA's Short Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms, October 2002 (EPA/821/R-02/013, 2002) or current version for major outfalls discharging to freshwater environments.

7. The Principal Permittee shall analyze samples for chronic toxicity according to the schedule below:
   (a) During the first year of the Order, 2 storm events shall be monitored at each mass emission and major outfall station. The first storm event of the wet season that produces at least 0.25 inches of rain, and 1 additional storm event. All storm events shall be separated by 7 days of dry weather (less than 0.1 inch of rain) from the previously measurable storm event.

Received
August 26, 2011
Commission on
State Mandates

(1) During the first year of the Order, all 3 test species shall be used for their respective chronic toxicity test method for the 2 storm events monitored, to determine the most sensitive test species for each monitoring station (see subparts D.8 and D.9 below).

(b) During the next 4 years of the Order, the first storm event of the wet season that produces at least 0.25 inches of rain shall be monitored for each mass emission and major outfall station.

(1) During the next 4 years of the Order, the most sensitive test species determined from the first year of testing at each mass emission and major outfall station shall be used for its respective chronic toxicity test method (see subpart D.6).

8. Marine and Estuarine Species and Test Methods.

(a) Marine and estuarine species and short-term test methods for estimating the chronic toxicity of NPDES effluents shall be used and are found in the first edition of *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to West Coast Marine and Estuarine Organisms* (EPA/600/R-95/136, 1995) and applicable water quality standards; also see 40 CFR Parts 122.41(j)(4) and 122.44(d)(1)(iv).

(1) The Permittee shall conduct:

(A) A static renewal toxicity test with the topsmelt, *Atherinops affinis* (Larval Survival and Growth Test Method 1006.01)

(B) A static non-renewal toxicity test with the giant kelp *Macrocystis pyrifera* (Germination and Growth Test Method 1009.0); and

(C) A static non-renewal toxicity test with the purple sea urchin, *Strongylocentrotus purpuratus*, (Fertilization Test Method 1008.0)

(b) In no case shall the preceding toxicity test species be substituted with another organism unless written authorization from the Regional Water Board Executive Officer is received.

9. Freshwater Species and Test Methods.

(a) Species and short-term test methods for estimating the chronic toxicity of NPDES effluent shall be used and are found in the fourth edition of *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms* (EPA/821/R-02/013, 2002; Table IA, 40 CFR Part 136).

(1) The Permittee shall conduct

(A) A static renewal toxicity test with the fathead minnow, *Pimephales promelas* (Larval Survival and Growth Test Method 1000.0[1])

[1] Daily observations for mortality make it possible to calculate acute toxicity for desired exposure periods (i.e., 7-day LC50, 96-hour LC50, etc.).

Received
August 26, 2011
Commission on
State Mandates

(B) A static renewal toxicity test with the daphnid, *Ceriodaphnia dubia* (Survival and Reproduction Test Method 1002.0[1]); and
(C) A static renewal toxicity test with the green alga, *Selenastrum capricornutum* (also named *Raphidocelis subcapitata*) (Growth Test Method 1003.0)

(b) In no case shall the preceding toxicity test species be substituted with another organism unless written authorization from the Regional Water Board Executive Officer is received.

10. The test endpoint data is analyzed using a standard t-test approach. Statistical analysis methods shall be consistent with U.S. EPA test method manuals.

11. If significant toxicity is found then according to paragraph 10.2.6.2 of the U.S. EPA freshwater test methods manual, all chronic toxicity test results from the multi-concentration tests required by this Order must be reviewed and reported according to U.S. EPA guidance on the evaluation of concentration-response relationships found in *Method Guidance and Recommendations for Whole Effluent Toxicity (WET) Testing (40 CFR 136)* (EPA/821/B-00-004, 2000).

12. Toxic samples shall be immediately subjected to Toxicity Identification Evaluation (TIE) procedures to identify the toxic chemical(s) if toxicity is demonstrated by the standard t-test.

13. A TIE is to be performed to identify the causes of toxicity using the same species and test method and, as guidance, U.S. EPA test method manuals: *Toxicity Identification Evaluation: Characterization of Chronically Toxic Effluents, Phase I* (EPA/600/6-91/005F, 1992); *Methods for Aquatic Toxicity Identification Evaluations, Phase II Toxicity Identification Procedures for Samples Exhibiting Acute and Chronic Toxicity* (EPA/600/R-92/080, 1993); *Methods for Aquatic Toxicity Identification Evaluations, Phase III Toxicity Confirmation Procedures for Samples Exhibiting Acute and Chronic Toxicity* (EPA/600/R-92/081, 1993); and *Marine Toxicity Identification Evaluation (TIE): Phase I Guidance Document* (EPA/600/R-96-054, 1996).

14. The Principal Permittee shall complete chronic Phase I (Toxicity Characterization Procedures) TIEs for all sites showing significant toxicity. For the purpose of triggering TIE (Toxicity Characterization Procedures), significant toxicity is defined as at least 50% mortality. The 50% mortality threshold is consistent with the approach recommended in guidance published by USEPA for conducting TIEs (USEPA, 1996), which recommends a minimum threshold of 50% mortality because the probability of completing a successful TIE decreases rapidly for samples with less than this level of toxicity.

Received
August 26, 2011
Commission on
State Mandates

(a) The TIE shall be conducted on test species, demonstrating the most sensitive toxicity response at a sampling station. However, a TIE(s) may be conducted on an additional test species with the caveat that once the toxicant(s) has been identified then the most sensitive test species triggering the TIE event needs to be tested additionally to verify that the toxicant has been identified and addressed.

15. A TIE Prioritization Metric may be utilized to rank sites for TIEs.[2]

16. Toxicity Reduction Evaluation (TRE) when toxicity is identified
   (a) When the same pollutant or class of pollutants is identified through 2 consecutive TIE evaluations, a TRE shall be performed for that identified toxic pollutant.
   (b) The TRE development shall be performed by a neutral third party (retained by the Permittees), in consultation with the Regional Water Board staff.
   (c) The TRE shall include all reasonable steps to identify the source(s) of toxicity and discuss appropriate BMPs to eliminate the causes of toxicity. No later than 30 days after the source of toxicity and appropriate BMPs are identified, the Permittees shall submit the TRE Corrective Action Plan to the Regional Water Board Executive Officer for approval. At a minimum, the Plan shall include a discussion of the following items:
      (1) The potential sources of pollutant(s) causing toxicity.
      (2) A list of municipalities and agencies that may have jurisdiction over sources of pollutant(s) causing toxicity.
      (3) Recommended BMPs to reduce the pollutant(s) causing toxicity.
      (4) Proposed post construction control measures to reduce the pollutant(s) causing toxicity.
      (5) Follow-up monitoring to demonstrate that toxicity has been removed.
   (d) The TRE process shall be coordinated with TMDL development and implementation (i.e., If a TMDL for 4,4'-DDD is being implemented when a TRE for 4,4'-DDD is required, the efforts shall be coordinated to avoid overlap).

17. Results of Toxicity monitoring conducted in accordance with the Standard Operating Procedure under Standard Provision 14 of this Attachment shall be sent to the Regional Board's Storm Water Site at MS4stormwaterRB4@waterboards.ca.gov, no later than 90 days from sample collection date for the initial toxicity test and no more than 30 days from completion of each aspect of the analysis for TIEs/TREs. The sample data transmitted shall be in the most recent update of the Southern California Municipal Storm Water Monitoring Coalition's (SMC) Standardized Data Transfer Formats (SDTFs).

[2] Appendix 5. SMC Model Monitoring Program.

Received
August 26, 2011
Commission on
State Mandates

18. The Annual Storm Water Report shall include:
    (a) A full laboratory report for all toxicity testing.
    (b) A summary of the years' mass emission and major outfall monitoring station's toxicity test results reported according to the test methods manual chapter on report preparation and test review.
    (c) The dates of sample collection and initiation of each toxicity test.
    (d) All results for effluent parameters monitored concurrently with the toxicity test(s).
    (e) TIE Phase testing (Phase I, Phase II, and Phase III) that has been or is in the process of being conducted per monitoring station.
    (f) The development, implementation, and results for each TRE Corrective Action Plan in the Annual Storm Water Report, beginning the year following the identification of each pollutant or pollutant class causing toxicity.

19. When the SMC Standardized Toxicity Testing Guidance is completed, the Regional Water Board Executive Officer may direct Permittees to replace the current toxicity program with the standardized guidance procedure.

SPECIAL STUDIES

E. Pyrethroid Insecticides Study

I. The Principal Permittee shall perform a Pyrethroid Insecticides study to accomplish the following objectives:
   i. Establish baseline data for major watersheds
   ii. Evaluate whether Pyrethroid Insecticide concentrations are at or approaching levels known to be toxic to sediment-dwelling aquatic organisms.
   iii. Determine if Pyrethroids discovered are from urban sources.
   iv. Assess any trends over the permit term.

1. The Permittees shall incorporate monitoring for Pyrethroid Insecticides within the Calleguas Creek, Santa Clara River and Ventura River Watersheds according to the following:
   (a) No later than the second year of this Order, monitoring shall begin.
   (b) Quality Assurance Project Plan (QAPP) to be submitted to the Regional Board for approval 12 months prior to beginning monitoring.
   (c) In selecting sites to conduct monitoring for Pyrethroid Insecticides, Permittees shall review existing monitoring programs in the watersheds by other public and private entities, watershed coalitions, and citizen volunteers, so as to complement and not duplicate efforts.
   (d) Establish at least 2 stations along the mainstems of each major watershed river that are influenced by urban discharges.

Received
August 26, 2011
Commission on
State Mandates

(e) The study shall be repeated every third year following the year monitoring begins.

2. The Principal Permittee shall monitor Pyrethroid Insecticides stations according to the following:
   (a) The Principal Permittee shall monitor 1 sampling event per station per monitoring year.
      (1) Monitoring shall occur after sediment has settled within the waterbody, and safe access can be assured.
   (b) Sufficient sediment is to be collected at each station in a pre-cleaned glass jar by skimming the upper 1 cm of the sediment column with a steel scoop, and held on ice until returned to the laboratory.
   (c) Sediment shall be homogenized in the laboratory by hand mixing, then held at 4 °C (toxicity samples) or -20 °C (chemistry samples).
   (d) All samples taken shall be analyzed for the following Pyrethroids:
      (1) biefenthrin
      (2) cyfluthrin
      (3) cypermethrin
      (4) deltamethrin
      (5) esfenvalerate
      (6) lambda-cyhalothrin
      (7) permethrin
      (8) tralomethrin (if laboratory is capable of analyzing for it)
   (e) Detection limits for all Pyrethroids shall be as close to 1ng/g (dry weight) as reasonably achievable.
   (f) Each sediment sample is to measure the following:
      (1) total organic carbon (TOC).

3. All samples shall be tested for toxicity to 7 to 10 day old ***Hyalella azteca*** according to standard U.S. EPA testing methods.[3]
   (a) Use of the approach described in *Aquatic Toxicity Due to Residential Use of Pyrethroid Insecticides*[4] for toxicity testing shall be used.

4. Analysis by a laboratory that has performed sediment toxicity testing for Pyrethroid Insecticides is preferred.

5. Monitoring results from each station shall be sent electronically to the Regional Board's Storm Water Site at MS4stormwaterRB4@waterboards.ca.gov, no later than 90 days from sample collection date. The sample data transmitted shall be

[3] *U.S. EPA. Methods for Measuring the Toxicity and Bioaccumulation of Sediment-Associated Contaminants with Freshwater Invertebrates*; EPA Publication 600/R-99/064; U.S. Environmental Protection Agency: Washington, DC, 2000; 192 pp.
[4] *Aquatic Toxicity Due to Residential Use of Pyrethroid Insecticides*; Weston, D.P.; Holmes, R.W.; You, J.; Lydy, M.J. Environ. Sci. Technol.; (Article); 2005; 39(24); 9780 pp.

Received
August 26, 2011
Commission on
State Mandates

in the most recent update of the Southern California Municipal Storm Water Monitoring Coalition's (SMC) Standardized Data Transfer Formats (SDTFs).

6. If toxicity is attributed to Pyrethroids then consultation with staff at U.S. EPA, the California Department of Pesticide Regulations and the California Stormwater Quality Association's (CASQA) pesticides committee (UP3 Project web site), shall be required to obtain relevant information to use in developing the recommendations to mitigate Pyrethroids in the Final Report.

7. Final Report for the Pyrethroid Insecticides study shall contain the following:
   (a) Executive summary
   (b) Methods
   (c) Results (including map depicting monitoring stations)
   (d) Discussion
   (e) Recommendations to mitigate Pyrethroids

8. The Final Report shall be completed and submitted to the Executive Officer of the Regional Water Board no later than 8 months after completion of the study.

9. The Pyrethroid Insecticides Study requirement may be satisfied by another tributary monitoring program within the Watershed performing a sediment Pyrethroid Insecticides Study that is monitoring to assess pyrethroid concentrations and sediment toxicity, so as to complement other ongoing programs.

F. Hydromodification Control Study

1. The Principal Permittee shall conduct or participate in special studies to develop tools to predict and mitigate the adverse impacts of Hydromodification, and to comply with hydromodification control criteria. This can be achieved by the following:
   (a) Develop a mapping and classification system for streams based on their susceptibility to the effects of hydromodification.
   (b) Establish protocols for ongoing monitoring to assess the effects of hydromodification.
   (c) Develop dynamic models to assess the effects of hydromodification on stream condition.
   (d) Develop a series of tools that managers can easily apply to make recommendations or set requirements relative to hydromodification for new development and redevelopment.

Received
August 26, 2011
Commission on
State Mandates

2. The Principal Permittee may satisfy this requirement by participating in the 'Development of Tools for Hydromodification Assessment and Management' Project undertaken by the SMC and coordinated by the SCCWRP.

3. The Principal Permittee shall continue to partner with the SMC and collect data or sponsor its collection for the Ventura County sites to reduce statistical uncertainty and/ or improve model predictability.

4. The Principal Permittee shall submit a letter to the Regional Water Board Executive Officer stating how they will satisfy this requirement, no later than 2 months after Order adoption date.

G. Low Impact Development

1. The Principal Permittee shall conduct or participate in a special study to assess the effectiveness of low impact development techniques in semi-arid climate regimes such as in Southern California.

2. The Principal Permittee may satisfy this requirement by participating in the SMC project titled "Quantifying the Effectiveness of Site Design/ Low Impact Development Best Management Practice in Southern California".

3. The Principal Permittee shall submit a letter to the Regional Water Board Executive Officer stating how they are satisfying this requirement, no later than 2 months after deciding to either conduct or participate in special study.

H. Southern California Bight Project

1. The Principal Permittee and Permittees shall participate with other government organizations regulating discharges in southern California in the collaboration to conduct a regional monitoring survey (Southern California Bight Project (SCBP)), which was started in 2008 and to be continued in successive years. The survey's primary objective is to assess the spatial extent and magnitude of ecological disturbances on the mainland continental shelf of the SCB and to describe relative conditions among different regions of the SCBP.

2. The Principal Permittee shall participate on the Steering Committee for the bight-wide monitoring project, and assist with the estuary and nearshore sampling effort requirement of the proposed monitoring project for Ventura County as defined in the SCBP plan.

Received
August 26, 2011
Commission on
State Mandates

I. Bioassessment

1. The Principal Permittee consents to participate in the following regional water quality program for watershed management and planning:
   (a) SMC Regional Monitoring Program
      (1) Southern California Regional Bioassessment
         (A) Level of effort per watershed per year
            (i) Probabilistic sites per watershed
               (I) Ventura River - Six
               (II) Santa Clara River - Three
               (III) Calleguas Creek - Six
            (ii) Integrator sites per watershed
               (A) Ventura River - One
               (B) Santa Clara River - One
               (C) Calleguas Creek – One
   (b) Ventura County Bioassessment: Permittees shall conduct bioassessment at one fixed site in each of the watersheds above on an annual basis. Southern California Regional Bioassessment protocols shall be used to conduct the Ventura County Bioassessment program.

J. Volunteer Monitoring Programs

1. The Permittees shall provide limited assistance if requested in the development and implementation of volunteer monitoring programs in the Ventura watersheds. These include, but are not limited to the following:
   (a) Ventura River - (Ventura Stream Team)
   (b) Santa Clara River - (Santa Clara River Stream Team)
   (c) Calleguas Creek - (Calleguas Creek Watershed Quality Monitoring Program)
   (d) Malibu Creek - (Malibu Creek Watershed Quality Monitoring Program)

K. Standard Monitoring Provisions

I. All monitoring activities shall meet the following requirements.

1. Monitoring and Records [40 CFR 122.41(j)(1)]
   (a) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

2. Monitoring and Records [40 CFR 122.41(j)(2)] [CWC §13383(a)]
   (a) The Principal Permittee and Permittees shall retain records of all monitoring information, including all calibration and maintenance of monitoring instrumentation, copies of all reports required by this Order, and records of all data used to complete the Report of Waste Discharge (ROWD) and application for this Order, for a period of at least five (5) years from the date

Received
August 26, 2011
Commission on
State Mandates

of the sample, measurement, report, or application. This period may be extended by request of the Regional Water Board or U.S. EPA at any time and shall be extended during the course of any unresolved litigation regarding this discharge.

3. Monitoring and Records [40 CFR 122.21(j)(3)]
   (a) Records of monitoring information shall include:
      (1) The date, time of sampling or measurements; exact place, weather conditions, and rain fall amount.
      (2) The individual(s) who performed the sampling or measurements.
      (3) The date(s) analyses were performed.
      (4) The individual(s) who performed the analyses.
      (5) The analytical techniques or methods used.
      (6) The results of such analyses.
      (7) The data sheets showing toxicity test results.

4. Monitoring and Records [40 CFR 122.21(j)(4)]
   (a) All sampling, sample preservation, and analyses must be conducted according to test procedures under 40 CFR Part 136, unless other test procedures have been specified in this Order. If a particular Minimum Level (ML) is not attainable in accordance with procedures set forth in 40 CFR 136, the lowest quantifiable concentration of the lowest calibration standard analyzed by a specific analytical procedure may be used instead.

5. Monitoring and Records [40 CFR 122.21(j)(5)]
   (a)The CWA provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Order shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four years, or both.

6. All chemical, bacteriological, and toxicity analyses shall be conducted at a laboratory:
   (a) Certified for such analyses by an appropriate governmental regulatory agency.
   (b) Participated in 'Intercalibration Studies' for storm water pollutant analysis conducted by the SMC. [5]

[5] The 'Intercalibration Studies' are conducted periodically by the SMC to establish a consensus based approach for achieving minimal levels of comparability among different testing laboratories for storm water samples to minimize analytical procedure bias. Stormwater Monitoring Coalition Laboratory Document, Technical Report 420 (2004) and subsequent revisions and augmentations.

Received
August 26, 2011
Commission on
State Mandates

(c) Which performs laboratory analyses consistent with the storm water monitoring guidelines as specified in, the *Stormwater Monitoring Coalition Laboratory Guidance Document,* 2nd Edition R. Gossettt and K. Schiff (2007), and its revisions.

7. For priority toxic pollutants that are identified in the CTR (65 *Fed. Reg.* 31682), the MLs published in Appendix 4 of the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays and Estuaries of California* (SIP) shall be used for all analyses, unless otherwise specified. The MLs from the SIP are incorporated into Attachment "G".

8. The Monitoring Report shall specify the analytical method used, the Method Detection Level (MDL) and the ML for each pollutant. For the purpose of reporting compliance with numerical limitations, performance goals, and receiving water limitations, analytical data shall be reported with 1 of the following methods, as appropriate:
   (a) An actual numerical value for sample results greater than or equal to the ML.
   (b) "Not-detected (ND)" for sample results less than the laboratory's MDL with the MDL indicated for the analytical method used.
   (c) "Detected, but Not Quantified (DNQ)" if results are greater than or equal to the laboratory's MDL but less than the ML. The estimated chemical concentration of the sample shall also be reported. This is the concentration that results from the confirmed detection of the substance by the analytical method below the ML value.

9. For priority toxic pollutants, if the Permittee can demonstrate that a particular ML is not attainable, in accordance with procedures set forth in 40 CFR 136, the lowest quantifiable concentration of the lowest calibration standard analyzed by a specific analytical procedure (assuming that all the method specified sample weights, volumes, and processing steps have been followed) may be used instead of the ML listed in Appendix 4 of the SIP. The Principal Permittee must submit documentation from the laboratory to the Regional Water Board Executive Officer for approval prior to raising the ML for any constituent.

10. Monitoring Reports [40 CFR 122.41(I)(4)(ii)]
   (a) If the Principal Permittee monitors any pollutant more frequently than required by the Order using test procedures approved under 40 CFR part 136, unless otherwise specified in the Order, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Annual Monitoring Reports.

Received
August 26, 2011
Commission on
State Mandates

11. Monitoring Reports [40 CFR 122.41(I)(4)(iii)]
    (a) Calculations for all limitations, which require averaging of measurements, shall utilize an arithmetic mean unless otherwise specified in this Order.

12. If no flow occurred during the reporting period, then the Monitoring Report shall, so state.

13. The Regional Water Board Executive Officer or the Regional Board, consistent with 40 CFR 122.41, may approve changes to the Monitoring Program, after providing the opportunity for public comment, either:
    (a) By petition of the Principal Permittee or by petition of interested parties after submittal of the Monitoring Report. Such petition shall be filed not later than 60 days after the Monitoring Report submittal date, or
    (b) As deemed necessary by the Regional Water Board Executive Officer following notice to the Principal Permittee.

14. The Principal Permittee must provide a copy of the Standard Operation Procedures (SOPs) for the Monitoring Program No. CI 7388 to the Regional Water Board upon request. The SOP will consist of five elements: Title page, Table of Contents, Procedures, Quality Assurance/ Quality Control (QA/ QC), and References. Briefly describe the purpose of the work or process, including any regulatory information or standards that are appropriate to the SOP process, and the scope to indicate what is covered. Denote what sequential procedures should be followed, divided into significant sections; e.g., possible interferences, equipment needed personnel qualifications, and safety considerations. Describe QA/ QC activities, and list any cited or significant references.

L. Total Maximum Daily Load (TMDL) Monitoring

1. TMDL monitoring is to determine compliance with the TMDL Waste Load Allocations (WLAs) and numeric targets for the MS4 Permittees that have been adopted by the Regional Water Board and have been approved by the Office of Administrative Law and the U.S. EPA.

2. TMDL monitoring is in accordance with approved TMDLs as discussed in part 5 of the permit. TMDL monitoring for specific watersheds is in accordance with the agreed upon monitoring plans submitted by stakeholders, including MS4 Permittees.

Received
August 26, 2011
Commission on
State Mandates

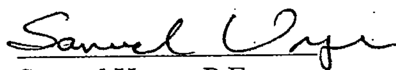
M. Beach Water Quality Monitoring

If funding from state and federal sources is not available for beach water quality monitoring the Principal Permittee shall conduct weekly year-round beach water quality sampling and analysis at a maximum of ten sites in accordance with the procedures and locations used in AB 411 monitoring and listed below:

1. Rincon Beach – 25 yards south of the creek mouth*
2. Oil Piers Beach – south of the drain, bottom of the wood staircase
3. Faria County Park – south of the drain at the north end of the park*
4. Solimar Beach – south (end of east gate access road)*
5. Emma Wood State Beach – 50 yards south of first drain
6. Oxnard Beach – at J Street drain
7. Surfer's Point at Seaside – end of the access path via wooden gate
8. Promenade Park – Figueroa Street
9. Surfer's Knoll – beach adjacent to the parking lot*
10. San Buenaventura Beach – south of drain at San Jon Road

* Not associated with MS4 discharges.

Ordered by:



Samuel Unger, P.E.
Interim Executive Officer

Date: July 8, 2010

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT G

Storm Water Monitoring Program's Constituents with Associated Minimum Levels (MLs)[1]

CONSTITUENTS	MLs
CONVENTIONAL POLLUTANTS	**mg/L**
Oil and Grease	5
Total Phenols	0.1
Cyanide	0.005
pH	0 - 14
Temperature	N/A
Dissolved Oxygen	Sensitivity to 5 mg/L
BACTERIA (single sample limits)	**MPN/100ml**
Total coliform (marine waters)	10,000
Enterococcus (marine waters)	104
Fecal coliform (marine & fresh waters)	400
E. coli (fresh waters)	235
GENERAL	**mg/L**
Dissolved Phosphorus	0.05
Total Phosphorus	0.05
Turbidity	0.1 NTU
Total Suspended Solids	2
Total Dissolved Solids	2
Volatile Suspended Solids	2
Total Organic Carbon	1
Total Petroleum Hydrocarbon	5
Biochemical Oxygen Demand	2
Chemical Oxygen Demand	20-900
Total Ammonia-Nitrogen	0.1
Total Kjeldahl Nitrogen	0.1
Nitrate-Nitrite	0.1
Alkalinity	2
Specific Conductance	1umho/cm
Total Hardness	2
MBAS	0.5
Chloride	2
Fluoride	0.1
Methyl tertiary butyl ether (MTBE)	1
Perchlorate	4 µg/L

[1] For priority pollutants, MLs published in Appendix 4 of the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays and Estuaries of California (SIP) shall be used for all analyses, unless otherwise specified. Method Detection Levels (MDLs) must be lower than or equal to the ML value, unless otherwise approved by the Regional Board.

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT G

Storm Water Monitoring Program's Constituents with Associated Minimum Levels (MLs)[1]

METALS (Dissolved & Total)	**µg/L**
Aluminum	100
Antimony	0.5
Arsenic	1
Beryllium	0.5
Cadmium	0.25
Chromium (total)	0.5
Copper	0.5
Hex. Chromium	5
Iron	100
Lead	0.5
Mercury	0.5
Nickel	1
Selenium	1
Silver	0.25
Thallium	1
Zinc	1
SEMIVOLATILE ORGANIC COMPOUNDS	**µg/L**
ACIDS	**µg/L**
2-Chlorophenol	2
4-Chloro-3-methylphenol	1
2,4-Dichlorophenol	1
2,4-Dimethylphenol	2
2,4-Dinitrophenol	5
2-Nitrophenol	10
4-Nitrophenol	5
Pentachlorophenol	2
Phenol	1
2,4,6-Trichlorophenol	10
BASE/NEUTRAL	**µg/L**
Acenaphthene	1
Acenaphthylene	2
Anthracene	2
Benzidine	5
1,2 Benzanthracene	5
Benzo(a)pyrene	2
Benzo(g,h,i)perylene	5
3,4 Benzoflouranthene	10

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT G

Storm Water Monitoring Program's Constituents with Associated Minimum Levels (MLs)[1]

BASE/NEUTRAL	µg/L
Benzo(k)flouranthene	2
Bis(2-Chloroethoxy) methane	5
Bis(2-Chloroisopropyl) ether	2
Bis(2-Chloroethyl) ether	1
Bis(2-Ethylhexl) phthalate	5
4-Bromophenyl phenyl ether	5
Butyl benzyl phthalate	10
2-Chloroethyl vinyl ether	1
2-Chloronaphthalene	10
4-Chlorophenyl phenyl ether	5
Chrysene	5
Dibenzo(a,h)anthracene	0.1
1,3-Dichlorobenzene	1
1,4-Dichlorobenzene	1
1,2-Dichlorobenzene	1
3,3-Dichlorobenzidine	5
Diethyl phthalate	2
Dimethyl phthalate	2
di-n-Butyl phthalate	10
2,4-Dinitrotoluene	5
2,6-Dinitrotoluene	5
4,6 Dinitro-2-methylphenol	5
1,2-Diphenylhydrazine	1
di-n-Octyl phthalate	10
Fluoranthene	0.05
Fluorene	0.1
Hexachlorobenzene	1
Hexachlorobutadiene	1
Hexachloro-cyclopentadiene	5
Hexachloroethane	1
Indeno(1,2,3-cd)pyrene	0.05
Isophorone	1
Naphthalene	0.2
Nitrobenzene	1
N-Nitroso-dimethyl amine	5
N-Nitroso-diphenyl amine	1
N-Nitroso-di-n-propyl amine	5
Phenanthrene	0.05
Pyrene	0.05
1,2,4-Trichlorobenzene	1

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT G

Storm Water Monitoring Program's Constituents with Associated Minimum Levels (MLs)[1]

CHLORINATED PESTICIDES	**µg/L**
Aldrin	0.005
alpha-BHC	0.01
beta-BHC	0.005
delta-BHC	0.005
gamma-BHC (lindane)	0.02
alpha-chlordane	0.1
gamma-chlordane	0.1
4,4'-DDD	0.05
4,4'-DDE	0.05
4,4'-DDT	0.01
Dieldrin	0.01
alpha-Endosulfan	0.02
beta-Endosulfan	0.01
Endosulfan sulfate	0.05
Endrin	0.01
Endrin aldehyde	0.01
Heptachlor	0.01
Heptachlor Epoxide	0.01
Toxaphene	0.5
POLYCHLORINATED BIPHENYLS	**µg/L**
Aroclor-1016	0.5
Aroclor-1221	0.5
Aroclor-1232	0.5
Aroclor-1242	0.5
Aroclor-1248	0.5
Aroclor-1254	0.5
Aroclor-1260	0.5
ORGANOPHOSPHATE PESTICIDES	**µg/L**
Atrazine	2
Chlorpyrifos	0.05
Cyanazine	2
Diazinon	0.01
Malathion	1
Prometryn	2
Simazine	2
HERBICIDES	**µg/L**
2,4-D	10
Glyphosate	5
2,4,5-TP-SILVEX	0.5

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT H

Storm Water Monitoring Program's Major Outfall Stations

PERMITTEE	STATION ID	LATITUDE	LONGITUDE
City of Camarillo	MO-CAM	34°13'10.00"N	119° 3'58.06"W
City of Fillmore	MO-FIL	34°24'16.51"N	118°55'50.47"W
Unincorporated Ventura County	MO- MEI (Meiners Oaks)	34°26'43.98"N	119°17'25.18"W
City of Moorpark	MO-MPK	34°16'44.29"N	118°54'19.40"W
City of Ojai	MO-OJA	34°26'41.25"N	119°14'28.43"W
City of Oxnard	MO-OXN	34°14'17.38"N	119°11'23.08"W
City of Port Hueneme	MO-HUE	34° 8'29.30"N	119°11'21.09"W
City of Santa Paula	MO-SPA	34°20'54.99"N	119° 3'19.82"W
City of Simi Valley	MO-SIM	34°16'18.59"N	118°47'1.51"W
City of Thousand Oaks	MO-THO	34°12'49.16"N	118°55'16.24"W
City of Ventura	MO-VEN	34°14'35.86"N	119°11'40.86"W

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 1

TAB 2

Received
August 26, 2011
Commission on
State Mandates

California Regional Water Quality Control Board

Los Angeles Region

Winston H. Hickox
Secretary for Environmental Protection

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640
Internet Address: http://www.swrcb.ca.gov/~rwqcb4

Gray Davis
Governor

August 3, 2000

Jeff Pratt
Deputy Director, Department of Public Works
Ventura Countywide Stormwater Quality Management Program
Ventura County Flood Control District (Principal Co-Permittee)
800 South Victoria Avenue, L#1600
Ventura, CA 93009

Directors of Public Works/City Engineers
Municipal Co-Permittees
Ventura County MS4

VENTURA COUNTY MUNICIPAL STORM WATER NPDES PERMIT (BOARD ORDER No. 00-108; NPDES PERMIT No. CAS004002) – LETTER OF TRANSMITTAL

Dear Mr. Pratt, et al:

We are pleased to send you the final municipal storm water permit for the Ventura County (attached), which was adopted by the Regional Board at its meeting on July 27, 2000, pursuant to Division 7 of the California Water Code. Board Order No. 00-108 serves as your permit, under the National Pollutant Discharge Elimination System (NPDES), for storm water discharges and urban runoff within Ventura County, and will expire on July 27, 2005.

The Order requires the Ventura County Flood Control District, herein referred to as the Principal Co-Permittee, and other Co-Permittees to implement the NPDES Permit No. CAS004002, including the Monitoring and Reporting Program, Ventura Countywide Stormwater Quality Urban Impact Mitigation Plan (SQUIMP), and Ventura Countywide Stormwater Quality Management Plan (SMP). The first Annual Storm Water Report and Assessment, for the period July 1, 1999 through July 27, 2000, is due on October 1, 2000. The first Annual Monitoring Report is due July 15, 2001.

Once again, we wish to thank you and your staff for their participation and assistance during the development and adoption of the permit for the Ventura County. Should you have any questions, please do not hesitate to call me at (213) 576-6605 or Dr. Xavier Swamikannu at (213) 576-6654.

Sincerely,

The Original signed by
Dennis A. Dickerson
Executive Officer

Received
August 26, 2011
Commission on
State Mandates

cc: Jorge Leon, State Water Resources Control Board
Marilyn Levin, Office of the State Attorney General

County of Ventura	Co-Permittee
City of Camarillo	Co-Permittee
City of Fillmore	Co-Permittee
City of Moorepark	Co-Permittee
City of Ojai	Co-Permittee
City of Oxnard	Co-Permittee
City of Port Hueneme	Co-Permittee
City of San Buenaventura	Co-Permittee
City of Santa Paula	Co-Permittee
City of Simi Valley	Co-Permittee
City of Thousand Oaks	Co-Permittee

Interested Parties on File

Received
August 26, 2011
Commission on
State Mandates

TABLE OF CONTENTS

WASTE DISCHARGE REQUIREMENTS

Findings 1
Permit Background 1
Nature of Discharge 1
Permit Background 2
Permit Coverage 3
Federal and State Regulations 5
Public Notification 7

Part 1 DISCHARGE PROHIBITIONS 7

Part 2 RECEIVING WATER LIMITATIONS 9

Part 3 STORM WATER QUALITY MANAGEMENT PLAN IMPLEMENTATION 10
A. General Requirements 10
B. Modification 10
C. Legal Authority 11
D. Annual Storm Water Report and Assessment. 12
E. Storm Water Monitoring Report 13
F. Modification 13

Part 4 SPECIAL PROVISIONS 13
A. Programs for Residents. 14
B. Programs for Industrial/Commercial Businesses. 14
C. Programs for Planning and Land Development 16
D. Programs for Construction sites 17
E. Public Agency Activities 19
Corporation Yards 19
Other Facilities 20
F. Programs for Illicit Discharges/Illegal Connections 21
G. Total Maximum Daily Loads 21
H. Storm Water Quality Urban Impact Mitigation plan 21

Part 5 DEFINITIONS. 22

Received
August 26, 2011
Commission on
State Mandates

Part 6 STANDARD PROVISIONS 29
A. General 29
B. Submission of Correct Information. 29
C. Reporting of All Non-compliance 29
D. Compliance with SQUIMP and Monitoring Program 29
E. Public Review 29
F. Duty to Comply 29
G. Duty to Mitigate 30
H. Inspection and Entry 30
I. Proper Operation and Maintenance 30
J. Signatory Requirements 30
K. Reopener and Modification 30
L. Severability 31
M. Duty to Provide Information 32
N. Twenty-four Hour Reporting 32
O. Bypass 32
P. Upset 33
Q. Property Rights 33
R. Enforcement 34
S. Need to Halt or Reduce Activity not a Defense 35
T. Conditions to Modify, Revoke, or Reissue Board Order 35
U. Rescission of Board Order No. 94-082 35
V. Board Order Expiration Date 35

FIGURE 1

Map of Areas Subject to Permit Requirements 37

ATTACHMENT A

Storm Water Quality Urban Impact Mitigation Plan . . . . A-1 - A-20

FIGURE 2

Map of Unconfined Groundwater Basins and Vulnerable Unconfined aquifers . . . A-21

ATTACHMENT B

Storm Water Quality Management Plan . . . . i - vii

Received
August 26, 2011
Commission on
State Mandates

MONITORING AND REPORTING PROGRAM

I. Program Reporting Requirements T-1
Program Management T-1
Programs for Residents T-2
Programs for Industrial/Commercial Businesses T-2
Programs for Planning and Land Development T-2
Programs for Construction Sites T-3
Programs for Illicit Discharge and Illegal
Connection Control T-3
Programs for Facilities Maintenance T-4
Pollutants of Concern T-4

II. Monitoring Requirements T-5

III. Program Evaluation T-9

ATTACHMENT

Analyses, Methods, Limits and Holding Times T-10

Received
August 26, 2011
Commission on
State Mandates

STATE OF CALIFORNIA

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

ORDER NO. 00-108 NPDES PERMIT NO. CAS004002
WASTE DISCHARGE REQUIREMENTS
FOR
MUNICIPAL STORM WATER AND URBAN RUNOFF DISCHARGES
WITHIN
VENTURA COUNTY FLOOD CONTROL DISTRICT,
COUNTY OF VENTURA, AND THE CITIES OF VENTURA COUNTY

FINDINGS

The California Regional Water Quality Control Board, Los Angeles Region (hereinafter called the Regional Board), finds that:

Permit Parties

1. Ventura County Flood Control District (VCFCD), the County of Ventura, and the Cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura, Santa Paula, Simi Valley, and Thousand Oaks (hereinafter referred to separately as Co-permittees and jointly as the Discharger) have joined together to form the Ventura Countywide Storm Water Quality Management Program to discharge wastes under waste discharge requirements contained in Order No. 94-082, adopted by this Board on July 27, 2000. The Discharger discharges or contributes to discharges of storm water and urban runoff from municipal separate storm sewer systems (MS4s), also called storm drain systems, into receiving waters of the Santa Clara River, Ventura River, Calleguas Creek, and other coastal watersheds within Ventura County.

2. The Regional Board may require a separate National Pollutant Discharge Elimination System (NPDES) permit for any entity that discharges storm water into coastal watersheds of Ventura County. Such entity can be any State or Federal agency, State or Federal facility, real estate development, waste disposal facility, special district, private interest, etc. Pursuant to 40 CFR 122.26(a), the Regional Board will give these entities the option to become a Co-permittee, after obtaining the concurrence of the Co-permitees, or obtain an individual storm water discharge permit.

Nature of Discharge

3. Storm water discharges consist of surface water runoff generated from various land uses in all the hydrologic drainage basins which discharge into waters of the State. The quality of these discharges varies and is affected by hydrology, geology, land use, season, and sequence and duration of hydrologic events. The primary

Received
August 26, 2011
Commission on
State Mandates

pollutants of concern currently identified by the Program for these discharges are total and fecal coliform, mercury, polyaromatic hydrocarbons (PAHs), DDT and their by-products, diazinon, sediment/total suspended solids (TSS), chlorpyrifos, copper, lead, thallium, bis(2-ethylhexyl) phthalate, and phosphorous.

4. In general, the substances that are found in urban storm water runoff can harm human health and aquatic ecosystems. In addition, the high volumes of storm water discharged from MS4s in areas of urbanization can significantly impact aquatic ecosystems due to physical modifications such as bank erosion and widening of channels. It is anticipated that, due to the nature of storm water events (i.e., large volumes of water and high velocities) that there will be short-term, reversible impacts to beneficial uses that are not directly related to water quality.

5. Water quality assessments conducted by the Regional Board identified impairment, or threatened impairment, of beneficial uses of water bodies in the Ventura Coastal Watersheds. These impairments include many of the pollutants of concern identified by the program. These impairments are identified on the Federal 303(d) list of impaired water bodies.

Permit Background

6. The Discharger has filed a report of waste discharge (ROWD) and has applied for renewal of its waste discharge requirements and an NPDES permit to discharge wastes to surface waters. The ROWD includes the Ventura Countywide Storm Water Quality Management Plan (hereinafter called Ventura County SMP) which describes in detail all group activities and entity-specific activities. The Ventura County SMP also describes management measures that are included and how they are organized; it lists tasks required to accomplish the measures, the schedule for implementation, and specific goals. The schedule and tasks are projected for the 5-year permit period. An outline of the Ventura County SMP is presented in Attachment B. The Implementation chapter of the Ventura County SMP consists of the following elements:

   a. Program management
   b. Programs for residents
   c. Programs for industrial/commercial businesses
   d. Programs for land development
   e. Programs for construction sites
   f. Programs for Co-permittee facility maintenance, and
   g. Programs for illicit discharge control

   The Ventura County SMP is implemented by the Co-permittees with general funds, and/or Benefit Assessment Program funds.

7. The Ventura Countywide Storm Water Quality Management Program also includes the Storm Water Monitoring Plan. To date, the monitoring program has consisted of land-use based monitoring combined with receiving water monitoring and modeling. The Discharger intends to sign an agreement to participate in the Regional Monitoring Program established for Southern California municipal

Received
August 26, 2011
Commission on
State Mandates

programs under the guidance of the Southern California Coastal Water Research Project.

8. The Regional Board has reviewed the ROWD and has determined it to be complete under the reapplication policy for MS4s issued by the USEPA on July 1996. The Regional Board finds that the Permittee's proposed Storm Water Management Plan is acceptable at this time, and when fully implemented, is expected to be consistent with the statutory standard of Maximum Extent Practicable (MEP).

Permit Coverage

9. The area subject to permit requirements includes all areas within the boundaries of the cities as well as unincorporated areas of Ventura County defined as urban by the U.S. Census Bureau (Figure 1). Municipal storm drain systems in this area discharge either directly into the Pacific Ocean or one of five major water bodies:

Water Body	Receives Municipal Storm Drain Discharges from:
Ventura River	City of Ojai, City of San Buenaventura (part), unincorporated Ventura County (part)
Santa Clara River	City of Fillmore, City of Oxnard (part), City of San Buenaventura (part), City of Santa Paula, unincorporated Ventura County (part)
Calleguas Creek	City of Camarillo, City of Moorpark, City of Simi Valley, City of Thousand Oaks (part), unincorporated Ventura County (part)
Malibu Creek	City of Thousand Oaks (part), unincorporated Ventura County (part)
Bays/ Estuaries	City of Oxnard (part), City of Port Hueneme, City of San Buenaventura (part)

10. The Co-permittees are separate legal entities and have the authority to develop, administer, implement, and enforce storm water quality management programs within their own jurisdiction. The Ventura County SMP defines certain storm water discharge requirements that apply to the Discharger, and others that apply to specific Co-permittees. Each Co-permittee is responsible for compliance with relevant portions of this permit within their jurisdiction.

11. VCFCD is the Principal Co-permittee for permit implementation while the remaining entities, including the County of Ventura and the ten cities, are designated as Co-permittees. The following Implementation Agreement exists between the Principal Co-permittee and the Co-permittees:

As the Principal Co-permittee, VCFCD will:

a. Coordinate permit activities;
b. Establish uniform data submittal format;
c. Set time schedules;
d. Prepare regulatory reports;

Received
August 26, 2011
Commission on
State Mandates

e. Forward information to the Co-permittees;
f. Arrange for public review;
g. Secure services of consultants as necessary;
h. Implement activities of common interest;
i. Develop/prepare/generate all materials and data common to all Co-permittees;
j. Update Co-permittees on Regional Board and US Environmental Protection Agency (USEPA) regulations;
k. Arrange for collection and payment of annual permit renewal fee; and,
l. The Principal Co-permittee shall convene all Management Committee and Subcommittee meetings.

All Co-permittees will:

a. Comply with the requirements of the permit within their own jurisdictional boundaries;
b. Prepare and provide to the Principal Co-permittee permit-required submittals;
c. Develop programs to address:
   - Implementation of controls to reduce pollution from commercial, industrial, and residential areas;
   - Implementation of structural/non-structural controls on land development and construction sites;
   - Implementation of controls to reduce pollution from maintenance activities;
   - Elimination of illegal connections, including discouragement of improper disposal, encouragement of spill prevention and containment, and implementation of appropriate spill response;
   - Inspection monitoring and control programs for industrial facilities; and,
   - Implementation of public awareness and training programs.

d. Co-permittees shall be represented at Management Committee Meetings;
e. There are currently five subcommittees which were developed during the first permit cycle: Residents, Businesses/Illicit Discharges, Planning and Land Development, Construction, and Co-permittee Facilities Maintenance. The Management Committee will assign subcommittee attendance requirements in proportion to Co-permittee population. Co-permittees shall be represented at all assigned subcommittee meetings, and,
f. Within its own jurisdiction, each Co-permittee is responsible for adoption and enforcement of storm water pollution prevention ordinances, implementation of self-monitoring programs and Best Management Practices (BMPs), and conducting applicable inspections. Based upon a countywide model, each Co-permittee, except the City of Simi Valley, has adopted a Storm Water Quality

Received
August 26, 2011
Commission on
State Mandates

Ordinance applicable to their jurisdiction. This is in addition to 'the 'Control of Water Quality, Soil, Erosion and Sedimentation of New Agricultural Hillside Developments' adopted by the Board of Supervisors of the County of Ventura on March 20, 1984. The Principal Co-permittee is responsible for the preparation and submittal of progress and annual reports to the Regional Board.

12. This permit is intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution control program to minimize pollutants to the maximum extent practicable in storm water discharges from the permitted area in Ventura County to the waters of the United States.

Federal and State Regulations

13. The Water Quality Act of 1987 added Section 402(p) to the Federal Clean Water Act (CWA). This section requires the U.S. Environmental Protection Agency (EPA) to establish regulations setting forth NPDES requirements for storm water discharges. The first phase of these requirements was directed at municipal separate storm drainage systems (MS4) serving a population of 100,000 or more and storm water discharges associated with industrial activities, including construction activities. Other dischargers, including municipalities with a population of less than 100,000, for which the U.S. EPA Administrator or the State determines that the storm water discharge contributes to a violation of a water quality standard, or is a significant contributor of pollutants to waters of the United States, may also be subject to NPDES requirements. On November 16, 1990, EPA published these final regulations in the Federal Register under Part 122 Code of Federal Regulations.

14. The CWA allows the EPA to delegate its NPDES permitting authority to states with an approved environmental regulatory program. The State of California is a delegated State. The Porter-Cologne Water Quality Control Act (California Water Code) authorizes the State Water Resources Control Board (State Board), through the Regional Boards, to regulate and control the discharge of pollutants into waters of the State and tributaries thereto.

15. Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The Regional Board addresses septic systems through the administration of other programs.

16. The State Water Resources Control Board adopted a revised Water Quality Control Plan for Ocean Waters of California (Ocean Plan) on July 23, 1997. The Ocean Plan contains water quality objectives for the coastal waters of California.

17. This Regional Board adopted a revised Water Quality Control Plan (Basin Plan) for the Los Angeles Region on June 13, 1994. The Basin Plan, which is incorporated

Received
August 26, 2011
Commission on
State Mandates

into this Order by reference, specifies the beneficial uses of Ventura County water bodies and their tributary streams and contains both narrative and numerical water quality objectives for these receiving waters. The following beneficial uses are identified in the Basin Plan and apply to all or portions of each watershed covered by this Permit:

a. Municipal and domestic supply
b. Agricultural supply
c. Industrial service supply
d. Industrial process supply
e. Ground water recharge
f. Freshwater replenishment
g. Navigation
h. Hydropower generation
i. Water contact recreation
j. Non-contact water recreation
k. Ocean commercial and sport fishing
l. Warm freshwater habitat
m. Cold freshwater habitat
n. Preservation of Areas of Special Biological Significance
o. Saline water habitat
p. Wildlife habitat
q. Preservation of rare and endangered species
r. Marine habitat
s. Fish migration
t. Fish spawning
u. Shellfish harvesting

18. To facilitate compliance with federal regulations, the State Water Resources Control Board (State Board) has issued two statewide general NPDES permits: one for storm water from industrial sites [NPDES No. CAS000001, General Industrial Activities Storm Water Permit (GIASP)] and the other for storm water from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. The GCASP was issued on August 20, 1992. The GIASP was reissued on April 17, 1997. Facilities discharging storm water associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for storm water discharges, or be covered by these statewide general permits by completing and filing a Notice of Intent (NOI) with the State Board. The USEPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in storm water discharges to the MS4.

19. The State Board, on October 28, 1968, adopted Resolution No. 68-16, “Maintaining High Quality Water” which established an anti-degradation policy for State and Regional Boards.

20. The State Board, on June 17, 1999, adopted Order No. WQ 99-05, which specifies standard receiving water limitations language to be included in all municipal storm water permits issued by the State and Regional Boards.

Received
August 26, 2011
Commission on
State Mandates

21. California Water Code (CWC) Section 13263(a) requires that waste discharge requirements issued by Regional Boards shall implement any relevant water quality control plans that have been adopted; shall take into consideration the beneficial uses to be protected and the water quality objectives reasonably required for that purpose; other waste discharges; and, the need to prevent nuisance.

22. California Water Code Section 13370 *et seq.* requires that waste discharge requirements issued by the Regional Boards comply with provisions of the Federal Clean Water Act and its amendments.

<u>Public Notification</u>

23. This action to adopt and issue waste discharge requirements and an NPDES permit for this discharge is exempt from the provisions of the California Environmental Quality Act (CEQA), Chapter 3 (commencing with Section 21100) of Division 13 of the Public Resources Code in accordance with Section 13389 of the California Water Code.

24. The Regional Board has notified the Discharger and interested agencies and persons of its intent to issue waste discharge requirements for this discharge, and has provided them with an opportunity to submit their written views and recommendations.

25. The Regional Board, in a public hearing, heard and considered all comments pertaining to the discharge and to the tentative requirements.

26. This Order shall serve as a National Pollutant Discharge Elimination System (NPDES) Permit, pursuant to Section 402 of the Federal Clean Water Act, or amendments thereto, and shall take effect on August 11, 2000 provided the Regional Administrator of the EPA has no objections.

IT IS HEREBY ORDERED that the Ventura County Flood Control District, the County of Ventura, and the Cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura, Santa Paula, Simi Valley, and Thousand Oaks, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, and the provisions of the Clean Water Act, as amended, and regulations and guidelines adopted thereunder, shall comply with the following:

PART 1 - DISCHARGE PROHIBITIONS

A. The Co-permittees shall, within their respective jurisdictions, effectively prohibit non-storm water discharges into the MS4 (storm drain systems) and watercourses except where such discharges:

    1. Are covered by a separate individual or general NPDES permit; or

Received
August 26, 2011
Commission on
State Mandates

2. Meet one of the conditions below:

   a. Not identified as a source of pollutants:

      1. Flows from riparian habitats or wetlands;
      2. Diverted stream flows;
      3. Natural springs;
      4. Rising ground waters;
      5. Uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)]; or;

   b. Not identified as a source of pollutants, subject to conditions:

      6. Water line flushing;
      7. Discharges from potable water sources;
      8. Foundation drains;
      9. Footing drains;
      10. Air conditioning condensate;
      11. Water from crawl space pumps;
      12. Reclaimed and potable irrigation water;
      13. Dechlorinated swimming pool discharges;
      14. Individual residential car washing;
      15. Sidewalk washing;
      16. Discharges or flows from emergency fire fighting activities.

   If any of the above categories of non-storm water discharges (Part I, A.2.b) are determined to be a source of pollutants by the Regional Board Executive Officer, the discharge need not be prohibited if the Co-permittee implements appropriate BMPs to ensure that the discharge will not be a source of pollutants. Notwithstanding the above, the Regional Board Executive Officer may impose the prohibition in consideration of anti-degradation policies.

   The Discharger may, for any of the above non-storm water categories, require BMPs deemed necessary to ensure that the discharge will not be a source of pollutants.

   c. The Regional Board Executive Officer may authorize the discharge of additional categories of non-storm water, after consideration of anti-degradation policies and upon presentation of evidence that the non-storm water discharge will not be a source of pollutants. This evidence may include the implementation of BMPs to control pollutants.

3. Discharges originating from federal, state, or other facilities which the Discharger is pre-empted by law from regulating.

Received
August 26, 2011
Commission on
State Mandates

PART 2 - RECEIVING WATER LIMITATIONS

A. Discharges from the MS4 that cause or contribute to the violation of water quality standards or water quality objectives are prohibited.

B. Discharges from the MS4 of storm water, or non-storm water, for which a Discharger is responsible, shall not cause or contribute to a condition of nuisance.

C. The Discharger shall comply with the permit through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the Ventura County SMP and other requirements of this permit including any modifications. The Ventura County SMP shall be designed to achieve compliance with receiving water limitations. If exceedance(s) of water quality objectives or water quality standards persist, notwithstanding implementation of the Ventura County SMP and other requirements of this permit, the Discharger shall assure compliance with discharge prohibitions and receiving water limitations by complying with the following procedure:

   1. Upon a determination by either the Discharger or the Regional Board that discharges are causing or contributing to an exceedance of an applicable water quality standard(s), the Discharger shall promptly notify and thereafter submit a report to the Regional Board that describes BMPs that are currently being implemented, and additional BMPs that will be implemented, to prevent or reduce any pollutants that are causing or contributing to the exceedances of water quality standards. This report may be included with the Annual Storm Water Report and Assessment, unless the Regional Board directs an earlier submittal. The report shall include an implementation schedule. The Regional Board may require modifications to the report.

   2. Submit any modifications to the report required by the Regional Board within 30 days of notification.

   3. Within 30 days following the approval of the report, the Discharger shall revise the Ventura County SMP and monitoring program to incorporate the approved, modified suite of BMPs, implementation schedule, and any additional monitoring required.

   4. Implement the revised Ventura County SMP and monitoring program according to the approved schedule.

D. So long as the Discharger complies with the procedures set forth above and is implementing the revised Ventura County SMP, the Discharger does not have to repeat the procedure for continuing or recurring exceedances of the same water quality standard(s) unless directed by the Regional Board to develop additional BMPs.

Received
August 26, 2011
Commission on
State Mandates

PART 3 - STORM WATER QUALITY MANAGEMENT PLAN IMPLEMENTATION, MONITORING, AND REPORTING

A. General Requirements

1. The Discharger shall, at a minimum, adopt and implement the elements of the Ventura County SMP that are consistent with the terms of this permit.

   Additionally, modifications to the Ventura County SMP made during the term of the permit including those made in accordance with Part 3. B. of this permit shall be implemented.

2. The Ventura County SMP shall, at a minimum, comply with applicable requirements of 40 CFR 122.26(d)(2). The Ventura County SMP shall be implemented so as to reduce the discharges of pollutants in storm water to the maximum extent practicable. The Ventura County SMP is described in Attachment B.

3. Each Co-permittee shall be responsible for implementation of relevant portions of the Ventura County SMP within its jurisdictional boundaries. The Principal Co-permittee shall be responsible for program coordination as described in Section 1 of the Ventura County SMP as well as compliance with relevant portions of the permit within its jurisdiction.

B. Modifications

1. The Discharger shall modify the Ventura County SMP adopted with this Order to make it consistent with the requirements herein. The revised Ventura County SMP will be submitted to the Regional Board Executive Officer for approval no later than January 27, 2001].

2. The Regional Board Executive Officer may approve changes to the Ventura County SMP, except as noted in Part 3 B.1, either:

   a. Upon petition by the Discharger or interested parties, and after providing for and considering public comment, or,

   b. As deemed necessary by the Regional Board Executive Officer following notice to the Discharger, and after providing for and considering public comment.

The Discharger shall modify the Ventura County SMP, at the direction of the Regional Board Executive Officer, to incorporate regional provisions. Such provisions may include watershed-specific requirements for watersheds shared by the Discharger with other MS4 programs.

Received
August 26, 2011
Commission on
State Mandates

C. Legal Authority

1. Co-permittees shall possess the necessary legal authority to prohibit non-storm water discharges and control the contribution of pollutants to the storm drain system from storm water discharges, including, but not limited to:

   a. A prohibition on illicit discharges and illicit connections and a requirement for removal of illicit connections;

      i. Prohibit the discharge of wash waters to the MS4 when gas stations, auto repair garages, or other types of automotive service facilities are cleaned;
      ii. Prohibit the discharge of runoff to the MS4 from mobile auto washing, steam cleaning, mobile carpet cleaning, and other such mobile commercial and industrial operations;
      iii. Prohibit the discharges of runoff to the MS4 from areas where, repair of machinery and equipment which are visibly leaking oil, fluid or antifreeze, is undertaken;
      iv. Prohibit the discharge of runoff to the MS4 from storage areas of materials, containing grease, oil, or other hazardous substances, and uncovered receptacles containing hazardous materials;
      v. Prohibit the discharge of chlorinated swimming pool water and filter backwash to the MS4;
      vi. Prohibit the discharge of untreated runoff from the washing of toxic materials from paved or unpaved areas to the MS4;
      vii. Prohibit washing impervious surfaces in industrial/commercial areas which results in a discharge of untreated runoff to the MS4, unless specifically required by State or local health and safety codes; and
      viii. Prohibit the discharge from washing out of concrete trucks, pumps, tools, and equipment to the MS4.

   b. A prohibition on spills, dumping, or disposal of materials other than storm water ;

      i. Litter, landscape debris and construction debris;
      ii. Any state or federally banned pesticide, fungicide or herbicide;
      iii. Food wastes; and
      iv. Fuel and chemical wastes, animal wastes, garbage, batteries, and other materials which have potential adverse impacts on water quality.

   c. A mechanism to control, through interagency agreement, the contribution of pollutants from one portion of the MS4 to another portion of the MS4;

Received
August 26, 2011
Commission on
State Mandates

d. A requirement for compliance with conditions in ordinances, permits, contracts, or orders; and,

e. The ability to carry out all inspections, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions, including the prohibition on illicit discharges to the MS4.

2. Each Co-permittee shall adopt, no later than July 27, 2001, an agency-specific storm water and urban runoff ordinance or amend an existing one if necessary, based on the countywide model (Appendix A of the Ventura County SMP) to be able to enforce all requirements of the permit.

D. Annual Storm Water Report and Assessment

1. The Discharger shall submit, by October 1 of each year beginning the Year 2001, an Annual Storm Water Report and Assessment documenting the status of the general program and individual tasks contained in the Ventura County SMP, as well as results of analyses from the monitoring and reporting program CI 7388. The Annual Storm Water Report and Assessment shall cover each fiscal year from July 1 through June 30, and shall include the information necessary to assess the Discharger's compliance status relative to this Order, and the effectiveness of implementation of permit requirements on storm water quality. The Annual Storm Water Report and Assessment shall include any proposed changes to the Ventura County SMP as approved by the Management Committee.

   The Discharger shall submit, by October 1, 2000, the Annual Report for the period July 1, 1999 through July 27, 2000 documenting the status of the general program up to permit reissuance and the results of analyses from the monitoring and reporting program.

2. Storm Water Management Program Budget

   a. The Discharger shall prepare annually a storm water budget update on resources applied to the storm water program. This budget report shall include an annual update identifying the storm water budget for the following year using [estimated percentages and written explanations where necessary], for the specific categories noted below:

      i. Program management
      ii. Illicit connections/illicit discharge
      iii. Development planning/development construction
      iv. Construction inspection activities
      v. Public Agency Activities
         - Operations and Maintenance

Received
August 26, 2011
Commission on
State Mandates

- Municipal Street Sweeping
- Fleet and Public Agency Facilities
- Landscape and Recreational Facilities

vi. Capital Costs
vii. Public Information and Participation
viii. Monitoring Program
ix. Other

Co-permittees, in addition to the Benefit Assessment budget, shall report any supplemental dedicated budgets, if any, for the same categories.

E. Storm Water Monitoring Report.

1. The Discharger shall submit a Storm Water Monitoring Report on July 15, 2001 and annually on July 15 thereafter. The report shall include:

   a. Status of implementation of the monitoring program as described in the attached Monitoring and Reporting Program, CI-7388.

   b. Results of the monitoring program; and

   c. A general interpretation of the significance of the results, to the extent that data allows.

F. Modification

1. The Regional Board Executive Officer or the Regional Board consistent with 40 CFR 122.41 may approve changes to the Ventura County Monitoring Program, after providing the opportunity for public comment, either:

   a. By petition of the Permittee or by petition of interested parties, after the submittal of the Annual Monitoring Program Report. Such petition shall be filed, not later than 60 days after the Annual Monitoring Program Report submittal date, or

   b. As deemed necessary by the Regional Board Executive Officer following notice to the Permittee.

PART 4 – SPECIAL PROVISIONS

The Ventura County SMP submitted by the Discharger is an integral and enforceable component of the permit.

Changes to Storm Water Quality Management Plan may be made as follows:

Received
August 26, 2011
Commission on
State Mandates

It is anticipated that the storm water quality management program, as delineated in the Ventura County SMP may need to be modified, revised, or amended from time-to-time in response to changed conditions, and to incorporate more effective approaches to pollutant control. Minor changes to the Ventura County SMP may be made at the direction of the Regional Board Executive Officer. Minor changes requested by the Discharger shall become effective upon written approval of the Regional Board Executive Officer. If proposed changes constitute a major revision in the overall scope of effort of the program, such changes must be approved by the Regional Board as permit amendments. The Discharger shall implement the Ventura County SMP on July 27, 2000, and for the duration of this permit.

Requirements of the permit shall take effect on August 11, 2000 provided the US EPA Regional Administrator has no objections.

A. Programs for Residents

1. Co-permittees shall identify staff who will serve as the public reporting contact person(s) for reporting clogged catch basin inlets and illicit discharges/dumping, and general storm water management information within 6 months of permit issuance, and thereafter include this information, updated when necessary, in public information, the government pages of the telephone book, and the annual report as they are developed/published. The designated contact staff will be provided with relevant storm water quality information including current resident program activities, preventative storm water pollution control information and contact information for responding to illicit discharges/illegal dumping.

2. Co-permittees shall mark storm drain inlets with a legible “no dumping” message. In addition, signs with prohibitive language discouraging illegal dumping must be posted at designated public access points to creeks, other relevant water bodies, and channels by July 27, 2002.

3. Each Co-permittee shall conduct educational activities within its jurisdiction and participate in countywide events.

4. Each Co-permittee shall distribute outreach materials to the general public and school children at appropriate public counters and events. Outreach material shall include information such as proper disposal of litter, green waste, and pet waste, proper vehicle maintenance techniques, proper lawn care, and water conservation practices.

5. The Discharger shall insure that a minimum of 2.1 million impressions per year are made on the general public about storm water quality via print, local TV access, local radio, or other appropriate media.

B. Programs for Industrial/Commercial Businesses

Received
August 26, 2011
Commission on
State Mandates

1. Each Co-permittee shall implement an industrial/commercial educational site inspection program.

2. Co-permittees shall inspect automotive service and food service facilities in its jurisdiction once every two years. During site visits, Co-permittees shall:

   a. Consult with a representative of the facility to explain applicable storm water regulations;

   b. Distribute and discuss applicable BMP and educational materials; and,

   c. Conduct a site walk-through to inspect for, at a minimum, evidence of illicit discharges and storm water educational programs for employees.

3. Co-permittees shall revisit automotive and food service facilities where evidence of illicit discharge is found within six months of the inspection. If necessary, Co-permittees will begin enforcement action to remove sources of illicit discharges.

4. Based on Pollutants of Concern source identification, additional target businesses may be identified to be included in the inspection program. Co-permittees shall report on the types and proposed actions to be taken in regard to the additional target businesses in annual reports.

5. No later than July 27, 2002, each Co-permittee shall conduct a site visit and complete a site visit check-list provided by the Regional Board, and distribute educational program materials to facilities identified as subject to the State Board General Industrial Permit. Thereafter, material will be redistributed once every two years. These industrial facilities shall be notified of specific requirements contained in the Statewide Industrial General Permit including: that such facilities must file an Notice of Intent (NOI) with the State Board, and that a Storm Water Pollution Prevention Plan (SWPPP) must be available on the site. Educational materials shall also include information describing illicit discharges. The information shall include: types of discharges prohibited, how to prevent illicit discharges, what to do in the event of an illicit discharge, and the array of enforcement actions the facility may be subject to, including penalties that can be assessed. The Co-permittee shall note on the site-visit check-list if an NOI has been submitted and if a SWPPP is available on site.

6. Co-permittees shall provide an annual update of the inspected automotive service, food service, and other targeted facilities, and the facilities identified as Phase I industrial facilities to this Regional Board in the annual report. The database shall include at a minimum; facility name, site address, applicable SIC code(s), and NPDES storm water permit coverage.

Received
August 26, 2011
Commission on
State Mandates

7. Co-permittees shall train their employees in targeted positions (whose jobs or activities directly affect storm water quality, or those who respond to questions from the public), including inspection staff, regarding the requirements of the storm water management program by January 27, 2001, and annually thereafter.

C. Programs for Planning and Land Development

1. The Discharger shall implement the approved Ventura Countywide Stormwater Quality Urban Impact Mitigation Plan (SQUIMP) (Attachment A) no later than January 27, 2001. The SQUIMP shall address conditions and requirements for new development and significant redevelopment. At a minimum, appropriate elements of the SQUIMP will be included as project requirements for the following development categories:

   a. Single-family hillside residences;
   b. 100,000 square foot commercial developments;
   c. Automotive repair shops;
   d. Retail gasoline outlets;
   e. Restaurants;
   f. Home subdivisions with 10 or more housing units;
   g. Locations within, or directly adjacent to or discharging directly to an environmentally sensitive area; and,
   g. Parking lots of 5,000 square feet or more or with 25 or more parking spaces and potentially exposed to storm water runoff.

2. The Discharger shall no later than July 27, 2002, prepare a technical manual which shall include:

   a. specifications for treatment control BMPs and structural BMPs based on the flow-based and volume-based water quality design criteria for the purposes of countywide consistency, and
   b. criteria for the control of discharge rates and duration.

   Notwithstanding the requirement that the BMP design criteria be incorporated into a technical manual, the criteria shall be effective as of July 27, 2000. The technical manual criteria shall be consistent with, and must not be less stringent than the design criteria in the SQUIMP, and shall be subject to approval by the Regional Board Executive Officer.

3. The Discharger shall identify no later than January 27, 2001, specific environmentally sensitive areas in Ventura County for the application of SQUIMP requirements, based on the Regional Board's Basin Plan and CWA Section 303 (d) Impaired Water-bodies List, and submit the list to the Regional Board Executive Officer for approval. Once approved, this list will supplement the state designations included in the definition of "Environmentally Sensitive Areas".

Received
August 26, 2011
Commission on
State Mandates

4. Co-permittees shall make appropriate modifications to their internal planning procedures for preparing / reviewing CEQA documents, and for linking storm water quality mitigation conditions to legal discretionary project approvals.

5. Co-permittees shall train their employees in targeted positions (whose jobs or activities are engaged in development planning) regarding the requirements of the SQUIMP no later than January 27, 2001, and annually thereafter.

6. The Permittee shall include watershed and storm water management considerations in the appropriate elements of the Permittee's General Plan whenever said elements are significantly rewritten. Appropriate elements include, but are not limited to, water quality protection, development goals and policies, open space goals and policies, preservation of and integration with natural features, and water conservation policies.

D. Programs for Construction Sites

1. Co-permittees shall require the preparation, submittal, and implementation of a Storm Water Pollution Control Plan (SWPCP) prior to issuance of a grading permit for construction projects that meet one of the following criteria:

   a. Will result in soil disturbance of one acre or more in size;
   b. Is within or discharging directly to or directly adjacent to an environmentally sensitive area or,
   c. Is located in a hillside area.

2. Co-permittees shall prepare and implement a SWPCP on Co-permittee construction projects, as required above.

3. The SWPCP shall include appropriate construction site BMPs selected from documents such as the California Storm Water BMP Handbook, the Caltrans Storm Water Quality Handbook, Ventura County Stormwater Quality Standard Sheet, EPA database and American Society of Civil Engineers (ASCE) database. In addition, Co-permittees shall ensure the following minimum requirements are met, to the maximum extent practicable, at construction sites regardless of size:

   a. Sediments generated on the project site shall be retained using structural drainage controls;

   b. No construction-related materials, wastes, spills, or residues shall be discharged from the project site to streets, drainage facilities or adjacent properties by wind or runoff;

Received
August 26, 2011
Commission on
State Mandates

c. Non-storm water runoff from equipment and vehicle washing and any other activity shall be contained at the project site;

d. Erosion from slopes and channels will be eliminated, by implementing BMPs, including, but not limited to, limiting of grading scheduled during the wet season, inspecting graded areas during rain events, planting and maintenance of vegetation on slopes, and covering erosion susceptible slopes.

4. The SWPCP must include the rationale used for selecting or rejecting BMPs. The project architect, or engineer of record, or authorized qualified designee, must sign a statement on the SWPCP to the effect:

"As the architect/engineer of record, I have selected appropriate BMPs to effectively minimize the negative impacts of this project's construction activities on storm water quality. The project owner and contractor are aware that the selected BMPs must be installed, monitored, and maintained to ensure their effectiveness. The BMPs not selected for implementation are redundant or deemed not applicable to the proposed construction activity."

The landowner shall sign a statement to the effect:

"I certify that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, to the best of my knowledge and belief, the information submitted is true, accurate, and complete. I am aware that submitting false and/or inaccurate information, failing to update the SWPCP to reflect current conditions, or failing to properly and/or adequately implement the SWPCP may result in revocation of grading and/or other permits or other sanctions provided by law."

The SWPCP certification shall be signed by the landowner as follows:

(1) For a corporation: by a responsible corporate officer which means (a) a president, secretary, treasurer, or vice president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or (b) the manager of the construction activity if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures;

(2) For a partnership or sole proprietorship: by a general partner or the proprietor; or

Received
August 26, 2011
Commission on
State Mandates

(3) For a municipality or other public agency: by an elected official, a ranking management official (e.g., County Administrative Officer, City Manager, Director of Public Works, City Engineer, District Manager), or the manager of the construction activity if authority to sign SWPCPs has been assigned or delegated to the manager in accordance with established agency policy.

5. Co-permittees shall require proof of filing a Notice of Intent for coverage under the State General Construction Activity Storm Water Permit prior to issuing a grading permit for all projects requiring coverage under the state general permit.

6. Co-permittees shall inspect sites with SWPCPs for storm water quality requirements during routine inspections a minimum of once during the wet season. For inspected sites that have not adequately implemented their SWPCP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been achieved, and the site is covered under the State General Construction Activity Storm Water Permit, the Regional Board shall be notified. Co-permittees shall develop and implement a checklist for inspecting storm water quality control measures at construction sites by January 27, 2001.

7. Co-permittees shall discuss storm water controls at construction sites and distribute educational materials targeted to the construction community during meetings, inspections, and as appropriate.

8. Co-permittees shall train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the storm water management program by January 27, 2001, and annually thereafter.

E. Public Agency Activities

Corporation Yards

1. The Principal Co-permittee shall develop a model SWPCP for corporation yards and the Co-permittees shall implement the minimum requirements of the SWPCP in all corporation yards by July 27, 2002. Thereafter, Co-permittees shall inspect corporation yards on an annual basis.

2. Co-permittees shall prohibit the discharge of untreated storm water runoff to the storm drain system from toxic or hazardous material storage areas no later than January 27, 2001.

3. Co-permittees shall prohibit the discharge of untreated storm water runoff to the storm drain system from fueling areas, and repair/maintenance areas for vehicle maintenance and repair facilities no later than July 27, 2001.

Received
August 26, 2011
Commission on
State Mandates

4. Co-permittees shall require that all vehicle/equipment wash areas must be self-contained, or covered, or equipped with a clarifier, or other pretreatment facility, and properly connected to a sanitary sewer. This provision does not apply to fire fighting vehicles.

Other Facilities

5. Co-permittees shall inspect and clean the catch basins, open drainage facilities, and detention/retention basins at least one time each year prior to the wet season. At any time, any catch basin that is at least 40% full of trash and debris shall be cleaned out. All reinforced concrete open channels shall be cleaned at least once each year prior to the wet season.

6. Co-permittees shall conduct street sweeping on curbed public streets in their permitted area according to the following schedule:

   a. A monthly average not less than 4 times per month in high traffic downtown areas;
   b. A yearly average of not less than 6 times per year in moderate traffic collector streets, and residential areas;
   c. In addition, Co-permittees will sweep continuously bermed public streets once per year prior to the rainy season.

7. Co-permittees shall prohibit street saw cutting and paving during a storm event of 0.25 inches or greater (except during emergency conditions).

8. Co-permittees shall prohibit discharge of untreated runoff from temporary or permanent street maintenance material and waste storage areas.

9. The Discharger shall develop a standardized protocol for the routine and non-routine application of pesticides, herbicides (including preemergents), and fertilizers within one year after permit adoption.

   There shall be no application of pesticides or fertilizers during the following conditions:

   a. During rain events;
   b. Within one day of a rain event forecasted to be greater than 0.25 inches except for application of preemergent herbicides;
   c. After a rain event where water is leaching or running or,
   d. When water is running off-site.

   The Discharger shall ensure that staff applying pesticides are either certified by the California Department of Food and Agriculture, or are under the direct supervision on-site of a certified pesticide applicator.

Received
August 26, 2011
Commission on
State Mandates

10. Co-permittees shall train their employees in targeted positions (whose jobs and activities affect storm water quality) regarding the requirements of the storm water management program no later than January 27, 2001, and annually thereafter.

11. Co-permittees shall routinely conduct trash collection along, or in improved open channels within their jurisdiction.

12. The Discharger shall encourage the establishment of voluntary programs for the collection of trash in natural stream channels.

F. Programs for Illicit Discharges / Illegal Connections

1. Co-permittees shall investigate the cause, determine the nature and estimated amount of reported illicit discharge/dumping incidents, and refer documented non-storm water discharges/connections or dumping to an appropriate agency for investigation, containment and cleanup. Appropriate action including issuance of an enforcement order that will result in cessation of the illicit discharge, and/or elimination of the illicit connection, shall take place within six months after the Co-permittee gains knowledge of the discharge/connection.

2. Each Co-permittee shall train its employees in targeted positions, as defined by the Ventura County SMP, on how to identify and report illicit discharges by January 27, 2001, and annually thereafter.

3. Automotive, food facility, construction and Co-permittee facility site inspection visits shall include distribution of educational material that describes illicit discharges and provides a contact number for reporting illicit discharges.

4. New information developed for Phase I industrial facility educational material shall include information describing illicit discharges. The information shall include: types of discharges prohibited, how to prevent illicit discharges, what to do in the event of an illicit discharge, and the array of enforcement actions the facility may be subject to, including penalties that can be assessed.

G. Total Maximum Daily Loads [40 CFR 130.7]

1. The Permittee shall modify the Ventura County SMP to comply with waste load allocations developed and approved pursuant to the process for the designation and implementation of Total Daily Maximum Loads (TMDLs) for impaired water bodies.

H. Stormwater Quality Urban Impact Mitigation Plan

1. The terms and requirements in the Storm Water Quality Urban Impact Mitigation Plan (SQUIMP) may be amended by the Regional Board Executive Officer to conform with the State Board's decision in: In Re: *The*

Received
August 26, 2011
Commission on
State Mandates

Consolidated Petitions of Cities of Bellflower et al. (Review of January 26, 2000, Action of the Regional Board and its Executive Officer Pursuant to Board Order No. 96-054) or any subsequent ruling on the matter by a court of law.

2. Requirements for new development and significant redevelopment in environmentally sensitive areas shall be incorporated into enforceable documents such as land development guidelines and city ordinances no later than July 27, 2001.

a. Requirements of the SQUIMP as they relate to the supplemental list of "Environmentally Sensitive Areas" identified based on the Regional Board's Basin Plan and the CWA Section 303(d) Impaired Water-bodies List shall take effect no later than July 27, 2001.

b. Requirements of the Stormwater Quality Urban Impact Mitigation Plan for state designations of "Environmentally Sensitive Areas" shall take effect no later than January 27, 2001.

I. PART 5 - DEFINITIONS

A. The following are definitions for terms applicable to this Order:

1. **"Anti-degradation policies"** means the *Statement of Policy with Respect to Maintaining High Quality Water in California* (State Board Resolution No. 68-16) which protects surface and ground waters from degradation. In particular, this policy protects waterbodies where existing quality is higher than that necessary for the protection of beneficial uses including the protection of fish and wildlife propagation and recreation on and in the water.

2. **"Applicable Standards and Limitations"** means all State, interstate, and federal standards and limitations to which a "discharge" or a related activity is subject under the CWA, including "effluent limitations,"water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," and pretreatment standards under sections 301, 302, 303, 304, 306, 307, 308, 403 and 404 of CWA.

3. **"Automotive Repair Shop"** means a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

4. **Best Management Practices (BMPs)** are methods, measures, or practices designed and selected to reduce or eliminate the discharge of pollutants to surface waters from point and nonpoint source discharges including storm water. BMPs include structural and nonstructural controls, and operation and maintenance procedures, which can be applied before, during, and/or after pollution producing activities.

Received
August 26, 2011
Commission on
State Mandates

5. **"CWA"** means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Public Law 92—500, as amended by Public Law 95—217, Public Law 95—576, Public Law 96—483 and Public Law 77—117, 33 U.S.C. 1251 et seq.

6. **"Construction"** means constructing, clearing, grading, or excavation that results in soil disturbance. Construction includes structure teardown. It does not include routine maintenance to maintain original line and grade, hydraulic capacity, or original purpose of facility, nor does it include emergency construction activities required to immediately protect public health and safety.

7. **"Co-permittee"** shall mean any of the following public entities; the Ventura County Flood Control District (VCFCD), the County, or the City of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura, Santa Paula, Simi Valley, or Thousand Oaks. Each Co-permittee is responsible for compliance with the terms of the NPDES Permit.

8. "**Designated Public Access Points**" means any pedestrian, bicycle, equestrian, or public vehicular point of access to jurisdictional channels in the area of Ventura County subject to permit requirements.

9. **"Development"** shall mean any construction, rehabilitation, redevelopment or reconstruction of any public or private residential project (whether single-family, multi-unit or planned unit development); industrial, commercial, retail and other non-residential projects, including public agency projects; or mass grading for future construction.

10. **"Directly Adjacent**" means situated within 200 feet of the contiguous zone required for the continued maintenance, function, and structural stability of the environmentally sensitive area.

11. **"Director"** shall mean the Director of Public Works of the County and Person(s) designated by and under the Director's instruction and supervision.

12. "**Directly Discharging**" means outflow from a drainage conveyance system that is composed entirely or predominantly of flows from the subject, property, development, subdivision, or industrial facility, and not commingled with the flows from adjacent lands.

13. **"Discharge"** when used without qualification means the "discharge of a pollutant."

14. **"Discharge of a Pollutant"** means: Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source" or, Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. The term discharge includes additions of pollutants into waters of the United

Received
August 26, 2011
Commission on
State Mandates

States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect Discharger."

15. **"Effluent limitation"** means any restriction imposed by the Regional Board on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.

16. **"Environmental Protection Agency"** or **"EPA"** means the United States Environmental Protection Agency.

17. **"Environmentally Sensitive Areas"** means an area "in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which would be easily disturbed or degraded by human activities and developments" (California Public Resources Code § 30107.5). Areas subject to storm water mitigation requirements are : areas designated as an Area of Special Biological Significance (ASBS) by the State Water Resources Control Board, an area designated as a significant natural resource by the California Resources Agency, or an area identified by the Discharger as environmentally sensitive for water quality purposes, based on the Regional Board Basin Plan and Clean Water Act Section 303(d) Impaired Water-bodies List for the County of Ventura.

18. **"Facility or Activity"** means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

19. **"Hillside"** means property located in an area with known erosive soil conditions, where the development contemplates grading on any natural slope that is 25% or greater and where grading contemplates cut or fill slopes.

20. **"Illicit Connection"** shall mean any man-made conveyance that is connected to the storm drain system without a permit or through which prohibited non-storm water flows are discharged, excluding roof-drains and other similar type connections. Examples include channels, pipelines, conduits, inlets, or outlets that are connected directly to the storm drain system.

21. **"Illicit Discharge"** means any discharge to the storm drain system that is prohibited under local, state, or federal statutes, ordinances, codes, or regulations. The term illicit discharge includes all non storm-water discharges except discharges pursuant to an NPDES permit, discharges that are identified in Part 1 of this order, and discharges authorized by the Regional Board Executive Officer.

22. **"Infiltration"** means the downward entry of water into the surface of the soil.

Received
August 26, 2011
Commission on
State Mandates

23. "**MS4**" see Municipal Separate Storm Sewer System.

24. **"Municipal Separate Storm Sewer System"** means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains) owned by a State, city, town or other public body, that is designed or used for collecting or conveying storm water, which is not a combined sewer, and which is not part of a publicly owned treatment works. Commonly referred to as an "MS4".

25. **"National Pollutant Discharge Elimination System (NPDES)"** means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of CWA. The term includes an "approved program."

26. **"NPDES"** means National Pollutant Discharge Elimination System.

27. **"New Development"** means land disturbing activities; structural development, including construction or installation of a building or structure, creation of impervious surfaces; and land subdivision.

28. **"Non-Storm Water Discharge"** means discharge other than storm water runoff or snowmelt.

29. **"Parking Lot"** means land area or facility for the parking of commercial or business or private motor vehicles.

30. **"Permit"** means an authorization, license, or equivalent control document issued by EPA or an "approve State" to implement the requirements of 40 CFR Parts 122, 123, and 124. "Permit" includes an NPDES "general permit" (§ 122.28). Permit does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

31. **"Pollutants of Concern"** means a prioritized list of pollutants identified in the Ventura County SMP as requiring additional investigation.

32. **"Potable Water Sources"** means flows from drinking water storage, supply and distribution systems including flows from system failures, pressure releases, system maintenance, well development, pump testing fire hydrant flow testing; and flushing and dewatering of pipes, reservoirs, vaults, and wells.

33. **"Priority Pollutants"** are those constituents referred to in 40 CFR 401.15 and listed in the EPA NPDES Application Form 2C, pp. V-3 through V-9.

34. **"Rain Event"** means any rain event greater than 0.1 inch in 24 hours.

35. **"Redevelopment"** means, but is not limited to, the expansion of a building footprint or addition or replacement of a structure; structural development

Received
August 26, 2011
Commission on
State Mandates

including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routine maintenance activity; land disturbing activities related with structural or impervious surfaces. Redevelopment that results in the creation or addition of 5,000 square feet or more of impervious surfaces is subject to the requirements for storm water mitigation. If the creation or addition of impervious surfaces is fifty percent or more of the existing impervious surface area, then storm water runoff from the entire area (existing and additions) must be considered for purposes of storm water mitigation. If the creation or additions is less than fifty percent of the existing impervious area, then storm water runoff from only the addition area needs mitigation.

36. **"Regional Administrator"** means the Regional Administrator of the Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

37. **"Restaurant"** means a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC Code 5812).

38. **"Side Walk Washing"** means pressure washing of paved pedestrian walkways with average water usage of 0.006 gallons per square foot, with no cleaning agents, and properly disposing of all debris collected, as authorized under Regional Board Resolution No. 98-08.

39. **"Site"** means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

40. **"Source Control BMP"** means any schedules of activities, prohibitions of practices, maintenance procedures, managerial practices or operational practices that aim to prevent storm water pollution by reducing the potential for contamination at the source of pollution.

41. **"SQUIMP"** shall mean the Ventura Countywide Stormwater Quality Urban Impact Mitigation Plan. The SQUIMP shall address conditions and requirements of new development.

42. **"State General Permit"** shall mean a permit issued by the State Water Resources Control Board or the Regional Board pursuant to 40 CFR § 122 and 123 to regulate a category of point sources. The term State General Permit includes but is not limited to the General Permit for Stormwater Discharges Associated with Construction Activity and the General Industrial Activities Stormwater Permit and the terms and requirements of both. In the event the EPA revokes the in-lieu permitting authority of the State Water Resources Control Board, then the term State General Permit shall also refer to any EPA administered stormwater control program for industrial, construction, and any other category of activities.

Received
August 26, 2011
Commission on
State Mandates

43. **"Storm Water"** shall mean "Stormwater".

44. **"Storm Water Pollution Prevention Plan"** shall mean a plan, as required by a State General Permit, identifying potential pollutant sources and describing the design, placement and implementation of BMPs, to effectively prevent non-stormwater Discharges and reduce Pollutants in Stormwater Discharges during activities covered by the General Permit.

45. **"Stormwater"** shall mean any surface flow, runoff, and/or drainage associated with rainstorm events and/or snowmelt.

46. **"Stormwater Pollution Control Plan (SPCP)"** shall mean a plan identifying potential pollutant sources from a construction site and describing proposed design, placement and implementation of BMPs, to effectively prevent non-stormwater Discharges and reduce Pollutants in Stormwater Discharges to the Storm Drain System, to the maximum extent practicable, during construction activities.

47. **"Stormwater Quality Management Plan"** shall mean the Ventura Countywide Stormwater Quality Management Plan, which includes descriptions of programs, collectively developed by the Co-permittees in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law, as the same is amended from time to time.

48. **"Structural BMP"** means any structural facility designed and constructed to mitigate the adverse impacts of storm water and urban runoff pollution (e.g. canopy, structural enclosure). The category may include both treatment control BMPs and source control BMPs.

49. **"Total Maximum Daily Load (TMDL)"** means the amount of pollutant, or property of a pollutant, from point, nonpoint, and natural background sources, that may be discharged to a water quality-limited receiving water. Any pollutant loading above the TMDL results in a violation of applicable water quality standards.

50. **"Treatment"** means the application of engineered systems that use physical, chemical, or biological processes to remove pollutants. Such processes include, but are not limited to, filtration, gravity settling, media absorption, biodegradation, biological uptake, chemical oxidation and UV radiation.

51. **"Treatment Control BMP"** means any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants, filtration, biological uptake, media absorption or any other physical, biological, or chemical process.

52. **"Upset"** means an exceptional incident in which there is unintentional and temporary noncompliance with the permit limit because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment

Received
August 26, 2011
Commission on
State Mandates

facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper maintenance.

53. **"Water Quality Standards and Water Quality Objectives"** applicable to the Permittee include those contained in the Los Angeles Regional Water Quality Control Plan (Basin Plan), the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federally approved surface water quality plans. Such plans are used by the Regional Board to regulate all discharges, including storm water discharges.

54. **"Waters of the State"** means any surface water or groundwater, including saline waters, within boundaries of the state.

55. **"Waters of the United States or Waters of the U.S."** means:

a. All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
b. All interstate waters, including interstate "wetlands";
c. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
1. Which are or could be used by interstate or foreign travelers for recreational or other purposes;
2. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
3. Which are used or could be used for industrial purposes by industries in interstate commerce;

d. All impoundments of waters otherwise defined as waters of the United States under this definition;
e. Tributaries of waters identified in paragraphs (a) through (d) of this definition;
f. The territorial sea; and
g. "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.22(m), which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to man-made bodies of water, which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. *[See Note 1 of this section.]* Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with US EPA.

Received
August 26, 2011
Commission on
State Mandates

56. **"Watercourse"** shall mean any natural or artificial channel for passage of water, including the VCFCD jurisdictional channels included in the List of Channels within the Comprehensive Plan of the VCFCD, as approved by the Board of Supervisors of the VCFCD on October 4, 1993, and any amendments thereto.

57. **"Wet Season"** means the calendar period beginning October 1 through April 15.

58. **"Whole Effluent Toxicity"** means the aggregate toxic effect of an effluent measured directly by a toxicity test.

PART 6 – STANDARD PROVISIONS

A. The Discharger shall comply with all provisions and requirements of this permit.

B. Should the Discharger discover that it failed to submit any relevant facts or that it submitted incorrect information in a report, it shall promptly submit the missing or correct information.

C. The Discharger shall report all instances of non-compliance not otherwise reported at the time monitoring reports are submitted.

D. This Order includes the attached Monitoring and Reporting Program, and Storm Water Quality Urban Impact Mitigation Plan, which are a part of the permit and must be complied with in the same manner as with the rest of the requirements in the permit.

E. Public Review

1. All documents submitted to the Regional Board in compliance with the terms and conditions of this Permit shall be made available to members of the public pursuant to the Freedom of Information Act (5 U.S.C. Section 552 (as amended) and the Public Records Act (California Government Code Section 6250 *et seq.*).

2 All documents submitted to the Executive Officer for approval shall be made available to the public for a 30-day period to allow for public comment.

F. Duty to Comply [40 CFR 122.41(a)]

1. The Discharger must comply with all of the terms, requirements, and conditions of this Order. Any violation of this order constitutes a violation of the Clean Water Act, its regulations and the California Water Code, and is grounds for enforcement action, Order termination, Order

Received
August 26, 2011
Commission on
State Mandates

revocation and reissuance, denial of an application for reissuance; or a combination thereof.

2. A copy of these waste discharge specifications shall be maintained by the Discharger so as to be available during normal business hours to Discharger employees and members of the public.

3. Any discharge of wastes at any point(s) other than specifically described in this Order is prohibited, and constitutes a violation of the Order.

G. Duty to Mitigate [40 CFR 122.41 (d)]

The Discharger shall take all reasonable steps to minimize or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment.

H. Inspection and Entry [40 CFR 122.41(i)]

The Regional Board, USEPA, and other authorized representatives shall be allowed:

1. Entry upon premises where a regulated facility is located or conducted, or where records are kept under conditions of this Order;

2. Access to copy any records that are kept under the conditions of this Order;

3. To inspect any facility, equipment (including monitoring and control equipment), practices, or operations regulated or required under this Order; and,

4. To photograph, sample, and monitor for the purpose of assuring compliance with this Order, or as otherwise authorized by the Clean Water Act and the California Water Code.

I. Proper Operation and Maintenance [40 CFR 122.41 (e)]

The Discharger shall at all times properly operate and maintain all facilities and systems of treatment and (and related appurtenances) that are installed or used by the Discharger to achieve compliance with this Order. Proper operation and maintenance includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of backup or auxiliary facilities or similar system that are installed by a Discharger only when necessary to achieve compliance with the conditions of this Order.

J. Signatory Requirements [40 CFR 122.41(k)]

Except as otherwise provided in this Order, all applications, reports, or information submitted to the Regional Board shall be signed by the Director

Received
August 26, 2011
Commission on
State Mandates

of Public Works, City Engineer, or authorized designee under penalty of perjury.

K. Reopener and Modification [40 CFR 122.41(f)]

1. This Order may only be modified, revoked, or reissued, prior to the expiration date, by the Regional Board, in accordance with the procedural requirements of the Water Code and Title 23 of the California Code of Regulations for the issuance of waste discharge requirements, and upon prior notice and hearing, to:

   a. Address changed conditions identified in the required reports or other sources deemed significant by the Regional Board;

   b. Incorporate applicable requirements or statewide water quality control plans adopted by the State Board or amendments to the Basin Plan;

   c. Comply with any applicable requirements, guidelines, and/or regulations issued or approved pursuant to CWA Section 402(p); and/or,

   d. Consider any other federal, or state laws or regulations that became effective after adoption of this Order.

2. After notice and opportunity for a hearing, this Order may be terminated or modified for cause, including, but not limited to:

   a. Violation of any term or condition contained in this Order;

   b. Obtaining this Order by misrepresentation, or failure to disclose all relevant facts; or,

   c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

3. This Order may be modified, revoked and reissued, or terminated for cause.

4. The filing of a request by the Discharger for a modification, revocation and re-issuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any condition of this Order.

5. This Order may be modified to make corrections or allowances for changes in the permitted activity listed in this section, following the procedures at 40 CFR Part 122.63, if processed as a minor modification. Minor modifications may only:

   a. Correct typographical errors, or

Received
August 26, 2011
Commission on
State Mandates

b. Require more frequent monitoring or reporting by the Permittee.

L. Severability

The provisions of this permit are severable; and if any provision of this permit or the application of any provision of this permit to any circumstance is held invalid, the application of such provision to other circumstances and the remainder of this permit shall not be affected.

M. Duty to Provide Information [40 CFR 122.41(h)]

The Discharger shall furnish, within a reasonable time, any information the Regional Board or USEPA may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Order. The Discharger shall also furnish to the Regional Board, upon request, copies of records required to be kept by this Order.

N. Twenty-four Hour Reporting[1]

1. The Discharger shall report any noncompliance that may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the Discharger becomes aware of the circumstances. A written submission shall also be provided within five days of the time the Discharger becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times and, if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

2. The Regional Board may waive the required written report on a case-by-case basis.

O. Bypass [40 CFR 122.41(m)][2]

Bypass (the intentional diversion of waste streams from any portion of a treatment facility) is prohibited. The Regional Board may take enforcement action against the Discharger for bypass unless:

1. Bypass was unavoidable to prevent loss of life, personal injury or severe property damage. (Severe property damage means substantial physical damage to property, damage to the treatment facilities that

---

[1] This provision applies to incidents where effluent limitations (numerical or narrative) as provided in this Order or in the Ventura County SMP are exceeded, and which endanger public health or the environment.

[2] This provision applies to the operation and maintenance of storm water controls and BMPs as provided in this Order or in the Ventura County SMP.

Received
August 26, 2011
Commission on
State Mandates

causes them to become inoperable, or substantial and permanent loss of natural resources that can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.);

2. There were no feasible alternatives to bypass, such as the use of auxiliary treatment facilities, retention of untreated waste, or maintenance during normal periods of equipment down time. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that could occur during normal periods of equipment downtime or preventive maintenance;

3. The Discharger submitted a notice at least ten days in advance of the need for a bypass to the Regional Board; or,

4. The Discharger may allow a bypass to occur that does not cause effluent limitations to be exceeded, but only if it is for essential maintenance to assure efficient operation. In such a case, the above bypass conditions are not applicable. The Discharger shall submit notice of an unanticipated bypass as required.

P. Upset [40 CFR 122.41(n)][3]

1. A Discharger that wishes to establish the affirmative defense of an upset in an action brought for non compliance shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

   a. An upset occurred and that the Discharger can identify the cause(s) of the upset;

   b. The permitted facility was being properly operated by the time of the upset;

   c. The Discharger submitted notice of the upset as required; and,

   d. The Discharger complied with any remedial measures required.

2. No determination made before an action for noncompliance, such as during administrative review of claims that non-compliance was caused by an upset, is final administrative action subject to judicial review.

3. In any enforcement proceeding, the Discharger seeking to establish the occurrence of an upset has the burden of proof.

Q. Property Rights [40 CFR 122.4(g)]

[3] *Supra*. See footnote number 2.

Received
August 26, 2011
Commission on
State Mandates

This Order does not convey any property rights of any sort, or any exclusive privilege.

R. Enforcement

1. Violation of any of the provisions of the NPDES permit or any of the provisions of this Order may subject the violator to any of the penalties described herein, or any combination thereof, at the discretion of the prosecuting authority; except that only one kind of penalties may be applied for each kind of violation. The Clean Water Act provides the following:

   Criminal Penalties

   a. *Negligent Violations*
   The CWA provides that any person who negligently violates permit conditions implementing sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or both.

   b. *Knowing Violations*
   The CWA provides that any person who knowingly violates permit conditions implementing sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or both.

   c. *Knowing Endangerment*
   The CWA provides that any person who knowingly violates permit conditions implementing sections 301, 302, 307, 308, 318, or 405 of the Act and who knows at that time that he is placing another person in imminent danger of death or serious bodily injury is subject to a fine of not more than $250,000, or by imprisonment for not more than 15 years, or both.

   d. *False Statement*
   The CWA provides that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed of required to be maintained under the Act or who knowingly falsifies, tampers with, or renders inaccurate, any monitoring device or method required to be maintained under the Act, shall upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than two years, or by both. If a conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by

Received
August 26, 2011
Commission on
State Mandates

imprisonment of not more than four years, or by both. (See section 309(c)(4) of the Clean Water Act.)

Civil Penalties:

a. The CWA provides that any person who violates a permit condition implementing sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a civil penalty not to exceed $27,500 per day for each violation.

2. The California Water Code provides that any person who violates a waste discharge requirement provision of the California Water Code is subject to civil penalties of up to $5,000 per day, $10,000 per day, or $25,000 per day of violation; or when the violation involves the discharge of pollutants, is subject to civil penalties of up to $10 per gallon per day or $25 per gallon per day of violation; or some combination thereof, depending on the violation or combination violations.

S. Need to Halt or Reduce Activity not a Defense [40 CFR 122.41(c)]

It shall not be a defense for a Discharger in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this Order.

T. This Order may be modified, revoked, or reissued, prior to the expiration date as follows:

1. To address changed conditions identified in the required technical reports or other sources deemed significant by the Regional Board;

2. To incorporate applicable requirements or statewide water quality control plans adopted by the State Board, or amendments to the Basin Plan;

3. To comply with any applicable requirements, guidelines, or regulations issued or approved under Section 402(p) of the CWA, if the requirement, guideline, or regulation so issued or approved contains different conditions or additional requirements not provided for in this Order. The Order as modified or reissued under this paragraph shall also contain any other requirements of the CWA then applicable; or,

4. Any amendments under the Clean Water Act.

U. Regional Board Order No. 94-082 is hereby rescinded.

V. This Order expires on July 27, 2005]. The Discharger must submit a Storm Water Quality Management Plan in accordance with Title 23, California Code of Regulation, not later than 180 days in advance of such date as application for reissuance of waste discharge requirements.

Received
August 26, 2011
Commission on
State Mandates

I, Dennis A. Dickerson, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the California Regional Water Quality Control Board, Los Angeles Region, on July 27, 2000.

Dennis A. Dickerson
Executive Officer

Received
August 26, 2011
Commission on
State Mandates

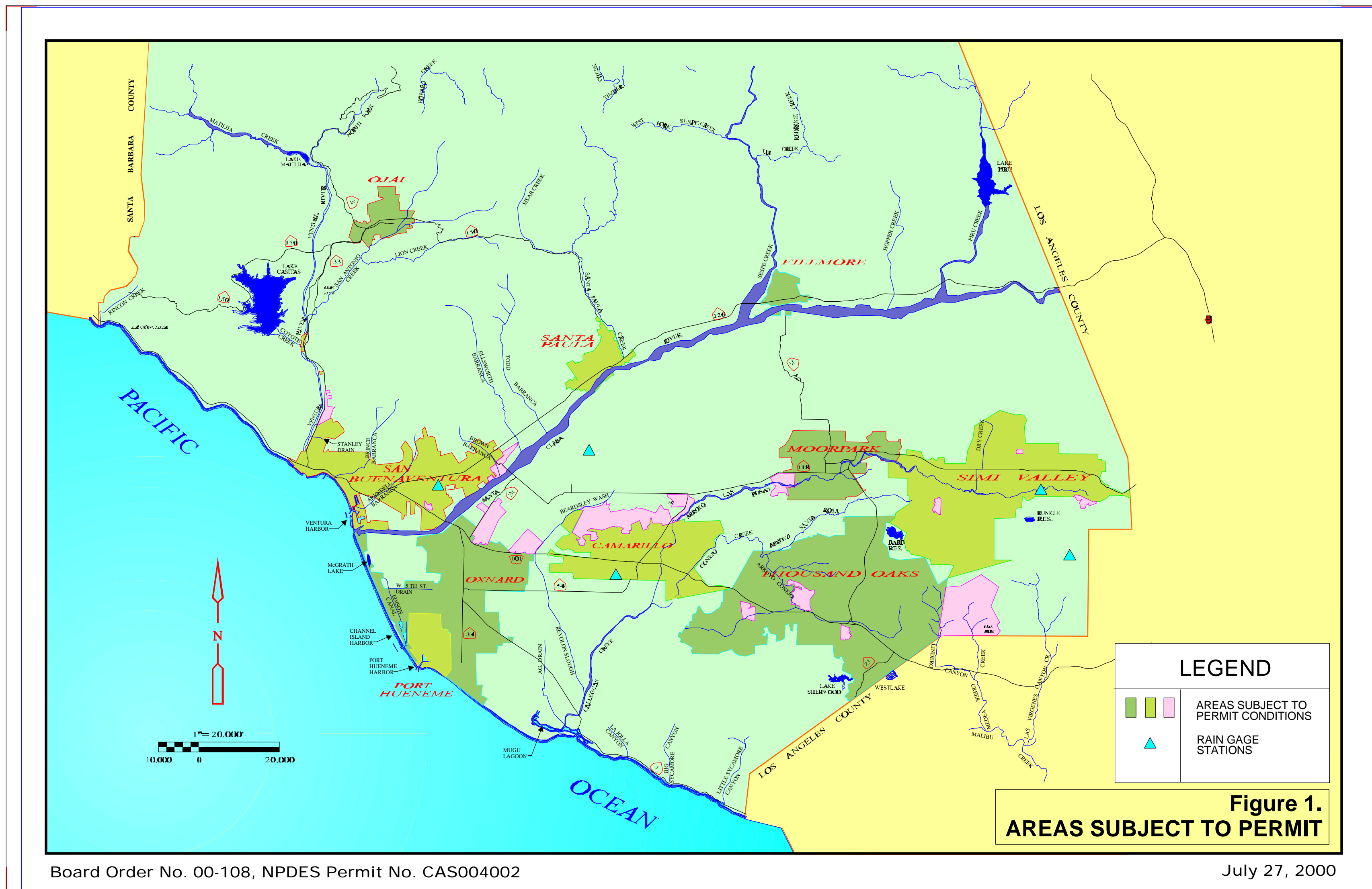


Figure 1.
AREAS SUBJECT TO PERMIT

Received
August 26, 2011
Commission on
State Mandates

State of California
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

MONITORING AND REPORTING PROGRAM NO. CI 7388

FOR

STORM WATER MANAGEMENT/URBAN RUNOFF DISCHARGES
FOR
VENTURA COUNTY FLOOD CONTROL DISTRICT,
COUNTY OF VENTURA, AND THE CITIES OF VENTURA COUNTY

NPDES PERMIT NO. CAS004002

I. Program Reporting Requirements

A. The Discharger shall submit, by October 1, 2000, the Annual Storm Water Report and Assessment for the period July 1, 1999, through July 27, 2000 documenting the status of the general program up to permit reissuance and the results of analyses from the monitoring and reporting program.

B. The Discharger shall submit, by October 1 of each year beginning the year 2001, an Annual Storm Water Report and Assessment documenting the status of the general program and individual tasks contained in the Ventura County SMP, and an integrated summary of the results of analyses from the monitoring program described under *II. Monitoring Requirements*.

The Annual Storm Water Report and Assessment shall include any proposed changes to the Ventura County SMP as approved by the Management Committee. The Annual Storm Water Report and Assessment Report shall cover each fiscal year from July 1 through June 30. At a minimum, the annual report will include the following:

Program Management

1. A comparison of program implementation results to performance standards established in the Ventura County SMP;

2. Status of compliance with permit requirements including implementation dates for all time-specific deadlines. If permit deadlines are not met, the Discharger shall report the reasons why the requirement was not met, how the requirements will be met in the future, including projected implementation date;

3. An assessment of the effectiveness of Ventura County SMP requirements to reduce storm water pollution. This assessment will be based upon the specific record-keeping information requirement in each major section of the permit,

Received
August 26, 2011
Commission on
State Mandates

monitoring data, and any other data the Discharger has, or is aware of that provides information on program effectiveness. Beginning in the Year 2003, to the extent data collected in monitoring requirements included herein allows, the discharger shall include an analysis of trends, land use contributions, pollutant source identifications, BMP effectiveness, and impacts on beneficial uses.

4. An analysis of the data to identify areas of the Program coverage which cause or contribute to exceedances of water quality standards or objectives, predominate land uses in these areas, and potential sources of pollutants in those areas;

5. Discussion of the compliance record and the corrective actions taken or planned that may be needed to bring the discharge into full compliance with the waste discharge requirements.

Programs for Residents

6. Number of storm drain inlets and signs in the Co-permittees' systems that are marked or posted with a no dumping message. Percent of total system marked/signed;

7. Description of activities on distributing brochures, community outreach efforts, public communication efforts and educational programs in schools including an estimate of the number of impressions per year made on the general public about storm water quality via print, local TV access, local radio presentations, meetings or other appropriate media;

Programs for Industrial / Commercial Businesses

8. Number of automotive, food facility and industrial facilities targeted under the program. During the past year, the number of industrial and commercial site visits conducted and the number of outreach contacts made and the number of industrial facilities the Co-permittees have identified that have failed to file an NOI;

9. An annual update of a database of industrial/commercial facilities identified as subject to the State Board General Industrial Permit. The database shall include at a minimum: facility name, site address, SIC code, and NPDES storm water permit coverage status, if applicable;

10. The percentage of targeted staff trained annually;

Programs for Planning and Land Development

11. The percentage of total development projects reviewed for storm water and conditioned to meet SQUIMP requirements in the previous year;

Received
August 26, 2011
Commission on
State Mandates

12. The scheduled date of significant rewrite of the Co-permittees' General Plan;

13. Description of activities on distributing brochures, outreach efforts, communication efforts including an estimate of the number of contacts made to the land development community about storm water quality via print, meetings or other appropriate venues.

14. The percentage of targeted staff trained annually;

Programs for Construction Sites

15. Number of construction projects requiring SWPCPs in the past year and the percentage of projects in categories requiring submittal of a SWPCP for which SWPCPs were completed;

16. Number and type of enforcement actions, applicable to storm water enforcement, taken at construction sites during the past year;

17. Description of the outreach program to the construction community and assessment of its effectiveness; This assessment should include a discussion of the number of inspections, site visits, or other meetings conducted;

18. The percentage of targeted staff trained annually;

Programs for Illicit Discharge and Illegal Connection Control

19. Number of reports of illicit discharges that Co-permittees responded to, percentage that were identified as actual illicit discharges, and percentage of the actual illicit discharges where the incident was either cleaned up, referred to another responsible agency and/or follow up/education with the discharger was conducted;

20. For groups of identified illicit discharge types where the probable causes for the discharge can be identified, report probable causes and the actions taken to prevent similar discharges from occurring;

21. Number of illicit connections identified in the past year;

22. Number of illicit connections eliminated in the past year;

23. Number and type of enforcement actions for storm water illicit discharges and/or illicit connections taken in the past year;

24. A summary from records on illicit discharges and connections which includes type of material, type of source, date of initial inspection, enforcement action taken, date of follow-up inspection, date of conclusion/clean up/removal/ follow

Received
August 26, 2011
Commission on
State Mandates

up/education;

Programs for Facilities Maintenance

25. A summary which at a minimum includes the quantity, predominant types and likely sources of trash removed from catch basin inlets;

26. _A summary of the total curb miles of streets swept annually and the percentage of total curb miles swept annually as a function of total curb miles;

27. The percentage of targeted staff trained annually; and,

Pollutants of Concern

28. A progress report on sources of Pollutants of Concern (POCs), BMPs for their control, and implemented BMP effectiveness.

B. The Discharger shall submit a Storm Water Monitoring Report on July 15, 2001, and annually on July 15, thereafter. The report shall include:

1. status of implementation of the monitoring program;
2. results of the monitoring program;
3. a general interpretation of the results;
4. both tabular and graphical summaries of the monitoring data obtained during the previous year; and

The Discharger shall submit, by October 1, 2000, the results of analyses from the monitoring and reporting program for the period July 1, 1999 through July 27, 2000 together with the Annual Report for the same period.

C. All applications, reports, or information submitted to the Regional Board shall be signed and certified pursuant to EPA regulations 40 CFR 122.41 (k). Each report shall contain the following completed declaration:

> "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted.
>
> Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility, of a fine and imprisonment for knowing violations.

Executed on the ___ day of _________ , 19__,

Received
August 26, 2011
Commission on
State Mandates

at ________________________.

(Signature)________________(Title)___________________";

Co-permittee submittals to the Principal Co-permittee shall also be signed and certified pursuant to EPA regulations 40 CFR 122.41 (k).

D. The Discharger shall mail the original of each annual report to:

INFORMATION TECHNOLOGY
CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD - LOS ANGELES REGION
320 W. 4TH STREET, SUITE 200
LOS ANGELES, CA 90013

A copy of the annual report shall also be mailed to:

REGIONAL ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 Hawthorne Street
San Francisco, CA 94105

II. Monitoring Requirements

A. The Discharger shall implement the Countywide Monitoring Plan, as described in Chapter 6 of the Report of Waste Discharge (ROWD), which addresses discharge characterization (outfall monitoring), receiving water and watershed monitoring. To achieve this, the Discharger shall:

1. Conduct land use monitoring as shown in the summary table shown below:

Received
August 26, 2011
Commission on
State Mandates

Monitoring Station	***Minimum Number Events (per year)***	***Sample Type***	***Constituents[1]***
A-1, Wood Road	1[2]	Automated composite and grab samples	Metals Organics Conventional Inorganics Microbiological Toxicity and TIEs[3]
R-1, Swan St.[3]	3 Per Permit Term	Automated composite and grab samples	Metals Organics Conventional Inorganics Microbiological Toxicity and TIEs[3]
I-2, Ortega St.[3]	3 Per Permit Term	Automated composite and grab samples	Metals Organics Conventional Inorganics Microbiological Toxicity and TIEs[3]

1 The list of specific constituents, analytical methods, detection limits, and holding times is included in Attachment to the Monitoring and Reporting Program No. 7388.
2 A maximum of 5 events shall be monitored during the permit term.
3 Toxicity monitoring shall occur during at least one storm per year until baseline information has been collected, and then be discontinued. A Toxicity Identification Evaluation (TIE) shall be performed when acute toxicity results are greater than 1 TUa. Freshwater acute toxicity test shall be conducted on the most sensitive of the two species - Fathead minnow and Ceriodaphnia.

2. Conduct receiving water and watershed monitoring:

   a. For Revolon Slough the following monitoring program shall be implemented:

Monitoring Station	***Minimum Number of Events (per year)***	***Type of Sample***	***Constituents[1]***
W-3, La Vista Drain	1[2]	Automated composite and grab samples	Metals Organics Conventional Inorganics Microbiological Toxicity and TIEs[3]
W-4, Revolon Slough @ Wood Road	1[2]	Composite and grab samples	Metals Organics Conventional Inorganics Microbiological Toxicity and TIEs[3]

1 The list of specific constituents, analytical methods, detection limits, and holding times is included in Attachment to the Monitoring and Reporting Program No. 7388.
2. A maximum of 5 events shall be monitored during the permit term.

Received
August 26, 2011
Commission on
State Mandates

Toxicity monitoring shall occur during at least 1 storm event a year until baseline information has been collected, and then be discontinued. A Toxicity Identification Evaluation (TIE) shall be performed when acute toxicity results are greater than 1 TUa. Freshwater acute toxicity test shall be conducted on the most sensitive of the two species - Fathead minnow and Ceriodaphnia.

b. The Discharger shall participate as part of the Federal 205(j) grant non-point source grant study of the Calleguas Creek watershed;

c. The Principal Co-permittee shall participate in appropriate water quality meetings of watershed management planning, including the Santa Clara River Enhancement and Management Plan, the Calleguas Creek Watershed Management Plan, and the Steelhead Restoration and Recovery Plan;

d. The Discharger shall participate with the Southern California Coastal Water Research Project (SCCWRP) in storm water studies, as set forth in the signed Memorandum of Agreement.

e. The Discharger shall participate in the development and implementation of volunteer monitoring programs in the Ventura Coastal watersheds.

f. The Discharger shall develop a work plan for an instream bioassessment monitoring program and submit it to the Regional Board Executive Officer for approval no later than January 27, 2001. On approval by the Regional Board Executive Officer, the Discharger shall implement the instream bioassessment monitoring program, and submit the results with the Annual Monitoring Report. The bioassessment program shall include an analysis of the community structure of the instream macroinvertebrate assemblages in urban runoff-impacted stream segments at experimental sites. The Discharger shall make all efforts to locate such sites in the Ventura River, but if they are not available then the Discharger may consider other watersheds.

g. The Discharger shall monitor a total of three mass emission stations to establish baseline conditions and load estimates, for the Ventura River and Calleguas Creek, beginning with the 2000-2001 monitoring season, and for the Santa Clara River beginning with the 2001-2002 monitoring season. Up to six station events per year, including a minimum of two dry weather samples must be monitored. All samples for mass emissions may be taken with an automatic sampler except for the following constituents: (i) pathogen indicators; and (ii) oil and grease. The constituents to be analyzed and their detection limits are listed in Attachment 1. If a constituent is not detected at the method detection limit (MDL) for its respective test in more than 75 percent of the first 48 sampling events, it will not be further analyzed unless the observed occurrences show concentrations greater than state water

Received
August 26, 2011
Commission on
State Mandates

quality standards. The Discharger will also conduct annual confirmation sampling for non-detected constituents at each station for as long as the station is monitored. Chronic toxicity tests shall be conducted using the most sensitive marine species for two wet weather events (preferably the first significant storm and one other event) and one dry weather flow sample per monitoring season. Toxicity Identification Evaluations (TIEs) shall be conducted when toxicity manifests in:
(1) two consecutive wet weather samples , or;
(2) any dry weather flow sample.

h. An update of the Watershed Management Model (WMM) may be required by the Regional Board Executive Officer based on the needs of TMDL development. The Regional Board will assist the Discharger in identifying fund sources to assist in the implementation of this requirement, if invoked.

B. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

C. The Discharger shall retain records of all monitoring information, including all calibration and maintenance of monitoring instrumentation, copies of all reports required by this Order, and records of all data used to complete the Report of Waste Discharge and application for this Order, for a period of at least five(5) years from the date of the sample, measurement, report, or application. This period may be extended by request of the Regional Board or EPA at any time and shall be extended during the course of any unresolved litigation regarding this discharge.

D. Records of monitoring information shall include:

1. The date, exact place, and time of sampling or measurements;

2. The individual(s) who performed the sampling or measurements;

3. The date(s) analyses were performed;

4. The individual(s) who performed the analyses;

5. The analytical techniques or methods used; and,

6. The results of such analyses.

E. All sampling, sample preservation, and analyses must be conducted according to test procedures under 40 CFR Part 136, unless other test procedures have been specified in this Order.

Received
August 26, 2011
Commission on
State Mandates

F. All chemical, bacteriological, and bioassay analyses shall be conducted at a laboratory certified for such analyses by an appropriate governmental regulatory agency.

G. If no flow occurred during the reporting period, the monitoring report shall so state.

H. For any analyses performed for which no procedure is specified in the EPA guidelines or in this Monitoring and Reporting Program, the constituent or parameter analyzed and the method or procedure used must be specified in the monitoring report.

I. Whenever feasible, all MDLs shall be less than California Toxic Rule and Ocean Plan standards. If this is not feasible, the Discharger shall use analytical methods with the lowest MDL.

J. The Regional Board Executive Officer or the Regional Board, consistent with 40 CFR 122.41, may approve changes to the Monitoring and Reporting Program, after providing the opportunity for public comment, either:

   a. By petition of the Discharger or by petition of interested parties after the submittal of the Annual Monitoring Program Report. Such petition shall be filed not later than 60 days after the Annual Monitoring Program Report submittal date, or
   b. As deemed necessary by the Regional Board Executive Officer following notice to the Discharger.

III. <u>Program Evaluation</u>

A. All Co-permittees shall perform a self-audit to verify implementation of the Ventura County SMP through January 1 of each year and report the results of the self-audit to the principal Co-permittee by February 1, 2001, and annually thereafter.

B. All Co-permittees shall submit program evaluation results, in a standardized format, to the principal Co-permittee by August 1, 2001, and annually thereafter.

The above monitoring and reporting program, or subsequent modification thereto, shall become effective when Order No. 00-108 is adopted. All reports shall be signed by a responsible officer or duly authorized representative (as specified in 40 CFR Section 122.22) of the Discharger and submitted under penalty of perjury.

Ordered by:

The Original signed by

Received
August 26, 2011
Commission on
State Mandates

Ventura County Municipal Storm Water
Monitoring and Reporting Program No. CI-7388

NPDES Permit No. CAS004002

Dennis A. Dickerson
Executive Officer

Date: July 27, 2000

Received
August 26, 2011
Commission on
State Mandates

Attachment
Analytes, Methods, Limits, and Holding Times

Constituent	Method	MDL	Holding Time
Metals: (Total Recoverable and Diss.)	**(units = ugl/l, unless specified)**		
Arsenic	EPA 206.3	1	6 months
Cadmium	EPA 213.2	0.1	6 months
Chromium	EPA 218.2	1	6 months
Copper	EPA 220.1	1	6 months
Lead	EPA 239.2	1	6 months
Mercury, total & diss.	EPA 1631	0.001	6 months
Nickel	EPA 249.2	1	6 months
Selenium	EPA 270.3	2	6 months
Silver	EPA 272.2	0.2	6 months
Zinc	EPA 289.1	1	6 months
Organics			
MTBE*	EPA 8020	1	14 days
Organochlorine Pesticides	EPA 8080	1-10 ng/L	7/40 days
Orthophosphate Pesticides	EPA 8140	2	7/40 days
Chlorinated Herbicides	EPA 8150	2-50 ug/L	7/40 days
Semi-volatiles	EPA 625	10-200 ng/L	7/40 days
TOC	EPA 415.1	1000	28 days
Conventional Inorganics	**(units = mg/l)**		
Ammonia	EPA 350.2	0.05	28 days
BOD	EPA 405.1	1	48 hours
Bromide	SM 4500BR	0.0001	immediate
Chloride	EPA 325.3	0.0001	28 days
Conductivity & pH	Electrometric	n/a	immediate
Hardness	EPA 130.2/SM2340B	1	6 months
Nitrate	EPA 352.1	0.01	28 days
TKN	EPA 351.3	0.05	28 days
Oil & Grease	EPA 413.1/413.2	0.1	28 days
Petroleum hydrocarbons (TRPH)	EPA 413.1/SM5520B, F	0.1	7 days
Orthophosphate	EPA 365.3	0.01	28 days
Phosphorous, total & diss.	EPA 365.3	0.01	28 days
Solids, Total Dissolved	EPA 160.1	1	7 days
Solids, Total Suspended	EPA 160.2	1	7 days
Microbiological	**(units = MPN/100 ml)**		
Coliform, Total & Fecal	SM9221	2	6 hours
Fecal Streptococcus	SM9230	2	6 hours
Toxicity			
Ceriodaphnia Acute Toxicity (TIE)	EPA 600/4-91/002		36 hours

* MTBE is an extra compound for EPA 8020 analysis & must be specifically requested, e.g. "8020 with MTBE"
Note: Holding times for methods 625, 8080, 8140, and 8150 are 7 days until extraction, 40 days after extraction

Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT A

Tentative Order No. 00-108 (NPDES NO. CAS004002)
Waste Discharge Requirements

for
Municipal Storm Water and Urban Runoff Discharges

VENTURA COUNTYWIDE STORMWATER QUALITY URBAN IMPACT MITIGATION PLAN

FOR THE VENTURA COUNTY FLOOD CONTROL DISTRICT, THE COUNTY OF VENTURA, AND THE CITIES OF VENTURA COUNTY

Received
August 26, 2011
Commission on
State Mandates

VENTURA COUNTYWIDE STORMWATER QUALITY URBAN IMPACT MITIGATION PLAN

FOR THE VENTURA COUNTY FLOOD CONTROL DISTRICT, THE COUNTY OF VENTURA, AND THE CITIES OF VENTURA COUNTY

Received
August 26, 2011
Commission on
State Mandates

VENTURA COUNTYWIDE URBAN RUNOFF AND STORM WATER NPDES PERMIT

STORM WATER QUALITY URBAN IMPACT MITIGATION PLAN

BACKGROUND

The Ventura Countywide Stormwater Quality Management Program (Ventura Program) was established pursuant to Section 402(p) of the Federal Clean Water Act, which requires that all point source discharges of pollutants into waters of the United States, including discharges from municipal storm drain systems, be regulated by a National Pollutant Discharge Elimination System (NPDES) permit. On August 22, 1994 the California Regional Water Quality Control Board, Los Angeles Region (Regional Board), issued NPDES permit CAS063339 (Permit) to the Ventura County Flood Control District (VCFCD), the County of Ventura, and the cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura, Santa Paula, Simi Valley, and Thousand Oaks for discharges from municipal storm drain systems in Ventura County. On February 11, 1999 these twelve agencies, the Co-permittees, submitted a Stormwater Quality Management Plan (1999 Plan) in accordance with Title 23, California Code of Regulation and as required by Permit. The 1999 Plan served as application for reissuance of waste discharge requirements and presented activities designed to advance the municipal storm water program that the Co-permittees implemented during the first five-year permit term. The 1999 Plan included a program for development planning. The Regional Board accepted the 1999 Plan, however, delayed reissuance of the Permit. On March 8, 2000, the Regional Board approved a final Standard Urban Storm Water Mitigation Plan (SUSMP) for Los Angles County and the Cities in Los Angeles County. Subsequently, at the request of the Regional Board, the Co-permittees prepared the Ventura Countywide Stormwater Quality Urban Impact Mitigation Plan (SQUIMP) to be consistent with SUSMP requirements and will be modifying the 1999 Plan to include the modified requirements.

The requirement to implement a program for development planning is based on, federal and state statutes including: Section 402 (p) of the Clean Water Act, Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 ("CZARA"), and the California Water Code. The Clean Water Act amendments of 1987 established a framework for regulating storm water discharges from municipal, industrial, and construction activities under the NPDES program. The primary objectives of the municipal storm water program requirements are to:

Received
August 26, 2011
Commission on
State Mandates

1. Effectively prohibit non-storm water discharges, and

2. Reduce the discharge of pollutants from storm water conveyance systems to the Maximum Extent Practicable (MEP statutory standard).

The SQUIMP was developed as part of the municipal storm water program to address storm water pollution from new development and redevelopment by the private sector. This SQUIMP contains a list of the minimum required Best Management Practices (BMPs) that shall be used for a designated project. Additional BMPs may be required by ordinance or code adopted by the Co-permittees and applied generally or on a case by case basis. The Co-permittees are required to implement the requirements set herein in their own jurisdictions. Developers shall incorporate appropriate SQUIMP requirements into the project plans for the projects covered by the SQUIMP requirements. Each Co-permittee will approve the project plan as part of the development plan approval process.

All projects that fall into one of eight categories are identified in the Ventura Countywide Municipal Permit as requiring SQUIMPs. These categories are:

- Single-Family Hillside Residences
- 100,000 Square Foot Commercial Developments
- Automotive Repair Shops
- Retail Gasoline Outlets
- Restaurants
- Home Subdivisions with 10 or more housing units
- Location within or directly adjacent to or discharging directly to an environmentally sensitive area
- Parking lots with 5,000 square feet or more impervious parking or access surfaces or with 25 or more parking spaces and potentially exposed to storm water runoff

The SQUIMP requirements shall take effect not later than January 27, 2001 for projects identified herein that have not received development/planning permit approval or been deemed complete for processing prior to July 27, 2000..

DEFINITIONS

"100,000 Square Foot Commercial Development" means any commercial development that creates at least 100,000 square feet of impermeable area, including parking areas.

"Automotive Repair Shop" means a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

"Best Management Practice (BMP)" means any program, technology, process, siting criteria, operational methods or measures, or engineered systems, which when implemented prevent, control, remove, or reduce pollution.

"Commercial Development" means any development on private land that is not heavy industrial or residential. The category includes, but is not limited to: hospitals,

Received
August 26, 2011
Commission on
State Mandates

laboratories and other medical facilities, educational institutions, recreational facilities, plant nurseries, multi-apartment buildings, car wash facilities, mini-malls and other business complexes, shopping malls, hotels, office buildings, public warehouses and other light industrial complexes.

“Designated Public Access Points” means any pedestrian, bicycle, equestrian, or vehicular point of access to jurisdictional channels in the area of Ventura County subject to permit requirements.

“Directly Adjacent” means situated within 200 feet of the contiguous zone required for the continued maintenance, function, and structural stability of the environmentally sensitive area.

“Directly Connected Impervious Area (DCIA)” means the area covered by a building, impermeable pavement, and/ or other impervious surfaces, which drains directly into the storm drain without first flowing across permeable land area (e.g. lawns).

.“Directly Discharging” means outflow from a drainage conveyance system that is composed entirely or predominantly of flows from the subject, property, development, subdivision, or industrial facility, and not commingled with the flows from adjacent lands.

“Environmentally Sensitive Area” means an area “in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which would be easily disturbed or degraded by human activities and developments” (California Public Resources Code § 30107.5)

Areas subject to storm water mitigation requirements are: areas designated as an Area of Special Biological Significance (ASBS) by the State Water Resources Control Board, an area designated as a significant natural resource by the California Resources Agency, or an area identified by the Discharger as environmentally sensitive for water quality purposes, based on the Regional Board Basin Plan and Clean Water Act Section 303(d) Impaired Water-bodies List for the County of Ventura.

“Hillside” means property located in an area with known erosive soil conditions, where the development contemplates grading on any natural slope that is twenty-five percent or greater.

“Infiltration” means the downward entry of water into the surface of the soil.

“New Development” means land disturbing activities; structural development, including construction or installation of a building or structure, creation of impervious surfaces; and land subdivision.

“Parking Lot” means land area or facility for the temporary parking or storage of motor

Received
August 26, 2011
Commission on
State Mandates

vehicles used personally, for business or for commerce with an impervious surface area of 5,000 square feet or more, or with 25 or more parking spaces.

"Redevelopment" means, but is not limited to, the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routine maintenance activity; land disturbing activities related with structural or impervious surfaces. Redevelopment that results in the creation or addition of 5,000 square feet or more of impervious surfaces is subject to the requirements for storm water mitigation. If the creation or addition of impervious surfaces is fifty percent or more of the existing impervious surface area, then storm water runoff from the entire area (existing and additions) must be considered for purposes of storm water mitigation. If the creation or additions is less than fifty percent of the existing impervious area, then storm water runoff from only the addition area needs mitigation.

"Restaurant" means a stand-alone facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption. (SIC code 5812).

"Retail Gasoline Outlet" means any facility engaged in selling gasoline and lubricating oils.

"Source Control BMP" means any schedules of activities, structural devices, prohibitions of practices, maintenance procedures, managerial practices or operational practices that aim to prevent storm water pollution by reducing the potential for contamination at the source of pollution.

"Storm Event" means a rainfall event that produces more than 0.1 inch of precipitation and that, which is separated from the previous storm event by at least 72 hours of dry weather.

"Structural BMP" means any structural facility designed and constructed to mitigate the adverse impacts of storm water and urban runoff pollution (e.g. canopy, structural enclosure). The category may include both Treatment Control BMPs and Source Control BMPs.

"Treatment" means the application of engineered systems that use physical, chemical, or biological processes to remove pollutants. Such processes include, but are not limited to, filtration, gravity settling, media adsorption, biodegradation, biological uptake, chemical oxidation and UV radiation.

"Treatment Control BMP" means any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants, filtration, biological uptake, media adsorption or any other physical, biological, or chemical process.

Received
August 26, 2011
Commission on
State Mandates

CONFLICTS WITH LOCAL PRACTICES

Where provisions of the SQUIMP requirements conflict with established local codes, (e.g., specific language of signage used on storm drain stenciling), the Co-permittees may continue the local practice and modify the SQUIMP to be consistent with the code, except that to the extent that the standards in the SQUIMP are more stringent than those under local codes, such more stringent standards shall apply.

SQUIMP PROVISIONS APPLICABLE TO ALL CATEGORIES

REQUIREMENTS

1. PEAK STORM WATER RUNOFF DISCHARGE RATES

The Discharger shall control the post-development peak storm water runoff discharge rates to maintain or reduce pre-development downstream erosion, and to protect stream habitat.

2. CONSERVE NATURAL AREAS

If applicable, the following items are required and shall be implemented in the site layout during the subdivision design and approval process, consistent with applicable General Plan and Local Area Plan policies:

- Concentrate or cluster Development on portions of a site while leaving the remaining land in a natural undisturbed condition.
- Limit clearing and grading of native vegetation at a site to the minimum amount needed to build lots, allow access, and provide fire protection.
- Maximize trees and other vegetation at each site by planting additional vegetation, clustering tree areas, and promoting the use of native and/or drought tolerant plants.
- Promote natural vegetation by using parking lot islands and other landscaped areas.
- Preserve riparian areas and wetlands.

3. MINIMIZE STORM WATER POLLUTANTS OF CONCERN

Storm water runoff from a site has the potential to contribute oil and grease, suspended solids, metals, gasoline, pesticides, and pathogens to the storm water conveyance system. The development shall be designed so as to minimize, to the maximum extent practicable, the introduction of pollutants of concern that may result in significant impacts, generated from site runoff of directly connected impervious areas (DCIA), to

Received
August 26, 2011
Commission on
State Mandates

the storm water conveyance system. Pollutants of concern consist of any pollutants that exhibit one or more of the following characteristics: current loadings or historic deposits of the pollutant are impacting the beneficial uses of a receiving water, elevated levels of the pollutant are found in sediments of a receiving water and/or have the potential to bioaccumulate in organisms therein, or the detectable inputs of the pollutant are at concentrations or loads considered potentially toxic to humans and/or flora and fauna. The storm water pollutants of concern currently identified by the Program are total and fecal coliform, mercury, PAHs, DDT and byproducts, diazinon, sediment/TSS, chlorpyrifos, copper, lead, thallium, bis(2-ethylhexyl)phthalate, and phosphorous. The program may amend the list of pollutants of concern as additional information becomes available.

In meeting this specific requirement, "minimization of the pollutants of concern" will require the incorporation of a BMP or combination of BMPs best suited to maximize the reduction of pollutant loadings in that runoff to the Maximum Extent Practicable. Those BMPs best suited for that purpose are those listed in the *Ventura Countywide Stormwater Quality Management Program's Land Development Guidelines*; *California Storm Water Best Management Practices Handbooks*; *Caltrans Storm Water Quality Handbook: Planning and Design Staff Guide*; *Start at the Source (1999) by Bay Area Stormwater Management Agencies Association*, *Manual for Storm Water Management in Washington State*; *The Maryland Storm Water Design Manual*; *Florida Development Manual: A Guide to Sound Land and Water Management*; Denver *Urban Storm Drainage Criteria Manual, Volume 3 – Best Management Practices* and *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*, USEPA Report No. EPA-840-B-92-002, as "likely to have significant impact" beneficial to water quality for targeted pollutants that are of concern at the site in question. However, it is possible that a combination of BMPs not so designated may, in a particular circumstance, be better suited to maximize the reduction of the pollutants.

Examples of BMPs that can be used for minimizing the introduction of pollutants of concern generated from site runoff are identified in Table 2. All BMPs for development planning recommended in one of the above references may be used, subject to the criteria set in this SQUIMP.

4. PROTECT SLOPES AND CHANNELS

Project plans shall include BMPs consistent with local codes and ordinances and the SQUIMP to decrease the potential of slopes and/or channels from eroding and impacting storm water runoff:

- Convey runoff safely from the tops of slopes and stabilize disturbed slopes
- Utilize natural drainage systems to the Maximum Extent Practicable
- Control or reduce or eliminate flow to natural drainage systems to the Maximum Extent Practicable

Received
August 26, 2011
Commission on
State Mandates

- Stabilize permanent channel crossings
- Vegetate slopes with first consideration given to native or drought tolerant species
- Install energy dissipaters, such as riprap, at the outlets of new storm drains, culverts, conduits, or channels that enter unlined channels in accordance with applicable specifications to minimize erosion, with the approval of all agencies with jurisdiction, e.g., the U.S. Army Corps of Engineers and the California Department of Fish and Game

5. PROVIDE STORM DRAIN SYSTEM STENCILING AND SIGNAGE

Storm drain stencils are highly visible source controls that are typically placed directly adjacent to storm drain inlets. The stencil contains a brief statement that prohibits the dumping of improper materials into the storm water conveyance system. Graphical icons, either illustrating anti-dumping symbols or images of receiving water fauna, are effective supplements to the anti-dumping message.

- All storm drain inlets and catch basins within the project area shall be stenciled with prohibitive language (such as: “DON’T DUMP! DRAINS TO OCEAN”) and/or graphical icons to discourage illegal dumping.
- Signs and prohibitive language and/or graphical icons, which prohibit illegal dumping, shall be posted at designated public access points along channels and creeks within the project area.
- Legibility of stencils and signs shall be maintained.

6. PROPERLY DESIGN OUTDOOR MATERIAL STORAGE AREAS

Outdoor material storage areas refer to storage areas or storage facilities solely for the storage of materials. Improper storage of materials outdoors may provide an opportunity for toxic compounds, oil and grease, heavy metals, nutrients, suspended solids, and other pollutants to enter the storm water conveyance system. Where proposed project plans include outdoor areas for permanent storage of materials that may contribute pollutants to the storm water conveyance system, the following Structural or Treatment BMPs are required:

- Materials with the potential to contaminate storm water shall be: (1) placed in an enclosure such as, but not limited to, a cabinet, shed, or similar structure that prevents contact with runoff or spillage to the storm water conveyance system; or (2) protected by secondary containment structures such as berms, dikes, or curbs.
- The storage area shall be paved and sufficiently impervious to contain leaks and spills.

Received
August 26, 2011
Commission on
State Mandates

- The storage area shall have a roof or awning to minimize collection of storm water within the secondary containment area.

7. PROPERLY DESIGN TRASH STORAGE AREAS

A trash storage area refers to an area where a trash receptacle or receptacles are located for use as a repository for solid wastes. Loose trash and debris can be easily transported by the forces of water or wind into nearby storm drain inlets, channels, and/or creeks. All trash container areas shall meet the following Structural or Treatment Control BMP requirements (individual single family residences are exempt from these requirements):

- Trash container areas shall have drainage from adjoining roofs and pavement diverted around the area(s).
- Trash container areas shall be screened or walled to prevent off-site transport of trash.

8. PROVIDE PROOF OF ONGOING BMP MAINTENANCE

Improper maintenance is one of the most common reasons why water quality controls will not function as designed or systems to fail entirely. It is important to consider who will be responsible for maintenance of a permanent BMP and what equipment is required to perform the maintenance properly. As part of project review, if a project applicant has included or is required to include, Structural or Treatment Control BMPs in project plans, the Co-permittee shall require that the applicant provide verification of maintenance provisions through such means as may be appropriate, including, but not limited to legal agreements, covenants, CEQA mitigation requirements and/or Conditional Use Permits.

For all properties, the verification will include the developer's signed statement, as part of the project application, accepting responsibility for all structural and treatment control BMP maintenance until the time the property is transferred and, where applicable, a signed agreement from the public or private entity assuming responsibility for Structural or Treatment Control BMP maintenance. The transfer of property to a private or public owner shall have conditions requiring the recipient to assume responsibility for maintenance of any Structural or Treatment Control BMP included in the sales or lease agreement for that property. The condition of transfer shall include a provision that the property owners conduct maintenance inspection of all Structural or Treatment Control BMPs at least once a year and retain proof of inspection. For residential properties where the Structural or Treatment Control BMPs are located within a common area which will be maintained by a homeowner's association, language regarding the responsibility for maintenance shall be included in the projects conditions, covenants and restrictions (CC&Rs). Printed educational materials will be required to accompany

Received
August 26, 2011
Commission on
State Mandates

the first deed transfer to highlight the existence of the requirement and to provide information on what storm water management facilities are present, signs that maintenance is needed, how the necessary maintenance can be performed, and assistance that the Co-permittee can provide. The transfer of this information shall also be required with any subsequent sale of the property.

If Structural or Treatment Control BMPs are located within a public area proposed for transfer, they will be the responsibility of the developer until they are accepted for transfer by the appropriate public agency. Structural or Treatment Control BMPs proposed for transfer shall meet design standards adopted by the public entity for the BMP installed and should be approved by the appropriate public agency prior to installation.

9. DESIGN STANDARDS FOR STRUCTURAL OR TREATMENT CONTROL BMPs

Structural or Treatment Control BMPs selected for use at any project covered by this SQUIMP shall meet the design standards of this Section unless specifically exempted.

Volume-based and flow-based design standards may be used separately or in combination to equivalent treatment of storm water discharges. Volume-based criteria should be used in the sizing of detention/retention or infiltration structures; flow-based criteria should be used on swales, catch basin devices, or wetlands. Other, BMP-specific criteria may be applicable. Project applicants should refer to the *Ventura Countywide Storm Water Quality Management Program Land Development Guidelines* for further information.

Volume-based Post-construction Structural or Treatment Control BMPs shall be designed to mitigate (infiltrate or treat) storm water runoff from either:

1. the volume of annual runoff based on unit basin storage water quality volume, to achieve 80 percent or more volume treatment by the method recommended in *California Stormwater Best Management Practices Handbook – Industrial/ Commercial,* (1993), the *Ventura Countywide Stormwater Quality Management Program Land Development Guidelines*, or

2. the 85th percentile 24-hour runoff event determined as the maximized capture storm water volume for the area, from the formula recommended in *Urban Runoff Quality Management, WEF Manual of Practice No. 23/ ASCE Manual of Practice No. 87, (1998*), or

3. the volume of runoff produced from a 0.75 inch storm event, prior to its discharge to a storm water conveyance system, or

4. the volume of runoff produced from a historical-record based reference 24-hour rainfall criterion for “treatment” that achieves approximately the same reduction in pollutant loads achieved by the 85th percentile 24-hour runoff event,

OR

Received
August 26, 2011
Commission on
State Mandates

Flow Based Post-Construction Structural or Treatment Control BMPs shall be sized to handle the flow generated from either:

1. 10% of the 50-year design flow rate, or
2. a flow that will result in treatment of the same portion of runoff as treated using volumetric standards above, or
3. a rain event equal to at least 0.2 inches per hour intensity, or
4. a rain event equal to at least two times the 85th percentile hourly rainfall intensity for Ventura County

Limited Exclusion

Where the land area for development or redevelopment is less than 5,000 square feet, restaurants are excluded from the numerical Structural or Treatment Control BMP design standard requirement only.

10. PROVISIONS APPLICABLE TO INDIVIDUAL PRIORITY PROJECT CATEGORIES

REQUIREMENTS

A. 100,000 SQUARE FOOT COMMERCIAL DEVELOPMENTS

1. PROPERLY DESIGN LOADING/UNLOADING DOCK AREAS

Loading/unloading dock areas have the potential for material spills to be quickly transported to the storm water conveyance system. To minimize this potential, the following design criteria are required:

- Cover loading dock areas or design drainage to minimize run-on and runoff of storm water.
- Direct connections to storm drains from depressed loading docks (truck wells) are prohibited.

2. PROPERLY DESIGN REPAIR/MAINTENANCE BAYS

Oil and grease, solvents, car battery acid, coolant and gasoline from the repair/maintenance bays can negatively impact storm water if allowed to come into contact with storm water runoff. Therefore, design plans for repair bays shall include the following:

Received
August 26, 2011
Commission on
State Mandates

- Repair/maintenance bays shall be indoors or designed in such a way that does not allow storm water run-on or contact with storm water runoff.
- Design a repair/maintenance bay drainage system to capture all washwater, leaks and spills. Connect drains to a sump for collection and disposal. Direct connection of the repair/maintenance bays to the storm drain system is prohibited. If required by local jurisdiction, obtain an Industrial Waste Discharge Permit.

3. PROPERLY DESIGN VEHICLE/EQUIPMENT WASH AREAS

The activity of vehicle/equipment washing/steam cleaning has the potential to contribute metals, oil and grease, solvents, phosphates, and suspended solids to the storm water conveyance system. Include, in the project plans, an area for washing/steam cleaning of vehicles and equipment. The area in the site design shall be:

- Self-contained and/or covered, equipped with a clarifier, or other pretreatment facility, and properly connected to a sanitary sewer.

B. RESTAURANTS

1. PROPERLY DESIGN EQUIPMENT/ACCESSORY WASH AREAS

The activity of outdoor equipment/accessory washing/steam cleaning has the potential to contribute metals, oil and grease, solvents, phosphates, and suspended solids to the storm water conveyance system. Include in the project plans an area for the washing/steam cleaning of equipment and accessories. This area shall be:

- Self-contained, connected to a grease interceptor, and properly connected to a sanitary sewer.
- If the wash area is to be located outdoors, it shall be covered, paved, have secondary containment, be connected to a grease interceptor and be connected to the sanitary sewer.

C. RETAIL GASOLINE OUTLETS

1. PROPERLY DESIGN FUELING AREA

Fueling areas have the potential to contribute oil and grease, solvents, car battery acid, coolant and gasoline to the storm water conveyance system. The project plans shall include the following BMPs:

- The fuel dispensing area shall be covered with an overhanging roof structure

Received
August 26, 2011
Commission on
State Mandates

or canopy. The canopy's minimum dimensions shall be equal to or greater than the area within the grade break. The canopy shall not drain onto the fuel dispensing area, and the canopy downspouts shall be routed to prevent drainage across the fueling area.
- The fuel dispensing area shall be paved with Portland cement concrete (or equivalent smooth impervious surface), and the use of asphalt concrete shall be prohibited.
- The fuel dispensing area shall have a 2% to 4% slope to prevent ponding, and shall be separated from the rest of the site by a grade break that prevents run-on of storm water to the extent practicable.
- At a minimum, the concrete fuel dispensing area shall extend 6.5 feet (2.0 meters) from the corner of each fuel dispenser, or the length at which the hose and nozzle assembly may be operated plus 1 foot (0.3 meter), whichever is less.

D. AUTOMOTIVE REPAIR SHOPS

1. PROPERLY DESIGN FUELING AREA

Fueling areas have the potential to contribute oil and grease, solvents, car battery acid, coolant and gasoline to the storm water conveyance system. Therefore, design plans, which include fueling areas, shall contain the following:

- The fuel dispensing area shall be covered with an overhanging roof structure or canopy. The cover's minimum dimensions shall be equal to or greater than the area within the grade break. The cover shall not drain onto the fuel dispensing area and the downspouts shall be routed to prevent drainage across the fueling area.
- The fuel dispensing areas shall be paved with Portland cement concrete (or equivalent smooth impervious surface), and the use of asphalt concrete shall be prohibited.
- The fuel dispensing area shall have a 2% to 4% slope to prevent ponding, and shall be separated from the rest of the site by a grade break that prevents run-on of storm water.
- At a minimum, the concrete fuel dispensing area shall extend 6.5 feet (2.0 meters) from the corner of each fuel dispenser, or the length at which the hose and nozzle assembly may be operated plus 1 foot (0.3 meter), whichever is less.

2. PROPERLY DESIGN REPAIR/MAINTENANCE BAYS

Received
August 26, 2011
Commission on
State Mandates

Oil and grease, solvents, car battery acid, coolant and gasoline from the repair/maintenance bays can negatively impact storm water if allowed to come into contact with storm water runoff. Therefore, design plans for repair bays shall include the following:

- Repair/maintenance bays shall be indoors or designed in such a way that does not allow storm water run-on or contact with storm water runoff.
- Design a repair/maintenance bay drainage system to capture all wash-water, leaks and spills. Connect drains to a sump for collection and disposal. Direct connection of the repair/maintenance bays to the storm drain system is prohibited. If required by local jurisdiction, an Industrial Waste Discharge Permit should be obtained.

3. PROPERLY DESIGN VEHICLE/EQUIPMENT WASH AREAS

The activity of vehicle/equipment washing/steam cleaning has the potential to contribute metals, oil and grease, solvents, phosphates, and suspended solids to the storm water conveyance system. Include, in the project plans, an area for washing/steam cleaning of vehicles and equipment. This area shall be:

- Self-contained and/or covered, equipped with a clarifier, or other pretreatment facility, and properly connected to a sanitary sewer or to a permitted disposal facility.

4. PROPERLY DESIGN LOADING/UNLOADING DOCK AREAS

Loading/unloading dock areas have the potential for material spills to be quickly transported to the storm water conveyance system. To minimize this potential, the following design criteria are required:

- Cover loading dock areas or design drainage to minimize run-on and runoff of storm water

- Direct connections to storm drains from depressed loading docks (truck wells) are prohibited

E. PARKING LOTS

1. PROPERLY DESIGN PARKING AREA

Parking lots contain pollutants such as heavy metals, oil and grease, and polycyclic aromatic hydrocarbons that are deposited on parking lot surfaces by motor vehicles.

Received
August 26, 2011
Commission on
State Mandates

These pollutants are directly transported to surface waters. To minimize the offsite transport of pollutants, the following design criteria are required:

- Reduce impervious land coverage of parking areas
- Infiltrate runoff before it reaches the storm drain system
- Treat runoff before it reaches the storm drain system

2. PROPERLY DESIGN TO LIMIT OIL CONTAMINATION AND PERFORM MAINTENANCE

Parking lots may accumulate oil, grease, and water insoluble hydrocarbons from vehicle drippings and engine system leaks.

- Treat to remove oil and petroleum hydrocarbons at parking lots that are heavily used (e.g. fast food outlets, lots with 25 or more parking spaces, sports event parking lots, shopping malls, grocery stores, discount warehouse stores)
- Ensure adequate operation and maintenance of treatment systems, particularly sludge and oil removal, and system fouling/plugging prevention control

11. WAIVER

A Co-permittee may, through adoption of an ordinance or code incorporating the treatment requirements of the SQUIMP, provide for a waiver from the requirement if impracticability for a specific property can be established. A waiver for impracticability shall be granted only when all other Structural or Treatment Control BMPs have been considered and rejected as infeasible. Recognized situations of impracticability include, (i) extreme limitations of space for treatment on a redevelopment project, (ii) unfavorable or unstable soil conditions at a site to attempt infiltration, and (iii) risk of ground water contamination because a known unconfined aquifer lies beneath the land surface or an existing or potential underground source of drinking water is less than 10 feet from the soil surface. Any other justification for impracticability shall be separately petitioned by the Co-permittee and submitted to the Regional Board for consideration. The Regional Board may consider approval of the waiver justification or may delegate the authority to approve a class of waiver justifications to the Regional Board Executive Officer. The supplementary waiver justification becomes recognized and effective only after approval by the Regional Board or the Regional Board Executive Officer. A waiver granted by a Co-permittee to any development or redevelopment project may be revoked by the Regional Board Executive Officer for cause and with proper notice upon petition.

If a waiver is granted for impracticability, the Co-permittee shall require the project proponent to transfer the savings in cost, as determined by the Co-permittee, to a storm

Received
August 26, 2011
Commission on
State Mandates

water mitigation fund operated by a public agency or a non-profit entity to be used to promote regional or alternative solutions for storm water pollution in the watershed.

12. LIMITATION ON USE OF INFILTRATION BMPs

Three factors significantly influence the potential for storm water to contaminate ground water. They are (i) pollutant mobility, (ii) pollutant abundance in storm water, (iii) and soluble fraction of pollutant. The risk of contamination of groundwater may be reduced by pretreatment of storm water. A discussion of limitations and guidance for infiltration practices is contained in, *Potential Groundwater Contamination from Intentional and Non-Intentional Storm water Infiltration, Report No. EPA/600/R-94/051, USEPA (1994).*

The distance of the groundwater table from the infiltration BMP may also be a factor determining the risk of contamination. A historic high water table distance separation of ten feet depth in California presumptively poses negligible risk for storm water not associated with industrial activity or high vehicular traffic except in cases where groundwater basins are unconfined. Unconfined groundwater basins and vulnerable unconfined aquifers are areas that have been identified by the County of Ventura Public Works Agency, Water Resources Division and the Regional Board as areas where the application of infiltration BMPs should be limited to those that provide pre-treatment to ensure groundwater is protected from pollutants of concern.

Infiltration BMPs are not recommended for areas of industrial activity or areas subject to high vehicular traffic (25,000 or greater average daily traffic (ADT) on main roadway or 15,000 or more ADT on any intersecting roadway) unless appropriate pretreatment is provided to ensure groundwater is protected and the infiltration BMP is not rendered ineffective by overload.

13. ALTERNATIVE CERTIFICATION FOR STORM WATER TREATMENT MITIGATION

In lieu of conducting detailed BMP review to verify Structural or Treatment Control BMPs adequacy, a Co-permittee may elect to accept a signed certification from a Civil Engineer or a Licensed Architect registered in the State of California, that the plan meets the criteria established herein. The Co-permittee is encouraged to verify that certifying person(s) have been trained on BMP design for water quality, not more than two years prior to the signature date. Training conducted by an organization with storm water BMP design expertise (e.g., a University, American Society of Civil Engineers, American Society of Landscape Architects, American Public Works Association, or the California Water Environment Association) may be considered qualifying.

Received
August 26, 2011
Commission on
State Mandates

14. RESOURCES AND REFERENCE

TABLE 1

SUGGESTED RESOURCES	HOW TO GET A COPY
Ventura Countywide Stormwater Quality Management Program Land Development Guidelines Presents guidance for designing storm water BMPs	Ventura County Flood Control District 800 South Victoria Avenue Ventura, CA 93009 805-650-4064
Start at the Source (1999) by Bay Area Stormwater Management Agencies Association Detailed discussion of permeable pavements and alternative driveway designs presented.	Bay Area Stormwater Management Agencies Association 2101 Webster Street Suite 500 Oakland, CA 510-286-1255
Design of Stormwater Filtering Systems (1996) by Richard A. Claytor and Thomas R. Schuler Presents detailed engineering guidance on ten different storm water-filtering systems.	Center for Watershed Protection 8391 Main Street Ellicott City, MD 21043 410-461-8323

Received
August 26, 2011
Commission on
State Mandates

Better Site Design: A Handbook for Changing Development Rules in Your Community (1998) Presents guidance for different model development alternatives.	Center for Watershed Protection 8391 Main Street Ellicott City, MD 21043 410-461-8323
Design Manual for Use of Bioretention in Stormwater Management (1993) Presents guidance for designing bioretention facilities.	Prince George's County Watershed Protection Branch 9400 Peppercorn Place, Suite 600 Landover, MD 20785
Operation, Maintenance and Management of Stormwater Management (1997) Provides a thorough look at storm water practices including, planning and design considerations, programmatic and regulatory aspects, maintenance considerations, and costs.	Watershed Management Institute, Inc. 410 White Oak Drive Crawfordville, FL 32327 850-926-5310
California Storm Water Best Management Practices Handbooks (1993) for Construction Activity, Municipal, and Industrial/Commercial Presents a description of a large variety of Structural BMPs, Treatment Control, BMPs and Source Control BMPs	Los Angeles County Department of Public Works Cashiers Office 900 S. Fremont Avenue Alhambra, CA 91803 626-458-6959
Second Nature: Adapting LA's Landscape for Sustainable Living (1999) by Tree People Detailed discussion of BMP designs presented to conserve water, improve water quality, and achieve flood protection.	Tree People 12601 Mullholland Drive Beverly Hills, CA 90210 818-753-4600
Florida Development Manual: A Guide to Sound Land and Water Management (1988) Presents detailed guidance for designing BMPs	Florida Department of the Environment 2600 Blairstone Road, Mail Station 3570 Tallahassee, FL 32399 850-921-9472
Stormwater Management in Washington State (2000) Vols. 1-5 Presents detailed guidance on BMP design for new development and construction.	Department of Printing State of Washington Department of Ecology P.O. Box 798 Olympia, WA 98507-0798 360-407-7529
Maryland Stormwater Design Manual (2000) Presents guidance for designing storm water BMPs	Maryland Department of the Environment 2500 Broening Highway Baltimore, MD 21224 410-631-3000

Received
August 26, 2011
Commission on
State Mandates

Texas Nonpoint Source Book – Online Module (1998)www.txnpsbook.org Presents BMP design and guidance information on-line	Texas Statewide Storm Water Quality Task Force North Central Texas Council of Governments 616 Six Flags Drive Arlington, TX 76005 817-695-9150
Urban Storm Drainage, Criteria Manual – Volume 3, Best Management Practices (1999) Presents guidance for designing BMPs	Urban Drainage and Flood Control District 2480 West 26th Avenue, Suite 156-B Denver, CO 80211 303-455-6277
National Storm water Best Management Practices (BMP) Database, Version 1.0 Provides data on performance and evaluation of storm water BMPs	American Society of Civil Engineers 1801 Alexander Bell Drive Reston, VA 20191 703-296-6000
Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters (1993) Report No. EPA–840-B-92-002. Provides an overview of, planning and design considerations, programmatic and regulatory aspects, maintenance considerations, and costs.	National Technical Information Service U.S. Department of Commerce Springfield, VA 22161 800-553-6847
Caltrans Storm Water Quality Handbook: Planning and Design Staff Guide (Best Management Practices Handbooks (1998) Presents guidance for design of storm water BMPs	California Department of Transportation P.O. Box 942874 Sacramento, CA 94274-0001 916-653-2975

Received
August 26, 2011
Commission on
State Mandates

TABLE 2

EXAMPLE BEST MANAGEMENT PRACTICES (BMPs)

The following are examples of BMPs that can be used for minimizing the introduction of pollutants of concern that may result in significant impacts, generated from site runoff to the storm water conveyance system. (See Table 1: Suggested Resources for additional sources of information):

- Provide reduced width sidewalks and incorporate landscaped buffer areas between sidewalks and streets. However, sidewalk widths shall still comply with regulations for the Americans with Disabilities Act and other life safety requirements.
- Design residential streets for the minimum required pavement widths needed to comply with all zoning and applicable ordinances to support travel lanes; on-street parking; emergency, maintenance, and service vehicle access; sidewalks; and vegetated open channels.
- Comply with all zoning and applicable ordinances to minimize the number of residential street cul-de-sacs and incorporate landscaped areas to reduce their impervious cover. The radius of cul-de-sacs should be the minimum required to accommodate emergency and maintenance vehicles. Alternative turnarounds should be considered.
- Use permeable materials for private sidewalks, driveways, parking lots, or interior roadway surfaces (examples: hybrid lots, parking groves, permeable overflow parking, etc.).
- Use open space development that incorporates smaller lot sizes.
- Reduce building density.
- Comply with all zoning and applicable ordinances to reduce overall lot

Received
August 26, 2011
Commission on
State Mandates

imperviousness by promoting alternative driveway surfaces and shared driveways that connect two or more homes together.

- Comply with all zoning and applicable ordinances to reduce the overall imperviousness associated with parking lots by providing compact car spaces, minimizing stall dimensions, incorporating efficient parking lanes, and using pervious materials in spillover parking areas.
- Direct rooftop runoff to pervious areas such as yards, open channels, or vegetated areas, and avoid routing rooftop runoff to the roadway or the storm water conveyance system.
- Biofilters including vegetated swales and strips
- Extended/dry detention basins
- Infiltration basin
- Infiltration trenches or vaults
- Wet detention basins/wet ponds
- Constructed wetlands

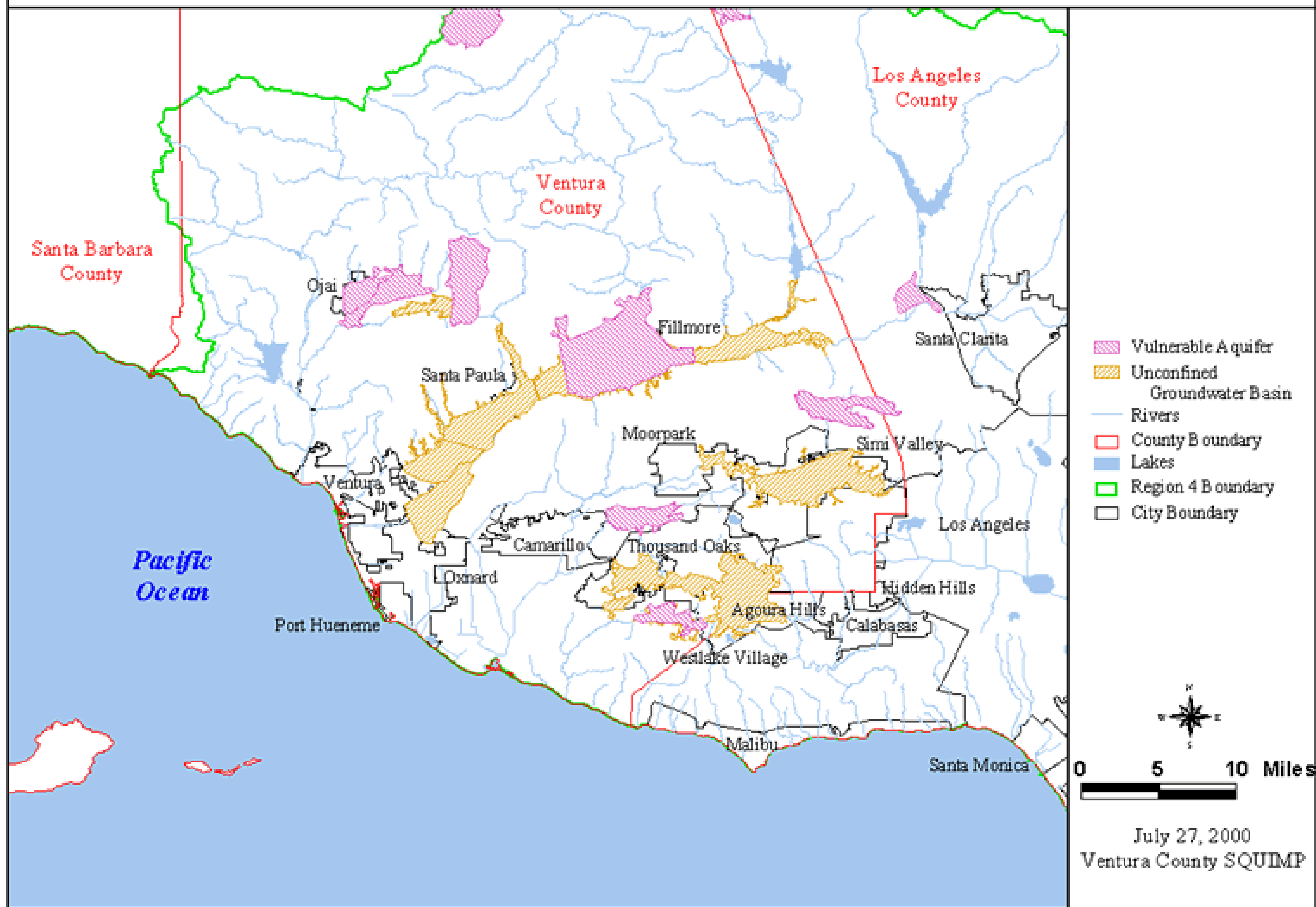
TABLE 2 (Continued)

- Catch basin inserts
- Continuous flow deflection/separation systems
- Storm drain inserts
- Media filtration
- Bioretention facility
- Foundation planting
- Catch basin screens
- Normal flow storage/separation systems
- Clarifiers
- Filtration systems
- Primary waste water treatment systems
- Dry Wells[1]
- Cistern

---

1 The proponent must ensure that this BMP complies with all applicable federal, state, and local requirements for siting, construction, operation and maintenance.

Received
August 26, 2011
Commission on
State Mandates



Received
August 26, 2011
Commission on
State Mandates

ATTACHMENT B

Tentative Order No. 00-108 (NPDES NO. CAS004002)
Waste Discharge Requirements

for
Municipal Storm Water and Urban Runoff Discharges

Within
Ventura County Flood Control District
County of Ventura
Cities of Ventura County

Table of Contents

For the

Ventura Countywide Stormwater
Quality Management Plan (SMP)

Received
August 26, 2011
Commission on
State Mandates

Contents

List of Tables
List of Figures

Section 1 Program Management 1-1

1.1 Overview 1-1
1.2 Program Structure 1-1
1.3 Institutional Arrangements 1-3
1.4 Fiscal Resources 1-3
1.5 Legal Authority 1-4

Section 2 Residents 2-1

2.1 Overview 2-1
2.2 Education 2-4
2.3 Public Reporting 2-5

Section 3 Industrial/Commercial Businesses 3-1

3.1 Overview 3-1
3.2 Business Inspections and Education 3-4
3.3 Staff Training 3-5

Section 4 Planning and Land Development 4-1

4.1 Overview 4-1
4.2 Land Use Planning and Zoning 4-6
4.3 Development Standards and Reviews 4-7
4.4 Development Community Education 4-9
4.5 Staff Training 4-9

Section 5 Construction Sites 5-1

5.1 Overview 5-1
5.2 Private Construction 5-6
5.3 Co-permittee Construction 5-7
5.4 Construction Community Education 5-8
5.5 Staff Training 5-9

Section 6 Co-permittee Facilities Maintenance 6-1

6.1 Overview 6-1
6.2 Drainage System Operation and Maintenance 6-6
6.3 Roadway Operation and Maintenance 6-6

Received
August 26, 2011
Commission on
State Mandates

6.4 Corporation Yards 6-7
6.5 Staff Training 6-8

Section 7 Illicit Discharges 7-1

7.1 Overview 7-1
7.2 Incident Response 7-5
7.3 Field Screening 7-6
7.4 Staff Training 7-7

Section 8 Program Evaluation 8-1

8.1 Overview 8-1
8.2 Performance Standards 8-1
8.3 Internal Reporting 8-1
8.4 Annual Reports 8-2
8.5 Stormwater Management Plan Revisions 8-2

Section 9 Monitoring 9-1

9.1 Proposed Structure of Monitoring Program 9-1
9.2 Discharge Characterization and Outfall Monitoring 9-2

9.2.1 Monitoring Site Descriptions 9-2
9.2.2 Storm Events Monitored 9-5
9.2.3 Monitoring Results 9-6

9.2.3.1 Water Quality Results 9-6
9.2.3.2 Bioassy Results 9-16
9.2.3.3 Comparison of Ventura County Mean Metals and Phosphorus Results to Other California Communities. 9-16

9.2.4 Proposed Monitoring Effort 9-19

9.3 Receiving Water and Watershed Monitoring 9-21

9.3.1 Receiving Water Assessments 9-21
9.3.2 Monitoring Site Descriptions 9-21

9.3.2.1 Receiving Water Sites 9-22
9.3.2.2 Malibu Creek Watershed Receiving Water Sites 9-22

9.3.3 Storm Events Monitored 9-23

9.3.3.1 Receiving Water Sites 9-23
9.3.3.2 Malibu Creek Watershed Monitoring Sites 9-24

Received
August 26, 2011
Commission on
State Mandates

9.3.4 Monitoring Results 9-24

9.3.4.1 Receiving Water Sites 9-25
9.3.4.2 Bioassay Results 9-30
9.3.4.3 Malibu Creek Watershed Receiving Water Sites 9-31

9.3.5 Proposed Receiving Water and Watershed Monitoring 9-35

9.3.5.1 Revolon Slough Watershed 9-35
9.3.5.2 Ventura River 9-35
9.3.5.3 Calleguas Creek Watershed 9-35

9.4 Pollutant Source Identification 9-36

9.4.1 Pollutant of Concern Identification and Prioritization 9-36
9.4.2 Proposed POC Source Identification Plan 9-37

9.4.2.1 General Source Investigation 9-37
9.4.2.2 Special Source Identification Studies 9-40
9.4.2.3 Control Measure Investigation 9-40

9.5 Management Program Effectiveness 9-41

9.5.1 Control Measure Effectiveness 9-41

9.5.1.1 Trash Control Measure Special Study 9-41

9.5.2 Pollutant Loading 9-41

9.5.2.1 Watershed Delineation/Land Use Specification 9-41
9.5.2.2 Current Pollutant Load Estimates 9-42
9.5.2.3 Proposed Activities to Improve Pollutant Load Estimates 9-44

Appendix A Legal Authority
A-1 Model Ordinance
A-2 County of Ventura's Adopted Ordinance

Appendix B Industrial/Commercial Businesses
B-1 Clean Business Program Approach Document
B-2 Suggested BMPs for Industrial Facilities

Appendix C Planning and Land Development
C-1 Land Development Guidelines
C-2 Sample Conditions of Approval
C-3 Land Development Approach Documents

Appendix D Construction Sites
D-1 Sample Conditions of Approval

Received
August 26, 2011
Commission on
State Mandates

D-2 Model SWPCP for Private Construction Projects
D-3 Example Construction Inspection Checklist
D-4 Stormwater Pollution Control Objectives and Inspection Criteria
D-5 Pollution Control Objectives for Construction Sites
D-6 Example Notice of New Construction Form
D-7 Model SWPCP for Public Works Projects
D-8 Stormwater Pollution Control Guidelines for Construction Sites
D-9 Education/Outreach to Construction Site Personnel

Appendix E Co-permittee Facilities Maintenance
E-1 Operation and Maintenance Personnel Training (including suggested BMPs)
E-2 Inspecting and Maintaining Corporation Yards

Appendix F Sample Illicit Discharge Reporting Form

Received
August 26, 2011
Commission on
State Mandates

List of Tables

Table 7-1 Exempt Discharges 7-5
Table 9-1 Discharge Characterization Monitoring Location Characteristics 9-3
Table 9-2 Summary of Discharge Characterization Monitoring Dates 9-5
Table 9-3 Summary Statistics for Detected Constituents at A-1, Wood Rd. (1994-1998) 9-6
Table 9-4 Summary Statistics for Detected Constituents at C-1, Via Del Norte (1993-1996) 9-8
Table 9-5 Summary Statistics for Detected Constituents at R-1, Swan Street (1993-1998) 9-9
Table 9-6 Summary Statistics for Detected Constituents at R-2, Lawrence Way (1993-1996) 9-11
Table 9-7 Summary Statistics for Detected Constituents at I-1, Via Pescador (1993-1996) 9-12
Table 9-8 Summary Statistics for Detected Constituents at I-2, Ortega St. (1993-1998) 9-14
Table 9-9 Survival Rates of Ceriodaphina for Discharge Characterization Monitoring Sites 9-16
Table 9-10 Summary of TIE Results 9-16
Table 9-11 Comparison of Industrial Land Use EMCs: Ventura County (1993-98) vs. California Communities 9-17
Table 9-12 Comparison of Residential Land Use EMCs: Ventura County (1993-98) vs. California Communities 9-18
Table 9-13 Comparison of R-1 Medians to Residential NURP Values 9-20
Table 9-14 Comparison of I-2 Medians to Industrial NURP Values 9-20
Table 9-15 Proposed Discharge Characterization Monitoring 9-21
Table 9-16 Receiving Water Monitoring Location Characteristics 9-22
Table 9-17 Malibu Creek Watershed Monitoring Location Characteristics 9-23
Table 9-18 Summary of Receiving Water Monitoring Dates 9-23
Table 9-19 Summary of Malibu Creek Watershed Monitoring Dates 9-24
Table 9-20 Summary Statistics for Detected Constituents at W-1, Heywood St. (1994-1997) 9-25
Table 9-21 Summary Statistics for Detected Constituents at W-2, Alamo St. (1994-1997) 9-26
Table 9-22 Summary Statistics for Detected Constituents at W-3, La Vista Rd. (1997-1998) 9-27
Table 9-23 Summary Statistics for Detected Constituents at W-4, Revolon Slough (1997-1998) 9-29
Table 9-24 Survival Rates of Ceriodaphnia for Receiving Water Monitoring Sites 9-31
Table 9-25 Summary of TIE Results 9-31
Table 9-26 Summary Statistics for Detected Constituents at LC-1, Lindero Canyon (1996-1998) 9-32
Table 9-27 Summary Statistics for Detected Constituents at LV-1, Las Virgenes Creek (1996-1998) 9-33
Table 9-28 Summary Statistics for Detected Constituents at MC-1, Medea Canyon (1996-1998) 9-34
Table 9-29 Proposed Monitoring in Revolon Slough Watershed 9-35

Received
August 26, 2011
Commission on
State Mandates

Table 9-30	Tier 1 and Tier 2 Pollutants of Concern	9-37
Table 9-31	General Sources of Tier 1 POCs	9-39
Table 9-32	Land Uses Within Ventura County	9-42
Table 9-33	Mean EMCs (1993-96) used in Modeling Pollutant Loads	9-43
Table 9-34	Estimated Mean Annual Loads for Southern Ventura County	9-43

Received
August 26, 2011
Commission on
State Mandates

List of Figures

Figure 1-1 Area Covered by the Stormwater Management Plan....................................... 1-2
Figure 9-1 Locations of Rain Gages and Monitoring Stations... 9-4

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

FEDERAL AND STATE CASES
&
STATUTES AND CONSTITUTIONAL REFERENCES

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

VOLUME 2 - INDEX

STATE CASES	
CASE NAME	**TAB NO.**
City of Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613	1
County of Fresno v. The State of California (1991) 53 Cal.3d 482	2
County of Los Angeles v. Commission on State Mandates (2007) 150 Cal.App.4th 898	3
County of Los Angeles v. The State of California (1987) 43 Cal.3d 46	4
County of San Diego v. The State of California (1997) 15 Cal.4th 68	5
Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564	6
Kinlaw v. The State of California (1991) 54 Cal.3d 326	7
Long Beach Unified School Dist. v. The State of California (1990) 225 Cal.App.3d 155	8
San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859	9

FEDERAL STATUTES	
33 U.S.C. § 1251	10
33 U.S.C. § 1342	11
33 U.S.C. § 1370	12

CODE OF FEDERAL REGULATIONS & FEDERAL REGISTER	
40 C.F.R. § 122.2	13
40 C.F.R. § 122.26	14
40 C.F.R. § 122.42	15
40 C.F.R. § 122.44	16
40 C.F.R. § 122.48	17
55 Fed.Reg. 47990	18

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

VOLUME 2 - INDEX

CALIFORNIA CONSTITUTION & STATUTES	
Cal. Const., art. XIII, § B	19
Cal. Const., art. XIII, § D	20
Cal. Gov. Code, § 17500	21
Cal. Gov. Code, § 17514	22
Cal. Gov. Code, § 17556	23
Cal. Wat. Code, § 13000	24
Cal. Wat. Code, § 13050	25
Cal. Wat. Code, § 13260	26
Cal. Wat. Code, § 13263	27
Cal. Wat. Code, § 13374	28
Cal. Wat. Code, § 13377	29

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 1

Received
August 26, 2011
Commission on
State Mandates

CITY OF BURBANK, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants. CITY OF LOS ANGELES, Plaintiff and Respondent, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.

S119248

SUPREME COURT OF CALIFORNIA

35 Cal. 4th 613; 108 P.3d 862; 26 Cal. Rptr. 3d 304; 2005 Cal. LEXIS 3486; 60 ERC (BNA) 1470; 2005 Cal. Daily Op. Service 2861; 2005 Daily Journal DAR 3870; 35 ELR 20071

April 4, 2005, Filed

SUBSEQUENT HISTORY: Time for Granting or Denying Rehearing Extended Burbank, City of v. State Water Resources Control Board, 2005 Cal. LEXIS 4271 (Cal., Apr. 21, 2005)
Rehearing denied by, Request denied by City of Burbank v. State Water Res. Control Bd., 2005 Cal. LEXIS 7185 (Cal., June 29, 2005)

PRIOR HISTORY: Superior Court of Los Angeles County, Nos. BS060960, BS060957, Dzintra I. Janavs, Judge. Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 & B152562.
City of Burbank v. State Water Resources Control Bd., 111 Cal. App. 4th 245, 4 Cal. Rptr. 3d 27, 2003 Cal. App. LEXIS 1236 (Cal. App. 2d Dist., 2003)

DISPOSITION: Judgment affirmed in part and remanded in part..

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court ruled that California law required a regional water quality control board to weigh the economic burden on a wastewater treatment facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. (Superior Court of Los Angeles County, Nos. BS060960 and BS060957, Dzintra I. Janavs, Judge.) The Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 and B152562, concluded that Wat. Code, ßß 13241 and 13263, required a regional board to take into account "economic considerations" when it adopted water quality standards in a basin plan but not when the regional board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

The Supreme Court affirmed the judgment of the Court of Appeal, reinstating the wastewater discharge permits in part and remanding for further proceedings. The court held that whether the regional board should have complied with Wat. Code, ßß 13263 and 13241, of California's Porter-Cologne Water Quality Control Act, Wat. Code, ß 13000 et seq., by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits, depended on whether those restrictions met or exceeded the requirements of the federal Clean Water Act, 33 U.S.C. ß 1251 et seq. To comport with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by [*614] federal law, from taking into account the economic effects of doing so. (Opinion by Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J. (see p. 629).)

Received
August 26, 2011
Commission on
State Mandates

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws ß 5--Water--"Basin Plans."--Whereas the State Water Resources Control Board establishes statewide policy for water quality control, Wat. Code, ß 13140, the regional boards formulate and adopt water quality control plans for all areas within a region, Wat. Code, ß 13240. Under Wat. Code, ß 13050, subd. (j), the regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. Basin plans must be consistent with state policy for water quality control under Wat. Code, ß 13240.

(2) Pollution and Conservation Laws ß 5--Water--Federal and State Standards.--Under 33 U.S.C. ß 1370, of the federal Clean Water Act, 33 U.S.C. ß 1251 et seq., each state is free to enforce its own water quality laws so long as its effluent limitations are not less stringent than those set out in the Clean Water Act.

(3) Pollution and Conservation Laws ß 5--Water--Federal and State Standards.--The Clean Water Act, 33 U.S.C. ß 1251 et seq., provides for two sets of water quality measures. Pursuant to 33 U.S.C. ßß 1311 and 1314, effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. Water quality standards are, in general, promulgated by the states and establish the desired condition of a waterway under 33 U.S.C. ß 1313. These standards supplement effluent limitations so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

(4) Pollution and Conservation Laws ß 5--Water--Federal and State Standards.--The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, 33 U.S.C. ß 1251 et seq., requires, inter alia, that state authorities periodically review water quality [*615] standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the state fails to comply with that recommendation, 33 U.S.C. ß 1313(c), authorizes the EPA to promulgate water quality standards for the state.

(5) Pollution and Conservation Laws ß 5--Water--National Pollutant Discharge Elimination System.--Part of the federal Clean Water Act, 33 U.S.C. ß 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. Title 33 U.S.C. ß 1342(a), (b), of the NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. Under California law, Wat. Code, ß 13374, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law.

(6) Statutes ß 21--Construction--Legislative Intent.--When construing any statute, the reviewing court's task is to determine the Legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

(7) Pollution and Conservation Laws ß 5--Water--Wastewater Discharge Permits--Economic Considerations.--Wat. Code, ß 13263, directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in Wat. Code, ß 13241. Listed among the ß 13241 factors is economic considerations, in ß 13241, subd. (d).

(8) Pollution and Conservation Laws ß 5--Water--Wastewater Discharge Permits--Economic Considerations.--Wat. Code, ß 13377, specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, ß 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of [*616] the United States unless there is compliance with federal law (33 U.S.C. ß 1311(a)), and publicly operated wastewater treatment plants must comply with the act's clean water standards under 33 U.S.C. ßß 1311(a), (b)(1)(B) and (C), 1342(a)(1) and (3), regardless of cost.

(9) Pollution and Conservation Laws ß 5--Water--Wastewater Discharge Permits--Economic Considerations.--Because Wat. Code, ß 13263, cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. Such

Received
August 26, 2011
Commission on
State Mandates

a construction of ß 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in Wat. Code, ß 13377, that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's supremacy clause, U.S. Const., art. VI, a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

(10) Pollution and Conservation Laws ß 5--Water--Federal and State Standards.--The federal Clean Water Act, 33 U.S.C. ß 1251 et seq., reserves to the states significant aspects of water quality policy under 33 U.S.C. ß 1251(b), and it specifically grants the states authority to enforce any effluent limitation that is not less stringent than the federal standard under 33 U.S.C. ß 1370. It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state--when imposing effluent limitations that are more stringent than required by federal law--from taking into account the economic effects of doing so. Thus, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are less stringent than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit more stringent than federal law requires, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, ßß 68, 69.] [*617]

COUNSEL: Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Richard M. Frank and Tom Greene, Chief Assistant Attorneys General, Mary E. Hackenbracht, Assistant Attorney General, Marilyn H. Levin and Gregory J. Newmark, Deputy Attorneys General, for Defendants and Appellants.

David S. Beckman and Dan L. Gildor for Natural Resources Defense Counsel, Butte Environmental Council, California Coastkeeper Alliance, CalTrout, Clean Water Action, Clean Water Fund, Coalition on the Environment and Jewish Life of Southern California, Coast Action Group, Defend the Bay, Ecological Rights Foundation, Environment in the Public Interest, Environmental Defense Center, Heal the Bay, Los Angeles Interfaith Environment Council, Ocean Conservancy, Orange County Coastkeeper, San Diego Baykeeper, Santa Barbara Channelkeeper, Santa Monica Baykeeper, Southern California Watershed Alliance, Ventura Coastkeeper, Waterkeeper Alliance, Waterkeepers Northern California, Westside Aquatics, Inc., and Wishtoyo Foundation as Amici Curiae on behalf of Defendants and Appellants.

Downey, Brand, Seymour & Rohwer, Downey Brand, Melissa A. Thorme, Jeffrey S. Galvin, Nicole E. Granquist and Cassandra M. Ferrannini for Plaintiffs and Appellants.

Dennis A. Barlow, City Attorney, and Carolyn A. Barnes, Assistant City Attorney, for Defendant and Appellant City of Burbank.

Rockard J. Delgadillo, City Attorney, and Christopher M. Westhoff, Assistant City Attorney, for Plaintiff and Appellant City of Los Angeles.

Rutan & Tucker and Richard Montevideo for Cities of Baldwin Park, Bell, Cerritos, Diamond Bar, Downey, Gardena, Montebello, Monterey Park, Paramount, Pico Rivera, Rosemead, San Gabriel, San Marino, Santa Fe Springs, Sierra Madre, Signal Hill, Temple City and West Covina, the California Building Industry Association and the Building Industry Legal Defense Foundation as Amici Curiae on behalf of Plaintiffs and Appellants.

Stoel Rives and Lawrence S. Bazel for Western Coalition of Arid States as Amicus Curiae on behalf of Plaintiffs and Appellants.

Richards, Watson & Gershon and John J. Harris for the League of California Cities as Amicus Curiae on behalf of Plaintiffs and Appellants.

[*618] Squire, Sanders & Dempsey, Joseph A. Meckes; David W. Burchmore; and Alexandra Dapolito Dunn for Association of Metropolitan Sewerage Agencies as Amicus Curiae on behalf of Plaintiffs and Appellants.

Lewis, Brisbois, Bisgaard & Smith and B. Richard Marsh for County Sanitation Districts of Los Angeles County as Amicus Curiae on behalf of Plaintiffs and Appellants.

Fulbright & Jaworski, Colin Lennard, Patricia Chen; Archer Norris and Peter W. McGaw for California Association of Sanitation Agencies as Amicus Curiae on behalf of Plaintiffs and Appellants. [***306]

Received
August 26, 2011
Commission on
State Mandates

JUDGES: Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J.

OPINION BY: KENNARD [**864]

OPINION

KENNARD, J.--Federal law establishes national water quality standards but allows the states to enforce their own water quality laws so long as they comply with federal standards. Operating within this federal-state framework, California's nine Regional Water Quality Control Boards establish water quality policy. They also issue permits for the discharge of treated wastewater; these permits specify the maximum allowable concentration of chemical pollutants in the discharged wastewater.

The question here is this: When a regional board issues a permit to a wastewater treatment facility, must the board take into account the facility's costs of complying with the board's restrictions on pollutants in the wastewater to be discharged? The trial court ruled that California law required a regional board to weigh the economic burden on the facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The Court of Appeal disagreed. On petitions by the municipal operators of three wastewater treatment facilities, we granted review.

We reach the following conclusions: Because both California law and federal law require regional boards to comply with federal clean water standards, and because the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit *more stringent* than federal law requires, California law allows the board to take into account economic [**865] factors, including the wastewater discharger's cost of compliance. We remand this case for further proceedings to determine whether the pollutant limitations in the permits challenged here meet or exceed federal standards.

[*619] **I. Statutory Background**

The quality of our nation's waters is governed by a "complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities." (*PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 704 [128 L. Ed. 2d 716, 114 S. Ct. 1900].) We first discuss California law, then federal law.

A. California Law

In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, ß 13000 et seq., added by Stats. 1969, ch. 482, ß 18, p. 1051.) [1] Its goal is "to attain the highest water [***307] quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (ß 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (ß 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board). [2]

1 Further undesignated statutory references are to the Water Code.

2 The Los Angeles water region "comprises all basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and San Gabriel River drainages." (ß 13200, subd. (d).)

(1) Whereas the State Board establishes statewide policy for water quality control (ß 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (ß 13240). The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. (ß 13050, subd. (j).) Basin plans must be consistent with "state policy for water quality control." (ß 13240.)

B. Federal Law

In 1972, Congress enacted amendments (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816) to the Federal Water Pollution Control Act (33 U.S.C. ß 1251 et seq.), which, as amended in 1977, is commonly known as the Clean [*620] Water Act. The Clean Water Act is a "comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' " (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, *supra*, 511 U.S. at p.

Received
August 26, 2011
Commission on
State Mandates

704, quoting 33 U.S.C. ß 1251(a).) The act's national goal was to eliminate by the year 1985 "the discharge of pollutants into the navigable waters" of the United States. (33 U.S.C. ß 1251(a)(1).) To accomplish this goal, the act established "effluent limitations," which are restrictions on the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents"; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards. (33 U.S.C. ßß 1311, 1362(11).)

(2) Under the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act. (33 U.S.C. ß 1370.) This led the California Legislature in 1972 to amend the state's Porter-Cologne Act "to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act." (ß 13372.)

[**866] **(3)** Roughly a dozen years ago, the United States Supreme Court, in *Arkansas v. Oklahoma* (1992) 503 U.S. 91 [117 L. Ed. 2d 239, 112 S. Ct. 1046], described the distinct roles of the state and federal agencies in enforcing water quality: "The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. ß 1251(a). Toward [***308] this end, [the Clean Water Act] provides for two sets of water quality measures. 'Effluent limitations' are promulgated by the [Environmental Protection Agency (EPA)] and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources.[3] See ßß 1311, 1314. '[W]ater quality standards' are, in general, promulgated by the States and establish the desired condition of a waterway. See ß 1313. These standards supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12 [48 L. Ed. 2d 578, 96 S. Ct. 2022, 2025, n. 12] (1976).

3 A "point source" is "any discernible, confined and discrete conveyance" and includes "any pipe, ditch, channel ... from which pollutants ... may be discharged." (33 U.S.C. ß 1362 (14).)

[*621] **(4)** "The EPA provides States with substantial guidance in the drafting of water quality standards. See generally 40 CFR pt. 131 (1991) (setting forth model water quality standards). Moreover, [the Clean Water Act] requires, *inter alia*, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State. 33 U.S.C. ß 1313(c)." (*Arkansas v. Oklahoma*, *supra*, 503 U.S. at p. 101.)

(5) Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma*, *supra*, 503 U.S. at p. 101.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. ß 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (ß 13374.)

With this federal and state statutory framework in mind, we now turn to the facts of this case.

II. Factual Background

This case involves three publicly owned treatment plants that discharge wastewater under NPDES permits issued by the Los Angeles Regional Board.

The City of Los Angeles owns and operates the Donald C. Tillman Water Reclamation Plant (Tillman Plant), which serves the San Fernando Valley. The City of Los Angeles also owns and operates the Los Angeles-Glendale Water Reclamation Plant (Los Angeles-Glendale Plant), which processes wastewater from areas within the City of Los Angeles and the independent cities of Glendale and Burbank. Both the Tillman Plant and the Los Angeles-Glendale Plant discharge wastewater directly into the Los Angeles River, now a concrete-lined flood control channel that runs through the City of Los Angeles, ending at the Pacific Ocean. The State Board and the Los Angeles Regional Board consider the Los Angeles River to be a navigable water of the United States for purposes of the federal Clean Water Act.

The third plant, the Burbank Water Reclamation Plant (Burbank Plant), is owned and operated by the City of Bur [***309] bank, serving residents and businesses within that city. The Burbank Plant discharges wastewater into the Burbank Western Wash, which drains into the Los Angeles River.

[*622] All three plants, which together process hundreds of millions of gallons of sewage [**867] each day, are tertiary treatment facilities; that is, the treated wastewater they release is processed sufficiently to be safe not only for use in watering food crops, parks, and

Received
August 26, 2011
Commission on
State Mandates

playgrounds, but also for human body contact during recreational water activities such as swimming.

In 1998, the Los Angeles Regional Board issued renewed NPDES permits to the three wastewater treatment facilities under a basin plan it had adopted four years earlier for the Los Angeles River and its estuary. That 1994 basin plan contained general narrative criteria pertaining to the existing and potential future beneficial uses and water quality objectives for the river and estuary. [4] The narrative criteria included municipal and domestic water supply, swimming and other recreational water uses, and fresh water habitat. The plan further provided: "All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life." The 1998 permits sought to reduce these narrative criteria to specific numeric requirements setting daily maximum limitations for more than 30 pollutants present in the treated wastewater, measured in milligrams or micrograms per liter of effluent. [5]

4 This opinion uses the terms "narrative criteria" or descriptions, and "numeric criteria" or effluent limitations. Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, "no toxic pollutants in toxic amounts" would be a narrative description. This contrasts with numeric criteria, which detail specific pollutant concentrations, such as parts per million of a particular substance.

5 For example, the permits for the Tillman and Los Angeles-Glendale Plants limited the amount of fluoride in the discharged wastewater to 2 milligrams per liter and the amount of mercury to 2.1 micrograms per liter.

The Cities of Los Angeles and Burbank (Cities) filed appeals with the State Board, contending that achievement of the numeric requirements would be too costly when considered in light of the potential benefit to water quality, and that the pollutant restrictions in the NPDES permits were unnecessary to meet the narrative criteria described in the basin plan. The State Board summarily denied the Cities' appeals.

Thereafter, the Cities filed petitions for writs of administrative mandate in the superior court. They alleged, among other things, that the Los Angeles Regional Board failed to comply with sections 13241 and 13263, part of California's Porter-Cologne Act, because it did not consider the economic burden on the Cities in having to reduce substantially the pollutant content of their discharged wastewater. They also alleged that compliance with the pollutant restrictions set out in the NPDES permits issued by the regional [*623] board would greatly increase their costs of treating the wastewater to be discharged into the Los Angeles River. According to the City of Los Angeles, its compliance costs would exceed $ 50 million annually, representing more than 40 percent of its entire budget for operating its four wastewater treatment plants and its sewer system; the City of Burbank estimated its added costs at over $ 9 million annually, a nearly 100 percent increase above its $ 9.7 million annual budget for wastewater treatment.

[***310] The State Board and the Los Angeles Regional Board responded that sections 13241 and 13263 do not require consideration of costs of compliance when a regional board issues a NPDES permit that restricts the pollutant content of discharged wastewater.

The trial court stayed the contested pollutant restrictions for each of the three wastewater treatment plants. It then ruled that sections 13241 and 13263 of California's Porter-Cologne Act required a regional board to consider costs of compliance not only when it adopts a basin or water quality plan but also when, as here, it issues an NPDES permit setting the allowable pollutant content of a treatment plant's discharged wastewater. The court found no evidence that the Los Angeles Regional Board had considered economic factors at either stage. Accordingly, the trial court granted the Cities' petitions for writs of mandate, and it ordered the Los Angeles Regional Board to vacate the contested restrictions on pollutants in the wastewater discharge permits issued to the three municipal plants here and to conduct hearings [**868] to consider the Cities' costs of compliance before the board's issuance of new permits. The Los Angeles Regional Board and the State Board filed appeals in both the Los Angeles and Burbank cases. [6]

6 Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that (1) the Los Angeles Regional Board failed to show how it derived from the narrative criteria in the governing basin plan the specific numeric pollutant limitations included in the permits; (2) the administrative record failed to support the specific effluent limitations; (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages; and (4) the permits improperly specified the manner of compliance.

The Court of Appeal, after consolidating the cases, reversed the trial court. It concluded that sections 13241 and 13263 require a regional board to take into account "economic considerations" when it adopts water quality standards in a basin plan but not when, as here, the regional board sets specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards. We granted the Cities' petition for review.

Received
August 26, 2011
Commission on
State Mandates

[*624] **III. Discussion**

A. Relevant State Statutes

The California statute governing the issuance of *wastewater permits* by a regional board is section 13263, which was enacted in 1969 as part of the Porter-Cologne Act. (See *ante*, at p. 619.) Section 13263 provides in relevant part: "*The regional board*, after any necessary hearing, *shall prescribe requirements as to the nature of any proposed discharge* [of wastewater]. *The requirements* shall implement any relevant water quality control plans that have been adopted, and *shall take into consideration* the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and *the provisions of Section 13241*." (ß 13263, subd. (a), italics added.)

Section 13241 states: "Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

[***311] "(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) *Economic considerations*.

"(e) The need for developing housing within the region.

"(f) The need to develop and use recycled water." (Italics added.)

The Cities here argue that section 13263's express reference to section 13241 requires the Los Angeles Regional Board to consider section 13241's listed factors, notably "[e]conomic considerations," before issuing NPDES permits requiring specific pollutant reductions in discharged effluent or treated wastewater.

[*625] Thus, at issue is language in section 13263 stating that when a regional board "prescribe[s] requirements as to the nature of any proposed discharge" of treated wastewater it must "take into consideration" certain factors including "the provisions of Section 13241." According to the Cities, this statutory language requires that a regional board make an independent evaluation of the section 13241 factors, including "economic considerations," before restricting the pollutant content in an NPDES permit. This was the view expressed in the trial court's ruling. The Court of Appeal rejected that view. It held that a regional board need consider the section 13241 factors only when it adopts a basin or water quality plan, but not when, as in this case, it issues a wastewater discharge [**869] permit that sets specific numeric limitations on the various chemical pollutants in the wastewater to be discharged. As explained below, the Court of Appeal was partly correct.

B. Statutory Construction

(6) When construing any statute, our task is to determine the Legislature's intent when it enacted the statute "so that we may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715 [3 Cal. Rptr. 3d 623, 74 P.3d 726]; see *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268 [121 Cal. Rptr. 2d 203, 47 P.3d 1069].) In doing this, we look to the statutory language, which ordinarily is "the most reliable indicator of legislative intent." (*Hassan*, *supra*, at p. 715.)

(7) As mentioned earlier, our Legislature's 1969 enactment of the Porter-Cologne Act, which sought to ensure the high quality of water in this state, predated the 1972 enactment by Congress of the precursor to the federal Clean Water Act. Included in California's original Porter-Cologne Act were sections 13263 and 13241. Section 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in section 13241. Listed among the section 13241 factors is "[e]conomic considerations." (ß 13241, subd. (d).) The plain language of sections 13263 and 13241 indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the cost of compliance when setting effluent limitations in a wastewater discharge permit.

Our construction of sections 13263 and 13241 does not end with their plain statutory language, however. We must also analyze them in the context of the statutory scheme of which they are a part. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [12 [***312] Cal. Rptr. 3d 343, 88 P.3d 71].) Like sections 13263 and 13241, section 13377 is part of the Porter-Cologne Act. But unlike the former two statutes, section 13377 was [*626] not enacted until 1972, shortly after Congress, through adoption of the Federal Water Pollution Control Act Amendments, es-

Received
August 26, 2011
Commission on
State Mandates

tablished a comprehensive water quality policy for the nation.

(8) Section 13377 specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. ß 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the act's clean water standards, regardless of cost (see *id.,* ßß 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3)). **(9)** Because section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. [7] Such a construction of section 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's [**870] declaration in section 13377 that all discharged wastewater must satisfy federal standards. [8] This was also the conclusion of the Court of Appeal. Moreover, under the federal Constitution's supremacy clause (art. VI), a state law that conflicts with federal law is " 'without effect.' " (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 [120 L. Ed. 2d 407, 112 S. Ct. 2608]; see *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923 [12 Cal. Rptr. 3d 262, 88 P.3d 1].) To comport with the principles of federal supremacy, California law cannot authorize this [*627] state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

7 The concurring opinion misconstrues both state and federal clean water law when it describes the issue here as "whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions *that meet the clean water standards in more cost-effective and economically efficient ways*." (Conc. opn. of Brown, J., *post*, at p. 629, some italics added.) This case has nothing to do with meeting federal standards in more cost effective and economically efficient ways. State law, as we have said, allows a regional board to consider a permit holder's compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit. (ßß 13241 & 13263.) Federal law, by contrast, as stated above in the text, "prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. ß 1311(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the [federal] act's *clean water standards*, *regardless of cost* (see *id.*, ßß 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3))." (Italics added.)

8 As amended in 1978, section 13377 provides for the issuance of waste discharge permits that comply with federal clean water law "together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." We do not here decide how this provision would affect the cost-consideration requirements of sections 13241 and 13263 when more stringent effluent standards or limitations in a permit are justified for some reason independent of compliance with federal law.

[***313] Thus, in this case, whether the Los Angeles Regional Board should have complied with sections 13263 and 13241 of California's Porter-Cologne Act by taking into account "economic considerations," such as the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permits, depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act. We therefore remand this matter for the trial court to resolve that issue.

C. Other Contentions

The Cities argue that requiring a regional board at the wastewater discharge permit stage to consider the permit holder's cost of complying with the board's restrictions on pollutant content in the water is consistent with federal law. In support, the Cities point to certain provisions of the federal Clean Water Act. They cite section 1251(a)(2) of title 33 United States Code, which sets, as a national goal "*wherever attainable,*" an interim goal for water quality that protects fish and wildlife, and section 1313(c)(2)(A) of the same title, which requires consideration, among other things, of waters' "*use and value* for navigation" when revising or adopting a "water quality standard." (Italics added.) These two federal statutes, however, pertain not to permits for wastewater discharge, at issue here, but to establishing water quality standards, not at issue here. Nothing in the federal Clean Water Act suggests that a state is free to disregard or to weaken the federal requirements for clean water when an NPDES permit holder alleges that compliance with those requirements will be too costly.

Received
August 26, 2011
Commission on
State Mandates

(10) At oral argument, counsel for amicus curiae National Resources Defense Council, which argued on behalf of California's State Board and regional water boards, asserted that the federal Clean Water Act incorporates state water policy into federal law, and that therefore a regional board's consideration of economic factors to justify greater pollutant concentration in discharged wastewater would conflict with the federal act even if the specified pollutant restrictions were not less stringent than those required under federal law. We are not persuaded. The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. ß 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. ß 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit [*628] a state--when imposing effluent limitations that are *more stringent* than required by federal law--from taking into account the economic effects of doing so.

Also at oral argument, counsel for the Cities asserted that if the three municipal wastewater treatment facilities ceased releasing their treated wastewater into the concrete channel that makes up the Los Angeles River, it would (other than during the rainy season) contain no water at all, and thus would not be a "navigable water" of the [**871] United States subject to the Clean Water Act. (See *Solid Waste Agency v. United States Army Corps of Engineers* (2001) 531 U.S. 159, 172 [148 L. Ed. 2d 576, 121 S. Ct. 675] ["The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."].) It is unclear when the Cities first raised this issue. The Court of Appeal did not discuss it in its opinion, and the Cities did not seek rehearing on this ground. (See Cal. Rules of Court, rule [***314] 28(c)(2).) Concluding that the issue is outside our grant of review, we do not address it.

Conclusion

Through the federal Clean Water Act, Congress has regulated the release of pollutants into our national waterways. The states are free to manage their own water quality programs so long as they do not compromise the federal clean water standards. When enacted in 1972, the goal of the Federal Water Pollution Control Act Amendments was to *eliminate* by the year 1985 the discharge of pollutants into the nation's navigable waters. In furtherance of that goal, the Los Angeles Regional Board indicated in its 1994 basin plan on water quality the intent, insofar as possible, to remove from the water in the Los Angeles River toxic substances in amounts harmful to humans, plants, and aquatic life. What is not clear from the record before us is whether, in limiting the chemical pollutant content of wastewater to be discharged by the Tillman, Los Angeles-Glendale, and Burbank wastewater treatment facilities, the Los Angeles Regional Board acted only to implement requirements of the federal Clean Water Act or instead imposed pollutant limitations that exceeded the federal requirements. This is an issue of fact to be resolved by the trial court.

Disposition

We affirm the judgment of the Court of Appeal reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants are necessary to satisfy federal Clean Water Act requirements for treated wastewater. The Court of Appeal is directed to remand this [*629] matter to the trial court to decide whether any numeric limitations, as described in the permits, are "more stringent" than required under federal law and thus should have been subject to "economic considerations" by the Los Angeles Regional Board before inclusion in the permits.

George, C. J., Baxter, J., Werdegar, J., Chin, J., and Moreno, J., concurred.

CONCUR BY: BROWN

CONCUR

BROWN, J., Concurring.--I write separately to express my frustration with the apparent inability of the government officials involved here to answer a simple question: How do the federal clean water standards (which, as near as I can determine, are the state standards) prevent the state from considering economic factors? The majority concludes that because "the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require." (Maj. opn., *ante*, at p. 618.) That seems a pretty self-evident proposition, but not a useful one. The real question, in my view, is whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions that *meet* the clean water standards in more cost-effective and economically efficient ways. I can see no reason why a federal law--which purports to be an example of cooperative federalism--would decree such a result. I do not think the majority's reasoning is at fault here. Rather, the agencies involved seemed to have worked hard to make this simple question impenetrably obscure.

Received
August 26, 2011
Commission on
State Mandates

A brief review of the statutory framework at issue is necessary to understand my concerns. [***315]

[**872] **I. Federal Law**

"In 1972, Congress enacted the Federal Water Pollution Control Act (33 U.S.C. ß 1251 et seq.), commonly known as the Clean Water Act (CWA) [Citation.] ... [∂] Generally, the CWA 'prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]' ... The most important of those exceptions is pollution discharge under a valid NPDES [National Pollution Discharge Elimination System] permit, which can be issued either by the Environmental Protection Agency (EPA), or by an EPA-approved state permit program such as California's. [Citations.] NPDES permits are valid for five years. [Citation.] [∂] Under the CWA's NPDES permit system, the states are required to develop *water quality standards*. [Citations.] A water quality standard 'establish[es] the desired condition of a waterway.? [Citation.] A water quality standard for any [*630] given waterway, or 'water body,' has two components: (1) the designated beneficial uses of the water body and (2) the *water quality criteria* sufficient to protect those uses. [Citations.] [∂] Water quality criteria can be either *narrative* or *numeric*. [Citation.]" (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092-1093 [1 Cal. Rptr. 3d 76].)

With respect to satisfying water quality standards, "a polluter must comply with *effluent limitations*. The CWA defines an effluent limitation as 'any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.' [Citation.] 'Effluent limitations are a means of *achieving* water quality standards.' [Citation.] [∂] NPDES permits establish effluent limitations for the polluter. [Citations.] CWA's NPDES permit system provides for a two-step process for the establishing of effluent limitations. First, the polluter must comply with *technology-based effluent limitations*, which are limitations based on the best available or practical technology for the reduction of water pollution. [Citations.] [∂] Second, the polluter must also comply with more stringent *water quality-based effluent limitations* (WQBEL's) where applicable. In the CWA, Congress 'supplemented the "technology-based" effluent limitations with "water quality-based" limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." ' [Citation.] [∂] The CWA makes WQBEL's applicable to a given polluter whenever WQBEL's are 'necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations ... .' [Citations.] Generally, NPDES permits must conform to state water quality laws insofar as the state laws impose more stringent pollution controls than the CWA. [Citations.] Simply put, WQBEL's implement water quality standards." (*Communities for a Better Environment v. State Water Resources Control Bd.*, *supra*, 109 Cal.App.4th at pp. 1093-1094, fns. omitted.)

This case involves water quality-based effluent limitations. As set forth above, "[u]nder the CWA, states have the primary role in promulgating water quality standards." (*Piney Run Preservation Ass'n v. Commrs. of Carroll Co.* (4th Cir. 2001) 268 F.3d 255, 265, fn. 9.) "Under the CWA, the water quality standards referred to in section 301 [see 33 U.S.C. ß 1311] are primarily the states' handiwork." [***316] (*American Paper Institute, Inc. v. U.S. Envtl. Protection Agency* (D.C. Cir. 1993) 302 U.S. App. D.C. 80 [996 F.2d 346, 349] (*American Paper*).) In fact, upon the 1972 passage of the CWA, "[s]tate water quality standards in effect at the time ... were deemed to be the initial water quality benchmarks for CWA purposes ... . The states were to revisit and, if [*631] necessary, revise those initial standards at least once every three years." (*American Paper*, at p. 349.) Therefore, "once a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard." (*American Paper*, at p. 350.) Accordingly, it appears that in most instances, [**873] state water quality standards are identical to the federal requirements for NPDES permits.

II. State Law

In California, pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, ß 13000 et seq.; Stats. 1969, ch. 482, ß 18, p. 1051; hereafter Porter-Cologne Act), the regional water quality control boards establish water quality standards--and therefore federal requirements for NPDES permits--through the adoption of water quality control plans (basin plans). The basin plans establish water quality objectives using enumerated factors--including economic factors--set forth in Water Code section 13241.

In addition, as one court observed: "The Porter-Cologne Act ... established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (Wat. Code, ßß 13100, 13140, 13200, 13201, 13240, 13241, 13243.) The Porter-Cologne Act identified these permits as 'waste discharge requirements,' and provided that the waste discharge requirements must mandate compliance

Received
August 26, 2011
Commission on
State Mandates

with the applicable regional water quality control plan. (Wat. Code, ßß 13263, subd. (a), 13377, 13374.) [∂] Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added Chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (Wat. Code, ß 13370, subd. (c).) As part of these amendments, the Legislature provided that the state and regional water boards 'shall, as required or authorized by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.' (Wat. Code, ß 13377.) Water Code section 13374 provides that '[t]he term "waste discharge requirements" as referred to in this division is the equivalent of the term "permits" as used in the [Clean Water Act].' [∂] California subsequently obtained the required approval to issue NPDES permits. [Citation.] Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat. Code, ß 13374.)" (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875 [22 Cal. Rptr. 3d 128].)

[*632] Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board)--the body responsible to enforce the statutory framework--failed to comply with its statutory mandate.

[***317] For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirement set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so.

Moreover, the Board acknowledges that it has neglected other statutory provisions that might have provided an additional opportunity to air these concerns. As set forth above, pursuant to the CWA, "[t]he states were to revisit and, if necessary, revise those initial standards at least once every three years--a process commonly known as triennial review. [Citation.] Triennial reviews consist of public hearings in which current water quality standards are examined to assure that they 'protect the public health or welfare, enhance the quality of water and serve the purposes' of the Act. [Citation.] Additionally, the CWA directs [**874] states to consider a variety of competing policy concerns during these reviews, including a waterway's 'use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.' " (*American Paper*, *supra*, 996 F.2d at p. 349.)

According to the Cities, "[t]he last time that the narrative water quality objective for toxicity contained in the Basin Plan was reviewed and modified was 1994." The Board does not deny this claim. Accordingly, the Board has failed its duty to allow public discussion--including economic considerations--at the required intervals when making its determination of proper water quality standards.

What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions.

[*633] Our decision today arguably allows the Board to continue to shirk its statutory duties. The majority holds that when read together, Water Code sections 13241, 13263, and 13377 do not allow the Board to consider economic factors when issuing NPDES permits to satisfy federal CWA requirements. (Maj. opn., *ante*, at pp. 625-627.) The majority then bifurcates the issue when it orders the Court of Appeal "to remand this matter to the trial court to decide whether any numeric limitations, as described in the permits, are 'more stringent' than required under federal law and thus should have been subject to 'economic considerations' by the Los Angeles Regional Board before inclusion in the permits." (*Id.* at pp. 628-629.)

The majority overlooks the feedback loop established by the CWA, under which federal standards are linked to state-established water quality standards, including narrative water quality criteria. (See 33 U.S.C. ß 1311 (b)(1)(C); 40 C.F.R. ß 122.44(d)(1) (2004).) Under the CWA, NPDES permit requirements include the state narrative criteria, which are incorporated into the Board's basin plan under the description "no toxins in toxic amounts." As far as I can determine, NPDES permits [***318] designed to achieve this narrative criteria (as well as designated beneficial uses) will usually implement the state's basin plan, while satisfying federal requirements as well.

Received
August 26, 2011
Commission on
State Mandates

If federal water quality standards are typically identical to state standards, it will be a rare instance that a state exceeds its own requirements and economic factors are taken into consideration. [1] In light of the Board's initial failure to consider costs of compliance and its repeated failure to conduct required triennial reviews, the result here is an unseemly bureaucratic bait-and-switch that we should not endorse. The likely outcome of the majority's decision is that the Cities will be economically burdened to meet standards imposed on them in a highly questionable manner. [2] In these times of tight fiscal budgets, it is difficult to imagine imposing additional financial burdens on municipalities without at least allowing them to present alternative views.

1 (But see *In the Matter of the Petition of City and County of San Francisco, San Francisco Baykeeper et al.* (Order No. WQ 95-4, Sept. 21, 1995) 1995 WL 576920.)

2 Indeed, given the fact that "water quality standards" in this case are composed of broadly worded components (i.e., a narrative criteria and "designated beneficial uses of the water body"), the Board possessed a high degree of discretion in setting NPDES permit requirements. Based on the Board's past performance, a proper exercise of this discretion is uncertain.

Based on the facts of this case, our opinion today appears to largely retain the status quo for the Board. If the Board can actually demonstrate that only the precise limitations at issue here, implemented in only one way, will achieve the desired water standards, perhaps its obduracy is justified. That case has yet to be made.

[*634] Accordingly, I cannot conclude that the majority's decision is wrong. The analysis [**875] may provide a reasonable accommodation of conflicting provisions. However, since the Board's actions "make me wanna holler and throw up both my hands," [3] I write separately to set forth my concerns and concur in the judgment--*dubitante*. [4]

3 Marvin Gaye (1971) "Inner City Blues."

4 I am indebted to Judge Berzon for this useful term. (See *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir. 2005) 400 F.3d 1119 [2005 WL 466202] (conc. opn. of Berzon, J.).)

The petitions of all appellants and respondent for a rehearing were denied June 29, 2005. Brown, J., did not participate therein.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 2

Received
August 26, 2011
Commission on
State Mandates

COUNTY OF FRESNO, Plaintiff and Appellant, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents.

No. S015637.

Supreme Court of California

53 Cal. 3d 482; 808 P.2d 235; 280 Cal. Rptr. 92; 1991 Cal. LEXIS 1363; 91 Cal. Daily Op. Service 2870; 91 Daily Journal DAR 4617

April 22, 1991.

PRIOR HISTORY: Superior Court of Fresno County, No. 379518-4, Gary S. Austin, Judge.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A county filed a test claim with the Commission on State Mandates seeking, under Cal. Const., art. XIII B, ß 6 (state must provide subvention of funds to reimburse local governments for costs of state-mandated programs or increased levels of service), reimbursement from the state for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (Health & Saf. Code, ß 25500 et seq.). The commission found the county had the authority to charge fees to pay for the program, and the program was thus not a reimbursable state-mandated program under Gov. Code, ß 17556, subd. (d), which provides that costs are not state-mandated if the agency has the authority to levy a charge or fee sufficient to pay for the program. The county filed a petition for writ of mandate and a complaint for declaratory relief against the state. The trial court denied relief. (Superior Court of Fresno County, No. 379518-4, Gary S. Austin, Judge.) The Court of Appeal, Fifth Dist., No. F011925, affirmed.

The Supreme Court affirmed the decision of the Court of Appeal. The court held, as to the single issue on review, that Gov. Code, ß 17556, subd. (d), was facially constitutional under Cal. Const., art. XIII B, ß 6. It held art. XIII B was not intended to reach beyond taxation, and ß 6 was included in art. XIII B in recognition that Cal. Const., art. XIII A, severely restricted the taxing powers of local governments. It held that art. XIII B, ß 6 was designed to protect the tax revenues of local governments from state mandates that would require an expenditure of such revenues and, when read in textual and historical context, requires subvention only when the costs in question can be recovered solely from tax revenues. Accordingly, the court held that Gov. Code, ß 17556, subd. (d), effectively construed the term "cost" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that such a construction is altogether sound. (Opinion by Mosk, J., with Lucas, C. J., Broussard, Panelli, Kennard, JJ., and Best (Hollis G.), J., * concurring. Separate concurring opinion by Arabian, J.)

* Presiding Justice, Court of Appeal, Fifth Appellate District, assigned by the Chairperson of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) State of California ß 11--Reimbursement to Local Governments for State-mandated Costs--Costs for Which Fees May Be Levied--Validity of Exclusion. -- In a proceeding by a county seeking reversal of a decision by the Commission on State Mandates that the state was not required by Cal. Const., art. XIII B, ß 6, to reimburse the county for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (Health & Saf. Code, ß 25500 et seq.), the trial court properly found that Gov. Code, ß 17556, subd. (d)

Received
August 26, 2011
Commission on
State Mandates

(costs are not state-mandated if agency has authority to levy charge or fee sufficient to pay for program), was facially constitutional. Cal. Const., art. XIII B, was intended to apply to taxation and was not intended to reach beyond taxation, as is apparent from its language and confirmed by its history. It was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues; read in its textual and historical contexts, it requires subvention only when the costs in question can be recovered solely from tax revenues. Gov. Code, ß 17556, subd. (d), effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that construction is altogether sound. Accordingly, Gov. Code, ß 17556, subd. (d), is facially constitutional under Cal. Const., art. XIII B, ß 6.

[See 9 **Witkin,** Summary of Cal. Law (9th ed. 1988) Taxation, ß 124.]

COUNSEL: Max E. Robinson, County Counsel, and Pamela A. Stone, Deputy County Counsel, for Plaintiff and Appellant.

B. C. Barnum, County Counsel (Kern), and Patricia J. Randolph, Deputy County Counsel, as Amici Curiae on behalf of Plaintiff and Appellant.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, N. Eugene Hill, Assistant Attorney General, and Richard M. Frank, Deputy Attorney General, for Defendants and Respondents.

JUDGES: Mosk, J. Lucas, C.J., Broussard, J., Panelli, J., Kennard, J., Best (Hollis G.), J., * concur. Arabian, J., concurring.

* Presiding Justice, Court of Appeal, Fifth Appellate District, sitting under assignment by the Chairperson of the Judicial Council.

OPINION BY: MOSK

OPINION

[*484] [**236] [***93] MOSK, J.

We granted review in this proceeding to decide whether section 17556, subdivision (d), of the Government Code (section 17556(d)) is facially valid under article XIII B, section 6, of the California Constitution (article XIII B, section 6).

Article XIII B, section 6, provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [P] (a) Legislative mandates requested by the local agency affected; [P] (b) Legislation defining a new crime or changing an existing definition of a crime; or [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

The Legislature enacted Government Code sections 17500 through 17630 to implement article XIII B, section 6. (Gov. Code, ß 17500.) It created a "quasi-judicial body" (*ibid* .) called the Commission on State Mandates (commission) (*id* ., ß 17525) to "hear and decide upon [any] claim" by a local government that the local government "is entitled to be reimbursed by the state for costs" as required by article XIII B, section 6. (Gov. Code, ß 17551, subd. (a).) It defined "costs" as "costs mandated by the state"--"any increased costs" that the local government "is required to incur . . . as a result of any statute . . . , or any executive order implementing any statute . . . , which mandates a new program or higher level of service of any existing program" within the meaning of article XIII B, section 6. (Gov. Code, ß 17514.) Finally, in section 17556(d) it declared that "The commission shall not find costs mandated by the state . . . if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

For the reasons discussed below, we conclude that section 17556(d) is facially constitutional under article XIII B, section 6.

[*485] I. FACTS AND PROCEDURAL HISTORY

The present proceeding arose after the Legislature enacted the Hazardous Materials Release Response Plans and Inventory Act (Act). (Health & Saf. Code, ß 25500 et seq.) The Act establishes minimum statewide standards for business and area plans relating to the handling and release or threatened release of hazardous materials. (*Id* ., ß 25500.) It requires local governments to implement its provisions. (*Id* ., ß 25502.) To cover the costs they may incur, it authorizes them to collect fees from those who handle hazardous materials. (*Id*., ß 25513.)

The County of Fresno (County) implemented the Act but chose not to impose the authorized fees. Instead, it filed a so-called "test" or initial claim with the commission (Gov. Code, ß 17521) seeking reimbursement from the State of California (State) under article XIII B, section 6. After a hearing, the commission rejected the

Received
August 26, 2011
Commission on
State Mandates

claim. In its statement of decision, the commission made the following findings, among others: the Act constituted a "new program"; the County did indeed incur increased [**237] [***94] costs; but because it had authority under the Act to levy fees sufficient to cover such costs, section 17556(d) prohibited a finding of reimbursable costs.

The County then filed a petition for writ of mandate and complaint for declaratory relief against the State, the commission, and others, seeking vacation of the commission's decision and a declaration that section 17556(d) is unconstitutional under article XIII B, section 6. While the matter was pending, the commission amended its statement of decision to include another basis for denial of the test claim: the Act did not constitute a "program" under the rationale of *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202] (*County of Los Angeles*), because it did not impose unique requirements on local governments.

After a hearing, the trial court denied the petition and effectively dismissed the complaint. It determined, inter alia, that mandate under Code of Civil Procedure section 1094.5 was the County's sole remedy, and that the commission was the sole properly named respondent. It also determined that section 17556(d) is constitutional under article XIII B, section 6. It did not address the question whether the Act constituted a "program" under *County of Los Angeles* . Judgment was entered accordingly.

The Court of Appeal affirmed. It held the Act did indeed constitute a "program" under *County of Los Angeles* , *supra* , 43 Cal.3d 46. It also held section 17556(d) is constitutional under article XIII B, section 6.

[*486] **(1)** We granted review to decide a single issue, i.e., whether section 17556(d) is facially constitutional under article XIII B, section 6.

II. DISCUSSION

We begin our analysis with the California Constitution. At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new "special taxes." (*Amador Valley Joint Union High Sch. Dist*. v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281].) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*).)

At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

"Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes." (*City of Sacramento* , *supra* , 50 Cal.3d at p. 59, fn. 1.)

Article XIII B of the Constitution was intended to apply to taxation specifically, to provide "permanent protection for taxpayers from excessive taxation" and "a reasonable way to provide discipline in tax spending at state and local levels." (See *County of Placer* v. *Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232], quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument in favor of Prop. 4, p. 18.) To this end, it establishes an "appropriations limit" for both state and local governments (Cal. Const., art. XIII B, ß 8, subd. (h)) and allows no "appropriations subject to limitation" in excess thereof (*id* ., ß 2). (See *County of Placer* v. *Corin* , *supra* , 113 Cal.App.3d at p. 446.) It defines the relevant "appropriations subject to limitation" as "any authorization to expend during a fiscal year the proceeds of taxes . . . ." (Cal. Const., art. XIII B, ß 8, subd. (b).) It defines "proceeds of taxes" as including "all tax revenues and the proceeds to . . . government from," inter alia, "regulatory licenses, user charges, and user fees *to the extent that such proceeds exceed the costs reasonably borne by [government] in providing* [**238] [***95] *the regulation, product, or service* . . . ." (Cal. Const., art. XIII B, ß 8, subd. (c), italics added.) Such "excess" proceeds from "licenses," "charges," and "fees" "are but [*487] *taxes* " for purposes here. (*County of Placer* v. *Corin* , *supra* , 113 Cal.App.3d at p. 451, italics in original.)

Article XIII B of the Constitution, however, was not intended to reach beyond taxation. That fact is apparent from the language of the measure. It is confirmed by its history. In his analysis, the Legislative Analyst declared that Proposition 4 "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue, including federal funds, bond funds, traffic fines, user fees based on reasonable costs, and income from gifts." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), analysis by Legislative Analyst, p. 16.)

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See

Received
August 26, 2011
Commission on
State Mandates

County of Los Angeles , *supra* , 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid* .; see *Lucia Mar Unified School Dist*. v. *Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse . . . local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues* .

In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state . . . if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.

The County argues to the contrary. It maintains that section 17556(d) in essence creates a new exception to the reimbursement requirement of article XIII B, section 6, for self-financing programs and that the Legislature cannot create exceptions to the reimbursement requirement beyond those enumerated in the Constitution.

We do not agree that in enacting section 17556(d) the Legislature created a new exception to the reimbursement requirement of article [*488] XIII B, section 6. As explained, the Legislature effectively and properly construed the term "costs" as excluding expenses that are recoverable from sources other than taxes. In a word, such expenses are outside of the scope of the requirement. Therefore, they need not be explicitly excepted from its reach.

The County nevertheless argues that no matter how characterized, section 17556(d) is indeed inconsistent with article XIII B, section 6. Its contention is in substance as follows: the source of section 17556(d) is former Revenue and Taxation Code section 2253.2; at the time of Proposition 4, subdivision (b)(4) of that former section stated that the State Board of Control shall not allow a claim for reimbursement of costs mandated by the state if the legislation contains a self-financing authority; the [**239] [***96] drafters of Proposition 4 incorporated some of the provisions of former Revenue and Taxation Code section 2253.2 into article XIII B, section 6, but did not incorporate former subdivision (b)(4); their failure to do so reveals an intent to treat as immaterial the presence or absence of a "self-financing" provision; and such an intent is confirmed by the "legislative history" set out at page 55 in Spirit of 13, Inc., Summary of Proposed Implementing Legislation and Drafters' Intent: "the state may not arbitrarily declare that it is not going to comply with Section 6 . . . if the state provides new compensating revenues."

In our view, the County's argument is unpersuasive. Even if we assume arguendo that the intent of those who drafted Proposition 4 is as claimed, what is crucial here is the intent of those who voted for the measure. (See *County of Los Angeles* , *supra* , 43 Cal.3d 46, 56.) There is no substantial evidence that the voters sought what the County assumes the drafters desired. Moreover, the "legislative history" cited above cannot be considered relevant; it was written and circulated after the passage of Proposition 4. As such, it could not have affected the voters in any way.

To avoid this result, the County advances one final argument: "Based on the authority of [section 17556(d)], the Commission on State Mandates refuses to hear mandates on the merits once it finds that the authority to charge fees is given by the Legislature. This position is taken whether or not fees can actually or legally be charged to recover the entire costs of the program."

[*489] The County appears to be making one or both of the following arguments: (1) the commission applies section 17556(d) in an unconstitutional manner; or (2) the Act's self-financing authority is somehow lacking. Such contentions, however, miss the designated mark. They raise questions bearing on the constitutionality of section 17556(d) as applied and the legal efficacy of the authority conferred by the Act. The sole issue on review, however, is the facial constitutionality of section 17556(d).

III. CONCLUSION

For the reasons set forth above, we conclude that section 17556(d) is facially constitutional under article XIII B, section 6.

The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Broussard, J., Panelli, J., Kennard, J., and Best (Hollis G.), J., * concurred.

Received
August 26, 2011
Commission on
State Mandates

* Presiding Justice, Court of Appeal, Fifth Appellate District, assigned by the Chairperson of the Judicial Council.

CONCUR BY: ARABIAN

CONCUR

ARABIAN, J., Concurring.

I concur in the determination that Government Code section 17556, subdivision (d) [1] (section 17556(d)), does not offend article XIII B, section 6, of the California Constitution (article XIII B, section 6). In my estimation, however, the constitutional measure of the issue before us warrants fuller examination than the majority allow. A literalistic analysis begs the question of whether the Legislature had the authority to act statutorily upon a subject matter the electorate has spoken to constitutionally through the initiative process.

1 Unless otherwise indicated, all further statutory references are to the Government Code.

Article XIII B, section 6, unequivocally commands that "the state shall provide a subvention of funds to reimburse . . . local government for the costs of [a new] program or increased level of service" except as specified therein. Article XIII B does not define this reference to "costs." (See Cal. Const., art. XIII B, ß 8.) Rather, the Legislature assumed the task of explicating the related concept of "costs mandated by the state" when it created the Commission on State Mandates and enacted procedures intended to implement article XIII B, section 6, more effectively. (See ß 17500 et seq.) As part of this statutory scheme, it exempted the state from its constitutionally imposed subvention obligation under certain enumerated circumstances. Some of these exemptions the electorate expressly contemplated in approving article XIII B, section 6 (ß 17556, subds. (a), (c), & (g); see [**240] [***97] ß 17514), while others are strictly of legislative formulation and derive from [*490] former Revenue and Taxation Code section 2253.2. (ß 17556, subds. (b), (d), (e), & (f).)

The majority find section 17556 valid notwithstanding the mandatory language of article XIII B, section 6, based on the circular and conclusory rationale that "the Legislature effectively and properly construed the term 'costs' as excluding expenses that are recoverable from sources other than taxes. In a word, such expenses are outside of the scope of the [subvention] requirement. Therefore, they need not be explicitly excepted from its reach." (Maj. opn., *ante* , at p. 488.) In my view, excluding or otherwise removing something from the purview of a law is tantamount to creating an exception thereto. When an exclusionary implication is clear from the import or effect of the statutory language, use of the word "except" should not be necessary to construe the result for what it clearly is. In this circumstance, "I would invoke the folk wisdom that if an object looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck." (*In re Deborah C.* (1981) 30 Cal.3d 125, 141 [177 Cal.Rptr. 852, 635 P.2d 446] (conc. opn. by Mosk, J.).)

Of at least equal importance, section 17500 et seq. constitutes a legislative implementation of article XIII B, section 6. As such, the overall statutory scheme must comport with the express constitutional language it was designed to effectuate as well as the implicit electoral intent. Eschewing semantics, I would squarely and forthrightly address the fundamental and substantial question of whether the Legislature could lawfully enlarge upon the scope of article XIII B, section 6, to include exceptions not originally designated in the initiative.

I do not hereby seek to undermine the majority holding but rather to set it on a firmer constitutional footing. "[S]tatutes must be given a reasonable interpretation, one which will carry out the intent of the legislators and render them valid and operative rather than defeat them. In so doing, sections of the Constitution, as well as the codes, will be harmonized where reasonably possible, in order that all may stand." (*Rose* v. *State of California* (1942) 19 Cal.2d 713, 723 [123 P.2d 505]; see also *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 58 [233 Cal.Rptr. 38, 729 P.2d 202].) To this end, it is a fundamental premise of our form of government that "the Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and . . . it is competent for the Legislature to exercise all powers not forbidden . . . ." (*People* v. *Coleman* (1854) 4 Cal. 46, 49.) "Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the [*491] Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. [Citations.] *In other words, 'we do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited* .' [Citation.] [P] Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.' [Citations.]" (*Methodist Hosp. of Sacramen-*

Received
August 26, 2011
Commission on
State Mandates

to v. *Saylor* (1971) 5 Cal.3d 685, 691 [97 Cal.Rptr. 1, 488 P.2d 161], italics added.) "Specifically, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms. [Citations.]" (*Dean* v. *Kuchel* (1951) 37 Cal.2d 97, 100 [230 P.2d 811].)

As the majority opinion impliedly recognizes, neither the language nor the intent of article XIII B conflicts with the exercise of legislative prerogative we review today. Of paramount significance, neither section 6 nor any other provision of article XIII B prohibits statutory delineation of additional [**241] [***98] circumstances obviating reimbursement for state mandated programs. (See *Dean* v. *Kuchel* , *supra* , 37 Cal.2d at p. 101; *Roth Drugs, Inc.* v. *Johnson* (1936) 13 Cal.App.2d 720, 729 [57 P.2d 1022]; see also *Kehrlein* v. *City of Oakland* (1981) 116 Cal.App.3d 332, 338 [172 Cal.Rptr. 111].)

Furthermore, the initiative was "[b]illed as a flexible way to provide discipline in government spending" by creating appropriations limits to restrict the amount of such expenditures. (*County of Placer* v. *Corin* (1980) 113 Cal.App.3d 443, 447 [170 Cal.Rptr. 232]; see Cal. Const., art. XIII B, ß 1.) By their nature, user fees do not affect the equation of local government spending: While they facilitate implementation of newly mandated state programs or increased levels of service, they are excluded from the "appropriations subject to limitations" calculation and its attendant budgetary constraints. (See Cal. Const., art. XIII B, ß 8; see also *City Council* v. *South* (1983) 146 Cal.App.3d 320, 334 [194 Cal.Rptr. 110]; *County of Placer* v. *Corin* , *supra* , 113 Cal.App.3d at pp. 448-449; Cal. Const., art. XIII B, ß 3, subd. (b); cf. *Russ Bldg. Partnership* v. *City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1505 [246 Cal.Rptr. 21] ["fees not exceeding the reasonable cost of providing the service or regulatory activity for which the fee is charged and which are not levied for general revenue purposes, have been considered outside the realm of "special taxes" [limited by California Constitution, article XIII A]q "]; *Terminal Plaza Corp.* v. *City* [*492] *and County of San Francisco* (1986) 177 Cal.App.3d 892, 906 [223 Cal.Rptr. 379] [same].)

This conclusion fully accommodates the intent of the voters in adopting article XIII B, as reflected in the ballot materials accompanying the proposition. (See *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281].) In general, these materials convey that "[t]he goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending." (*County of Los Angeles* v. *State of California* , *supra* , 43 Cal.3d at p. 61; *Huntington Park Redevelopment Agency* v. *Martin* (1985) 38 Cal.3d 100, 109-110 [211 Cal.Rptr. 133, 695 P.2d 220].) To the extent user fees are not borne by the general public or applied to the general revenues, they do not bear upon this purpose. Moreover, by imputation, voter approval contemplated the continued imposition of reasonable user fees outside the scope of article XIII B. (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Limitation of Government Appropriations, Special Statewide Elec. (Nov. 6, 1979), arguments in favor of and against Prop. 4, p. 18 [initiative "WILL curb excessive user fees imposed by local government" but "will NOT eliminate user fees . . ."]; see *County of Placer* v. *Corin* , *supra* , 113 Cal.App.3d at p. 452.)

"The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles* v. *State of California* , *supra* , 43 Cal.3d at p. 56; see *City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 66 [266 Cal.Rptr. 139, 785 P.2d 522].) "Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs." (*County of Los Angeles* v. *State of California* , *supra* , 43 Cal.3d at p. 61.) An exemption from reimbursement for state mandated programs for which local governments are authorized to charge offsetting user fees does not frustrate or compromise these goals or otherwise disturb the balance of local government financing [**242] [***99] and expenditure. [2] (See *County of Placer* v. *Corin* , *supra* , 113 Cal.App.3d at p. 452, [*493] fn. 7.) Article XIII B, section 8, subdivision (c), specifically includes regulatory licenses, user charges, and user fees in the appropriations limitation equation only "to the extent that those proceeds exceed the costs reasonably borne by [the governmental] entity in providing the regulation, product, or service . . . ."

2 This conclusion also accords with the traditional and historical role of user fees in promoting the multifarious functions of local government by imposing on those receiving a service the cost of providing it. (Cf. *County of Placer* v. *Corin* , *supra* , 113 Cal.App.3d at p. 454 ["Special assessments, being levied only for improvements that benefit particular parcels of land, and not to raise general revenues, are simply not the type of exaction that can be used as a mechanism

Received
August 26, 2011
Commission on
State Mandates

for circumventing these tax relief provisions. [Citation.]"].)

The self-executing nature of article XIII B does not alter this analysis. "It has been uniformly held that the legislature has the power to enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions. [Citations.]" (*Chesney* v. *Byram* (1940) 15 Cal.2d 460, 465 [101 P.2d 1106].) ""Legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." [Citations.]'" (*Id* ., at pp. 463-464; see also *County of Contra Costa* v. *State of California* (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750].) Section 17556(d) is not "merely [a] transparent attempt[] to do indirectly that which cannot lawfully be done directly." (*Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 541 [234 Cal.Rptr. 795].) On the contrary, it creates no conflict with the constitutional directive it subserves. Hence, rather than pursue an interpretive expedient, this court should expressly declare that it operates as a valid legislative implementation thereof.

"[Initiative] provisions of the Constitution and of charters and statutes should, as a general rule, be liberally construed in favor of the reserved power. [Citations.] As opposed to that principle, however, 'in examining and ascertaining the intention of the people with respect to the scope and nature of those . . . powers, it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential and, perhaps, . . . indispensable, to the convenience, comfort, and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case the courts may and should assume that the people intended no such result to flow from the application of those powers and that they do not so apply.' [Citation.]" (*Hunt* v. *Mayor & Council of Riverside* (1948) 31 Cal.2d 619, 628-629 [191 P.2d 426].)

[*494] This court is not infrequently called upon to resolve the tension of apparent or actual conflicts in the express will of the people. [3] Whether that expression emanates directly from the ballot or indirectly through legislative implementation, each deserves our fullest estimation and effectuation. Given the historical and abiding role of government by initiative, I decline to circumvent that responsibility and accept uncritically the Legislature's self-validating statutory scheme as the basis for approving [***100] the exercise [**243] of its prerogative. It is not enough to say a broader constitutional analysis yields the same result and therefore is unnecessary. We provide a higher quality of justice harmonizing rather than ignoring the divers voices of the people, for such is the nature of our office.

3 See, e.g., *Zumwalt* v. *Superior Court* (1989) 49 Cal.3d 167 [260 Cal.Rptr. 545, 776 P.2d 247]; *Los Angeles County Transportation Com.* v. *Richmond* (1982) 31 Cal.3d 197 [182 Cal.Rptr. 324, 643 P.2d 941]; *California Housing Finance Agency* v. *Patitucci* (1978) 22 Cal.3d 171 [148 Cal.Rptr. 875, 583 P.2d 729]; *California Housing Finance Agency* v. *Elliott* (1976) 17 Cal.3d 575 [131 Cal.Rptr. 361, 551 P.2d 1193]; *Blotter* v. *Farrell* (1954) 42 Cal.2d 804 [270 P.2d 481]; *Dean* v. *Kuchel* , *supra* , 37 Cal.2d 97; *Hunt* v. *Mayor & Council of Riverside* , *supra* , 31 Cal.2d 619.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 3

Received
August 26, 2011
Commission on
State Mandates

COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants, v. COMMISSION ON STATE MANDATES, Defendant and Appellant; REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, Real Party in Interest and Respondent. CITY OF ARTESIA et al., Plaintiffs and Appellants, v. COMMISSION ON STATE MANDATES, Defendant and Appellant; REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, Real Party in Interest and Respondent.

B183981

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

150 Cal. App. 4th 898; 58 Cal. Rptr. 3d 762; 2007 Cal. App. LEXIS 711; 2007 Cal. Daily Op. Service 5216; 37 ELR 20107

May 10, 2007, Filed

PRIOR HISTORY: [***1] Superior Court of Los Angeles County, Nos. BS089769 and BS089785, Victoria G. Chaney, Judge.

DISPOSITION: Affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court issued a writ of mandate directing the Commission on State Mandates to set aside its decisions affirming its executive director's rejections of test claims presented by a county and several cities and to consider fully the test claims and determine whether the county and the cities were entitled to reimbursement without consideration of Gov. Code, ß 17516, subd. (c). The county and the cities sought reimbursement for carrying out obligations required by a National Pollutant Discharge Elimination System Permit for municipal stormwater and urban runoff discharges that was issued by the Regional Water Quality Control Board (Regional Water Board), Los Angeles Region. (Superior Court of Los Angeles County, Nos. BS089769 and BS089785, Victoria G. Chaney, Judge.)

The Court of Appeal affirmed the judgment, holding that Gov. Code, ß 17516, subd. (c), is unconstitutional to the extent that it exempts regional water boards from the constitutional state mandate subvention requirement. Its creation of an exception for regional water boards, which are state agencies, contravenes the plain, unequivocal, and all-inclusive reference to "any state agency" in Cal. Const., art. XIII B, ß 6. Moreover, a contrary conclusion was not compelled by virtue of the fact that ß 17516, subd. (c), essentially mirrors the language of Rev. & Tax. Code, ß 2209, subd. (c). A statute cannot trump the constitution. The court found persuasive the commission's position that should the court conclude ß 17516, subd. (c), was unconstitutional, the appropriate remedy was to afford the commission the opportunity to pass on the merits of the subject test claims on the issues of whether: (1) the subject permit qualified as a state mandated program under Cal. Const., art. XIII B, ß 6; (2) the permit amounted to a new program or higher level of service; and (3) the permit imposed costs on local entities (Gov. [*899] Code, ßß 17514, 17556). A cross-appeal filed by the county and the cities was premised on the theory that if subvention of funds from the commission was foreclosed by ß 17516, subd. (c), they were entitled to pursue an independent action against the Regional Water Board, Los Angeles Region. Accordingly, the court concluded that the cross-appeal, which was simply protective in nature, was moot. (Opinion by Aldrich, J., with Klein, P. J., and Croskey, J., concurring.)

HEADNOTES

Received
August 26, 2011
Commission on
State Mandates

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) State of California ß 11--Fiscal Matters--Reimbursement to Local Governments--New Programs and Services--Subvention.--"Subvention" generally means a grant of financial aid or assistance, or a subsidy. As used in connection with state-mandated costs, the basic legal requirements of subvention can be easily stated; it is in the application of the rule that difficulties arise. Essentially, the constitutional rule of state subvention provides that the state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. This does not mean that the state is required to reimburse local agencies for any incidental cost that may result from the enactment of a state law; rather, the subvention requirement is restricted to governmental services which the local agency is required by state law to provide to its residents. The subvention requirement is intended to prevent the state from transferring the costs of government from itself to local agencies. Reimbursement is required when the state freely chooses to impose on local agencies any peculiarly governmental cost which they were not previously required to absorb. The subvention requirement of Cal. Const., art. XIII B, ß 6, is triggered if the Legislature or any state agency mandates a new program or higher level of service (art. XIII B, ß 6). Such requirement is inapplicable where the additional costs on local governments are imposed by a federal mandate, i.e., the federal government. Article XIII B, ß 9, subd. (b), defines federally mandated appropriations as those required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly. [*900]

(2) State of California ß 11--Fiscal Matters--Reimbursement to Local Governments--New Programs and Service--Subvention--Procedure for Claims.--Whether a particular cost incurred by a local government arises from carrying out a state mandate for which subvention is required under Cal. Const., art. XIII B, ß 6, is a matter for the Commission on State Mandates to determine in the first instance. A local government initiates the process for subvention under art. XIII B, ß 6, by filing a claim with the commission (Gov. Code, ß 17521). The initial claim is referred to as a test claim (ß 17521). The provisions of Gov. Code, ß 17500 et seq., provide the sole and exclusive procedure by which a local agency may claim reimbursement for costs mandated by the state as required by art. XIII B, ß 6 (Gov. Code, ß 17552). The Legislature has created a quasi-judicial body called the Commission on State Mandates, Gov. Code, ß 17525, to hear and decide upon any claim by a local government that the local government is entitled to be reimbursed by the state for costs as required by Cal. Const., art. XIII B, ß 6 (Gov. Code, ß 17551, subd. (a)). It has defined "costs" as costs mandated by the state--any increased costs that the local government is required to incur as a result of any statute, or any executive order implementing any statute, which mandates a new program or higher level of service of any existing program within the meaning of Cal. Const., art. XIII B, ß 6 (Gov. Code, ß 17514). Finally, in Gov. Code, ß 17556, subd. (d), it has declared that the commission shall not find costs mandated by the state if, after a hearing, the commission finds that the local government has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(3) Limitation of Actions ß 28--Defenses--Raising by Demurrer--Forfeiture.--The time bar of a statute of limitations may be raised by demurrer where the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, for the reason that it fails to state facts sufficient to constitute a cause of action. Forfeiture of a time-bar defense transpires by the failure to raise the applicable statute of limitations in the answer.

(4) Mandamus and Prohibition ß 57--Mandamus--Time Limits.--If a time limit in a mandamus proceeding is held to be jurisdictional, estoppel or waiver cannot extend the time.

(5) Limitation of Actions ß 5--Validity, Construction, and Application of Statutes--Challenge to Constitutionality--State Funding Statute.--The time bar of Code Civ. Proc., ß 341.5, applies to a challenge to the [*901] constitutionality of any statute relating to state funding for counties and other local governmental entities, not to a challenge to an action by an administrative agency.

(6) Pollution and Conservation Laws ß 5--Water Pollution--Statewide Program for Quality Control--Administration by Regional Water Quality Control Boards--Issuance of Discharge Permits.--Part of the federal Clean Water Act (33 U.S.C. ß 1251 et seq.) is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. The NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater (33 U.S.C. ß 1342(a) & (b)). In California, wastewater discharge requirements established by the Regional Water Quality

Received
August 26, 2011
Commission on
State Mandates

Control Boards are the equivalent of the NPDES permits required by federal law (Wat. Code, ß 13374). California's Porter-Cologne Act (Wat. Code, ß 13000 et seq.) establishes a statewide program for water quality control. Nine regional water boards, overseen by the State Water Board, administer the program in their respective regions (Wat. Code, ßß 13140, 13200 et seq., 13240, and 13301). Wat. Code, ßß 13374 and 13377, authorize the regional water board to issue federal NPDES permits for five-year periods (33 U.S.C. ß 1342, subd. (b)(1)(B)).

(7) Constitutional Law ß 13--Construction of Constitutions--Language of Enactment--Voters' Intent.--In construing the meaning of Cal. Const., art. XIII B, ß 6, a court's inquiry is not focused on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted art. XIII B, ß 6. To determine this intent, the court must look to the language of the provision itself.

(8) State of California ß 11--Fiscal Matters--Reimbursement to Local Governments--New Programs and Services--Subvention.--The subvention requirement of Cal. Const., art. XIII B, ß 6, applies whenever the Legislature or any state agency mandates a new program or higher level of service. The all-encompassing "any state agency" language defeats any perceived presumption that the electorate intended to incorporate into art. XIII B, ß 6, the exclusion of a particular state agency from its subvention requirement. [*902]

(9) State of California ß 11--Fiscal Matters--Reimbursement to Local Governments--New Programs and Services--Subvention--Unconstitutionality of Conflicting Statute--Order Issued by Regional Water Board.--The constitutional infirmity of Gov. Code, ß 17516, subd. (c), is readily apparent from its plain language that the definition of "executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Board or by any regional water quality control board pursuant to division 7 (commencing with Wat. Code, ß 13000) of the Water Code (ß 17516, subd. (c)). This exclusion of any order issued by any regional water board contravenes the clear, unequivocal intent of Cal. Const., art. XIII B, ß 6, that subvention of funds is required whenever any state agency mandates a new program or higher level of service on any local government (ß 17516, subd. (c)). Therefore, ß 17516, subd. (c), is unconstitutional to the extent it excludes any order issued by any regional water board pursuant to division 7 (commencing with Wat. Code, ß 13000) of the Water Code from the definition of "executive order." This conclusion leads to the further conclusion that whether one or both of the subject two obligations constitutes a state mandate necessitating subvention of funds under Cal. Const., art. XIII B, ß 6, is an issue that must in the first instance be resolved by the Commission on State Mandates.

(10) State of California ß 11--Fiscal Matters--Reimbursement to Local Governments--New Programs and Services--Subvention--Unconstitutionality of Conflicting Statute--Order Issued by Regional Water Board--Remedy.--Because Gov. Code, ß 17516, subd. (c), is unconstitutional to the extent it purports to exempt orders issued by regional water quality control boards from the definition of "executive orders" for which subvention of funds to local governments for carrying out state mandates is required pursuant to Cal. Const., art. XIII B, ß 6, a trial court properly issued a writ of mandate directing the Commission on State Mandates to resolve four test claims presented by a county and several cities on the merits without reference to ß 17516, subd. (c).

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, ß 1043; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, ß 119 et seq.]

COUNSEL: Raymond G. Fortner, Jr., County Counsel and Judith A. Fries, Principal Deputy County Counsel, for Plaintiffs and Appellants County of Los Angeles and Los Angeles County Flood Control District. [*903]

Burhenn & Gest, Howard Gest and David Burhenn for Plaintiffs and Appellants County of Los Angeles, Los Angeles County Flood Control District and Cities of Commerce, Carson, Downey, Hawaiian Gardens, Montebello, Santa Fe Springs, Signal Hill, Artesia, Beverly Hills, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino and Westlake Village.

Thomas F. Casey III, County Counsel (San Mateo) and Miruni Soosaipillai, Deputy County Counsel for City/County Association of Governments of San Mateo County as Amicus Curiae on behalf of Plaintiffs and Appellants.

Morrison & Foerster and Robert L. Falk for Bay Area Stormwater Management Agencies Association as Amicus Curiae on behalf of Plaintiffs and Appellants.

Camille Shelton and Eric D. Feller for Defendant and Appellant.

Bill Lockyer, Attorney General, Tom Green and Mary E. Hackenbracht, Assistant [***2] Attorneys General, Helen G. Arens and Jennifer F. Novak, Deputy Attorneys General for Regional Water Quality Control Board, Los Angeles Region as Amicus Curiae on behalf of Defendant and Appellant.

Received
August 26, 2011
Commission on
State Mandates

No apperance for Real Party in Interest and Respondent.

JUDGES: Aldrich, J., with Klein, P. J., and Croskey, J., concurring.

OPINION BY: Aldrich

OPINION

[**764] **ALDRICH, J.**--

INTRODUCTION

The California Commission on State Mandates (the Commission) appeals from the judgment entered following the partial grant of cross-motions for judgment on the pleadings. The County of Los Angeles, the Los Angeles County Flood Control District, and the Cities of Commerce, Carson, Downey, Hawaiian Gardens, Montebello, Santa Fe Springs, Signal Hill, Artesia, Beverly Hills, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino and Westlake Village (collectively, County/Cities) filed a cross-appeal from the judgment.

In 2001, the Regional Water Quality Control Board (Regional Water Board), Los Angeles Region, issued a National Pollutant Discharge Elimination System (NPDES) permit for municipal stormwater and urban runoff discharges, which obligated County/Cities to inspect industrial, [*904] commercial, and construction water treatment facilities (which obligation County/Cities claim [***3] the state previously performed) and to install and maintain trash receptacles at transit stops.

County/Cities presented "test claims" [1] to the executive director of the Commission [**765] seeking reimbursement for carrying out these obligations pursuant to the constitutional requirement for subvention arising from a state mandate (Cal. Const., art. XIII B, ß 6). The executive director returned the claims unadjudicated, because they did not involve an executive order under section 17516 of the Government Code (Section 17516(c)). In denying the appeals of County/Cities, the Commission noted it was without authority to declare a statute unconstitutional and concluded that Section 17516(c) excludes from the subvention requirement any order, which includes a permit, issued by the Regional Water Boards of the State Water Resources Control Board (State Water Board).

1 " 'Test claim' means the first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state." (Gov. Code, ß 17521.)

[***4] Section 6 of article XIII B of the California Constitution (article XIII B, section 6) provides in pertinent part: "Whenever the Legislature or *any state agency* mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service ... ." (Italics added.)

As we shall discuss, Section 17516(c) is unconstitutional to the extent it exempts Regional Water Boards from the constitutional state mandate subvention requirement. Its creation of an exception for Regional Water Boards, which are state agencies, contravenes the plain, unequivocal, and all-inclusive reference to "any state agency" in article XIII B, section 6. Moreover, a contrary conclusion is not compelled by virtue of the fact that Section 17516(c) essentially mirrors the language of section 2209, subdivision (c) (ß 2209(c)) of the Revenue and Taxation Code. A statute cannot trump the Constitution.

We decline to consider the Commission's new claim that the constitutional challenge to Section 17516(c) by County/Cities is barred by the 90-day limitation period [***5] of section 341.5 of the Code of Civil Procedure. This statute of limitations defense, which should have been raised before the trial court, is not cognizable on this appeal. [*905]

The Commission urges that should this court conclude Section 17516(c) is unconstitutional, the appropriate remedy is to afford the Commission the opportunity to pass on the merits of the subject test claims on the issues of whether (1) the subject permit qualifies as a state-mandated program under article XIII B, section 6; (2) the permit amounts to a new program or higher level of service; and (3) the permit imposes costs on local entities (Gov. Code, ßß 17514, 17556). We find its position persuasive.

The cross-appeal filed by County/Cities is premised on the theory that if subvention of funds from the Commission is foreclosed by Section 17516(c), County/Cities are entitled to pursue an independent action against the Regional Water Board, Los Angeles Region (LA Regional Water Board). This cross-appeal, which is simply protective in nature, is moot.

In sum, we uphold the trial court's issuance of a writ of mandate directing the Commission [***6] to set aside its decisions affirming its executive director's rejections of the subject test claims and to consider fully these test claims and determine whether County/Cities are entitled to reimbursement without consideration of Section 17516(c), and we affirm the judgment in its entirety.

BACKGROUND

Received
August 26, 2011
Commission on
State Mandates

1. *Article XIII B, Section 6, Subvention of Funds for State Mandates*

"The electorate approved Proposition 4 in 1979, thus adding article XIII B to the state Constitution. [**766] While the earlier Proposition 13 limited the state and local governments' power to increase taxes (see Cal. Const., art. XIII A, added by initiative measure in Primary Elec. (June 6, 1978)), Proposition 4, the so-called 'Spirit of 13,' imposed a complementary limit on the rate of growth in governmental spending." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 574 [7 Cal. Rptr. 2d 245, 828 P.2d 147].) This measure also "provided [for] reimbursement to local governments for the costs of complying with certain requirements mandated by the state." (*Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal. App. 3d 155, 172 [275 Cal. Rptr. 449].)

"[V]oters were told [***7] that section 6 of Proposition 4 was intended to prevent state government attempts 'to force programs on local governments without the state paying for them.' (Ballot Pamp., Special Statewide Elec. [(Nov. 6, 1979)] p. 18.)" (*County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282 [101 Cal. Rptr. 2d 784]; see also *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 [233 Cal. Rptr. 38, 729 P.2d 202] [intent was not all local costs arising from compliance with state law to be reimbursable; rather, intent was to prevent "the perceived [*906] attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public"].)

"Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. [Citation.] The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped [***8] to handle the task. [Citations.] Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the 'state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,' read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*." (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 [280 Cal. Rptr. 92, 808 P.2d 235], original italics; see also *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal. Rptr. 677, 750 P.2d 318] [a reimbursement requirement was "enshrined in the Constitution ... to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources"].)

Article XIII B, section 6 provides: "(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State [***9] shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide such a subvention of funds for the following mandates. [∂] (1) Legislative mandates requested by the local agency affected. [∂] (2) Legislation defining a new crime or changing an existing definition of a crime. [∂] (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

(1) " 'Subvention' generally means a grant of financial aid or assistance, or a [**767] subsidy. [Citation.] As used in connection with state-mandated costs, the basic legal requirements of subvention can be easily stated; it is in the application of the rule that difficulties arise.

"Essentially, the constitutional rule of state subvention provides that the state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.] This does not mean that the state is required to [*907] reimburse local agencies for any incidental [***10] cost that may result from the enactment of a state law; rather, the subvention requirement is restricted to governmental services which the local agency is required by state law to provide to its residents. [Citation.] The subvention requirement is intended to prevent the state from transferring the costs of government from itself to local agencies. [Citation.] Reimbursement is required when the state 'freely chooses to impose on local agencies *any* peculiarly "governmental" cost which they were not previously required to absorb.' [Citation.]" (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, at 1577-1578 [15 Cal. Rptr. 2d 547].)

The subvention requirement of article XIII B, section 6 is triggered if "the Legislature or any state agency" mandates a new program or higher level of service. (Art. XIII B, ß 6.) Such requirement is inapplicable where the additional costs on local governments are imposed by a federal mandate, i.e., the federal government. Article XIII B, section 9, subdivision (b) of the California Constitution, defines federally mandated appropriations as

Received
August 26, 2011
Commission on
State Mandates

those "required to comply with mandates of the courts or the federal government which, *without discretion,* [***11] require an expenditure for additional services or which *unavoidably make the provision of existing services more costly.*" [2] (Italics added.)

2 "In 1980, after the adoption of article XIII B, [the Legislature] amended the statutory definition of 'costs mandated by the federal government' to provide that these include 'costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in *substantial monetary penalties* or *loss of funds* to *public or private persons* in the state. ...' (Rev. & Tax. Code, ß 2206, italics added; Stats. 1980, ch. 1256, ß 3, p. 4247.)" (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 75 [266 Cal. Rptr. 139, 785 P.2d 522].)

There is no precise formula or rule for determining whether the "costs" are the product of a federal mandate. Our Supreme Court explained: "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of article XIII B, section 9(b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary." (*City of Sacramento v. State of California, supra*, 50 Cal.3d at p. 76.)

[***12] 2. *Existence of State Mandate Matter for the Commission*

(2) Whether a particular cost incurred by a local government arises from carrying out a state mandate for which subvention is required under article XIII B, section 6, is a matter for the Commission to determine in the first instance. [*908]

A local government initiates the process for subvention under article XIII B, section 6 by filing a claim with the Commission. (Gov. Code, ß 17521; [**768] cf. *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89 [61 Cal. Rptr. 2d 134, 931 P.2d 312] [futility exception to exhaustion of administrative remedies doctrine applicable to failure to file claim before Commission].) The initial claim is referred to as a "test claim." (Gov. Code, ß 17521.)

"The Legislature enacted Government Code sections 17500 through 17630 to implement article XIII B, section 6. (Gov. Code, ß 17500.)" (*County of Fresno v. State of California, supra*, 53 Cal. 3d at p. 484.) The provisions of Government Code section 17500 et seq. "provide the sole and exclusive [***13] procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by" article XIII B, section 6. (Gov. Code, ß 17552.)

"It created a 'quasi-judicial body' (*ibid.*) called the Commission on State Mandates ... ([Gov. Code], ß 17525) to 'hear and decide upon [any] claim' by a local government that the local government 'is entitled to be reimbursed by the state for costs' as required by article XIII B, section 6. (Gov. Code, ß 17551, subd. (a).) It defined 'costs' as 'costs mandated by the state'--'any increased costs' that the local government 'is required to incur ... as a result of any statute ... , or any executive order implementing any statute ... , which mandates a new program or higher level of service of any existing program' within the meaning of article XIII B, section 6. (Gov. Code, ß 17514.) Finally, in section 17556(d) it declared that 'The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that' the local government 'has the authority to levy service charges, fees, [***14] or assessments sufficient to pay for the mandated program or increased level of service.' " (*County of Fresno v. State of California, supra*, 53 Cal. 3d at p. 484.)

3. *Regional Water Board Order Not "Executive Order"*

Section 17516(c) defines, in pertinent part, an " '[e]xecutive order' [as] any order, plan, requirement, rule, or regulation issued by ... [∂] ... [∂] ... [a]ny agency ... of state government, " except an " '[e]xecutive order' does not include any order, plan, requirement, rule, or regulation issued by the State Water ... Board or by any regional water ... board pursuant to Division 7 (commencing with Section 13000) of the Water Code." [3] (Added by Stats. 1984, ch. 1459, ß 1, p. 5113.)

3 Section 17516(c) further provides: "It is the intent of the Legislature that the State Water ... Board and regional water ... boards will not adopt enforcement orders against publicly owned dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. 'Major' means either a new treatment facility or

Received
August 26, 2011
Commission on
State Mandates

an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility."

LA Regional Water Board argues the trial court's ruling sustaining its demurrer to the fourth cause of action for a writ of mandate directing it to delete the subject two obligations under the permit as violative of Government Code section 17516 should be upheld, because section 17516 "applies to construction of major waste treatment facilities, not trash receptacles or inspections." This analysis, however, is inconsistent with the plain language of section 17516 in its entirety.

[*909]

[***15] In light of the above definition, the subject permit issued by an order of the LA Regional Water Board cannot constitute an "executive order implementing any statute, ... which mandates a new program or higher level of service of an existing program within the meaning of" the article XIII B, section 6 [**769] requirement of subvention of funds to local governments for carrying out a state mandate. (Gov. Code, ß 17514.)

4. *Procedural Posture*

LA Regional Water Board issued order No. 01-182, which adopted NPDES permit No. CAS004001 (Permit). This Permit imposed two obligations on County/Cities for the purpose of regulating municipal stormwater and urban runoff discharges in Los Angeles County. The first required County/Cities to inspect industrial, commercial, and construction sites to ensure compliance with the law, and the other required County/Cities to install and maintain trash receptacles at transit stops.

County/Cities filed four test claims, i.e., test claims 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21, seeking reimbursement of costs for carrying out these obligations. The executive director rejected these test claims as excluded from subvention [***16] pursuant to Section 17516(c).

In the administrative appeals, the Commission found it was bound by Section 17516(c), upheld its executive director's decision, and denied the appeals.

In their amended and consolidated petitions and complaints, County/Cities sought, among other things: (1) An order requiring the State to reimburse them for the new programs or higher level of service under the Permit or, alternatively, to allow them to offset payment of permit and other fees or moneys owed or to be transferred to the state against their costs; (2) an order enjoining state from refusing to reimburse them in the future; or, alternatively, (3) a peremptory writ of mandate directing the Commission to accept their test claims and find they are entitled to reimbursement; (4) a declaration that Government Code section 17516 is unconstitutional; (5) a peremptory writ of mandate directing LA Regional Water Board either to delete or not [*910] enforce the subject obligations under the Permit; and (6) a stay of the challenged portions of the permit.

The Commission and County/Cities filed cross-motions for judgment on the pleadings. The trial court granted the Commission's motion as to the second cause of action for declaratory [***17] relief. The court explained: "The only actual controversy between [County/Cities] and [Commission] is whether [County/Cities]' claims should be deemed reimbursable. The sole and exclusive procedure by which to adjudicate this controversy is a mandate action under Code of Civil Procedure section 1094.5. ([Government Code s]ections 17552, 17559.) The only pertinent relief under ... section 1094.5 is a finding that [the Commission] 'has not proceeded in the manner required by law.' Declaratory relief is not available."

After construing the motion addressed to the third cause of action as a motion to strike improper requested relief, the court granted the motion and struck that part of the third cause of action requesting an order directing the Commission to find their claims to be reimbursable on the ground "[t]he court has no power at this time to do so. [Citations.]"

Turning to County/Cities' motion for judgment on the pleadings, the trial court granted the motion as to the third cause of action for extraordinary writ relief, except as to the stricken request for improper relief. [4]

4 In the third cause of action, County/Cities sought a writ of mandate (Code Civ. Proc., ß 1094.5) compelling a court finding that Government Code section 17516 was unconstitutional on its face or as applied in this action and directing the Commission to accept their test claims for filing and approving them for reimbursement.

[***18] The court found that to the extent Section 17516(c) excepted the orders of Regional [**770] The Water Boards from the definition of "executive orders," Section 17516(c) was unconstitutional in that it expressly contravened article XIII B, section 6. The court ordered the Commission to set aside its order affirming its executive director's rejections of the four test claims and to consider these claims on the merits.

In granting in part County/Cities' petitions for a writ of mandate, the trial court found the Commission, "though it proceeded as required by statutory law, as it was constrained to do, has not proceeded as required by superior constitutional law. (Code Civ. Proc., [ß]1094.5, subd. (a).) The question whether [County/Cities] state

Received
August 26, 2011
Commission on
State Mandates

valid claims for reimbursement must be remanded to [C]ommission, which is ordered to consider [these] claims on their merits. [Citations.]" [*911]

A peremptory writ of mandate was issued on May 24, 2005. Judgment was entered the same date. This appeal and cross-appeal followed.

STANDARD OF REVIEW

"The standard for reviewing a judgment on the pleadings is settled: 'A motion for judgment on the pleadings is the equivalent [***19] of a general demurrer but is made after the time for demurrer has expired. The rules governing demurrers apply. [Citation.] The grounds for a motion for judgment on the pleadings must appear on the face of the challenged complaint or be based on facts which the court may judicially notice. [Citations.] On review we must determine if the complaint states a cause of action as a matter of law.' [Citation.] 'We review the complaint de novo to determine whether [it] alleges facts sufficient to state a cause of action under any legal theory. [Citation.]' [Citation.]" (*McCormick v. Travelers Ins. Co.* (2001) 86 Cal.App.4th 404, 408 [103 Cal. Rptr. 2d 258].)

"In reviewing the trial court's ruling on a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. (*Evans* v. *Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407 [216 Cal. Rptr. 782, 703 P.2d 122].) However, where the facts are undisputed and the issues present questions of law, the appellate court is not bound by the trial court's decision but may make its own determination. (*Ibid.*)" (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 394 [69 Cal. Rptr. 2d 231].)

[***20] DISCUSSION

1. *Defense of Statute of Limitations Forfeited*

On appeal for the first time, the Commission asserts the challenge of County/Cities to the constitutionality of Section 17156(c) is barred by the 90-day limitation period of section 341.5 of the Code of Civil Procedure, which governs the timeliness of actions challenging the constitutionality of state funding for municipalities, school districts, special districts, and local agencies.

Code of Civil Procedure section 341.5 provides: "Notwithstanding any other provision of law, any action or proceeding in which a county, city, city and county, school district, special district, or any other local agency is a plaintiff or petitioner, that is brought against the State of California challenging the constitutionality of any statute relating to state funding for counties, cities, cities and counties, school districts, special districts, or other local agencies, shall be commenced within 90 days of the effective date of the [*912] statute at issue in the action. For purposes of this section, 'State of California' means the State of California itself, or any of its agencies, [***21] departments, commissions, boards, or public officials." (Added by [**771] Stats. 1994, ch. 155, ß 1, p. 1601, eff. July 11, 1994; amended by Stats. 1994, ch. 156, ß 1, p. 1619, eff. July 11, 1994.)

The Commission argues the constitutional challenge to Section 17516(c) is time-barred, because: "Government Code section 17500 et seq., including section 17516, relates to state funding for counties and cities relative to state-mandated local programs. ... [S]ection 17516 was enacted in 1984 and became effective January 1, 1985. The petition in this case challenging section 17516 as unconstitutional was filed April 28, 2004," which was more than 90 days after the effective date of section 17516.

(3) The time bar of a statute of limitations may be raised by demurrer "[w]here the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, [for the reason that] it fails to state facts sufficient to constitute a cause of action. [Citation.]" (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 833 [30 Cal. Rptr. 3d 588].) Forfeiture of a time-bar defense transpires by the failure to raise [***22] the applicable statute of limitations in the answer. (See, e.g., *Minton v. Cavaney* (1961) 56 Cal.2d 576, 581 [15 Cal. Rptr. 641, 364 P.2d 473]; *Davies v. Krasna* (1975) 14 Cal.3d 502, 508 [121 Cal. Rptr. 705, 535 P.2d 1161]; *Mitchell v. County Sanitation Dist.* (1957) 150 Cal. App. 2d 366, 371 [309 P.2d 930]; see also Code Civ. Proc., ß 458.)

As the Commission concedes, it did not raise "[Code of Civil Procedure] section 341.5 as an affirmative defense in its pleadings in the trial court." This omission signifies that the Commission therefore has forfeited any right it may have had to assert section 341.5 to bar, as untimely, the claims of County/Cities to the constitutionality of Section 17516(c).

(4) For a contrary conclusion, the Commission argues "the statute of limitations to challenge an administrative action is jurisdictional and should not be considered waived. (*United Farm Workers of America v. Agricultural Labor Relations Board* (1977) 74 Cal. App. 3d 347, 350 [141 Cal. Rptr. 437]; *Tielsch v. City of Anaheim* (1984) 160 Cal. App. 3d 576, 578 [206 Cal. Rptr. 740]; [***23] *Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1103 [103 Cal. Rptr. 2d 882].) If a time limit in a mandamus proceeding is held to be jurisdictional, estoppel or waiver cannot extend the time. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15

Received
August 26, 2011
Commission on
State Mandates

Cal.3d 660, 666, 674 [125 Cal. Rptr. 757, 542 P.2d 1349].)" [*913]

The Commission's fallback position is that this court should exercise its discretion to determine the applicability of the time bar, because this "issue is a question of law rather than of fact" and "[t]his matter affects the public interest since [County/Cities] are seeking reimbursement from the state for costs incurred to comply with a permit" issued by the LA Regional Water Board. In other words, "taxpayers statewide could unjustly suffer the consequences of funding a local program if Code of Civil Procedure section 341.5 is not considered and ... section 17516 is held to be unconstitutional." As authority, the Commission relies primarily on *City of Sacramento v. State of California*, *supra*, 50 Cal.3d at pages 64-65 (where issue of law rather than fact raised, public interest exception governs over [***24] collateral estoppel bar) and *Connell v. Superior Court, supra*, 59 Cal.App.4th at pages 387-388, 396-397 (public interest exception applicable to allow review of question of law as to whether recycled wastewater regulation constituted reimbursable state mandate.)

(5) Neither of the Commission's positions is successful. In the first instance, the time [**772] bar of section 341.5 of the Code of Civil Procedure applies to a challenge to the constitutionality of any statute relating to state funding for counties and other local governmental entities, *not* to a challenge to an action by an administrative agency. As for the second, neither *City of Sacramento* nor *Connell* stands for the proposition that the bar of the applicable statute of limitations may be raised for the first time on appeal.

Additionally, the Commission's characterization of the public interest to be served is a non sequitur. If Government Code section 17516 were in fact unconstitutional, it does not follow that "taxpayers statewide could *unjustly* suffer the consequences of funding a local program." (Italics added.) How could such funding result in injustice when any requirement of [***25] reimbursement to local governments would be under the constitutional compulsion of article XIII B, section 6

2. *Existence of Federal or State Mandate Issue for the Commission*

It is undisputed that a federal mandate is not subject to the subvention requirement of article XIII B, section 6 for a state mandate. Accordingly, if the Permit, including the subject two obligations thereunder, constitutes a federal mandate, the constitutionality of Section 17516(c) is not implicated, and thus, no issue as to its constitutionality is before this court to address on the merits. (See *People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912 [83 Cal. Rptr. 670, 464 P.2d 126] ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court."].) [*914]

In its amicus curiae brief, LA Regional Water Board takes the position that, as a matter of law, Section 17516(c) is consistent with article XIII B, section 6 (and thus not unconstitutional) "to the extent Division 7, Chapter 5.5 (commencing with Water Code section 13370)" simply implements federal mandates under the Clean Water Act (33 U.S.C. ß 1342(b)). [***26] The water boards, i.e., the State Water Board and its Regional Water Boards, implement the federal permit program under chapter 5.5, which the California Legislature enacted to bypass administration of such program directly by the federal Environmental Protection Agency.

LA Regional Water Board takes the further position that the federal mandate nature of its NPDES permits remains constant although it exercises discretion to control the discharge of pollutants through municipal stormwater programs not appearing in federal regulations. Specifically, LA Regional Water Board argues: "When a state [Regional Water Board] issues an NPDES permit requiring municipalities to inspect facilities as a means of controlling their discharge of pollutants, this is not shifting state responsibilities onto local agencies[, because f]ederal law imposes inspection requirements upon municipal permittees."

As for the trash receptacle obligation, LA Regional Water Board points out the Clean Water Act allows the use of programs to control discharge of pollutants in connection with a municipal stormwater permit and argues one such program under the Permit is the ability of "municipalities to employ 'Best [***27] Management Practices' (BMPs) to ... attain water quality standards." It identifies "[t]he Permit's trash receptacle requirement as one such [BMP]."

It further argues that the trash receptacle obligation cannot be deemed a state-mandated program, because it is not "an absolute requirement. Any permittee may petition the Regional Water Board to substitute another equally effective BMP for one included within the Permit.[] [For instance, i]f a permittee demonstrates that [**773] a pre-existing program or level of service will be equally effective in controlling pollution, it may seek to substitute that program."

We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances. As explained, *ante*, the existence of a federal, as contrasted with a state, mandate is not easily ascertainable.

By letter, we invited the parties and LA Regional Water Board to address whether an obligation under an NPDES permit by a Regional Water Board can qualify as

Received
August 26, 2011
Commission on
State Mandates

a state mandate within the meaning of article XIII B, section 6, assuming an NPDES permit itself qualified as a federal mandate, and if so, [*915] why each [***28] of the subject two obligations does or does not constitute a state mandate. We have received their responses.

a. *NPDES Permits Issued by Regional Water Boards*

"California cases have repeatedly explained the complicated web of federal and state laws and regulations concerning water pollution, especially storm sewer discharge into the public waterways. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619-621 [26 Cal. Rptr. 3d 304, 108 P.3d 862] (*Burbank*); *Building Industry Assn. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872-875 [22 Cal. Rptr. 3d 128] ... ; *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092-1094 [1 Cal. Rptr. 3d 76] ... ; *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1451-1453 [126 Cal. Rptr. 2d 389].)

(6) "For purposes of this case, the important point is described by the California Supreme Court in *Burbank*: 'Part of the Federal Clean Water Act [33 U.S.C. ß 1251 et seq.] is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations [***29] and standards under the Clean Water Act. (*Arkansas v. Oklahoma* [(1992) 503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046]].) The NPDES sets out the conditions under which the federal [Enviromental Protection Agency] or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. ß 1342(a) & (b).) In California, wastewater discharge requirements established by the regional [water] boards are the equivalent of the NPDES permits required by federal law. (ß 13374.)' (*Burbank, supra*, 35 Cal.4th at p. 621.)

"California's Porter-Cologne Act (Wat. Code, ß 13000 et seq.) establishes a statewide program for water quality control. Nine regional [water] boards, overseen by the State [Water] Board, administer the program in their respective regions. (Wat. Code, ßß 13140, 13200 et seq., 13240, and 13301.) Water Code sections 13374 and 13377 authorize the Regional [Water] Board to issue federal NPDES permits for five-year periods. (33 U.S.C. ß 1342, subd. (b)(1)(B).)" [***30] [5] [**774] (*City of Rancho Cucamonga v. Regional Water Quality* [*916] *Control Bd.* (2006) 135 Cal.App.4th 1377, 1380-1381 [38 Cal. Rptr. 3d 450].) In a related case, Division Five of this district upheld the authority of LA Regional Water Board to issue the Permit here. (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 999-1000 [50 Cal. Rptr. 3d 619], review den. [holding the nine Regional Water Boards authorized under state law to issue NPDES permits].)

5 In pertinent part, article XIII B, section 6, provides: "[T]he Legislature may, but need not, provide a subvention of funds for the following mandates: [∂] ... [∂] (3) Legislative mandates enacted prior to January 1, 1975, or executive orders ... initially implementing legislation enacted prior to January 1, 1975." (Art. XIII B, ß 6, subd. (a)(3).) LA Regional Water Board argues that subvention under article XIII B, section 6, is not required as to the Permit, because it is an executive order implementing the Porter-Cologne Water Quality Control Act (Wat. Code, ß 13020 et seq.), which is legislation enacted in 1969. This argument fails for the reason that the executive order resulting in the 2001 Permit was not one "*initially*" implementing such pre-1975 legislation. Equally unsuccessful is LA Regional Water Board's apparent argument that Section 17516(c) should be deemed constitutional for the reason that "most of" the Porter-Cologne Act (div. 7) was enacted prior to 1975. The fatal fallacy of this position is that the exclusion of Section 17516(c) applies to all orders issued pursuant to division 7 *regardless* of the date the statute in question was enacted.

[***31] b. *Potential Federal and State Components of NPDES Permit*

As expected, LA Regional Water Board contends that as in the case of NPDES "permits as a whole, the individual conditions of an NPDES permit are federally required to meet the mandates of the Clean Water Act." It argues: "The Permit is federally required. The conditions within it are federally required to implement the Clean Water Act's mandates. The two cannot be separated into a 'federal' permit with 'state' conditions. [Citation.]"

County/Cities respond, contrariwise, that "[a]n NPDES permit can contain both federal and nonfederal requirements." As case authority, they rely primarily on *City of Burbank v. State Water Resources Control Bd., supra*, 35 Cal.4th 613. Our Supreme Court concluded that under the supremacy clause of the federal Constitution, a Regional Water Board must comply with the federal Clean Water Act in issuing an NPDES permit. (35 Cal. 4th at pp. 626-627.) Nonetheless, "[u]nder the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not 'less stringent' than those set out in the Clean Water Act. [Citation.]" (*Id.* at p. 620.) [***32] The court thus

Received
August 26, 2011
Commission on
State Mandates

acknowledged in *Burbank* that an NPDES permit may contain terms federally mandated and terms exceeding federal law. (See also *Burbank, supra*, at pp. 618, 628.) County/Cities also point out that the potential for non-federally mandated components of an NPDES permit is acknowledged under both federal law [6] and state law. [7]

6 In this regard, they rely on this federal statute: "Except as expressly provided in this Act [33 USCS ßß 1251 et seq.], nothing in this Act [33 USCS ßß 1251 et seq.] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation ... is in effect under this Act [33 USCS ßß 1251 et seq.], such State[, etc.] ... may not adopt or enforce any effluent limitation or other limitation ... which is less stringent than the effluent limitation, or other limitation ... ." (33 U.S.C.S. ß 1370.)

[***33]

7 On this point, they rely on this statutory provision: "Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." (Wat. Code, ß 13377.)

[*917]

[**775] Additionally, County/Cities argue "that an obligation imposed on a municipality arises as a result of a federal law or program does not, in and of itself, render that obligation a federal mandate." Rather, they assert that to qualify as a federal mandate, "federal law itself must impose the obligation upon the municipality." They point out Government Code section 17556 provides that costs flowing from a federal mandate may be subject [***34] to subvention if such costs exceed such mandate. [8] They also cite two cases in support of their position.

8 Government Code section 17556, subdivision (c), provides: "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds ... [∂] ... [∂] [t]he 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."

In *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 [16 Cal. Rptr. 3d 466, 94 P.3d 589], our Supreme Court concluded the costs incurred by school districts in holding mandatory expulsion hearings under Education Code section 48915 were state mandates subject to subvention under article XIII B, section 6. [***35] The court explained that expulsion was mandated under the Education Code, rather than federal law, and thus, the fact the costs were incurred to comport with federal due process, a federal mandate, was not controlling. (*San Diego Unified School Dist. v. Commission on State Mandates, supra*, at pp. 880-882.)

In the other case, *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564, the appellate court concluded that the finding a mandate was federal turned on whether "the state freely chose to impose the costs upon the local agency as a means of implementing a federal program" and that under these circumstances, "the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government." (*Id.* at p. 1594.)

c. *Existence of State Mandates Matter for the Commission*

A review of the pleadings and the matters that may be judicially noticed (Evid. Code, ßß 451, 452, 459) leads to the inescapable conclusion that whether the two obligations in question constitute federal or state mandates [***36] presents factual issues which must be addressed in the first instance by the [*918] Commission if Section 17516(c) were found to be unconstitutional. Resolution of the federal or state nature of these obligations therefore is premature and, thus, not properly before this court.

In its response, the Commission argues that if this court determines Section 17516(c) is unconstitutional, the subject test claims "should be remanded to ... Commission to 'decide in the first instance whether a local agency is entitled to reimbursement under [article XIII B,] section 6[.]' (*Lucia Mar Unified School District v. Honig*[, *supra*,] 44 Cal.3d 830, 837; Gov. Code, ß 17552.)"

The Commission stated that on such remand, it would apply the following cases in determining whether state mandates exist: *City of Sacramento v. State of Cali-*

Received
August 26, 2011
Commission on
State Mandates

fornia, supra, 50 Cal.3d 51, which sets forth various factors and criteria for determining whether the federal program imposes a mandate on the state; *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564, [**776] which it contends "provides guidance on whether the state, [***37] in turn, has mandated a federal program on the local governments"; *Long Beach Unified Sch. Dist. v. State of California, supra*, 225 Cal. App. 3d 155, which analyzes whether the state-mandated activities exceed federal requirements; and *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th 859, which also provides guidance on this same issue.

3. *"Executive Order" Under Revenue and Taxation Code Not Probative*

The Commission contends the exclusion of orders of the Regional Water Boards from the definition of "executive order" in Section 17516(c) does not contravene article XIII B, section 6, because Government Code section 17516 derives from the definition of "executive order" in Revenue and Taxation Code section 2209, [9] of which the voters were presumed to have known to exist [*919] when they adopted Proposition 4 (i.e., art. XIII B, ß 6) in 1979, and thus, Proposition 4 intended to endorse and continue such exclusion from the definition of "executive order" which was later carried over to Section 17516(c). We disagree.

9 Revenue and Taxation Code section 2209(c) provides: " 'Executive order' means any order, plan, requirement, rule or regulation issued ... [∂] ... [∂] ... [b]y any agency ... of state government; provided that the term 'executive order' shall not include any order ... issued by the State Water ... Board or by any regional water ... board pursuant to Division 7 (commencing with Section 13000) of the Water Code.

"It is the intent of the Legislature that the State Water ... Board and regional water ... boards will not adopt enforcement orders against publicly owned discharges which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available.

" 'Major' means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility." (Rev. and Tax. Code, ß 2209(c), added by Stats. 1974, ch. 457, ß 2, p. 1079, and amended by Stats. 1975, ch. 486, ß 2, p. 998, eff. Sept. 2, 1975.)

[***38] We further disagree with the Commission's reliance on a presumption that when the voters adopted Proposition 1A in November 2004, they knew of, and thus, necessarily approved of Section 17516(c)'s exclusion of orders of Regional Water Boards from the definition of "executive order."

(7) Our focus, instead, must be on the import of article XIII B, section 6, not on the preconstitutional scheme for subvention of funds to local agencies of which section 2209 of the Revenue and Taxation Code was part. As our Supreme Court instructs: "In construing the meaning of the constitutional provision [i.e., article XIII B, section 6], our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must look to the language of the provision itself. [Citation.]" (*County of Los Angeles v. California, supra*, 43 Cal.3d at p. 56.)

(8) The subvention requirement of article XIII B, section 6 applies "[w]henever the Legislature or any state agency mandates a new program or higher level of service ... ." The all-encompassing [***39] "any state agency" language defeats any perceived presumption that the electorate intended to incorporate into article XIII B, section 6 the exclusion of a particular state agency, e.g., the Regional Water Board, from its subvention requirement.

[**777] 4. *Section 17516(c) Unconstitutional as to Regional Water Boards*

LA Regional Water Board argues in its amicus curiae brief that Section 17516(c) is constitutional for the additional reason that its exemption from the subvention requirement of article XIII B, section 6, is "appropriate because the Water Boards regulate water pollution with an even hand. Whether the pollution originates from a local public agency or a private industrial source, the Water Boards must assure their permits protect water quality consistent with state and federal law."

This argument is not persuasive. Whether the permit in question issued by Regional Water Boards governs both public and private pollution dischargers to the same extent presents factual issues not yet resolved. In any event, the applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes [***40] a state mandate necessitating subvention under article XIII B, section 6. (See *Carmel Valley Fire Protection Dist. v. State of* [*920] *California* (1987) 190 Cal. App. 3d 521, 530-531, 534, 537, 541 [234 Cal. Rptr. 795] [executive orders for protective fire clothing and equipment state mandated even if rec-

Received
August 26, 2011
Commission on
State Mandates

ord, which was incomplete, revealed private sector firefighters also subject to the executive orders].)

(9) In contrast, the constitutional infirmity of Section 17516(c) is readily apparent from its plain language that the definition of " '[e]xecutive order' does not include *any* order, plan, requirement, rule, or regulation *issued by the State Water ... Board or by any regional water ... board* pursuant to Division 7 (commencing with Section 13000) of the Water Code." (ß 17516(c), italics added.) This exclusion of any order issued by any Regional Water Board contravenes the clear, unequivocal intent of article XIII B, section 6 that subvention of funds is required "[w]henever ... *any state agency* mandates a new program or higher level of service on any local government ... ." [10] (Italics added.) We therefore conclude that Section 17516(c) [***41] is unconstitutional to the extent it excludes "any order ... issued by ... any regional water ... board pursuant to Division 7 (commencing with Section 13000) of the Water Code" from the definition of " '[e]xecutive order.' " (Art. XIII B, ß6.)

10 At oral argument, when asked to identify the public policy or other reason that would be served by exempting Regional Water Boards from the constitutional subvention requirement, counsel for LA Regional Water Board responded exemption is warranted, because water is an important concern. No one can quarrel with the fact water plays an important role in California. Nonetheless, this reason does not compel the conclusion that an exemption should be carved out for Regional Water Boards as contrasted with those state agencies which regulate other important state interests.

This conclusion leads to the further conclusion that whether one or both of the subject two obligations constitutes a state mandate necessitating subvention of funds under [***42] article XIII B, section 6 is an issue that must in the first instance be resolved by the Commission. Accordingly, we uphold the trial court's issuance of a writ of mandate directing the Commission to vacate its decisions affirming its executive director's rejection of the four test claims and to consider these claims on the merits.

5. *Cross-appeal Moot*

County/Cities filed a protective cross-appeal from the judgment to the extent the trial court dismissed the portions of their writ of mandate petitions against LA Regional Water Board. [11] The threshold [**778] issue raised is whether County/Cities are entitled to proceed directly in superior court against LA [*921] Regional Water Board for reimbursement relief if they are statutorily precluded from obtaining a hearing before the Commission.

11 The trial court sustained the demurrer to the fourth cause of action for a writ of mandate directing LA Regional Water Board to delete or not enforce the inspection and trash receptacle obligations. The court granted its own motion for judgment on the pleadings without leave to amend as to LA Regional Water Board on the first cause of action for a writ of mandate directing reimbursement; the second cause of action for declaratory relief; and the fifth cause of action for a writ of mandate directing LA Regional Water Board to delete or not enforce the subject obligations.

[***43] County/Cities' position is they are entitled to a hearing on the merits of their claims before either the Commission or LA Regional Water Board. If this court determines the Commission's jurisdiction is exclusive, the Commission must afford them a hearing and determine the merits of their subvention claim under article XIII B, section 6. If not exclusive, County/Cities must be allowed to seek relief directly against Regional Water Board before the superior court.

LA Regional Water Board argues County/Cities have no right to seek subvention relief from a Regional Water Board, because reimbursement of costs mandated by the state must be pursued through the statutory subvention scheme, which is "the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B ... ." (Gov. Code, ß 17552.) Their claims thus must be addressed exclusively to the Commission in first instance.

The cross-appeal against LA Regional Water Board is moot in light of our above conclusion that the Commission is to hear and determine the merits of the County/Cities' test claims. We therefore do [***44] not reach the merits of the issues raised in the cross-appeal.

CONCLUSION

(10) Section 17516(c) is unconstitutional to the extent it purports to exempt orders issued by Regional Water Boards from the definition of "executive orders" for which subvention of funds to local governments for carrying out state mandates is required pursuant to article XIII B, section 6. The trial court therefore properly issued a writ of mandate directing the Commission to resolve the four test claims on the merits without reference to Section 17516(c). In light of this conclusion, we need not, and therefore do not, address the issues raised on the now moot cross-appeal. [*922]

Received
August 26, 2011
Commission on
State Mandates

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal and cross-appeal.

Klein, P. J., and Croskey, J., concurred.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 4

Received
August 26, 2011
Commission on
State Mandates

COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents. CITY OF SONOMA et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents

L.A. No. 32106

Supreme Court of California

43 Cal. 3d 46; 729 P.2d 202; 233 Cal. Rptr. 38; 1987 Cal. LEXIS 273

January 2, 1987

SUBSEQUENT HISTORY: Appellants' petition for a rehearing was denied February 26, 1987.

PRIOR HISTORY: Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges. The Court of Appeal, Second Dist., Div. Five, affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings (B001713 and B003561).

DISPOSITION: The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied a petition for writ of mandate to compel the State Board of Control to approve reimbursement claims of local government entities, for costs incurred in providing an increased level of service mandated by the state for workers' compensation benefits. The trial court found that Cal. Cosnt., art. XIII B, ß 6, requiring reimbursement when the state mandates a new program or a higher level of service, is subject to an implied exception for the rate of inflation. In another action, the trial court, on similar claims, granted partial relief and ordered the board to set aside its ruling denying the claims. The trial court, in this second action, found that reimbursement was not required if the increases in benefits were only cost of living increases not imposing a higher or increased level of service on an existing program. Thus, the second matter was remanded due to insubstantial evidence and legally inadequate findings. (Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges.) The Court of Appeal, Second Dist., Div. Five, Nos. B001713 and B003561 affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings.

The Supreme Court reversed the judgment of the Court of Appeal, holding that the petitions lacked merit and should have been denied by the trial court without the necessity of further proceedings before the board. The court held that when the voters adopted art. XIII B, ß 6, their intent was not to require that state to provide subvention whenever a newly enacted statute results incidentally in some cost to local agencies, but only to require subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. Thus, the court held, reimbursement was not required by art. XIII B, ß 6. Finally, the court held that no pro tanto repeal of Cal. Const., art. XIV, ß 4 (workers' compensation), was intended or made necessary by the adoption of art. XIII B, ß 6. (Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

Received
August 26, 2011
Commission on
State Mandates

(1) State of California ß 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Costs to Be Reimbursed. --When the voters adopted Cal. Const., art. XIII B, ß 6 (reimbursement to local agencies for new programs and services), their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities.

(2) Statutes ß 18--Repeal--Effect--"Increased Level of Service." --The statutory definition of the phrase "increased level of service," within the meaning of Rev. Tax. Code, ß 2207, subd. (a) (programs resulting in increased costs which local agency is required to incur), did not continue after it was specifically repealed, even though the Legislature, in enacting the statute, explained that the definition was declaratory of existing law. It is ordinarily presumed that the Legislature, by deleting an express provision of a statute, intended a substantial change in the law.

[See Am.Jur.2d, Statutes, ß 384.]

(3) Constituional Law ß 13--Construction of Constitutions--Language of Enactment. --In construing the meaning of an initiative constitutional provision, a reviewing court's inquiry is focused on what the voters meant when they adopted the provision. To determine this intent, courts must look to the language of the provision itself.

(4) Constitutional Law ß 13--Construction of Constitutions--Language of Enactment--"Program" --The word "program," as used in Cal. Const., art. XIII B, ß 6 (reimbursement to local agencies for new programs and services), refers to programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

(5) State of California ß 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Increases in Workers' Compensation Benefits. --The provisions of Cal. Const., art. XIII B. ß 6 (reimbursement to local agencies for nw programs and services), have no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. Although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of art. XIII B. ß 6. Accordingly, the State Board of Control properly denied reimbursement to local governmental entitles for costs incurred in providing state-mandated increases in workers' compensation benefits. (Disapproving *City of Sacramento v. State of California* (1984) 156 Cal. App. 3d 182 [203 Cal. Rptr. 258], to the extent it reached a different conclusion with respect to expenses incurred by local entities as the result of a newly enacted law requiring that all public employees by covered by unemployment insurance.)

[See **Cal.Jur.3d,** State of California, ß 78.]

(6) Constitutional Law ß 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts. --Controlling principles of construction require that in the absence of irreconcilable conflict among their various parts, constitutional provisions must be harmonized and construed to give effect to all parts.

(7) Constitutional Law ß 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts--Pro Tanto Repeal of Constitutional Provision. --The goals of Cal. Const., art XIII B, ß 6 (reimbursement to local agencies for new programs and services), were to protect residents from excessive taxation and government spending, and to preclude a shift of financial responsibility for governmental functions from the state to local agencies. Since these goals can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, the adoption of art. XIII B, ß 6, did not effect a pro tanto repeal of Cal. Const., art. XIV, ß 4, which gives the Legislature plenary power over workers' compensation.

COUNSEL: De Witt W. Clinton, County Counsel, Paula A. Snyder, Senior Deputy County Counsel, Edward G. Pozorski, Deputy County Counsel, John W. Witt, City Attorney, Kenneth K. Y. So, Deputy City Attorney, William D. Ross, Diana P. Scott, Ross & Scott and Rogers & Wells for Plaintiffs and Appellants.

James K. Hahn, City Attorney (Los Angeles), Thomas C. Bonaventura and Richard Dawson, Assistant City Attorneys, and Patricia V. Tubert, Deputy City Attorney, as Amici Curiae on behalf of Plaintiffs and Appellants.

John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Henry G. Ullerich and

Received
August 26, 2011
Commission on
State Mandates

Martin H. Milas, Deputy Attorneys General, for Defendants and Respondents.

Laurence Gold, Fred H. Altshuler, Marsha S. Berzon, Gay C. Danforth, Altshuler & Berzon, Charles P. Scully II, Donald C. Carroll, Peter Weiner, Heller, Ehrman, White & McAuliffe, Donald C. Green, Terrence S. Terauchi, Manatt, Phelps, Rothenberg & Tunney and Clare Bronowski as Amici Curiae on behalf of Defendants and Respondents.

JUDGES: Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.

OPINION BY: GRODIN

OPINION

[*49] [**203] [***38] We are asked in this proceeding to determine whether legislation enacted in 1980 and 1982 increasing certain workers' compensation benefit payments is subject to the command of article XIII B of the California Constitution that local government costs mandated by the state must be funded by the state. The County of Los Angeles and the City of Sonoma sought review by this court of a decision of the Court of Appeal which held that state-mandated increases [***39] in workers' compensation benefits that do not exceed the rise in the cost of living are not costs which must be borne by the state under article XIII B, an initiative constitutional provision, and legislative implementing statutes.

Although we agree that the State Board of Control properly denied plaintiffs' claims, our conclusion rests on grounds other than those relied upon by the Court of Appeal, and requires that its judgment be reversed. (1) We conclude that when the voters adopted article XIII B, section 6, their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or [*50] increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" they had in mind the commonly understood meaning of the term, programs which carry out the governmental function of providing services to the public. Reimbursement for the cost or increased cost of providing workers' compensation benefits to employees of local agencies is not, therefore, required by section 6.

We recognize also the potential conflict between article XIII B and the grant of plenary power over workers' compensation bestowed upon the Legislature by section 4 of article XIV, but in accord with established rules of construction our construction of article XIII B, section 6, harmonizes these constitutional provisions.

I

On November 6, 1979, the voters approved an initiative measure which added article XIII B to the California Constitution. That article imposed spending limits on the state and local governments and provided in section 6 (hereafter section 6): "Whenever the Legislature or any state agency mandates a new program or higher level of [**204] service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [para.] (a) Legislative mandates requested by the local agency affected; [para.] (b) Legislation defining a new crime or changing an existing definition of a crime; or [para.] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." No definition of the phrase "higher level of service" was included in article XIII B, and the ballot materials did not explain its meaning. [1]

1 The analysis by the Legislative Analyst advised that the state would be required to "reimburse local governments for the cost of complying with 'state mandates.' 'State mandates' are requirements imposed on local governments by legislation or executive orders." Elsewhere the analysis repeats: "[The] initiative would establish a requirement that the state provide funds to reimburse local agencies for the cost of complying with state mandates . . . .

The one ballot argument which made reference to section 6, referred only to the "new program" provision, stating, "Additionally, this measure [para.] (1) will not allow the state government to force programs on local governments without the state paying for them."

The genesis of this action was the enactment in 1980 and 1982, after article XIII B had been adopted, of laws increasing the amounts which [*51] employers, including local governments, must pay in workers' compensation benefits to injured employees and families of deceased employees.

The first of these statutes, Assembly, Bill No. 2750 (Stats. 1980, ch. 1042, p. 3328), amended several sections of the Labor Code related to workers' compensation. The amendments of Labor Code sections 4453, 4453.1 and 4460 increased the maximum weekly wage

Received
August 26, 2011
Commission on
State Mandates

upon which temporary and permanent disability indemnity is computed from $ 231 per week to $ 262.50 per week. The amendment of section 4702 of the Labor Code increased certain death benefits from $ 55,000 to $ 75,000. No appropriation [***40] for increased state-mandated costs was made in this legislation. [2]

2 The bill was approved by the Governor and filed with the Secretary of State on September 22, 1980. Prior to this, the Assembly gave unanimous consent to a request by the bill's author that his letter to the Speaker stating the intent of the Legislation be printed in the Assembly Journal. The letter stated: (1) that the Assembly Ways and Means Committee had recommended approval without appropriation on grounds that the increases were a result of changes in the cost of living that were not reimbursable under either Revenue and Taxation Code section 2231, or article XIII B; (2) the Senate Finance Committee had rejected a motion to add an appropriation and had approved a motion to concur in amendments of the Conference Committee deleting any appropriation.

Legislative history confirms only that the final version of Assembly Bill No. 2750, as amended in the Assembly on April 16, 1986, contained no appropriation. As introduced on March 4, 1980, with a higher minimum salary of $ 510 on which to base benefits, an unspecified appropriation was included.

Test claims seeking reimbursement for the increased expenditure mandated by these changes were filed with the State Board of Control in 1981 by the County of San Bernardino and the City of Los Angeles. The board rejected the claims, after hearing, stating that the increased maximum workers' compensation benefit levels did not change the terms or conditions under which benefits were to be awarded, and therefore did not, by increasing the dollar amount of the benefits, create an increased level of service. The first of these consolidated actions was then filed by the County of Los Angeles, the County of San Bernardino, and the City of San Diego, seeking a writ of mandate to compel the board to approve the reimbursement claims for costs incurred in providing an increased level of service mandated by the state pursuant to Revenue and Taxation Code section 2207. [3] They also sought a declaration that because the State of California and the board were obliged by article XIII B to reimburse them, they were not obligated to [**205] pay the increased benefits until the state provided reimbursement.

3 The superior court consolidated another action by the County of Butte, Novato Fire Protection District, and the Galt Unified School District with that action. Neither those plaintiffs nor the County of San Bernardino are parties to the appeal.

The superior court denied relief in that action. The court recognized that although increased benefits reflecting cost of living raises were not expressly [*52] excepted from the requirement of state reimbursement in section 6 the intent of article XIII B to limit governmental expenditures to the prior year's level allowed local governments to make adjustment for changes in the cost of living, by increasing their own appropriations. Because the Assembly Bill No. 2750 changes did not exceed cost of living changes, they did not, in the view of the trial court, create an "increased level of service" in the existing workers' compensation program.

The second piece of legislation (Assem. Bill No. 684), enacted in 1982 (Stats. 1982, ch. 922. p. 3363), again changed the benefit levels for workers' compensation by increasing the maximum weekly wage upon which benefits were to be computed, and made other changes among which were: The bill increased minimum weekly earnings for temporary and permanent total disability from $ 73.50 to $ 168, and the maximum from $ 262.50 to $ 336. For permanent partial disability the weekly wage was raised from a minimum of $ 45 to $ 105, and from a maximum of $ 105 to $ 210, in each case for injuries occurring on or after January 1, 1984. (Lab. Code, ß 4453.) A $ 10,000 limit on additional compensation for injuries resulting from serious and willful employer misconduct was removed (Lab. Code, ß 4553), and the maximum death benefit was raised from $ 75,000 to $ 85,000 for deaths in 1983, and to $ 95,000 for deaths on or after January 1, 1984. (Lab. Code, ß 4702.)

Again the statute included no appropriation and this time the statute expressly acknowledged that the omission was made "[notwithstanding] section 6 of Article XIIIB of the California Constitution and section 2231 . . . of the Revenue and Taxation [***41] Code." (Stats. 1982, ch. 922, ß 17, p. 3372.) [4]

4 The same section "recognized," however, that a local agency "may pursue any remedies to obtain reimbursement available to it" under the statutes governing reimbursement for state-mandated costs in chapter 3 of the Revenue and Taxation Code, commencing with section 2201.

Once again test claims were presented to the State Board of Control, this time by the City of Sonoma, the County of Los Angeles, and the City of San Diego. Again the claims were denied on grounds that the statute

Received
August 26, 2011
Commission on
State Mandates

made no change in the terms and conditions under which workers' compensation benefits were to be awarded, and the increased costs incurred as a result of higher benefit levels did not create an increased level of service as defined in Revenue and Taxation Code section 2207, subdivision (a).

The three claimants then filed the second action asking that the board be compelled by writ of mandate to approve the claims and the state to pay them, and that chapter 922 be declared unconstitutional because it was not adopted in conformity with requirements of the Revenue and Taxation Code or [*53] section 6. The trial court granted partial relief and ordered the board to set aside its ruling. The court held that the board's decision was not supported by substantial evidence and legally adequate findings on the presence of a state-mandated cost. The basis for this ruling was the failure of the board to make adequate findings on the possible impact of changes in the burden of proof in some workers' compensation proceedings (Lab. Code, ß 3202.5); a limitation on an injured worker's right to sue his employer under the "dual capacity" exception to the exclusive remedy doctrine (Lab. Code, ßß 3601- 3602); and changes in death and disability benefits and in liability in serious and wilful misconduct cases. (Lab. Code, ß 4551.)

The court also held: "[The] changes made by chapter 922, Statutes of 1982 may be excluded from state-mandated costs if that change effects a cost of living increase which does not impose a higher or increased level of service on an existing program." The City of Sonoma, the County of Los Angeles, and the City of San Diego [**206] appeal from this latter portion of the judgment only.

II

The Court of Appeal consolidated the appeals. The court identified the dispositive issue as whether legislatively mandated increases in workers' compensation benefits constitute a "higher level of service" within the meaning of section 6, or are an "increased level of service" [5] described in subdivision (a) of Revenue and Taxation Code section 2207 . The parties did not question the proposition that higher benefit payments might constitute a higher level of "service." The dispute centered on whether higher benefit payments which do not exceed increases in the cost of living constitute a higher level of service. Appellants maintained that the reimbursement requirement of section 6 is absolute and permits no implied or judicially created exception for increased costs that do not exceed the inflation rate. The Court of Appeal addressed the problem as one of defining "increased level of service."

5 The court concluded that there was no legal or semantic difference in the meaning of the terms and considered the intent or purpose of the two provisions to be identical.

The court rejected appellants' argument that a definition of "increased level of service" that once had been included in section 2231, subdivision (e) of the Revenue and Taxation Code should be applied. That definition brought any law that imposed "additional costs" within the scope of "increased level of service." The court concluded that the repeal of section 2231 in 1975 (Stats. 1975, ch. 486, ß 7, pp. 999-1000) and the failure of the Legislature by statute or the electorate in article XIII B to readopt the [*54] definition must be treated as reflecting an intent to change the law. (*Eu* v. *Chacon* (1976) 16 Cal.3d 465, 470 [128 Cal. Rptr. 1, 546 P.2d 289].) [6] On that basis the court [***42] concluded that increased costs were no longer tantamount to an increased level of service.

6 The Court of Appeal also considered the expression of legislative intent reflected in the letter by the author of Assembly Bill No. 2750 (see fn. 2, *ante*). While consideration of that expression of intent may have been proper in construing Assembly Bill No. 2750, we question its relevance to the proper construction of either section 6, adopted by the electorate in the prior year, or of Revenue and Taxation Code section 2207, subdivision (a) enacted in 1975. (Cf. *California Employment Stabilization Co.* v. *Payne* (1947) 31 Cal.2d 210, 213-214 [187 P.2d 702].) There is no assurance that the Assembly understood that its approval of printing a statement of intent as to the later bill was also to be read as a statement of intent regarding the earlier statute, and it was not relevant to the intent of the electorate in adopting section 6.

The Court of Appeal also recognized that the history of Assembly Bill No. 2750 and Statutes 1982, chapter 922, which demonstrated the clear intent of the Legislature to omit any appropriation for reimbursement of local government expenditures to pay the higher benefits precluded reliance on reimbursement provisions included in benefit-increase bills passed in earlier years. (See e.g., Stats. 1973, chs. 1021 and 1023.)

The court nonetheless assumed that an increase in costs mandated by the Legislature did constitute an increased level of service if the increase exceeds that in the cost of living. The judgment in the second, or "Sonoma" case was affirmed. The judgment in the first, or "Los Angeles" case, however, was reversed and the matter

Received
August 26, 2011
Commission on
State Mandates

"remanded" to the board for more adequate findings, with directions. [7]

7 We infer that the intent of the Court of Appeal was to reverse the order denying the petition for writ of mandate and to order the superior court to grant the petition and remand the matter to the board with directions to set aside its order and reconsider the claim after making the additional findings. (See Code Civ. Proc. ß 1094.5, subd. (f).)

III

The Court of Appeal did not articulate the basis for its conclusion that costs in excess of the increased cost of living do constitute a reimbursable increased level of service within the meaning of section 6. Our task in ascertaining the meaning of the phrase is aided somewhat by one explanatory reference to this part of section 6 in the ballot materials.

A statutory requirement of state reimbursement was in effect when section 6 [**207] was adopted. That provision used the same "increased level of service" phraseology but it also failed to include a definition of "increased level of service," providing only: "Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [para.] (a) Any law . . . which mandates a new program or an increased level of service of an existing program." (Rev. & Tax. Code ß 2207.) As noted, however, the definition of that term which had been [*55] included in Revenue and Taxation Code section 2164.3 as part of the Property Tax Relief Act of 1972 (Stats. 1972, ch. 1406, ß 14.7, p. 2961), had been repealed in 1975 when Revenue and Taxation Code section 2231, which had replaced section 2164.3 in 1973, was repealed and a new section 2231 enacted. (Stats. 1975. ch. 486, ßß 6 & 7, p. 999.) [8] Prior to repeal, Revenue and Taxation Code section 2164.3 , and later section 2231, after providing in subdivision (a) for state reimbursement, explained in subdivision (e) that ""Increased level of service' means any requirement mandated by state law or executive regulation . . . which makes necessary expanded or additional costs to a county, city and county, city, or special district." (Stats. 1972, ch. 1406, ß 14.7, p. 2963.)

8 Pursuant to the 1972 and successor 1973 property tax relief statutes the Legislature had included appropriations in measures which, in the opinion of the Legislature, mandated new programs or increased levels of service in existing programs (see, e.g., Stats. 1973, ch. 1021, ß 4, p. 2026; ch. 1022, ß 2, p. 2027; Stats. 1976, ch. 1017, ß 9, p. 4597) and reimbursement claims filed with the State Board of Control pursuant to Revenue and Taxation Code sections 2218-2218.54 had been honored. When the Legislature fails to include such appropriations there is no judicially enforceable remedy for the statutory violation notwithstanding the command of Revenue and Taxation Code section 2231, subdivision (a) that "[the] state shall reimburse each local agency for all 'costs mandated by the state,' as defined in Section 2207" and the additional command of subdivision (b) that any statute imposing such costs "provide an appropriation therefor." (*County of Orange* v. *Flournoy* (1974) 42 Cal. App. 3d 908, 913 [117 Cal. Rptr. 224].)

[***43] (2) Appellants contend that despite its repeal, the definition is still valid, relying on the fact that the Legislature, in enacting section 2207, explained that the provision was "declaratory of existing law." (Stats. 1975, ch. 486, ß 18.6, p. 1006.) We concur with the Court of Appeal in rejecting this argument. "[It] is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*Lake Forest Community Assn.* v. *County of Orange* (1978) 86 Cal. App. 3d 394, 402 [150 Cal. Rptr. 286]; see also *Eu* v. *Chacon, supra*, 16 Cal.3d 465, 470.) Here, the revision was not minor: a whole subdivision was deleted. As the Court of Appeal noted, "A change must have been intended; otherwise deletion of the preexisting definition makes no sense."

Acceptance of appellants' argument leads to an unreasonable interpretation of section 2207. If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post-1975 statutory scheme. Since that definition has been repealed, an act of which the drafters of section 6 and the electorate are presumed to have been [*56] aware, we may not conclude that an intent existed to incorporate the repealed definition into section 6.

(3) In construing the meaning of the constitutional provision, our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must look to the language of the provision itself. (*ITT World Communications, Inc.* v. *City and County of San Francisco* (1985) 37 Cal.3d 859, 866 [210 Cal. Rptr. 226, 693 P.2d 811].) In section 6, the electorate commands [**208] that the state reimburse local

Received
August 26, 2011
Commission on
State Mandates

agencies for the cost of any "new program or higher level of service." Because workers' compensation is not a new program, the parties have focussed on whether providing higher benefit payments constitutes provision of a higher level of service. As we have observed, however, the former statutory definition of that term has been incorporated into neither section 6 nor the current statutory reimbursement scheme.

(4) Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term -- programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: "Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them." (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments [***44] to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase "to force programs on local governments" confirms that the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not [*57] for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to "force" programs on localities.

The language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. We believe that if the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word "program" was being used in such a unique fashion. (Cf. *Fuentes* v. *Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [128 Cal. Rptr. 673, 547 P.2d 449]; *Big Sur Properties* v. *Mott* (1976) 63 Cal. App. 3d 99, 105 [132 Cal. Rptr. 835].) Nothing in the history of article XIII B that we have discovered, or that has been called to our attention by the parties, suggests that the electorate had in mind either this construction or the additional indirect, but substantial impact it would have on the legislative process.

Were section 6 construed to require state subvention for the incidental cost to local governments of general laws, the result would be far-reaching indeed. Although such laws may be passed by simple majority vote of each house of the Legislature (art. IV, ß 8, subd. (b)), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by article XIII B. (Rev. & Tax. Code, ßß 2255, subd. (c).) Revenue bills must be passed by two-thirds vote of each house of the Legislature. (Art. IV, ß 12, subd. (d).) Thus, were we to construe section 6 as [**209] applicable to general legislation whenever it might have an incidental effect on local agency costs, such legislation could become effective only if passed by a supermajority vote. [9] Certainly no such intent is reflected in the language or history of article XIII B or section 6.

9 Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question. (See *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 228 [149 Cal. Rptr. 239, 583 P.2d 1281].)

(5) We conclude therefore that section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation [*58] benefits that employees of private individuals or organizations receive. [10] Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state

Received
August 26, 2011
Commission on
State Mandates

through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See [***45] Lab. Code, ß 3201 et seq.) Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.

10 The Court of Appeal reached a different conclusion in *City of Sacramento* v. *State of California* (1984) 156 Cal. App. 3d 182 [203 Cal. Rptr. 258], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as to whether the expense was a "state mandated cost," rather than as whether the provision of an employee benefit was a "program or service" within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.

IV

(6) Our construction of section 6 is further supported by the fact that it comports with controlling principles of construction which "require that in the absence of irreconcilable conflict among their various parts, [constitutional provisions] must be harmonized and construed to give effect to all parts. (*Clean Air Constituency* v. *California State Air Resources Bd*. (1974) 1 Cal.3d 801, 813-814 [114 Cal. Rptr. 577, 523 P.2d 617]; *Serrano* v. *Priest* (1971) 5 Cal.3d 584, 596 [96 Cal. Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; *Select Base Materials* v. *Board of Equal*. (1959) 51 Cal.2d 640, 645 [335 P.2d 672].)" (*Legislature* v. *Deukmejian* (1983) 34 Cal.3d 658, 676 [194 Cal. Rptr. 781, 669 P.2d 17].)

Our concern over potential conflict arises because article XIV, section 4, [11] gives the [**210] Legislature "plenary power, unlimited by any provision of [*59] this Constitution" over workers' compensation. Although seemingly unrelated to workers' compensation, section 6, as we have shown, would have an indirect, but substantial impact on the ability of the Legislature to make future changes in the existing workers' compensation scheme. Any changes in the system which would increase benefit levels, provide new services, or extend current service might also increase local agencies' costs. Therefore, even though workers' compensation is a program which is intended [***46] to provide benefits to all injured or deceased employees and their families, because the change might have some incidental impact on local government costs, the change could be made only if it commanded a supermajority vote of two-thirds of the members of each house of the Legislature. The potential conflict between section 6 and the plenary power over workers' compensation granted to the Legislature by article XIV, section 4 is apparent.

11 Section 4: "The Legislature is hereby *expressly vested with plenary power, unlimited by any provision of this Constitution*, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribu-

Received
August 26, 2011
Commission on
State Mandates

nal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

"The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees of the employer.

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed." (Italics added.)

The County of Los Angeles, while recognizing the impact of section 6 on the Legislature's power over workers' compensation, argues that the "plenary power" granted by article XIV, section 4, is power over the substance of workers' compensation legislation, and that this power would be unaffected by article XIII B if the latter is construed to compel reimbursement. The subvention requirement, it is argued, is analogous to other procedural [*60] limitations on the Legislature, such as the "single subject rule" (art. IV, ß 9), as to which article XIV, section 4, has no application. We do not agree. A constitutional requirement that legislation either exclude employees of local governmental agencies or be adopted by a supermajority vote would do more than simply establish a format or procedure by which legislation is to be enacted. It would place workers' compensation legislation in a special classification of substantive legislation and thereby curtail the power of a majority to enact substantive changes by any procedural means. If section 6 were applicable, therefore, article XIII B would restrict the power of the Legislature over workers' compensation.

The City of Sonoma concedes that so construed article XIII B *would* restrict the plenary power of the Legislature, and reasons that the provision therefore either effected a pro tanto repeal of article XIV, section 4, or must be accepted as a limitation on the power of the Legislature. We need not accept that conclusion, however, because our construction of section 6 permits the constitutional provisions to be reconciled.

Construing a recently enacted constitutional provision such as section 6 to avoid conflict with, and thus pro tanto repeal of, an earlier provision is also consistent with [**211] and reflects the principle applied by this court in *Hustedt* v. *Workers' Comp. Appeals Bd*. (1981) 30 Cal.3d 329 [178 Cal. Rptr. 801, 636 P.2d 1139]. There, by coincidence, article XIV, section 4, was the later provision. A statute, enacted pursuant to the plenary power of the Legislature over workers' compensation, gave the Workers' Compensation Appeals Board authority to discipline attorneys who appeared before it. If construed to include a transfer of the authority to discipline attorneys from the Supreme Court to the Legislature, or to delegate that power to the board, article XIV, section 4, would have conflicted with the constitutional power of this court over attorney discipline and might have violated the separation of powers doctrine. (Art. III, ß 3.) The court was thus called upon to determine whether the adoption of article XIV, section 4, granting the Legislature plenary power over workers' compensation effected a pro tanto repeal of the preexisting, exclusive jurisdiction of the Supreme Court over attorneys.

We concluded that there had been no pro tanto repeal because article XIV, section 4, did not give the Legislature the authority to enact the statute. Article XIV, section 4, did not expressly give the Legislature power over attorney discipline, and that power was not integral to or necessary to the establishment of a complete system of workers' compensation. In those circumstances the presumption against implied repeal controlled. "It is well established that the adoption of article XIV, section 4 'effected a repeal *pro tanto*' of any state constitutional provisions which conflicted with that [*61] amendment. (*Subsequent Etc. Fund.* v. *Ind. Acc. Com*. (1952) 39 Cal.2d 83, 88 [244 P.2d 889]; *Western Indemnity Co.* v. *Pillsbury* (1915) 170 Cal. 686, 695, [151 P. 398].) A *pro tanto* repeal of conflicting state constitutional provisions removes 'insofar as necessary' any restrictions which would prohibit the realization [***47] of the objectives of the new article. (*Methodist Hosp. of Sacramento* v. *Saylor* (1971) 5 Cal.3d 685, 691-692 [97 Cal. Rptr. 1, 488 P.2d 161]; cf. *City and County of San Francisco* v. *Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d 103, 115-117 [148 Cal. Rptr. 626, 583 P.2d 151].) Thus the question becomes whether the board must have the power to discipline attorneys if the objectives of article XIV, section 4 are to be effectuated. In other words, does the achievement of those objectives compel the modification of a power -- the disciplining of attorneys -- that otherwise rests exclusively with this court?" (*Hustedt* v. *Workers' Comp. Appeals Bd., supra*, 30 Cal.3d 329, 343.) We concluded that the ability to discipline attorneys appearing before it was not necessary to the expeditious resolution of workers' claims or the efficient administration of the agency. Thus, the absence of disciplinary power over attorneys would not preclude the board from

Received
August 26, 2011
Commission on
State Mandates

achieving the objectives of article XIV, section 4, and no pro tanto repeal need be found.

(7) A similar analysis leads to the conclusion here that no pro tanto repeal of article XIV, section 4, was intended or made necessary here by the adoption of section 6. The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. (*Huntington Park Redevelopment Agency* v. *Martin* (1985) 38 Cal.3d 100, 109-110 [211 Cal. Rptr. 133, 695 P.2d 220].) Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage -- costs which all employers must bear -- neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.

[**212] Therefore, since the objectives of article XIII B and section 6 can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, section 6 did not effect a pro tanto repeal of the Legislature's otherwise plenary power over workers' compensation, a power that does not contemplate that the Legislature rather than the employer must fund the cost or increases in [*62] benefits paid to employees of local agencies, or that a statute affecting those benefits must garner a supermajority vote.

Because we conclude that section 6 has no application to legislation that is applicable to employees generally, whether public or private, and affects local agencies only incidentally as employers, we need not reach the question that was the focus of the decision of the Court of Appeal -- whether the state must reimburse localities for state-mandated cost increases which merely reflect adjustments for cost-of-living in existing programs.

V

It follows from our conclusions above, that in each of these cases the plaintiffs' reimbursement claims were properly denied by the State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

In B001713, the Los Angeles case, the Court of Appeal reversed the judgment of the superior court denying the petition. In the B003561, the Sonoma case, the superior court granted partial relief, ordering further proceedings before the board, and the Court of Appeal affirmed that judgment.

The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

CONCUR BY: MOSK

CONCUR

MOSK, J. I concur in the result reached by the majority, but I prefer the rationale of the Court of Appeal, i.e., that neither article XIII B, section 6, of the Constitution nor Revenue and Taxation Code sections 2207 and 2231 require state subvention for increased workers' compensation benefits provided by chapter 1042, Statutes of 1980, and chapter 922, Statutes of 1982, but only if the increases do not exceed applicable cost-of-living adjustments because such payments do not result in an increased level of service.

Under the majority theory, the state can order unlimited financial burdens on local units of government without providing the funds to meet those burdens. This may have serious implications in the future, and does violence to the requirement of section 2231, subdivision (a), that the state reimburse local government for "all costs mandated by the state."

In this instance it is clear from legislative history that the Legislature did not intend to mandate additional burdens, but merely to provide a cost-of-living [*63] adjustment. I agree with the Court of Appeal that this was permissible.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 5

Received
August 26, 2011
Commission on
State Mandates

COUNTY OF SAN DIEGO, Cross-complainant and Respondent, v. THE STATE OF CALIFORNIA et al., Cross-defendants and Appellants.

No. S046843.

SUPREME COURT OF CALIFORNIA

15 Cal. 4th 68; 931 P.2d 312; 61 Cal. Rptr. 2d 134; 1997 Cal. LEXIS 630; 97 Cal. Daily Op. Service 1555; 97 Daily Journal DAR 2296

March 3, 1997, Decided

PRIOR HISTORY: Superior Court of San Diego County, Super. Ct. No. 634931. Michael I. Greer, * Harrison R. Hollywood and Judith McConnell, Judges.

* Retired judge of the San Diego Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISPOSITION: The judgment of the Court of Appeal is affirmed insofar as it holds that the exclusion of adult MIP's from Medi-Cal imposed a mandate on San Diego within the meaning of section 6. The judgment is reversed insofar as it holds that the state required San Diego to spend at least $ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. The matter is remanded to the Commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, ß 1442.5, former subd. (c); Welf. & Inst. Code, ß 10000, 17000) forced San Diego to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which San Diego is entitled.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

After a county's unsuccessful administrative attempts to obtain reimbursement from the state for expenses incurred through its County Medical Services (CMS) program, and after a class action was filed on behalf of CMS program beneficiaries seeking to enjoin termination of the program, the county filed a cross-complaint and petition for a writ of mandate (Code Civ. Proc., ß 1085) against the state, the Commission on State Mandates, and various state officers, to determine the county's rights under Cal. Const., art. XIII B, ß 6 (reimbursement to local government for state-mandated new program or higher level of service). The county alleged that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The trial court found that the state had an obligation to fund the county's CMS program. (Superior Court of San Diego County, No. 634931, Michael I. Greer, * Harrison R. Hollywood, and Judith McConnell, Judges.) The Court of Appeal, Fourth Dist., Div. One, No. D018634, affirmed the judgment of the trial court insofar as it provided that Cal. Const., art. XIII B, ß 6, required the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required the county to spend at least $ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. The Court of Appeal remanded to the commission to determine the reimbursement amount and appropriate statutory remedies.

* Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Supreme Court affirmed the judgment of the Court of Appeal insofar as it held that the exclusion of medically indigent adults from Medi-Cal imposed a mandate on the county within the meaning of Cal. Const., art. XIII B, ß 6. The Supreme Court reversed the judgment insofar as it held that the state required the

Received
August 26, 2011
Commission on
State Mandates

county to spend at least $ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991, and remanded the matter to the commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, ß 1442.5, former subd. (c), Welf. & Inst. Code, ßß 10000, 17000) forced the county to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which the county was entitled. The court held that the trial court had jurisdiction to adjudicate the county's mandate claim, notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The court also held that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was Welf. & Inst. Code, ß 17000, enacted in 1965, rather than the 1982 legislation, and since Cal. Const., art. XIII B, ß 6, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, Welf. & Inst. Code, ß 17000, requires a county to support indigent persons only in the event they are not assisted by other sources. The court further held that there was a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide the medical care. While Welf. & Inst. Code, ß 17001, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of Welf. & Inst. Code, ß 17000, or be struck down as void by the courts. The court also held that the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the commission to determine the amount of any reimbursement due, erred in finding the county had a minimum required expenditure on its CMS program. (Opinion by Chin, J., with George, C. J., Mosk, and Baxter, JJ., Anderson, J., [**] and Aldrich, J., [+] concurring. Dissenting opinion by Kennard, J.)

> ** Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
> + Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) State of California ß 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program. --Cal. Const., art. XIII A, and art. XIII B, work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Their goals are to protect residents from excessive taxation and government spending. The purpose of Cal. Const., art. XIII B, ß 6 (reimbursement to local government for state-mandated new program or higher level of service), 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 Cal. Const., arts. XIII A and XIII B, impose. With certain exceptions, Cal. Const., art. XIII B, ß 6, essentially requires the state to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.

(2a) (2b) State of California ß 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Jurisdiction--With Pending Test Claim. --The trial court had jurisdiction to adjudicate a county's mandate claim asserting the Legislature's transfer to counties of the responsibility for providing health care for medically indigent adults constituted a new program or higher level of service that required state funding under Cal. Const., art. XIII B, ß 6 (reimbursement to local government for costs of new state-mandated program), notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The trial court's failure to defer to the primary jurisdiction of the other court did not prejudice the state. The trial court did not usurp the Commission on State Mandates' authority, since the commission had exercised its authority in the pending action. Since the pending action was settled, no multiple decisions resulted. Nor did lack of an administrative record prejudice the state, since determining whether a statute imposes a state mandate is an issue of law. Also, attempts to seek relief from the commission would have been futile, thus triggering

Received
August 26, 2011
Commission on
State Mandates

the futility exception to the exhaustion requirement, given that the commission rejected the other county's claim.

(3) Administrative Law ß 99--Judicial Review and Relief--Administrative Mandamus--Jurisdiction--As Derived From Constitution. --The power of superior courts to perform mandamus review of administrative decisions derives in part from Cal. Const., art. VI, ß 10. That section gives the Supreme Court, Courts of Appeal, and superior courts "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus." The jurisdiction thus vested may not lightly be deemed to have been destroyed. While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication.

(4) State of California ß 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate. --In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, ß 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was Welf. & Inst. Code, ß 17000, enacted in 1965, rather than the 1982 legislation, and since Cal. Const., art. XIII B, ß 6, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, Welf. & Inst. Code, ß 17000, requires a county to support indigent persons only in the event they are not assisted by other sources. To the extent care was provided prior to the 1982 legislation, the county's obligation had been reduced. Also, the state's assumption of full funding responsibility prior to the 1982 legislation was not intended to be temporary. The 1978 legislation that assumed funding responsibility was limited to one year, but similar legislation in 1979 contained no such limiting language. Although the state asserted the health care program was never operated by the state, the Legislature, in adopting Medi-Cal, shifted responsibility for indigent medical care from counties to the state. Medi-Cal permitted county boards of supervisors to prescribe rules (Welf. & Inst. Code, ß 14000.2), and Medi-Cal was administered by state departments and agencies.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, ß 123.]

(5a) (5b) State of California ß 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate--Discretion to Set Standards--Eligibility. --In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, ß 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care. While Welf. & Inst. Code, ß 17001, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of Welf. & Inst. Code, ß 17000 (counties shall relieve and support "indigent persons"), or be struck down as void by the courts. As to eligibility standards, counties must provide care to all adult medically indigent persons (MIP's). Although Welf. & Inst. Code, ß 17000, does not define "indigent persons," the 1982 legislation made clear that adult MIP's were within this category. The coverage history of Medi-Cal demonstrates the Legislature has always viewed all adult MIP's as "indigent persons" under Welf. & Inst. Code, ß 17000. The Attorney General also opined that the 1971 inclusion of MIP's in Medi-Cal did not alter the duty of counties to provide care to indigents not eligible for Medi-Cal, and this opinion was entitled to considerable weight. Absent controlling authority, the opinion was persuasive since it was presumed the Legislature was cognizant of the Attorney General's construction and would have taken corrective action if it disagreed. (Disapproving *Bay General Community Hospital* v. *County of San Diego* (1984) 156 Cal.App.3d 944 [203 Cal.Rptr. 184] insofar as it holds that a county's responsibility under Welf. & Inst. Code, ß 17000, extends only to indigents as defined by the county's board of supervisors, and suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of Welf. & Inst. Code, ß 17000, but do not qualify for Medi-Cal.)

(6) Public Aid and Welfare ß 4--County Assistance--Counties' Discretion. --Counties may exercise their discretion under Welf. & Inst. Code, ß 17001 (county board of supervisors or authorized agency shall adopt standards of aid and care for indigent and dependent poor), only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict

Received
August 26, 2011
Commission on
State Mandates

with the statute, and reasonably necessary to effectuate its purpose (Gov. Code, ß 11374). Despite the counties' statutory discretion, courts have consistently invalidated county welfare regulations that fail to meet statutory requirements.

(7) State of California ß 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate--Discretion to Set Standards--Service. --In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, ß 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care by setting its own service standards. Welf. & Inst. Code, ß 17000, mandates that medical care be provided to indigents, and Welf. & Inst. Code, ß 10000, requires that such care be provided promptly and humanely. There is no discretion concerning whether to provide such care. Courts construing Welf. & Inst. Code, ß 17000, have held it imposes a mandatory duty upon counties to provide medically necessary care, not just emergency care, and it has been interpreted to impose a minimum standard of care. Until its repeal in 1992, Health & Saf. Code, ß 1442.5, former subd. (c), also spoke to the level of services that counties had to provide under Welf. & Inst. Code, ß 17000, requiring that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county. (Disapproving *Cooke* v. *Superior Court* (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706] to the extent it held that Health & Saf. Code, ß 1442.5, former subd. (c), was merely a limitation on a county's ability to close facilities or reduce services provided in those facilities, and was irrelevant absent a claim that a county facility was closed or that services in the county were reduced.)

(8) State of California ß 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Minimum Required Expenditure. --In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, ß 6 (reimbursement to local government for state-mandated new program or higher level of service), in which the trial court found that the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults mandated a reimbursable new program entitling the county to reimbursement, the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the Commission on State Mandates to determine the amount of any reimbursement due, erred in finding the county had a minimum required expenditure on its County Medical Services (CMS) program. The Court of Appeal relied on Welf. & Inst. Code, former ß 16990, subd. (a), which set forth the financial maintenance-of-effort requirement for counties that received California Healthcare for the Indigent Program (CHIP) funding. However, counties that chose to seek CHIP funds did so voluntarily. Thus, Welf. & Inst. Code, former ß 16990, subd. (a), did not mandate a minimum funding requirement. Nor did Welf. & Inst. Code, former ß 16991, subd. (a)(5), establish a minimum financial obligation. That statute required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its allocation from various sources was less than the funding it received under Welf. & Inst. Code, ß 16703, for 1988-1989. Nothing about this requirement imposed on the county a minimum funding requirement.

(9) State of California ß 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Proper Mandamus Proceeding: Mandamus and Prohibition ß 23--Claim Against Commission on State Mandates. --In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, ß 6 (reimbursement to local government for state-mandated new program or higher level of service), after the Commission on State Mandates indicated the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults did not mandate a reimbursable new program, a mandamus proceeding under Code Civ. Proc., ß 1085, was not an improper vehicle for challenging the commission's position. Mandamus under Code Civ. Proc., ß 1094.5, commonly denominated "administrative" mandamus, is mandamus still. The full panoply of rules applicable to ordinary mandamus applies to administrative mandamus proceedings, except where they are modified by statute. Where entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding under Code Civ. Proc., ß 1085, as one brought under Code Civ. Proc., ß 1094.5, and should overrule a demurrer asserting that the wrong mandamus statute has been invoked. In any event, the determination whether the statutes at issue established a mandate under Cal. Const., art. XIII B, ß 6, was a question of law. Where a purely legal question is at issue, courts exercise independent judgment, no matter whether the issue arises by traditional or administrative mandate.

Received
August 26, 2011
Commission on
State Mandates

COUNSEL: Daniel E. Lungren, Attorney General, Charlton G. Holland III, Assistant Attorney General, John H. Sanders and Richard T. Waldow, Deputy Attorneys General, for Cross-defendants and Appellants.

Lloyd M. Harmon, Jr., County Counsel, John J. Sansone, Acting County Counsel, Diane Bardsley, Chief Deputy County Counsel, Valerie Tehan and Ian Fan, Deputy County Counsel, for Cross-complainant and Respondent.

JUDGES: Opinion by Chin, J., with George, C. J., Mosk, and Baxter, JJ., Anderson, J., [*] and Aldrich, J., [**] concurring. Dissenting opinion by Kennard, J.

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
** Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: CHIN

OPINION

[*75] [**314] [***136] **CHIN, J.**

Section 6 of article XIII B of the California Constitution (section 6) requires the State of California (state), subject to certain exceptions, to "provide a subvention of funds to reimburse" local governments "[w]henever the Legislature or any state agency mandates a new program or higher level of service . . . ." In this action, the County of San Diego (San Diego or the County) seeks reimbursement under section 6 from the state for the costs of providing health care services to certain adults who formerly received medical care under the California Medical Assistance Program (Medi-Cal) (see Welf. & Inst. Code, [**315] [***137] ß 14063) [1] because they were medically indigent, i.e., they had insufficient financial resources to pay for their own medical care. In 1979, when the electorate adopted section 6, the state provided Medi-Cal coverage to these medically indigent adults without requiring financial contributions from counties. Effective January 1, 1983, the Legislature excluded this population from Medi-Cal. (Stats. 1982, ch. 328, ß 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, ß 19, 86, pp. 6315, 6357.) Since that date, San Diego has provided medical care to these individuals with varying levels of state financial assistance.

1 Except as otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

To resolve San Diego's claim, we must determine whether the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" on San Diego within the meaning of section 6. The Commission on State Mandates (Commission), which the Legislature created to determine claims under section 6, has ruled that section 6 does not apply to the Legislature's action and has rejected reimbursement claims like San Diego's. (See *Kinlaw v. State of California* (1991) 54 Cal. 3d 326, 330, fn. 2 [285 Cal. Rptr. 66, 814 P.2d 1308] (*Kinlaw*).) The trial court and Court of Appeal in this case disagreed with the Commission, finding that San Diego was entitled to reimbursement. The state seeks [*76] reversal of this finding. It also argues that San Diego's failure to follow statutory procedures deprived the courts of jurisdiction to hear its claim. We reject the state's jurisdictional argument and affirm the finding that the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" within the meaning of section 6. Accordingly, we remand the matter to the Commission to determine the amount of reimbursement, if any, due San Diego under the governing statutes.

I. FUNDING OF INDIGENT MEDICAL CARE

Before the start of Medi-Cal, "the indigent in California were provided health care services through a variety of different programs and institutions." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3 (Preliminary Report).) County hospitals "provided a wide range of inpatient and outpatient hospital services to all persons who met county indigency requirements whether or not they were public assistance recipients. The major responsibility for supporting county hospitals rested upon the counties, financed primarily through property taxes, with minor contributions from" other sources. (*Id*. at p. 4.)

Medi-Cal, which began operating March 1, 1966, established "a program of basic and extended health care services for recipients of public assistance and for medically indigent persons." (*Morris v. Williams* (1967) 67 Cal. 2d 733, 738 [63 Cal. Rptr. 689, 433 P.2d 697] (*Morris*); *id*. at p. 740; see also Stats. 1966, Second Ex. Sess. 1965, ch. 4, ß 2, p. 103.) It "represent[ed] California's implementation of the federal Medicaid program (42 U.S.C. ß 1396-1396v), through which the federal government provide[d] financial assistance to states so that they [might] furnish medical care to qualified indigent persons. [Citation.]" (*Robert F. Kennedy Medical Center v. Belsh* (1996) 13 Cal. 4th 748, 751 [55 Cal. Rptr. 2d

Received
August 26, 2011
Commission on
State Mandates

107, 919 P.2d 721] (*Belsh*).) "[B]y meeting the requirements of federal law," Medi-Cal "qualif[ied] California for the receipt of federal funds made available under title XIX of the Social Security Act." (*Morris*, *supra*, 67 Cal. 2d at p. 738.) "Title [XIX] permitted the combination of the major governmental health care systems which provided care for the indigent into a single system financed by the state and federal governments. By 1975, this system, at least as originally proposed, would provide a wide range of health care services for all those who [were] indigent regardless of whether they [were] public assistance recipients . . . ." (Preliminary Rep., *supra*, at p. 4; see also Act of July 30, 1965, Pub.L. No. 89-97, ß 121(a), 79 Stat. 286, reprinted in 1965 U.S. Code [*77] Cong. & Admin. News, p. 378 [states must make effort to [**316] [***138] liberalize eligibility requirements "with a view toward furnishing by July 1, 1975, comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources"].) [2]

2 Congress later repealed the requirement that states work towards expanding eligibility. (See Cal. Health and Welfare Agency, The Medi-Cal Program: A Brief Summary of Major Events (Mar. 1990) p. 1 (Summary of Major Events).)

However, eligibility for Medi-Cal was initially limited only to persons linked to a federal categorical aid program by age (at least 65), blindness, disability, or membership in a family with dependent children within the meaning of the Aid to Families with Dependent Children program (AFDC). (See Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.) pp. 548, 550 (1971 Legislative Analyst's Report).) Individuals possessing one of these characteristics (categorically linked persons) received full benefits if they actually received public assistance payments. (*Id*. at p. 550.) Lesser benefits were available to categorically linked persons who were only medically indigent, i.e., their income and resources, although rendering them ineligible for cash aid, were "not sufficient to meet the cost of health care." (*Morris*, *supra*, 67 Cal. 2d at p. 750; see also 1971 Legis. Analyst's Rep., *supra*, at pp. 548, 550; Stats. 1966, Second Ex. Sess. 1965, ch. 4, ß 2, pp. 105-106.)

Individuals not linked to a federal categorical aid program (non-categorically linked persons) were ineligible for Medi-Cal, regardless of their means. Thus, "a group of citizens, not covered by Medi-Cal and yet unable to afford medical care, remained the responsibility of" the counties. (*County of Santa Clara v. Hall* (1972) 23 Cal. App. 3d 1059, 1061 [100 Cal. Rptr. 629] (*Hall*).) In establishing Medi-Cal, the Legislature expressly recognized this fact by enacting former section 14108.5, which provided: "The Legislature hereby declares its concern with the problems which will be facing the counties with respect to the medical care of indigent persons who are not covered [by Medi-Cal] . . . and . . . whose medical care must be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, ß 2, p. 116.) The Legislature directed the Health Review and Program Council "to study this problem and report its findings to the Legislature no later than March 1, 1967." (*Ibid*.)

Moreover, although it required counties to contribute to the costs of Medi-Cal, the Legislature established a method for determining the amount of their contributions that would "leave them with []sufficient funds to provide hospital care for those persons not eligible for Medi-Cal." (*Hall*, *supra*, 23 Cal. App. 3d at p. 1061, fn. omitted.) Former section 14150.1, [*78] which was known as the "county option" or the "option plan," required a county "to pay the state a sum equal to 100 percent of the county's health care costs (which included both linked and nonlinked individuals) provided in the 1964-1965 fiscal year, with an adjustment for population increase; in return the state would pay the county's entire cost of medical care." [3] (*County of Sacramento v. Lackner* (1979) 97 Cal. App. 3d 576, 581 [159 Cal. Rptr. 1] (*Lackner*).) Under the county option, "the state agreed to assume all county health care costs . . . in excess of" the county's payment. (*Id*. at p. 586.) It "made no distinction between 'linked' and 'nonlinked' persons," and "simply guaranteed a medical cost ceiling to counties electing to come within the option plan." (*Ibid*.) "Any difference [**317] [***139] in actual operating costs and the limit set by the option provision [was] assumed entirely by the state." (Preliminary Rep., *supra*, at p. 10, fn. 2.) Thus, the county option "guarantee[d] state participation in the cost of care for medically indigent persons who [were] not otherwise covered by the basic Medi-Cal program or other repayment programs." [4] (1971 Legis. Analyst's Rep., *supra*, at p. 549.)

3 Former section 14150.1 provided in relevant part: "[A] county may elect to pay as its share [of Medi-Cal costs] one hundred percent . . . of the county cost of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county . . . . If the county so elects, the county costs of health care in any fiscal year shall not exceed the total county costs of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a con-

Received
August 26, 2011
Commission on
State Mandates

tract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county . . . ." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, ß 2, p. 121.)

4 Former section 14150 provided the standard method for determining the counties' share of Medi-Cal costs. Under it, "a county was required to pay the state a specific sum, in return for which the state would pay for the medical care of all [categorically linked] individuals . . . . Financial responsibility for nonlinked individuals . . . remained with the counties." (*Lackner*, *supra*, 97 Cal. App. 3d at p. 581.)

Primarily through the county option, Medi-Cal caused a "significant shift in financing of health care from the counties to the state and federal government. . . . During the first 28 months of the program the state . . . paid approximately $ 76 million for care of non-Medi-Cal indigents in county hospitals." (Preliminary Rep., *supra*, at p. 31.) These state funds paid "costs that would otherwise have been borne by counties through increases in property taxes." (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1974-1975 Budget Bill, Sen. Bill No. 1525 (1973-1974 Reg. Sess.) p. 626 (1974 Legislative Analyst's Report).) "[F]aced with escalating Medi-Cal costs, the Legislature in 1967 imposed strict guidelines on reimbursing counties electing to come under the 'option' plan. ([Former] ß 14150.2.) Pursuant to subdivision (c) of [former] section 14150.2, the state imposed a limit on its obligation to pay for medical services to nonlinked persons [*79] served by a county within the 'option' plan." (*Lackner*, *supra*, 97 Cal. App. 3d at p. 589; see also Stats. 1967, ch. 104, ß 3, p. 1019; Stats. 1969, ch. 21, ß 57, pp. 106-107; 1974 Legis. Analyst's Rep., *supra*, at p. 626.)

In 1971, the Legislature substantially revised Medi-Cal. It extended coverage to certain noncategorically linked minors and adults "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83; see Stats. 1971, ch. 577, ß 12, 23, pp. 1110-1111, 1115.) These medically indigent individuals met "the income and resource requirements for aid under [AFDC] but [did] not otherwise qualify[] as a public assistance recipient." (56 Ops.Cal.Atty.Gen. 568, 569 (1973).) The Legislature anticipated that this eligibility expansion would bring "approximately 800,000 additional medically needy Californians" into Medi-Cal. (Stats. 1971, ch. 577, ß 56, p. 1136.) The 1971 legislation referred to these individuals as " '[n]oncategorically related needy person[s].' " (Stats. 1971, ch. 577, ß 23, p. 1115.) Subsequent legislation designated them as "medically indigent person[s]" (MIP's) and provided them coverage under former section 14005.4. (Stats. 1976, ch. 126, ß 7, p. 200; *id*. at ß 20, p. 204.)

The 1971 legislation also established a new method for determining each county's financial contribution to Medi-Cal. The Legislature eliminated the county option by repealing former section 14150.1 and enacting former section 14150. That section specified (by amount) each county's share of Medi-Cal costs for the 1972-1973 fiscal year and set forth a formula for increasing the share in subsequent years based on the taxable assessed value of certain property. (Stats. 1971, ch. 577, ß 41, 42, pp. 1131-1133.)

For the 1978-1979 fiscal year, the state assumed each county's share of Medi-Cal costs under former section 14150. (Stats. 1978, ch. 292, ß 33, p. 610.) In July 1979, the Legislature repealed former section 14150 altogether, thereby eliminating the counties' responsibility to share in Medi-Cal costs. (Stats. 1979, ch. 282, ß 74, p. 1043.) Thus, in November 1979, when the electorate adopted section 6, "the state was funding Medi-Cal coverage for [MIP's] without requiring any county financial contribution." (*Kinlaw*, *supra*, 54 Cal. 3d at p. 329.) The state continued to provide full funding for MIP medical care through 1982.

In 1982, the Legislature passed two Medi-Cal reform bills that, as of January 1, 1983, excluded from Medi-Cal most adults who had been eligible [*80] under the MIP category [***140] (adult [**318] MIP's or Medically Indigent Adults). [5] (Stats. 1982, ch. 328, ß 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, ß 19, 86, pp. 6315, 6357; *Cooke v. Superior Court* (1989) 213 Cal. App. 3d 401, 411 [261 Cal. Rptr. 706] (*Cooke*).) As part of excluding this population from Medi-Cal, the Legislature created the Medically Indigent Services Account (MISA) as a mechanism for "transfer[ing] [state] funds to the counties for the provision of health care services." (Stats. 1982, ch. 1594, ß 86, p. 6357.) Through MISA, the state annually allocated funds to counties based on "the average amount expended" during the previous three fiscal years on Medi-Cal services for county residents who had been eligible as MIP's. (Stats. 1982, ch. 1594, ß 69, p. 6345.) The Legislature directed that MISA funds "be consolidated with existing county health services funds in order to provide health services to low-income persons and other persons not eligible for the Medi-Cal program." (Stats. 1982, ch. 1594, ß 86, p. 6357.) It further provided: "Any person whose income and resources meet the income and resource criteria for certification for [Medi-Cal] services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, ß 70, p. 6346.)

Received
August 26, 2011
Commission on
State Mandates

5 In this opinion, the terms "adult MIP's" and "Medically Indigent Adults" refer only to those persons who were excluded from the Medi-Cal program by the 1982 legislation.

After passage of the 1982 legislation, San Diego established a county medical services (CMS) program to provide medical care to adult MIP's. According to San Diego, between 1983 and June 1989, the state fully funded San Diego's CMS program through MISA. However, for fiscal years 1989-1990 and 1990-1991, the state only partially funded San Diego's CMS program. For example, San Diego asserts that, in fiscal year 1990-1991, it exhausted state-provided MISA funds by December 24, 1990. Faced with this shortfall, San Diego's board of supervisors voted in February 1991 to terminate the CMS program unless the state agreed by March 8 to provide full funding for the 1990-1991 fiscal year. After the state refused to provide additional funding, San Diego notified affected individuals and medical service providers that it would terminate the CMS program at midnight on March 19, 1991. The response to the County's notification ultimately resulted in the unfunded mandate claim now before us.

II. UNFUNDED MANDATES

Through adoption of Proposition 13 in 1978, the voters added article XIII A to the California Constitution, which "imposes a limit on the power of state and local governments to adopt and levy taxes. [Citation.]" (*County of Fresno v. State of California* (1991) 53 Cal. 3d 482, 486 [280 Cal. Rptr. 92, [*81] 808 P.2d 235] (*County of Fresno*).) The next year, the voters added article XIII B to the Constitution, which "impose[s] a complementary limit on the rate of growth in governmental spending." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal. 4th 571, 574 [7 Cal. Rptr. 2d 245, 828 P.2d 147].) **(1)** These two constitutional articles "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, 59, fn. 1 [266 Cal. Rptr. 139, 785 P.2d 522].) Their goals are "to protect residents from excessive taxation and government spending. [Citation.]" (*County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, 61 [233 Cal. Rptr. 38, 729 P.2d 202] (*County of Los Angeles*).)

Article XIII B of the California Constitution includes section 6, which is the constitutional provision at issue here. It provides in relevant part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [P] . . . [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." Section 6 [**319] [***141] recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments. (*County of Fresno*, *supra*, 53 Cal. 3d at p. 487.) Its purpose 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 Fresno*, *supra*, 53 Cal. 3d at p. 487; *County of Los Angeles*, *supra*, 43 Cal. 3d at p. 61.) With certain exceptions, section 6 "[e]ssentially" requires the state "to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.]" (*Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1577 [15 Cal. Rptr. 2d 547].)

In 1984, the Legislature created a statutory procedure for determining whether a statute imposes state-mandated costs on a local agency within the meaning of section 6. (Gov. Code, ß 17500 et seq.). The local agency must file a test claim with the Commission, which, after a public hearing, decides whether the statute mandates a new program or increased level of service. (Gov. Code, ß 17521, 17551, 17555.) If the Commission finds a claim to be reimbursable, it must determine the amount of reimbursement. (Gov. Code, ß 17557.) The local agency must then follow certain statutory procedures to [*82] obtain reimbursement. (Gov. Code, ß 17558 et seq.) If the Legislature refuses to appropriate money for a reimbursable mandate, the local agency may file "an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Gov. Code, ß 17612, subd. (c).) If the Commission finds no reimbursable mandate, the local agency may challenge this finding by administrative mandate proceedings under section 1094.5 of the Code of Civil Procedure. (Gov. Code, ß 17559.) Government Code section 17552 declares that these provisions "provide the sole and exclusive procedure by which a local agency . . . may claim reimbursement for costs mandated by the state as required by Section 6 . . . ."

III. ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

A. *The Los Angeles Action*

On November 23, 1987, the County of Los Angeles (Los Angeles) filed a claim (the Los Angeles action) with the Commission asserting that the exclusion of adult MIP's from Medi-Cal constituted a reimbursable man-

Received
August 26, 2011
Commission on
State Mandates

date under section 6. (*Kinlaw*, *supra*, 54 Cal. 3d at p. 330, fn. 2.) Alameda County subsequently filed a claim on November 30, 1987, but the Commission rejected it because of the pending Los Angeles claim. (*Id*. at p. 331, fn. 4.) Los Angeles refused to permit Alameda County to join as a claimant, but permitted San Bernardino County to join. (*Ibid*.)

In April 1989, the Commission rejected the Los Angeles claim, finding no reimbursable mandate. [6] (*Kinlaw*, *supra*, 54 Cal. 3d at p. 330, fn. 2.) It found that the 1982 legislation did not impose on counties a new program or a higher level of service for an existing program because counties had a "pre-existing duty" to provide medical care to the medically indigent under section 17000. That section provides in relevant part: "Every county . . . shall relieve and support all incompetent, poor, indigent persons . . . lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Section 17000 did not impose a reimbursable mandate under section 6, the Commission further reasoned, because it "was enacted prior to January 1, 1975 . . . ." Finally, the Commission found no mandate because the 1982 legislation "neither establish[ed] the level of care to be provided nor . . . define[d] the class of persons determined to be eligible for medical care since these criteria were established by boards of supervisors" pursuant to section 17001.

6 San Diego lodged with the trial court a copy of the Commission's decision in the Los Angeles aaction.

[**320] [***142] On March 20, 1990, the Los Angeles Superior Court filed a judgment reversing the Commission's decision and directing issuance of a peremptory [*83] writ of mandate. On April 16, 1990, the Commission and the state filed an appeal in the Second District Court of Appeal. (*County of Los Angeles v. State of California*, No. B049625.) [7] In early 1992, the parties to the Los Angeles action agreed to settle their dispute and to seek dismissal. In April 1992, after learning of this agreement, San Diego sought to intervene. Explaining that it had been waiting for resolution of the action, San Diego requested that the Court of Appeal deny the dismissal request and add (or substitute in) the County as a party. The Court of Appeal did not respond. On December 15, 1992, the parties to the Los Angeles action entered into a settlement agreement that provided for vacation of the superior court judgment and dismissal of the appeal and superior court action. Consistent with the settlement agreement, on December 29, 1992, the Court of Appeal filed an order vacating the superior court judgment, dismissing the appeal, and instructing the superior court to dismiss the action without prejudice on remand. [8]

7 In setting forth the facts relating to the Los Angeles action, we rely in part on the appellate record from that action, of which we take judicial notice. (Evid. Code, ß 452, subd. (d), 459.)

8 The settlement resulted from 1991 legislation that changed the system of health care funding as of June 30, 1991. (See ß 17600 et seq.; Stats. 1991, chs. 87, 89, pp. 231-235, 243-341.) That legislation provided counties with new revenue sources, including a portion of state vehicle license fees, to fund health care programs. However, the legislation declared that the statutes providing counties with vehicle license fees would "cease to be operative on the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal" that "[t]he state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982." (Rev. & Tax. Code, ß 10753.8, subd. (b)(2), 11001.5, subd. (d)(2); see also Stats. 1991, ch. 89, ß 210, p. 340.) Los Angeles and San Bernardino Counties settled their action to avoid triggering these provisions. Unlike the dissent, we do not believe that consideration of these recently enacted provisions is appropriate in analyzing the 1982 legislation. Nor do we assume, as the dissent does, that our decision necessarily triggers these provisions. That issue is not before us.

B. *The San Diego Action*

1. *Administrative Attempts to Obtain Reimbursement*

On March 13, 1991, San Diego submitted an invoice to the State Controller seeking reimbursement of its uncompensated expenditures on the CMS program for fiscal year 1989-1990. The Controller is a member of the Commission. (Gov. Code, ß 17525.) On April 12, the Controller returned the invoice "without action," stating that "[n]o appropriation has been given to this office to allow for reimbursement" of medical costs for adult MIP's, and noting that litigation was pending regarding the state's reimbursement obligation. On December 18, 1991, San Diego submitted a similar invoice for the 1990-1991 fiscal year. The state has not acted regarding this second invoice.

[*84] 2. *Court Proceedings*

Received
August 26, 2011
Commission on
State Mandates

Responding to San Diego's notice of intent to terminate the CMS program, on March 11, 1991, the Legal Aid Society of San Diego filed a class action on behalf of CMS program beneficiaries seeking to enjoin termination of the program. The trial court later issued a preliminary injunction prohibiting San Diego "from taking any action to reduce or terminate" the CMS program.

On March 15, 1991, San Diego filed a cross-complaint and petition for writ of mandate under Code of Civil Procedure section 1085 against the state, the Commission, and various state officers. [9] The cross-complaint alleged that, by excluding adult MIP's from Medi-Cal and transferring responsibility for [**321] [***143] their medical care to counties, the state had mandated a new program and higher level of service within the meaning of section 6. The cross-complaint further alleged that the state therefore had a duty under section 6 to reimburse San Diego for the entire cost of its CMS program, and that the state had failed to perform its duty.

9 The cross-complaint named the following state officers: (1) Kenneth W. Kizer, Director of the Department of Health Services; (2) Kim Belsh, Acting Secretary of the Health and Welfare Agency; (3) Gray Davis, the State Controller; (4) Kathleen Brown, the State Treasurer; and (5) Thomas Hayes, the Director of the Department of Finance. Where the context suggests, subsequent references in this opinion to "the state" include these officers.

Proceeding from these initial allegations, the cross-complaint alleged causes of action for indemnification, declaratory and injunctive relief, reimbursement and damages, and writ of mandate. In its first declaratory relief claim, San Diego alleged (on information and belief) that the state contended the CMS program was a nonreimbursable, county obligation. In its claim for reimbursement, San Diego alleged (again on information and belief) that the Commission had "previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement from the State for the costs of such programs." "Under these circumstances," San Diego asserted, "denial of the County's claim by the Commission . . . is virtually certain and further administrative pursuit of this claim would be a futile act."

For relief, San Diego requested a judgment declaring the following: (1) that the state must fully reimburse San Diego if it "is compelled to provide any CMS Program services to plaintiffs . . . after March 19, 1991"; (2) that section 6 requires the state "to fully fund the CMS Program" (or, alternatively, that the CMS program is discretionary); (3) that the state must pay San Diego for all of its unreimbursed costs for the CMS program during [*85] the 1989-1990 and 1990-1991 fiscal years; and (4) that the state shall assume responsibility for operating any court-ordered continuation of the CMS program. San Diego also requested that the court issue a writ of mandamus requiring the state to fulfill its reimbursement obligation. Finally, San Diego requested issuance of preliminary and permanent injunctions to ensure that the state fulfilled its obligations to the County.

In April 1991, San Diego determined that it could continue operating the CMS program using previously unavailable general fund revenues. Accordingly, San Diego and plaintiffs settled their dispute, and plaintiffs dismissed their complaint.

The matter proceeded solely on San Diego's cross-complaint. The court issued a preliminary injunction and alternative writ in May 1991. At a hearing on June 25, 1991, the court found that the state had an obligation to fund San Diego's CMS program, granted San Diego's request for a writ of mandate, and scheduled an evidentiary hearing to determine damages and remedies. On July 1, 1991, it issued an order reflecting this ruling and granting a peremptory writ of mandate. The writ did not issue, however, because of the pending hearing to determine damages. In December 1992, after an extensive evidentiary hearing and posthearing proceedings on the claim for a peremptory writ of mandate, the court issued a judgment confirming its jurisdiction to determine San Diego's claim, finding that section 6 required the state to fund the entire cost of San Diego's CMS program, determining the amount that the state owed San Diego for fiscal years 1989-1990 and 1990-1991, identifying funds available to the state to satisfy the judgment, and ordering issuance of a peremptory writ of mandate. [10] The court also issued a peremptory writ of mandate directing the state and various state officers to comply with the judgment.

10 The judgment dismissed all of San Diego's other claims.

The Court of Appeal affirmed the judgment insofar as it provided that section 6 requires the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required San Diego to spend at least $ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. It remanded the matter to the Commission to determine the reimbursement amount and appropriate statutory remedies. We then granted the state's petition for review.

Received
August 26, 2011
Commission on
State Mandates

[**322] [***144] IV. SUPERIOR COURT JURISDICTION

(2a) Before reaching the merits of the appeal, we must address the state's assertion that the superior court lacked jurisdiction to hear San [*86] Diego's mandate claim. According to the state, in *Kinlaw*, *supra*, 54 Cal. 3d 326, we "unequivocally held that the orderly determination of [unfunded] mandate questions demands that only one claim on any particular alleged mandate be entertained by the courts at any given time." Thus, if a test claim is pending, "other potential claims must be held in abeyance . . . ." Applying this principle, the state asserts that, since "the test claim litigation was pending" in the Los Angeles action when San Diego filed its cross-complaint seeking mandamus relief, "the superior court lacked jurisdiction from the outset, and the resulting judgment is a nullity. That defect cannot be cured by the settlement of the test claim, which occurred after judgment was entered herein."

In *Kinlaw*, we held that individual taxpayers and recipients of government benefits lack standing to enforce section 6 because the applicable administrative procedures, which "are the exclusive means" for determining and enforcing the state's section 6 obligations, "are available only to local agencies and school districts directly affected by a state mandate . . . ." (*Kinlaw*, *supra*, 54 Cal. 3d at p. 328.) In reaching this conclusion, we explained that the reimbursement right under section 6 "is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services." (*Id*. at p. 334.) We concluded that "[n]either public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues." (*Id*. at p. 335.)

In finding that individuals do not have standing to enforce the section 6 rights of local agencies, we made several observations in *Kinlaw* pertinent to operation of the statutory process as it applies to entities that do have standing. Citing Government Code section 17500, we explained that "the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6 . . . because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process." (*Kinlaw*, *supra*, 54 Cal. 3d at p. 331.) Thus, the governing statutes "establish[] procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created." (*Id*. at p. 333.) Specifically, "[t]he legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies . . . ." (*Id*. at p. 331.) Describing the Commission's application of the test-claim procedure to claims regarding exclusion of adult MIP's from Medi-Cal, we observed: "The test claim by the County of Los Angeles was filed prior to that [*87] proposed by Alameda County. The Alameda County claim was rejected for that reason. (See [Gov. Code,] ß 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the [adult MIP exclusion] issues . . . . Los Angeles County declined a request from Alameda County that it be included in the test claim . . . ." (*Id*. at p. 331, fn. 4.)

Consistent with our observations in *Kinlaw*, we here agree with the state that the trial court should not have proceeded to resolve San Diego's claim for reimbursement under section 6 while the Los Angeles action was pending. A contrary conclusion would undermine one of "the express purpose[s]" OF THE STATUTORY PROCEDURE: to "avoid[] multiple proceedings . . . addressing the same claim that a reimbursable state mandate has been created." (*Kinlaw*, *supra*, 54 Cal. 3d at p. 333.)

(3) However, we reject the state's assertion that the error was jurisdictional. The power of superior courts to perform mandamus review [**323] [***145] of administrative decisions derives in part from article VI, section 10 of the California Constitution. (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 138 [93 Cal. Rptr. 234, 481 P.2d 242]; *Lipari v. Department of Motor Vehicles* (1993) 16 Cal. App. 4th 667, 672 [20 Cal. Rptr. 2d 246].) That section gives "[t]he Supreme Court, courts of appeal, [and] superior courts . . . original jurisdiction in proceedings for extraordinary relief in the nature of mandamus . . . ." (Cal. Const., art. VI, ß 10.) "The jurisdiction thus vested may not lightly be deemed to have been destroyed." (*Garrison v. Rourke* (1948) 32 Cal. 2d 430, 435 [196 P.2d 884], overruled on another ground in *Keane v. Smith* (1971) 4 Cal. 3d 932, 939 [95 Cal. Rptr. 197, 485 P.2d 261].) "While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. [Citations.] Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication." (*Garrison*, *supra*, at p. 436.) **(2b)** Here, we find no statutory provision that either "expressly provide[s]" (*id*. at p. 435) or otherwise "clearly indicate[s]" (*id*. at p. 436) that the Legislature intended to divest all courts other than the court hearing the test claim of their mandamus jurisdiction.

Rather, following *Dowdall v. Superior Court* (1920) 183 Cal. 348 [191 P. 685] (*Dowdall*), we interpret the governing statutes as simply vesting primary jurisdiction in the court hearing the test claim. In *Dowdall*, we de-

Received
August 26, 2011
Commission on
State Mandates

termined the jurisdictional effect of Code of Civil Procedure former section 1699 on actions to settle the account of trustees of a testamentary trust. Code of Civil Procedure former section 1699 provided in part: "Where any trust [*88] has been created by or under any will to continue after distribution, the Superior Court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust." (Stats. 1889, ch. 228, ß 1, p. 337.) We explained that, under this section, "the superior court, sitting in probate upon the distribution of an estate wherein the will creates a trust, retain[ed] jurisdiction of the estate for the purpose of the settlement of the accounts under the trust." (*Dowdall*, *supra*, 183 Cal. at p. 353.) However, we further observed that "the superior court of each county in the state has general jurisdiction in equity to settle trustees' accounts and to entertain actions for injunctions. This jurisdiction is, in a sense, concurrent with that of the superior court, which, by virtue of the decree of distribution, has jurisdiction of a trust created by will. The latter, however, is the primary jurisdiction, and if a bill in equity is filed in any other superior court for the purpose of settling the account of such trustee, that court, upon being informed of the jurisdiction of the court in probate and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case and allow the account to be settled by the court having primary jurisdiction thereof." (*Ibid*.)

Similarly, we conclude that, under the statutes governing determination of unfunded mandate claims, the court hearing the test claim has primary jurisdiction. Thus, if an action asserting the same unfunded mandate claim is filed in any other superior court, that court, upon being informed of the pending test claim, should postpone the proceeding before it and allow the court having primary jurisdiction to determine the test claim.

However, a court's erroneous refusal to stay further proceedings does not render those further proceedings void for lack of jurisdiction. As we explained in *Dowdall*, a court that refuses to defer to another court's primary jurisdiction "is not without jurisdiction." (*Dowdall*, *supra*, 183 Cal. at p. 353.) Accordingly, notwithstanding pendency of the Los Angeles action, the trial court here did not lack jurisdiction to determine San Diego's mandamus petition. (See *Collins v. Ramish* (1920) 182 Cal. 360, 366-369 [188 P. 550] [although trial court erred in refusing to abate action because of former action pending, new trial was not warranted on issues that the trial court correctly decided]; *People* ex rel. *Garamendi v. American Autoplan, Inc*. (1993) 20 Cal. App. 4th 760, 772 [***146] [25 Cal. Rptr. 2d 192] [**324] (*Garamendi*) ["rule of exclusive concurrent jurisdiction is not 'jurisdictional' in the sense that failure to comply renders subsequent proceedings void"]; *Stearns v. Los Angeles City School Dist*. (1966) 244 Cal. App. 2d 696, 718 [53 Cal. Rptr. 482, 21 A.L.R.3d 164] [where trial court errs in failing to stay proceedings in [*89] deference to jurisdiction of another court, reversal would be frivolous absent errors regarding the merits].) [11]

11 In *Garamendi*, *supra*, 20 Cal. App. 4th at pages 771-775, the court discussed procedural requirements for raising a claim that another court has already exercised its concurrent jurisdiction. Given our conclusion that the trial court's error here was not jurisdictional, we express no opinion about this discussion in *Garamendi* or the sufficiency of the state's efforts to raise the issue in this case.

The trial court's failure to defer to the primary jurisdiction of the court hearing the Los Angeles action did not prejudice the state. Contrary to the state's assertion, the trial court did not "usurp" the Commission's "authority to determine, in the first place, whether or not legislation creates a mandate." The Commission had already exercised that authority in the Los Angeles action. Moreover, given the settlement of the Los Angeles action, which included vacating the judgment in that action, the trial court's exercise of jurisdiction here did not result in one of the principal harms that the statutory procedure seeks to prevent: multiple decisions regarding an unfunded mandate question. Finally, the lack of an administrative record specifically relating to San Diego's claim did not prejudice the state because the threshold determination of whether a statute imposes a state mandate is an issue of law. (*County of Fresno v. Lehman* (1991) 229 Cal. App. 3d 340, 347 [280 Cal. Rptr. 310].) To the extent that an administrative record was necessary, the record developed in the Los Angeles action could have been submitted to the trial court. [12] (See *Los Angeles Unified School Dist. v. State of California* (1988) 199 Cal. App. 3d 686, 689 [245 Cal. Rptr. 140].)

12 Notably, in discussing the options still available to San Diego, the state asserts that San Diego "might have been able to go to superior court and file a [mandamus] petition based on the record of the prior test claim."

We also find that, on the facts of this case, San Diego's failure to submit a test claim to the Commission before seeking judicial relief did not affect the superior court's jurisdiction. Ordinarily, counties seeking to pursue an unfunded mandate claim under section 6 must exhaust their administrative remedies. (*Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal. App. 4th 621, 641 [21 Cal. Rptr. 2d 453]; *County of Contra Costa v. State of California* (1986) 177

Received
August 26, 2011
Commission on
State Mandates

Cal. App. 3d 62, 73-77 [222 Cal. Rptr. 750] (*County of Contra Costa*).) However, counties may pursue section 6 claims in superior court without first resorting to administrative remedies if they "can establish an exception to" the exhaustion requirement. (*County of Contra Costa*, *supra*, 177 Cal. App. 3d at p. 77.) The futility exception to the exhaustion requirement applies if a county can "state with assurance that the [Commission] would rule adversely in its own particular case. [Citations.]" (*Lindeleaf v. Agricultural Labor Relations Bd*. (1986) 41 Cal. 3d 861, 870 [226 Cal. Rptr. 119, 718 P.2d 106]; see also *County of Contra Costa*, *supra*, 177 Cal. App. 3d at pp. 77-78.)

[*90] We agree with the trial court and the Court of Appeal that the futility exception applied in this case. As we have previously noted, San Diego invoked this exception by alleging in its cross-complaint that the Commission's denial of its claim was "virtually certain" because the Commission had "previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement . . . ." Given that the Commission rejected the Los Angeles claim (which alleged the same unfunded mandate claim that San Diego alleged) and appealed the judicial reversal of its decision, the trial court correctly determined that further attempts to seek relief from the Commission would have been futile. Therefore, we reject the state's jurisdictional argument and proceed to the merits of the appeal.

[**325] [***147] V. EXISTENCE OF A MANDATE UNDER SECTION 6

(4) In determining whether there is a mandate under section 6, we turn to our decision in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830 [244 Cal. Rptr. 677, 750 P.2d 318] (*Lucia Mar*). There, we discussed section 6's application to Education Code section 59300, which "requires a school district to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped." (*Lucia Mar*, *supra*, at p. 832.) Before 1979, the Legislature had statutorily required school districts "to contribute to the education of pupils from the districts at the state schools [citations] . . . ." (*Id*. at pp. 832-833.) The Legislature repealed the statutory requirements in 1979 and, on July 12, 1979, the state assumed full-funding responsibility. (*Id*. at p. 833.) On July 1, 1980, when section 6 became effective, the state still had full-funding responsibility. On June 28, 1981, Education Code section 59300 took effect. (*Lucia Mar*, *supra*, at p. 833.)

Various school districts filed a claim seeking reimbursement under section 6 for the payments that Education Code section 59300 requires. The Commission denied the claim, finding that the statute did not impose on the districts a new program or higher level of service. The trial court and Court of Appeal agreed, the latter "reasoning that a shift in the funding of an existing program is not a new program or a higher level of service" under section 6. (*Lucia Mar*, *supra*, 44 Cal. 3d at p. 834.)

We reversed, finding that a contrary result would "violate the intent underlying section 6 . . . ." (*Lucia Mar*, *supra*, 44 Cal. 3d at p. 835.) That section "was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of the[] [*91] restrictions on the taxing and spending power of the local entities" that articles XIII A and XIII B of the California Constitution imposed. (*Lucia Mar*, *supra*, at pp. 835-836.) "The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 . . . because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B*, the result seems equally violative of the fundamental purpose underlying section 6 . . . ." (*Id*. at p. 836, italics added, fn. omitted.) We thus concluded in *Lucia Mar* "that because [Education Code] section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts--an obligation the school districts did not have at the time article XIII B was adopted--it calls for [the school districts] to support a 'new program' within the meaning of section 6." (*Ibid*., fn. omitted.)

The similarities between *Lucia Mar* and the case before us "are striking. In *Lucia Mar*, prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-197[8] the state and county shared the cost of caring for [adult MIP's] under the Medi-Cal program. . . . [F]ollowing enactment of [article XIII A], the state took full responsibility for both programs." (*Kinlaw*, *supra*, 54 Cal. 3d at p. 353 (dis. opn. of Broussard, J.).) As to both programs, the Legislature cited adoption of article XIII A of the California Constitution, and specifically its effect on tax revenues, as the basis for the state's assumption of full funding responsibility. (Stats. 1979, ch. 237, ß 10, p. 493; Stats. 1979, ch. 282, ß 106, p. 1059.) "Then in 1981 (for handicapped children) and 1982 (for [adult MIP's]), the state sought to shift some of the burden back to the counties." (*Kinlaw*, *supra*, [**326] [***148] 54 Cal. 3d at p. 353 (dis. opn. of Broussard, J.).)

Received
August 26, 2011
Commission on
State Mandates

Adopting the Commission's analysis in the Los Angeles action, the state nevertheless argues that *Lucia Mar* "is inapposite." The school program at issue in *Lucia Mar* "had been wholly operated, administered and financed by the state" and "was unquestionably a 'state program.' " " 'In contrast,' " the state argues, " 'the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for' " it under section 17000 and its predecessors. [13] The courts have interpreted section 17000 as "impos[ing] upon counties a duty to [*92] provide hospital and medical services to indigent residents. [Citations.]" (*Board of Supervisors v. Superior Court* (1989) 207 Cal. App. 3d 552, 557 [254 Cal. Rptr. 905].) Thus, the state argues, the source of San Diego's obligation to provide medical care to adult MIP's is section 17000, not the 1982 legislation. Moreover, because the Legislature enacted section 17000 in 1965, and section 6 does not apply to "mandates enacted prior to January 1, 1975," there is no reimbursable mandate. Finally, the state argues that, because section 17001 give counties "complete discretion" in setting eligibility and service standards under section 17000, there is no mandate. A contrary conclusion, the state asserts, "would erroneously expand the definition of what constitutes a 'new program' under" section 6. As we explain, we reject these arguments.

13 "County General Assistance in California dates from 1855, and for many years afforded the only form of relief to indigents." (*Mooney* v. *Pickett* (1971) 4 Cal. 3d 669, 677 [94 Cal. Rptr. 279, 483 P.2d 1231] (*Mooney*).) Section 17000 is substantively identical to former section 2500, which was enacted in 1937. (Stats. 1937, chs. 369, 464, pp. 1097, 1406.)

A. *The Source and Existence of San Diego's Obligation*

1. *The Residual Nature of the Counties' Duty Under Section 17000*

The state's argument that San Diego's obligation to provide medical care to adult MIP's predates the 1982 legislation contains numerous errors. First, the state misunderstands San Diego's obligation under section 17000. That section creates "the *residual* fund" to sustain indigents "who cannot qualify . . . under any specialized aid programs." (*Mooney*, *supra*, 4 Cal. 3d at p. 681, italics added; see also *Board of Supervisors v. Superior Court*, *supra*, 207 Cal. App. 3d at p. 562; *Boehm v. Superior Court* (1986) 178 Cal. App. 3d 494, 499 [223 Cal. Rptr. 716] [general assistance "is a program of last resort"].) By its express terms, the statute requires a county to relieve and support indigent persons *only* "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." (ß 17000.) [14] "Consequently, to the extent that the state or federal governments provide[d] care for [adult MIP's], the [C]ounty's obligation to do so [was] reduced . . . ." (*Kinlaw*, *supra*, 54 Cal. 3d at p. 354, fn. 14 (dis. opn. of Broussard, J.).) [15]

14 See also *County of Los Angeles v. Frisbie* (1942) 19 Cal. 2d 634, 639 [122 P.2d 526] (construing former section 2500); *Jennings v. Jones* (1985) 165 Cal. App. 3d 1083, 1091 [212 Cal. Rptr. 134] (counties must support all indigent persons "having no other means of support"); *Union of American Physicians & Dentists v. County of Santa Clara* (1983) 149 Cal. App. 3d 45, 51, fn. 10 [196 Cal. Rptr. 602]; *Rogers v. Detrich* (1976) 58 Cal. App. 3d 90, 95 [128 Cal. Rptr. 261] (counties have duty of support "where such support is not otherwise furnished").

15 In asserting that Medi-Cal coverage did not supplant San Diego's obligation under section 17000, the dissent incorrectly relies on *Madera Community Hospital v. County of Madera* (1984) 155 Cal. App. 3d 136 [201 Cal. Rptr. 768] (*Madera*) and *Cooke*, *supra*, 213 Cal. App. 3d 401. (Dis. opn. of Kennard, J., *post*, at p. 115.) In *Madera*, the court voided a county ordinance that extended county benefits under section 17000 only to persons " 'meeting all eligibility standards for the Medi-Cal program.' " (*Madera*, *supra*, 155 Cal. App. 3d at p. 150.) The court explained: "Because all funding for the Medi-Cal program comes from either the federal or the state government . . ., [c]ounty has denied any financial obligation whatsoever from county funds for the medical care of its indigent and poor residents." (*Ibid.*) Thus, properly understood, *Madera* held only that Medi-Cal does not relieve counties of their obligation to provide medical care to persons who are "indigent" within the meaning of section 17000 but who are ineligible for Medi-Cal. The limit of *Madera*'s holding is apparent from the court's reliance on a 1979 opinion of the Attorney General discussing the scope of a county's authority under section 17000. (*Madera*, *supra*, 155 Cal. App. 3d at pp. 151-152.) The Attorney General explained that "[t]he county obligation [under section 17000] to provide general relief extends to those indigents who do not qualify under specialized aid programs, . . . including Medi-Cal." (62 Ops.Cal.Atty.Gen. 70, 71, fn. 1 (1979).) Moreover, the *Madera* court expressly recognized that state and federal programs "alleviate, to a greater or lesser extent, [a] [c]ounty's burden." (*Madera*, *supra*, 155 Cal. App. 3d at p.

Received
August 26, 2011
Commission on
State Mandates

151.) In *Cooke*, the court simply made a passing reference to *Madera* in dictum describing the coverage history of Medi-Cal. (*Cooke*, *supra*, 213 Cal. App. 3d at p. 411.) It neither analyzed the issue before us nor explained the meaning of the dictum that the dissent cites.

[**327] [***149] As we have explained, the state began providing adult MIP's with medical care under Medi-Cal in 1971. Although it initially required counties to [*93] contribute generally to the costs of Medi-Cal, it did not set forth a specific amount for coverage of MIP's. The state was primarily responsible for the costs of the program, and the counties were simply required to contribute funds to defray the state's costs. Beginning with the 1978-1979 fiscal year, the state paid all costs of the Medi-Cal program, including the cost of medical care for adult MIP's. Thus, when section 6 was adopted in November 1979, to the extent that Medi-Cal provided medical care to adult MIP's, San Diego bore no financial responsibility for these health care costs. [16]

16 As we have previously explained, even before 1971 the state, through the county option, assumed much of the financial responsibility for providing medical care to adult MIP's.

The California Attorney General has expressed a similar understanding of Medi-Cal's effect on the counties' medical care responsibility under section 17000. After the 1971 extension of Medi-Cal coverage to MIP's, Fresno County sought an opinion regarding the scope of its duty to provide medical care under section 17000. It asserted that the 1971 repeal of former section 14108.5, which declared the Legislature's concern with the counties' problems in caring for indigents not eligible for Medi-Cal, evidenced a legislative intent to preempt the field of providing health services. (56 Ops.Cal.Atty.Gen., *supra*, at p. 571.) The Attorney General disagreed, concluding that the 1971 change "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (*Id*. at p. 569.) The Attorney General explained: "The statement of concern acknowledged the obligation of counties to continue to provide medical assistance under section 17000; the removal of the statement of concern was not accompanied by elimination of such duty on the part of the counties, *except as the addition of* [*MIP's*] *to the Medi-Cal program would remove the burden on the counties to provide medical care for such persons*." (*Id*. at p. 571, italics added.)

[*94] Indeed, the Legislature's statement of intent in an uncodified section of the 1982 legislation excluding adult MIP's from Medi-Cal suggests that it also shared our understanding of section 17000. Section 8.3 of the 1982 Medi-Cal revisions expressly declared the Legislature's intent "[i]n eliminating [M]edically [I]ndigent [A]dults from the Medi-Cal program . . . ." (Stats. 1982, ch. 328, ß 8.3, p. 1575; Stats. 1982, ch. 1594, ß 86, p. 6357.) It stated in part: "It is further the intent of the Legislature to provide counties with as much flexibility as possible in organizing county health services to serve *the population being transferred*." (Stats. 1982, ch. 328, ß 8.3, p. 1576; Stats. 1982, ch. 1594, ß 86, p. 6357, italics added.) If, as the state contends, counties had always been responsible under section 17000 for the medical care of adult MIP's, the description of adult MIP's as "the population being transferred" would have been inaccurate. By so describing adult MIP's, the Legislature indicated its understanding that counties did not have this responsibility while adult MIP's were eligible for Medi-Cal. These sources fully support our rejection of the state's argument that the 1982 legislation did not impose a mandate because, under section 17000, counties had always borne the responsibility for providing medical care to adult MIP's.

2. *The State's Assumption of Full Funding Responsibility for Providing Medical Care to Adult MIP's Under Medi-Cal*

To support its argument that it never relieved counties of their obligation under section [**328] [***150] 17000 to provide medical care to adult MIP's, the state characterizes as "temporary" the Legislature's assumption of full-funding responsibility for adult MIP's. According to the state, "any ongoing responsibility of the county was, at best, only temporarily, partially, alleviated (and never supplanted)." The state asserts that the Court of Appeal thus "erred by focusing on one phase in th[e] shifting pattern of arrangements" for funding indigent health care, "a focus which led to a myopic conclusion that the state alone is forever responsible for funding the health care for" adult MIP's.

A comparison of the 1978 and 1979 statutes that eliminated the counties' share of Medi-Cal costs refutes the state's claim. The Legislature expressly limited the effect of the 1978 legislation to one fiscal year, providing that the state "shall pay" each county's Medi-Cal cost share "for the period from July 1, 1978, to June 30, 1979." (Stats. 1978, ch. 292, ß 33, p. 610.) The Legislative Counsel's Digest explained that this section would require the state to pay "[a]ll county costs for Medi-Cal" for "the 1978-79 fiscal year only." (Legis. Counsel's Dig., Sen. Bill No. 154, 4 Stats. 1978 (Reg. Sess.), Summary Dig., p. 71.) The digest further explained that the purpose of the bill containing this section was "the *partial* relief of local government from the *temporary* difficulties brought about by the approval of Proposition 13." [*95] (*Id*. at p. 70, italics added.) Clearly, the Legislature knew how to include words of limitation when it intended the effects of its provisions to be temporary.

Received
August 26, 2011
Commission on
State Mandates

By contrast, the 1979 legislation contains no such limiting language. It simply provided: " Section 14150 of the Welfare and Institutions Code is repealed." (Stats. 1979, ch. 282, ß 74, p. 1043.) In setting forth the need to enact the legislation as an urgency statute, the Legislature explained: "The adoption of Article XIII A . . . may cause the curtailment or elimination of programs and services which are vital to the state's public health, safety, education, and welfare. In order that such services not be interrupted, it is necessary that this act take effect immediately." (Stats. 1979, ch. 282, ß 106, p. 1059.) In describing the effect of this legislation, the Legislative Counsel first explained that, "[u]nder existing law, the counties pay a specified annual share of the cost of" Medi-Cal. (Legis. Counsel's Dig., Assem. Bill No. 8, 4 Stats. 1979 (Reg. Sess.), Summary Dig., p. 79.) Referring to the 1978 legislation, it further explained that "[f]or the 1978-79 fiscal year only, the state pays . . . [P] . . . [a]ll county costs for Medi-Cal . . . ." (*Ibid.*) The 1979 legislation, the digest continued, "provid[ed] for state assumption of all county costs of Medi-Cal." (*Ibid.*) We find nothing in the 1979 legislation or the Legislative Counsel's summary indicating a legislative intent to eliminate the counties' cost share of Medi-Cal only temporarily.

The state budget process for the 1980-1981 fiscal year confirms that the Legislature's assumption of all Medi-Cal costs was not viewed as "temporary." In the summary of his proposed budget, then Governor Brown described Assembly Bill No. 8, 1981-1982 Regular Session, generally as "a long-term local financing measure" (Governor's Budget for 1980-1981 as submitted to Legislature (1979-1980 Reg. Sess.) Summary of Local Government Fiscal Relief, p. A-30) through which "[t]he total cost of [the Medi-Cal] program was *permanently* assumed by the State . . . ." (*Id.* at p. A-32, italics added.) Similarly, in describing to the Joint Legislative Budget Committee the Medi-Cal funding item in the proposed budget, the Legislative Analyst explained: "Item 287 includes the state cost of 'buying out' the county share of Medi-Cal expenditures. Following passage of Proposition 13, [Senate Bill No.] 154 appropriated $ 418 million to relieve counties of all fiscal responsibility for Medi-Cal program costs. Subsequently, [Assembly Bill No.] 8 was enacted, *which made permanent state assumption of county Medi-Cal costs*." (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1980-1981 Budget Bill, Assem. Bill No. 2020 (1979-1980 Reg. Sess.) at p. 721, italics added.) Thus, the state errs in asserting that the 1979 legislation eliminated the counties' financial support of Medi-Cal "only temporarily."

[*96] [**329] [***151] 3. *State Administration of Medical Care for Adult MIP's Under Medi-Cal*

The state argues that, unlike the school program before us in *Lucia Mar*, *supra*, 44 Cal. 3d 830, which "had been wholly operated, administered and financed by the state," the program for providing medical care to adult MIP's " 'has never been operated or administered by' " the state. According to the state, Medi-Cal was simply a state "reimbursement program" for care that section 17000 required counties to provide. The state is incorrect.

One of the legislative goals of Medi-Cal was "to allow eligible persons to secure basic health care in the same manner employed by the public generally, and without discrimination or segregation based purely on their economic disability." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, ß 2, p. 104.) "In effect, this meant that poorer people could have access to a private practitioner of their choice, and not be relegated to a county hospital program." (*California Medical Assn. v. Brian* (1973) 30 Cal. App. 3d 637, 642 [106 Cal. Rptr. 555].) Medi-Cal "provided for reimbursement to both public and private health care providers for medical services rendered." (*Lackner*, *supra*, 97 Cal. App. 3d at p. 581.) It further directed that, "[i]nsofar as practical," public assistance recipients be afforded "free choice of arrangements under which they shall receive basic health care." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, ß 2, p. 115.) Finally, since its inception, Medi-Cal has permitted county boards of supervisors to "prescribe rules which authorize the county hospital to integrate its services with those of other hospitals into a system of community service which offers free choice of hospitals to those requiring hospital care. The intent of this section is to eliminate discrimination or segregation based on economic disability so that the county hospital and other hospitals in the community share in providing services to paying patients and to those who qualify for care in public medical care programs." (ß 14000.2.) Thus, "Medi-Cal eligibles were to be able to secure health care in the same manner employed by the general public (i.e., in the private sector or at a county facility)." (1974 Legis. Analyst's Rep., *supra*, at p. 625; see also Preliminary Rep., *supra*, at p. 17.) By allowing eligible persons "a choice of medical facilities for treatment," Medi-Cal placed county health care providers "in competition with private hospitals." (*Hall*, *supra*, 23 Cal. App. 3d at p. 1061.)

Moreover, administration of Medi-Cal over the years has been the responsibility of various state departments and agencies. (ß 10720-10721, 14061-14062, 14105, 14203; *Belsh*, *supra*, 13 Cal. 4th at p. 751; *Morris*, *supra*, 67 Cal. 2d at p. 741; Summary of Major Events, *supra*, at pp. 2-3, 15.) Thus, "[i]n adopting the Medi-Cal program the state Legislature, for the most part, shifted indigent medical care from being a county responsibility to a State [*97] responsibility under the

Received
August 26, 2011
Commission on
State Mandates

Medi-Cal program. [Citation.]" (*Bay General Community Hospital v. County of San Diego* (1984) 156 Cal. App. 3d 944, 959 [203 Cal. Rptr. 184] (*Bay General*); see also Preliminary Rep., *supra*, at p. 18 [with certain exceptions, Medi-Cal "shifted to the state" the responsibility for administration of the medical care provided to eligible persons].) We therefore reject the state's assertion that, while Medi-Cal covered adult MIP's, county facilities were the sole providers of their medical care, and counties both operated and administered the program that provided that care.

The circumstances we have discussed readily distinguish this case from *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal. App. 4th 805 [38 Cal. Rptr. 2d 304], on which the state relies. There, the court rejected the claim that Penal Code section 987.9, which required counties to provide criminal defendants with certain defense funds, imposed an unfunded state mandate. Los Angeles filed the claim after the state, which had enacted appropriations between 1977 and 1990 "to reimburse counties for their costs under" the statute, made no appropriation for the 1990-1991 fiscal year. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at p. 812.) In rejecting the claim, [**330] [***152] the court first held that there was no state mandate because Penal Code section 987.9 merely implemented the requirements of federal law. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at pp. 814-816.) Thus, the court stated, "[a]ssuming, arguendo, the provisions of [Penal Code] section 987.9 [constituted] a new program" under section 6, there was no state mandate. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at p. 818.) Here, of course, it is unquestionably the state that has required San Diego to provide medical care to indigent persons.

In dictum, the court also rejected the argument that, under *Lucia Mar*, *supra*, 44 Cal. 3d 830, the state's "decision not to reimburse the counties for their programs under [Penal Code] section 987.9" imposed a new program by shifting financial responsibility for the program to counties. (*County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal. App. 4th at p. 817.) The court explained: "In contrast [to *Lucia Mar*], the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for implementing the procedures under [Penal Code] section 987.9. The state merely reimbursed counties for specific expenses incurred by the counties in their operation of a program for which they had a primary legal and financial responsibility." (*Ibid.*) Here, as we have explained, between 1971 and 1983, the state administered and bore financial responsibility for the medical care that adult MIP's received under Medi-Cal. The Medi-Cal program was not simply a [*98] method of reimbursement for county costs. Thus, the state's reliance on this dictum is misplaced. [17]

17 Because *County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal. App. 4th 805, is distinguishable, we need not (and do not) express an opinion regarding the court's analysis in that decision or its conclusions.

In summary, our discussion demonstrates the Legislature excluded adult MIP's from Medi-Cal *knowing* and *intending* that the 1982 legislation would trigger the counties' responsibility to provide medical care as providers of last resort under section 17000. Thus, through the 1982 legislation, the Legislature attempted to do precisely that which the voters enacted section 6 to prevent: "transfer[] to [counties] the fiscal responsibility for providing services which the state believed should be extended to the public." [18] (*County of Los Angeles*, *supra*, 43 Cal. 3d at p. 56; see also *City of Sacramento v. State of California*, *supra*, 50 Cal. 3d at p. 68 [A "central purpose" of section 6 was "to prevent the state's transfer of the *cost of government* from *itself* to the local level."].) Accordingly, we view the 1982 legislation as having mandated a " 'new program' " on counties by "compelling them to accept financial responsibility in whole or in part for a program," i.e., medical care for adult MIP's, "which was funded entirely by the state before the advent of article XIII B." [19] (*Lucia Mar*, *supra*, 44 Cal. 3d at p. 836.)

18 The state properly does not contend that the provision of medical care to adult MIP's is not a "program" within the meaning of section 6. (See *County of Los Angeles*, *supra*, 43 Cal. 3d at p. 56 [section 6 applies to "programs that carry out the governmental function of providing services to the public"].)

19 Alternatively, the 1982 legislation can be viewed as having mandated an increase in the services that counties were providing through existing section 17000 programs, by adding adult MIP's to the indigent population that counties already had to serve under that section. (See *County of Los Angeles*, *supra*, 43 Cal. 3d at p. 56 ["subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs' "].)

A contrary conclusion would defeat the purpose of section 6. Under the state's interpretation of that section, because section 17000 was enacted before 1975, the Legislature could eliminate the *entire* Medi-Cal program and shift to the counties under section 17000 complete financial responsibility for medical care that the state has been

Received
August 26, 2011
Commission on
State Mandates

providing [**331] [***153] since 1966. However, the taxing and spending limitations imposed by articles XIII A and XIII B would greatly limit the ability of counties to meet their expanded section 17000 obligation. "County taxpayers would be forced to accept new taxes or see the county forced to cut existing programs further . . . ." (*Kinlaw*, *supra*, 54 Cal. 3d at p. 351 (dis. opn. of Broussard, J.).) As we have previously explained, the voters, recognizing that articles XIII A and XIII B left counties "ill equipped" to assume such increased financial responsibilities, adopted section 6 precisely to avoid this result. (*County of Los Angeles*, [*99] *supra*, 43 Cal. 3d at p. 61.) Thus, it was the voters who decreed that we must, as the state puts it, "focus[] on one phase in th[e] shifting pattern of [financial] arrangements" between the state and the counties. Under section 6, the state simply cannot "compel[] [counties] to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B . . . ." [20] (*Lucia Mar*, *supra*, 44 Cal. 3d at p. 836.)

20 In reaching a contrary conclusion, the dissent ignores the electorate's purpose in adopting section 6. The dissent also mischaracterizes our decision. We do not hold that "whenever there is a change in a state program that has the effect of increasing a county's financial burden under section 17000 there must be reimbursement by the state." (Dis. opn. of Kennard, J., *post*, at p. 116.) Rather, we hold that section 6 prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility before adoption of section 6. Whether the state may discontinue assistance that it initiated after section 6's adoption is a question that is not before us.

B. *County Discretion to Set Eligibility and Service Standards*

(5a) The state next argues that, because San Diego had statutory discretion to set eligibility and service standards, there was no reimbursable mandate. Citing section 16704, the state asserts that the 1982 legislation required San Diego to spend MISA funds "only on those whom the county deems eligible under ß 17000," "gave the county exclusive authority to determine the level and type of benefits it would provide," and required counties "to include [adult MIP's] in their ß 17000 eligibility **only to the extent state funds were available and then only for 3 years.**" (Original emphasis.) [21] According to the state, under section 17001, "[t]he counties [*100] have complete discretion over the determination of eligibility, scope of benefits and how the services will be provided." [22]

21 As amended in 1982, section 16704, subdivision (c)(1), provided in relevant part: "The [county board of supervisors] shall assure that it will expend [MISA] funds only for the health services specified in Sections 14132 and 14021 provided to persons certified as eligible for such services pursuant to Section 17000 and shall assure that it will incur no less in net costs of county funds for county health services in any fiscal year than the amount required to obtain the maximum allocation under Section 16702." (Stats. 1982, ch. 1594, ß 70, p. 6346.) Section 16704, subdivision (c)(3), provided in relevant part: "Any person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided. Such persons may be held financially liable for these services based upon the person's ability to pay. A county may not establish a payment requirement which would deny medically necessary services. This section shall not be construed to mandate that a county provide any specific level or type of health care service . . . . The provisions of this paragraph shall become inoperative if a court ruling is issued which decrees that the provisions of this paragraph mandates [*sic*] that additional state funds be provided and which requires that additional state reimbursement be made to counties for costs incurred under this paragraph. This paragraph shall be operative only until June 30, 1983, unless a later enacted statute extends or deletes that date." (Stats. 1982, ch. 1594, ß 70, pp. 6346-6347.)

22 Section 17001 provides: "The board of supervisors of each county, or the agency authorized by county charter, shall adopt standards of aid and care for the indigent and dependent poor of the county or city and county."

The state exaggerates the extent of a county's discretion under section 17001. It is true "case law . . . has recognized that section 17001 confers broad discretion upon the counties in performing their statutory duty to provide general assistance benefits to needy residents. [Citations.]" (*Robbins v.* [**332] [***154] *Superior Court* (1985) 38 Cal. 3d 199, 211 [211 Cal. Rptr. 398, 695 P.2d 695] (*Robbins*).) However, there are "clear-cut limits" to this discretion. (*Ibid*.) **(6)** The counties may exercise their discretion "only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. [Citation.] When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be con-

Received
August 26, 2011
Commission on
State Mandates

sistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose. (Gov. Code, ß 11374.)" (*Mooney*, *supra*, 4 Cal. 3d at p. 679.) Thus, the counties' eligibility and service standards must "carry out" the objectives of section 17000. (*Mooney*, *supra*, 4 Cal. 3d at p. 679; see also *Poverty Resistance Center v. Hart* (1989) 213 Cal. App. 3d 295, 304-305 [261 Cal. Rptr. 545]; ß 11000 ["provisions of law relating to a public assistance program shall be fairly and equitably construed to effect the stated objects and purposes of the program"].) County standards that fail to carry out section 17000's objectives "are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." (*Morris*, *supra*, 67 Cal. 2d at p. 737.) Courts, which have " 'final responsibility for the interpretation of the law,' " must strike them down. (*Id*. at p. 748.) Indeed, despite the counties' statutory discretion, "courts have consistently invalidated . . . county welfare regulations that fail to meet statutory requirements. [Citations.]" (*Robbins*, *supra*, 38 Cal. 3d at p. 212.)

1. *Eligibility*

(5b) Regarding eligibility, we conclude that counties must provide medical care to all adult MIP's. As we emphasized in *Mooney*, section 17000 requires counties to relieve and support " '*all indigent persons* lawfully resident therein, "when such persons are not supported and relieved by their relatives" or by some other means.' " (*Mooney*, *supra*, 4 Cal. 3d at p. 678; see also *Bernhardt v. Board of Supervisors* (1976) 58 Cal. App. 3d 806, 811 [130 Cal. Rptr. 189].) Moreover, section 10000 declares that the statutory "purpose" of division 9 of the Welfare and Institutions Code, which includes section 17000, "is to provide for protection, care, and assistance to the [*101] people of the state in need thereof, and to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services to *all* of its needy and distressed." (Italics added.) Thus, counties have no discretion to refuse to provide medical care to "indigent persons" within the meaning of section 17000 who do not receive it from other sources. [23] (See *Bell v. Board of Supervisors* (1994) 23 Cal. App. 4th 1695, 1706 [28 Cal. Rptr. 2d 919] [eligibility standards may not "defeat the purpose of the statutory scheme by depriving qualified recipients of mandated support"]; *Washington v. Board of Supervisors* (1993) 18 Cal. App. 4th 981, 985 [22 Cal. Rptr. 2d 852] [courts have repeatedly "voided county ordinances which have attempted to redefine eligibility standards set by state statute"].)

23 We disapprove *Bay General*, *supra*, 156 Cal. App. 3d at pages 959-960, insofar as it (1) states that a county's responsibility under section 17000 extends only to indigents as defined by the county's board of supervisors, and (2) suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of section 17000 but do not qualify for Medi-Cal.

Although section 17000 does not define the term "indigent persons," the 1982 legislation made clear that all adult MIP's fall within this category for purposes of defining a county's obligation to provide medical care. [24] As part of its exclusion of adult MIP's, that legislation required counties to participate in the MISA program. (Stats. 1982, ch. 1594, ß 68, 70, 86, pp. 6343-6347, 6357.) Regarding that program, the 1982 legislation amended section 16704, subdivision (c)(1), to require [**333] [***155] that a county board of supervisors, in applying for MISA funds, "assure that it will expend such funds only for [specified] health services . . . provided to persons certified as eligible for such services pursuant to Section 17000 . . . ." (Stats. 1982, ch. 1594, ß 70, p. 6346.) At the same time, the 1982 legislation amended section 16704, subdivision (c)(3), to provide that "[a]ny person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, ß 70, p. 6346.) As the state correctly explains, under this provision, "counties had to include [Medically Indigent Adults] in their [section] 17000 eligibility" standards. By requiring counties to make all adult MIP's eligible for services paid for with MISA funds, while at the same time requiring counties to promise to spend such funds *only* on those certified as eligible under section 17000, the Legislature established that all adult MIP's are "indigent persons" for purposes of the counties' duty to provide medical care under section 17000. Otherwise, the counties could not comply with their promise.

24 Our conclusion is limited to this aspect of a county's duty under section 17000. We express no opinion regarding the scope of a county's duty to provide other forms of relief and support under section 17000.

[*102] Our conclusion is not affected by language in section 16704, subdivision (c)(3), making it "operative only until June 30, 1985, unless a later enacted statute extends or deletes that date." [25] As we have explained, the subdivision established that adult MIP's are "indigent persons" within the meaning of section 17000 for medical care purposes. As we have also explained, section 17000 requires counties to relieve and support *all* "indigent persons." Thus, even if the state is correct in asserting that section 16704, subdivision (c)(3), is now inoperative and no longer prohibits counties from excluding

Received
August 26, 2011
Commission on
State Mandates

adult MIP's from eligibility for medical services, section 17000 has that effect. [26]

25 The 1982 legislation made the subdivision operative until June 30, 1983. (Stats. 1982, ch. 1594, ß 70, p. 6347.) In 1983, the Legislature repealed and reenacted section 16704, and extended the operative date of subdivision (c)(3) to June 30, 1985. (Stats. 1983, ch. 323, ß 131.1, 131.2, pp. 1079-1080.)

26 Given our analysis, we express no opinion about the statement in *Cooke*, *supra*, 213 Cal. App. 3d at page 412, footnote 9, that the "life" of section 16704, subdivision (c)(3), "was implicitly extended" by the fact that the "paragraph remains in the statute despite three subsequent amendments to the statute . . . ."

Additionally, the coverage history of Medi-Cal demonstrates that the Legislature has always viewed all adult MIP's as "indigent persons" within the meaning of section 17000 for medical care purposes. As we have previously explained, when the Legislature created the original Medi-Cal program, which covered only categorically linked persons, it "declar[ed] its concern with the problems which [would] be facing the counties with respect to the medical care of indigent persons who [were] not covered" by Medi-Cal, "whose medical care [had to] be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, ß 2, p. 116 [enacting former ß 14108.5].) Moreover, to ensure that the counties' Medi-Cal cost share would not leave counties "with insufficient funds to provide hospital care for those persons not eligible for Medi-Cal," the Legislature also created the county option. (*Hall*, *supra*, 23 Cal. App. 3d at p. 1061.) Through the county option, "the state agreed to assume all county health care costs . . . in excess of county costs incurred during the 1964-1965 fiscal year, adjusted for population increases." (*Lackner*, *supra*, 97 Cal. App. 3d at p. 586.) Thus, the Legislature expressly recognized that the categorically linked persons initially eligible for Medi-Cal did not constitute all "indigent persons" entitled to medical care under section 17000, and required the state to share in the financial responsibility for providing that care.

In adding adult MIP's to Medi-Cal in 1971, the Legislature extended Medi-Cal coverage to noncategorically linked persons "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83.) This [*103] description was consistent with prior judicial decisions that, for purposes of a county's duty to provide "indigent persons" with hospitalization, [***156] had [**334] defined the term to include a person "who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support." (*Goodall v. Brite* (1936) 11 Cal. App. 2d 540, 550 [54 P.2d 510].)

Moreover, the fate of amendments to section 17000 proposed at the same time suggests that, in the Legislature's view, the category of "indigent persons" entitled to medical care under section 17000 extended even *beyond* those eligible for Medi-Cal as MIP's. The June 17, 1971, version of Assembly Bill No. 949 amended section 17000 by adding the following: "however, the health needs of such persons shall be met under [Medi-Cal]." (Assem. Bill No. 949 (1971 Reg. Sess.) ß 53.3, as amended June 17, 1971.) The Assembly deleted this amendment on July 20, 1971. (Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971, p. 37.) Regarding this change, the Assembly Committee on Health explained: "The proposed amendment to Section 17000, . . . which would have removed the counties' responsibilities as health care provider of last resort, is deleted. This change was originally proposed to clarify the guarantee to hold counties harmless from additional Medi-Cal costs. It is deleted since it cannot remove the fact that counties are, by definition, a 'last resort' for any person, with or without the means to pay, who does not qualify for federal or state aid." (Assem. Com. on Health, Analysis of Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971 (July 21, 1971), p. 4.)

The Legislature's failure to amend section 17000 in 1971 figured prominently in the Attorney General's interpretation of that section only two years later. In a 1973 published opinion, the Attorney General stated that the 1971 inclusion of MIP's in Medi-Cal "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (56 Ops.Cal.Atty.Gen., *supra*, at p. 569.) He based this conclusion on the 1971 legislation, relevant legislative history, and "the history of state medical care programs." (*Id*. at p. 570.) The opinion concluded: "The definition of medically indigent in [the chapter establishing Medi-Cal] is applicable only to that chapter and *does not include all those enumerated in section 17000*. If the former medical care program, by providing care only for a specific group, public assistance recipients, did not affect the responsibility of the counties to provide such service under section 17000, we believe the most recent expansion of the medical assistance program does not affect, *absent an express legislative intent to the contrary*, the duty of the counties under section 17000 to continue to provide services to those eligible under section 17000 but not under [Medi-Cal]." (*Ibid*., italics added.) The Attorney General's opinion, although not binding, is entitled to considerable weight. [*104] (*Freedom Newspapers, Inc. v. Orange County Employees Retirement*

Received
August 26, 2011
Commission on
State Mandates

System (1993) 6 Cal. 4th 821, 829 [25 Cal. Rptr. 2d 148, 863 P.2d 218].) Absent controlling authority, it is persuasive because we presume that the Legislature was cognizant of the Attorney General's construction of section 17000 and would have taken corrective action if it disagreed with that construction. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal. 3d 1, 17 [270 Cal. Rptr. 796, 793 P.2d 2].)

In this case, of course, we need not (and do not) decide whether San Diego's obligation under section 17000 to provide medical care extended beyond adult MIP's. Our discussion establishes, however, that the obligation extended *at least* that far. The Legislature has made it clear that all adult MIP's are "indigent persons" under section 17000 for purposes of San Diego's obligation to provide medical care. Therefore, the state errs in arguing that San Diego had discretion to refuse to provide medical care to this population. [27]

27 Although asserting that nothing required San Diego to provide "all" adult MIP's with medical care, the state never precisely identifies which adult MIP's were legally entitled to medical care and which ones were not. Nor does the state ever directly assert that some adult MIP's were not "indigent persons" under section 17000. On the contrary, despite its argument, the state seems to suggest that San Diego's medical care obligation under section 17000 extended even beyond adult MIP's. It asserts: "At no time prior to or following 1983 did Medi-Cal ever provide medical services to, or pay for medical services provided to, all persons who could not afford such services and therefore might be deemed 'medically indigent.' . . . For some period prior to 1983, Medi-Cal paid for services for some indigent adults under its 'medically indigent adults' category. . . . [A]t no time did the state ever assume financial responsibility for all adults who are too indigent to afford health care." (Original emphasis.)

[**335] [***157] 2. *Service Standards*

(7) A number of statutes are relevant to the state's argument that San Diego had discretion in setting service standards. Section 17000 requires in general terms that counties "relieve and support" indigent persons. Section 10000, which sets forth the purpose of the division containing section 17000, declares the "legislative intent that aid shall be administered and services provided promptly and humanely, with due regard for the preservation of family life," so "as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society." (ß 10000.) "Section 17000, as authoritatively interpreted, mandates that medical care be provided to indigents and section 10000 requires that such care be provided promptly and humanely. The duty is mandated by statute. There is no discretion concerning whether to provide such care . . . ." (*Tailfeather v. Board of Supervisors* (1996) 48 Cal. App. 4th 1223, 1245 [56 Cal. Rptr. 2d 255] (*Tailfeather*).)

Courts construing section 17000 have held that it "imposes a mandatory duty upon all counties to provide 'medically necessary care,' not just [*105] emergency care. [Citation.]" (*County of Alameda v. State Bd. of Control* (1993) 14 Cal. App. 4th 1096, 1108 [18 Cal. Rptr. 2d 487]; see also *Gardner v. County of Los Angeles* (1995) 34 Cal. App. 4th 200, 216 [40 Cal. Rptr. 2d 271]; ß 16704.1 [prohibiting a county from requiring payment of a fee or charge "before [it] renders medically necessary services to . . . persons entitled to services under Section 17000"].) It further "ha[s] been interpreted . . . to impose a minimum standard of care below which the provision of medical services may not fall." (*Tailfeather*, *supra*, 48 Cal. App. 4th at p. 1239.) In *Tailfeather*, the court stated that "section 17000 requires provision of medical services to the poor at a level which does not lead to unnecessary suffering or endanger life and health . . . ." (*Id*. at p. 1240.) In reaching this conclusion, it cited *Cooke*, *supra*, 213 Cal. App. 3d at page 404, which held that section 17000 requires counties to provide "dental care sufficient to remedy substantial pain and infection." (See also ß 14059.5 [defining "[a] service [as] 'medically necessary' . . . when it is reasonable and necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain"].)

During the years for which San Diego sought reimbursement, Health and Safety Code section 1442.5, former subdivision (c) (former subdivision (c)), also spoke to the level of services that counties had to provide under Welfare and Institutions Code section 17000. [28] As enacted in September 1974, former subdivision (c) provided that, whether a county's duty to provide care to all indigent people "is fulfilled directly by the county or through alternative means, the availability of services, and the quality of the treatment received by people who cannot afford to pay for their health care shall be the same as that available to nonindigent people receiving health care services in private facilities in that county." (Stats. 1974, ch. 810, ß 3, p. 1765.) The express "purpose and intent" of the act that contained former subdivision (c) was "to insure that the duty of counties to provide health care to indigents [was] properly and continuously fulfilled." (Stats. 1974, ch. 810, ß 1, p. 1764.) Thus, until its repeal in September 1992, [29] former subdivision (c) "[r]equire[d] that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county." (Legis. Counsel's Dig., Sen. Bill No. 2369, 2 Stats. 1974 (Reg. Sess.) Summary

Received
August 26, 2011
Commission on
State Mandates

Dig., p. 130; see also *Gardner v.* [**336] [***158] *County of Los Angeles*, *supra*, 34 Cal. App. 4th at p. 216; [*106] *Board of Supervisors v. Superior Court*, *supra*, 207 Cal. App. 3d at p. 564 [former subdivision (c) required that care provided "be *comparable* to that enjoyed by the nonindigent"].) [30] "For the 1990-91 fiscal year," the Legislature qualified this obligation by providing: "nothing in [former] subdivision (c) . . . shall require any county to exceed the standard of care provided by the state Medi-Cal program. Notwithstanding any other provision of law, counties shall not be required to increase eligibility or expand the scope of services in the 1990-91 fiscal year for their programs." (Stats. 1990, ch. 457, ß 23, p. 2013.)

28 The state argues that former subdivision (c) is irrelevant to our determination because, like section 17000, it "predate[d] 1975." Our previous analysis rejecting this argument in connection with section 17000 applies here as well.

29 Statutes 1992, chapter 719, section 2, page 2882, repealed former subdivision (c) and enacted a new subdivision (c) in its place. This urgency measure was approved by the Governor on September 14, 1992, and filed with the Secretary of State on September 15, 1992.

30 We disapprove *Cooke*, *supra*, 213 Cal. App. 3d at page 410, to the extent it held that Health and Safety Code section 1442.5, former subdivision (c), was merely "a limitation on a county's ability to close facilities or reduce services provided in those facilities," and was irrelevant absent a claim that a "county facility was closed [or] that any services in [the] county . . . were reduced." Although former subdivision (c) was contained in a section that dealt in part with closures and service reductions, nothing limited its reach to that context.

Although we have identified statutes relevant to service standards, we need not here define the precise contours of San Diego's statutory health care obligation. The state argues generally that San Diego had discretion regarding the services it provided. However, the state fails to identify either the specific services that San Diego provided under its CMS program or which of those services, if any, were not required under the governing statutes. Nor does the state argue that San Diego could have eliminated all services and complied with statutory requirements. Accordingly, we reject the state's argument that, because San Diego had some discretion in providing services, the 1982 legislation did not impose a reimbursable mandate. [31]

31 During further proceedings before the Commission to determine the amount of reimbursement due San Diego, the state may argue that particular services available under San Diego's CMS program exceeded statutory requirements.

VI. MINIMUM REQUIRED EXPENDITURE

(8) The Court of Appeal held that, under the governing statutes, the Commission must initially determine the precise amount of any reimbursement due San Diego. It therefore reversed the damages portion of the trial court's judgment and remanded the matter to the Commission for this determination. Nevertheless, the Court of Appeal affirmed the trial court's finding that the Legislature required San Diego to spend at least $ 41 million on its CMS program for fiscal years 1989-1990 and 1990-1991. In affirming this finding, the Court of Appeal relied primarily on section 16990, subdivision (a), as it read at all relevant times. The state contends this provision did not mandate that San Diego spend any minimum amount on the CMS program. It further asserts that the Court of Appeal's "ruling in effect sets a damages baseline, in contradiction to [its] ostensible reversal of the damage award."

[*107] Former section 16990, subdivision (a), set forth the financial maintenance-of-effort requirement for counties that received funding under the California Healthcare for the Indigent Program (CHIP). The Legislature enacted CHIP in 1989 to implement Proposition 99, the Tobacco Tax and Health Protection Act of 1988 (codified at Rev. & Tax. Code, ß 30121 et seq.). Proposition 99, which the voters approved on November 8, 1988, increased the tax on tobacco products and allocated the resulting revenue in part to medical and hospital care for certain persons who could not afford those services. (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal. 3d 245, 248, 254 [279 Cal. Rptr. 325, 806 P.2d 1360].) During the 1989-1990 and 1990-1991 fiscal years, former section 16990, subdivision (a), required counties receiving CHIP funds, "at a minimum," to "maintain a level of financial support of county funds for health services at least equal to its county match and any overmatch of county funds in the 1988-89 fiscal year," adjusted annually as provided. (Stats. 1989, ch. 1331, ß 9, p. 5427.) Applying this provision, the Court of Appeal affirmed the trial court's finding that the state had required San Diego to spend in fiscal years 1989-1990 and 1990-1991 [**337] [***159] at least $ 41 million on the CMS program.

We agree with the state that this finding is erroneous. Unlike participation in MISA, which was mandatory, participation in CHIP was voluntary. In establishing CHIP, the Legislature appropriated funds "for allocation to counties *participating* in" the program. (Stats. 1989, ch. 1331, ß 10, p. 5436, italics added.) Section 16980, subdivision (a), directed the State Department of Health

Received
August 26, 2011
Commission on
State Mandates

Services to make CHIP payments "upon application of the county assuring that it will comply with" applicable provisions. Among the governing provisions were former sections 16990, subdivision (a), and 16995, subdivision (a), which provided: "To be eligible for receipt of funds under this chapter, a county may not impose more stringent eligibility standards for the receipt of benefits under Section 17000 or reduce the scope of benefits compared to those which were in effect on November 8, 1988." (Stats. 1989, ch. 1331, ß 9, p. 5431.)

However, San Diego has cited no provision, and we have found none, that *required* eligible counties to participate in the program or apply for CHIP funds. Through Revenue and Taxation Code section 30125, which was part of Proposition 99, the electorate directed that funds raised through Proposition 99 "shall be used to supplement existing levels of service and not to fund existing levels of service." (See also Stats. 1989, ch. 1331, ß 1, 19, pp. 5382, 5438.) Counties not wanting to supplement their existing levels of service, and which therefore did not want CHIP funds, were not bound by the program's requirements. Those counties, including San Diego, that chose [*108] to seek CHIP funds did so voluntarily. [32] Thus, the Court of Appeal erred in concluding that former section 16990, subdivision (a), mandated a minimum funding requirement for San Diego's CMS program.

32 Consistent with the electorate's direction, in its application for CHIP funds, San Diego assured the state that it would "[e]xpend [CHIP] funds only to supplement existing levels of services provided and not to fund existing levels of service . . . ." Because San Diego's initial decision to seek CHIP funds was voluntary, the evidence it cites of state threats to withhold CHIP funds if it eliminated the CMS program is irrelevant.

Nor did former section 16991, subdivision (a)(5), which the trial court and Court of Appeal also cited, establish a minimum financial obligation for San Diego's CMS program. Former section 16991 generally "establish[ed] a procedure for the allocation of funds to each county receiving funds from the [MISA] . . . for the provision of services to persons meeting certain Medi-Cal eligibility requirements, based on the percentage of newly legalized individuals under the federal Immigration Reform and Control Act (IRCA)." (Legis. Counsel's Dig., Assem. Bill No. 75, 4 Stats. 1989 (Reg. Sess.) Summary Dig., p. 548.) Former section 16991, subdivision (a)(5), required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its combined allocation from various sources was less than the funding it received under section 16703 for fiscal year 1988-1989. [33] Nothing about this state reimbursement requirement imposed on San Diego a minimum funding requirement for its CMS program.

33 Former section 16991, subdivision (a)(5), provided in full: "If the sum of funding that a county received from its allocation pursuant to Section 16703, the amount of reimbursement it received from federal State Legalization Impact Assistance Grant [(SLIAG)] funding for indigent care, and its share of funding provided in this section is less than the amount of funding the county received pursuant to Section 16703 in fiscal year 1988-89 the state shall reimburse the county for the amount of the difference. For the 1990-91 fiscal year, if the sum of funding received from its allocation, pursuant to Section 16703 and the amount of reimbursement it received from [SLIAG] Funding for indigent care that year is less than the amount of funding the county received pursuant to Section 16703 in the 1988-89 fiscal year, the state shall reimburse the amount of the difference. If the department determines that the county has not made reasonable efforts to document and claim federal SLIAG funding for indigent care, the department shall deny the reimbursement." (Stats. 1989, ch. 1331, ß 9, p. 5428.)

Thus, we must reverse the judgment insofar as it finds that former sections 16990, subdivision (a), and 16991, subdivision (a)(5), established a $ 41 million spending floor for San Diego's CMS program. Instead, the various statutes that we have previously discussed (e.g., ß 10000, 17000, and Health & [**338] [***160] Saf. Code, ß 1442.5, former subd. (c)), the cases construing those statutes, and any other relevant authorities must guide the Commission's determination of the level of services that San Diego had to provide and any reimbursement to which it is entitled.

[*109] VII. REMAINING ISSUES

(9) The state raises a number of additional issues. It first complains that a mandamus proceeding under Code of Civil Procedure section 1085 was an improper vehicle for challenging the Commission's position. It asserts that, under Government Code section 17559, review by administrative mandamus under Code of Civil Procedure section 1094.5 is the exclusive method for challenging a Commission decision denying a mandate claim. The Court of Appeal rejected this argument, reasoning that the trial court had jurisdiction under Code of Civil Procedure section 1085 because, under section 6, the state has a ministerial duty of reimbursement when it imposes a mandate.

Like the Court of Appeal, but for different reasons, we reject the state's argument. "[M]andamus pursuant to

Received
August 26, 2011
Commission on
State Mandates

[Code of Civil Procedure] section 1094.5, commonly denominated 'administrative' mandamus, is mandamus still. It is not possessed of 'a separate and distinctive legal personality. It is not a remedy removed from the general law of mandamus or exempted from the latter's established principles, requirements and limitations.' [Citations.] The full panoply of rules applicable to 'ordinary' mandamus applies to 'administrative' mandamus proceedings, except where modified by statute. [Citations.]" (*Woods v. Superior Court* (1981) 28 Cal. 3d 668, 673-674 [170 Cal. Rptr. 484, 620 P.2d 1032].) Where the entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding brought under Code of Civil Procedure section 1085 as one brought under Code of Civil Procedure section 1094.5 and should deny a demurrer asserting that the wrong mandamus statute has been invoked. (*Woods*, *supra*, 28 Cal. 3d at pp. 673-674; *Anton v. San Antonio Community Hosp*. (1977) 19 Cal. 3d 802, 813-814 [140 Cal. Rptr. 442, 567 P.2d 1162].) Thus, even if San Diego identified the wrong mandamus statute, the error did not affect the trial court's ability to grant mandamus relief.

"In any event, distinctions between traditional and administrative mandate have little impact on this appeal . . . ." (*McIntosh v. Aubry* (1993) 14 Cal. App. 4th 1576, 1584 [18 Cal. Rptr. 2d 680].) The determination whether the statutes here at issue established a mandate under section 6 is a question of law. (*County of Fresno v. Lehman*, *supra*, 229 Cal. App. 3d at p. 347.) In reaching our conclusion, we have relied on no facts that are in dispute. Where, as here, a "purely legal question" is at issue, courts "exercise independent judgment . . ., no matter whether the issue arises by traditional or administrative mandate. [Citations.]" (*McIntosh*, *supra*, 14 Cal. App. 4th at p. 1584.) As the state concedes, even under Code of Civil Procedure section 1094.5, a judgment must "be reversed if based on erroneous conclusions of law." Thus, any differences between the two mandamus statutes have had no impact on our analysis.

[*110] The state next contends that the trial court prejudicially erred in denying the "peremptory disqualification" motion that the Director of the Department of Finance filed under Code of Civil Procedure section 170.6. We will not review this ruling, however, because it is reviewable only by writ of mandate under Code of Civil Procedure section 170.3, subdivision (d). (*People v. Webb* (1993) 6 Cal. 4th 494, 522-523 [24 Cal. Rptr. 2d 779, 862 P.2d 779]; *People v. Hull* (1991) 1 Cal. 4th 266 [2 Cal. Rptr. 2d 526, 820 P.2d 1036].)

Nor can we address the state's argument that the trial court erred in granting a preliminary injunction. The May 1991 order granting the preliminary injunction was "immediately and separately appealable" under Code of Civil Procedure section 904.1, subdivision (a)(6). (*Art Movers, Inc. v. Ni West, Inc*. (1992) 3 Cal. App. 4th 640, 645 [4 Cal. Rptr. 2d 689].) Thus, the state's attempt to challenge the order in an appeal filed after entry of final judgment in December 1992 [**339] [***161] was untimely. [34] (See *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal. App. 3d 230, 251 [256 Cal. Rptr. 194].) Moreover, the state's attempt to appeal the order granting the preliminary injunction is moot because of (1) the trial court's July 1 order granting a peremptory writ of mandate, which expressly "supersede[d] and replace[d]" the preliminary injunction order and (2) entry of final judgment. (*Sheward v. Citizens' Water Co*. (1891) 90 Cal. 635, 638-639 [27 P. 439]; *People v. Morse* (1993) 21 Cal. App. 4th 259, 264-265 [25 Cal. Rptr. 2d 816]; *Art Movers, Inc*., *supra*, 3 Cal. App. 4th at p. 647.)

34 Despite its argument here, when it initially appealed, the state apparently recognized that it could no longer challenge the May 1991 order. In its March 1993 notice of appeal, it appealed only from the judgment entered December 18, 1992, and did not mention the May 1991 order.

Finally, the state requests that we reverse the trial court's reservation of jurisdiction regarding an award of attorney fees. This request is premature. In the judgment, the trial court "retain[ed] jurisdiction to determine any right to and amount of attorneys' fees . . . ." This provision does not declare that San Diego in fact has a right to an award of attorney fees. Nor has San Diego asserted such a right. As San Diego states, at this point, "[t]here is nothing for this Court to review." We will not give an advisory ruling on this issue.

VIII. DISPOSITION

The judgment of the Court of Appeal is affirmed insofar as it holds that the exclusion of adult MIP's from Medi-Cal imposed a mandate on San Diego within the meaning of section 6. The judgment is reversed insofar as it holds that the state required San Diego to spend at least $ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. The matter is [*111] remanded to the Commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, ß 1442.5, former subd. (c); Welf. & Inst. Code, ß 10000, 17000) forced San Diego to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which San Diego is entitled.

George, C. J., Mosk, J., Baxter, J., Anderson, J., [*] and Aldrich, J., [**] concurred.

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the

Received
August 26, 2011
Commission on
State Mandates

Chief Justice pursuant to article VI, section 6 of the California Constitution.
** Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISSENT BY: KENNARD

DISSENT

KENNARD, J.

I dissent.

As part of an initiative measure placing spending limits on state and local government, the voters in 1979 added article XIII B to the California Constitution. Section 6 of this article provides that when the state "mandates a new program or higher level of service on any local government," the state must reimburse the local government for the cost of such program or service. Under subdivision (c) of this constitutional provision, however, the state "may, but need not," provide such reimbursement *if the state mandate was enacted before January 1, 1975*. (Cal. Const., art. XIII B, ß 6, subd. (c).) Subdivision (c) is the critical provision here.

Because the counties have for many decades been under a state mandate to provide for the poor, a mandate that existed before the voters added article XIII B to the state Constitution, the express language of subdivision (c) of section 6 of article XIII B exempts the state from any *legal obligation* to reimburse the counties for the cost of medical care to the needy. The fact that for a certain period after 1975 the state directly paid under the state Medi-Cal program for these costs did not lead to the creation of a new mandate once the state stopped doing so. To hold to the contrary, as the majority does, is to render subdivision (c) a nullity.

The issue here is not whether the poor are entitled to medical care. They are. The issue is whether the state or the counties must pay for this care. The majority places this obligation on the state. The counties' [**340] [***162] win, however, may be a pyrrhic victory. For, in anticipation of today's decision, the Legislature has enacted legislation that will drastically reduce the counties' share of other state revenue, as discussed in part III below.

I

Beginning in 1855, California imposed a legal obligation on the counties to take care of their poor. (*Mooney* v. *Pickett* (1971) 4 Cal. 3d 669, 677-678 [*112] [94 Cal. Rptr. 279, 483 P.2d 1231].) Since 1965, this obligation has been codified in Welfare and Institutions Code section 17000. (Stats. 1965, ch. 1784, ß 5, p. 4090.) That statute states in full: "Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." (Welf. & Inst. Code, ß 17000.) Included in this is a duty to provide medical care to indigents. (*Board of Supervisors v. Superior Court* (1989) 207 Cal. App. 3d 552, 557 [254 Cal. Rptr. 905].)

A brief overview of the efforts by federal, state, and local governments to furnish medical services to the poor may be helpful.

Before March 1, 1966, the date on which California began its Medi-Cal program, medical services for the poor "were provided in different ways and were funded by the state, county, and federal governments in varying amounts." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3.) The Medi-Cal program, which California adopted to implement the federal Medicaid program (42 U.S.C. ß 1396 et seq.; see *Morris v. Williams* (1967) 67 Cal. 2d 733, 738 [63 Cal. Rptr. 689, 433 P.2d 697]), at first limited eligibility to those persons "linked" to a federal categorical aid program by being over age 65, blind, disabled, or a member of a family with dependent children. (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.), pp. 548, 550.) Persons not linked to federal programs were ineligible for Medi-Cal; they could obtain medical care from the counties. (*County of Santa Clara* v. *Hall* (1972) 23 Cal. App. 3d 1059, 1061 [100 Cal. Rptr. 629].)

In 1971, the Legislature revised Medi-Cal by extending coverage to certain so-called "noncategorically linked" persons, or "medically indigent persons." (Stats. 1971, ch. 577, ß 12, 13, 22.5, 23, pp. 1110-1111, 1115.) The revisions included a formula for determining each county's share of Medi-Cal costs for the 1972-1973 fiscal year, with increases in later years based on the assessed value of property. (*Id*. at ß 41, 42, pp. 1131-1133.)

In 1978, California voters added to the state Constitution article XIII A (Proposition 13), which severely limited property taxes. In that same year, to help the counties deal with the drastic drop in local tax revenue, the Legislature assumed the counties' share of Medi-Cal costs. (Stats. 1978, ch. 292, ß 33, p. 610.) In 1979, the Legislature relieved the counties of their obligation to share in Medi-Cal costs. (Stats. 1979, ch. 282, ß 106, p. 1059.) [*113] Also in 1979, the voters added to the state Constitution article XIII B, which placed spending limits on state and local governments and added the mandate/reimbursement provisions at issue here.

Received
August 26, 2011
Commission on
State Mandates

In 1982, the Legislature removed from Medi-Cal eligibility the category of "medically indigent persons" that had been added in 1971. The Legislature also transferred funds for indigent health care services from the state to the counties through the Medically Indigent Services Account. (Stats. 1982, ch. 328, ß 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, ß 19, 86, pp. 6315, 6357.) Medically Indigent Services Account funds were then combined with county health service funds to provide health care to persons not eligible for Medi-Cal (Stats. 1982, ch. 1594, ß 86, p. 6357), and counties were to provide health services to persons in this category "to the extent that state funds are provided" (*id*., ß 70, p. 6346).

From 1983 through June 1989, the state fully funded San Diego County's program for furnishing medical care to the poor. Thereafter, in fiscal years 1989-1990 and 1990-1991, the state partially funded San Diego [**341] [***163] County's program. In early 1991, however, the state refused to provide San Diego County full funding for the 1990-1991 fiscal year, prompting a threat by the county to terminate its indigent medical care program. This in turn led the Legal Aid Society of San Diego to file an action against the County of San Diego, asserting that Welfare and Institutions Code section 17000 imposed a legal obligation on the county to provide medical care to the poor. The county cross-complained against the state. The county argued that the state's 1982 removal of the category of "medically indigent persons" from Medi-Cal eligibility mandated a "new program or higher level of service" within the meaning of section 6 of article XIII B of the California Constitution, because it transferred the cost of caring for these persons to the county. Accordingly, the county contended, section 6 required the state to reimburse the county for its cost of providing such care, and prohibited the state from terminating reimbursement as it did in 1991. The county eventually reached a settlement with the Legal Aid Society of San Diego, leading to a dismissal of the latter's complaint.

While the County of San Diego's case against the state was pending, litigation was proceeding in a similar action against the state by the County of Los Angeles and the County of San Bernardino. In that action, the Superior Court for the County of Los Angeles entered a judgment in favor of Los Angeles and San Bernardino Counties. The state sought review in the Second District Court of Appeal in Los Angeles. In December 1992, the parties to the Los Angeles case entered into a settlement agreement providing for dismissal of the appeal and vacating of the superior court judgment. [*114] The Court of Appeal thereafter ordered that the superior court judgment be vacated and that the appeal be dismissed.

The County of San Diego's action against the state, however, was not settled. It proceeded on the county's claim against the state for reimbursement of the county's expenditures for medical care to the indigent. [1] The majority holds that the county is entitled to such reimbursement. I disagree.

1 I agree with the majority that the superior court had jurisdiction to decide this case. (Maj. opn., *ante*, at pp. 85-90.)

II

Article XIII B, section 6 of the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, *except that the Legislature may, but need not, provide such subvention of funds for the following mandates:* [P] . . . [P] *(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975*." (Italics added.) [2]

2 Section 6 of article XIII B pertains to two types of mandates: new programs and higher levels of service. The words "such subvention" in the first paragraph of this constitutional provision makes the subdivision (c) exemption applicable to both types of mandates.

Of importance here is Welfare and Institutions Code section 17000 (hereafter sometimes section 17000). It imposes a legal obligation on the counties to provide, among other things, medical services to the poor. (*Board of Supervisors* v. *Superior Court*, *supra*, 207 Cal. App. 3d at p. 557; *County of San Diego v. Viloria* (1969) 276 Cal. App. 2d 350, 352 [80 Cal. Rptr. 869].) Section 17000 was enacted long before, and has existed continuously since, January 1, 1975, the date set forth in subdivision (c) of section 6 of article XIII B of the California Constitution. Thus, section 17000 falls within subdivision (c)'s language of "[l]egislative mandates enacted prior to January 1, 1975," rendering it exempt from the reimbursement provision of section 6.

Contrary to the majority's conclusion, the Legislature's 1982 legislation removing the category of "medically indigent persons" from Medi-Cal did not meet California Constitution, article XIII B, section 6's requirement of imposing on local government "a new program or higher level of service," and therefore did not entitle the counties to reimbursement [**342] [***164] from the state under section 6 of article XIII B. The counties' legal obligation to provide medical care arises from section 17000, not from the subsequently enacted [*115] 1982 legislation. The majority itself concedes that the

Received
August 26, 2011
Commission on
State Mandates

1982 legislation merely "trigger[ed] the counties' responsibility to provide medical care as providers of last resort under section 17000." (Maj. opn., *ante*, at p. 98.) Although certain actions by the state and the federal government during the 1970's and 1980's may have alleviated the counties' financial burden of providing medical care for the indigent, those actions did not supplant or remove the counties' existing legal obligation under section 17000 to furnish such care. (*Cooke* v. *Superior Court* (1989) 213 Cal. App. 3d 401, 411 [261 Cal. Rptr. 706]; *Madera Community Hospital* v. *County of Madera* (1984) 155 Cal. App. 3d 136, 151 [201 Cal. Rptr. 768].)

The state's reimbursement obligation under section 6 of article XIII B of the California Constitution arises only if, after January 1, 1975, the date mentioned in subdivision (c) of section 6, the state imposes on the counties "a new program or higher level of service." That did not occur here. As I pointed out above, the counties' legal obligation to provide for the poor arises from section 17000, enacted long before the January 1, 1975, cutoff date set forth in subdivision (c) of section 6. That statutory obligation remained in effect when, during a certain period after 1975, the state assumed the financial burden of providing medical care to the poor, in an effort to help the counties deal with a drastic drop in local revenue as a result of the voters' passage of Proposition 13, which severely limited property taxes. Because the counties' statutory obligation to provide health care to the poor was created before 1975 and has existed unchanged since that time, the state's 1982 termination of Medi-Cal eligibility for "medically indigent persons" did not create a "new program or higher level of service" within the meaning of section 6 of article XIII B, and therefore did not obligate the state to reimburse the counties for their expenditures in health care for the poor.

III

In imposing on the state a legal obligation to reimburse the counties for their cost of furnishing medical services to the poor, the majority's holding appears to bail out financially strapped counties. Not so.

Today's decision will immediately result in a reduction of state funds available to the counties. Here is why. In 1991, the Legislature added section 11001.5 to the Revenue and Taxation Code, providing that 24.33 percent of the moneys collected by the Department of Motor Vehicles as motor vehicle license fees must be deposited in the State Treasury to the credit of the Local Revenue Fund. In anticipation of today's decision, the Legislature stated in subdivision (d) of this statute: "This section shall cease to be operative on [*116] the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal [that]: [P] . . . [P] (2) The state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982." (Rev. & Tax. Code, ß 11001.5, subd. (d); see also *id*., ß 10753.8, subd. (b).)

The loss of such revenue, which the Attorney General estimates at "hundreds of millions of dollars," may put the counties in a serious financial bind. Indeed, realization of the scope of this revenue loss appears to explain why the County of Los Angeles, after a superior court victory in its action seeking state reimbursement for the cost of furnishing medical care to "medically indigent persons," entered into a settlement with the state under which the superior court judgment was effectively obliterated by a stipulated reversal. (See *Neary v. Regents of University of California* (1992) 3 Cal. 4th 273 [10 Cal. Rptr. 2d 859, 834 P.2d 119].) In a letter addressed to the Second District Court of Appeal, sent while the County of Los Angeles was engaged in settlement negotiations with the state, the county's attorney referred to the legislation mentioned above in these terms: "This legislation was quite clearly written with this case in mind. Consequently, [**343] [***165] to pursue this matter, *the County of Los Angeles risks losing a funding source it must have to maintain its health services programs at current levels*. The additional funding that might flow to the County from a final judgment in its favor in this matter, is several years away *and is most likely of a lesser amount than this County's share of the vehicle license fees*." (Italics added.) Thus, the County of Los Angeles had apparently determined that a legal victory entitling it to reimbursement from the state for the cost of providing medical care to the category of "medically indigent persons" would not in fact serve its economic interests.

I have an additional concern. According to the majority, whenever there is a change in a state program that has the effect of increasing a county's financial burden under section 17000 there must be reimbursement by the state. This means that so long as section 17000 continues to exist, an increase in state funding to a particular county for the care of the poor, once undertaken, may be irreversible, thus locking the state into perpetual financial assistance to that county for health care to the needy. This would, understandably, be a major disincentive for the Legislature to ever increase the state's funding of a county's medical care for the poor.

The rigidity imposed by today's holding will have unfortunate consequences should the state's limited financial resources prove insufficient to [*117] reimburse the counties under section 6 of article XIII B of the California Constitution for the "new program or higher level of service" of providing medical care to the poor under

Received
August 26, 2011
Commission on
State Mandates

section 17000. In that event, the state may be required to modify this "new program or higher level of service" in order to reconcile the state's reimbursement obligation with its finite resources and its other financial commitments. Such modifications are likely to take the form of limitations on eligibility for medical care or on the amount or kinds of medical care that the counties must provide to the poor under section 17000. A more flexible system--one that actively encouraged shared state and county responsibility for indigent medical care, using a variety of innovative funding mechanisms--would be less likely to result in a curtailment of medical services to the poor.

And if the Legislature is unable or unwilling to appropriate funds to comply with the majority's reimbursement order, the law allows the county to file "in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Gov. Code, ß 17612, subd. (c); see maj. opn., *ante*, at p. 82.) Such a declaration would do nothing to alleviate the plight of the poor.

Conclusion

The dispute in this case ultimately arises from a collision between the taxing limitations on the counties imposed by article XIII A of the state Constitution and the preexisting, open-ended mandate imposed on them under Welfare and Institutions Code section 17000 to provide medical care for the poor. As I have explained, the Legislature's assumption thereafter of some of the resulting financial burden to the counties did not repeal section 17000's mandate, nor did the Legislature's later termination of its financial support create a new mandate. In holding to the contrary, the majority imposes on the Legislature an obligation that the Legislature does not have under the law.

I recognize that my resolution of this issue--that under existing law the state has *no legal obligation* to reimburse the counties for health expenditures for the poor--would leave the counties in the same difficult position in which they find themselves now: providing funding for indigent medical care while maintaining other essential public services in a time of fiscal austerity. But complex policy questions such as the structuring and funding of indigent medical care are best left to the counties, the Legislature, and ultimately the electorate, rather than to the courts. It is the counties that must figure out how to allocate the limited budgets imposed on them by the electorate's adoption of articles XIII A and XIII B of the California Constitution among indigent medical care programs and a host of other pressing [*118] and essential needs. It is the Legislature that must decide whether to furnish financial assistance to the counties so [***166] they [**344] can meet their section 17000 obligations to provide for the poor, and whether to continue to impose the obligations of section 17000 on the counties. It is the electorate that must decide whether, given the ever-increasing costs of meeting the needs of indigents under section 17000, counties should be afforded some relief from the taxing and spending limits of articles XIII A and XIII B, both enacted by voters' initiative. These are hard choices, but for the reasons just given they are better made by the representative branches of government and the electorate than by the courts.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 6

Received
August 26, 2011
Commission on
State Mandates

THOMAS WILLIAM HAYES, as Director, etc., Plaintiff and Respondent, v. COMMISSION ON STATE MANDATES, Defendant, Cross-defendant, and Respondent; DALE S. HOLMES, as Superintendent, etc., Real Party in Interest, Cross-complainant and Appellant; WILLIAM CIRONE, as Superintendent, etc., Real Party in Interest and Respondent; STATE OF CALIFORNIA et al., Cross-defendants and Respondents.

No. C009519

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

11 Cal. App. 4th 1564; 15 Cal. Rptr. 2d 547; 1992 Cal. App. LEXIS 1498; 93 Cal. Daily Op. Service 17; 93 Daily Journal DAR 18

December 30, 1992, Decided

SUBSEQUENT HISTORY: [***1] Review Denied April 1, 1993, Reported at 1993 Cal. LEXIS 1988. Lucas, C.J., Kennard, J., and Arabian, J., are of the opinion the petition should be granted.

PRIOR HISTORY: Superior Court of Sacramento County, No. 352795, Eugene T. Gualco, Judge.

DISPOSITION: The judgment is affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Two school districts filed claims with the State Board of Control for state reimbursement of alleged state-mandated costs incurred in connection with special education programs. The board determined that the costs were state mandated and subject to reimbursement by the state. In a mandamus proceeding, the trial court entered a judgment by which it issued a writ of administrative mandate directing the Commission on State Mandates (the successor to the board) to set aside the board's administrative decision and to reconsider the matter in light of an intervening decision by the California Supreme Court, and by which it denied the petition of one of the school districts for a writ of mandate that would have directed the State Controller to issue a warrant in payment of the district's claim. (Superior Court of Sacramento County, No. 352795, Eugene T. Gualco, Judge.)

The Court of Appeal affirmed. It held that the 1975 amendments to the federal Education of the Handicapped Act (20 U.S.C. ß 1401 et seq.) constituted a federal mandate with respect to the state. However, even though the state had no real choice in deciding whether to comply with the act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. The court held that to the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state-mandated and subject to subvention under Cal. Const., art. XIII B, ß 6. Thus, on remand to the commission, the court held, the commission was required to focus on the costs incurred by local school districts and on whether those costs were imposed by federal mandate or by the state's voluntary choice in its implementation of the federal program. (Opinion by Sparks, Acting P. J., with Davis and Scotland, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) State of California ß 11 -- Fiscal Matters -- Reimbursement to Local Governments -- State-mandated Costs: Words, Phrases, and Maxims -- Subvention. -- "Subvention" generally means a grant of financial aid or assistance, or a subsidy. The constitutional rule of state

Received
August 26, 2011
Commission on
State Mandates

subvention provides that the state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. This does not mean that the state is required to reimburse local agencies for any incidental cost that may result from the enactment of a state law; rather, the subvention requirement is restricted to governmental services that the local agency is required by state law to provide to its residents. The subvention requirement is intended to prevent the state from transferring the costs of government from itself to local agencies. Reimbursement is required when the state freely chooses to impose on local agencies any peculiarly governmental cost which they were not previously required to absorb.

(2) Schools ß 4 -- School Districts -- Relationship to State. --A school district's relationship to the state is different from that of local governmental entities such as cities, counties, and special districts. Education and the operation of the public school system are matters of statewide rather than local or municipal concern. Local school districts are agencies of the state and have been described as quasi-municipal corporations. They are not distinct and independent bodies politic. The Legislature's power over the public school system is exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. The Legislature has the power to create, abolish, divide, merge, or alter the boundaries of school districts. The state is the beneficial owner of all school properties, and local districts hold title as trustee for the state. School moneys belong to the state, and the apportionment of funds to a school district does not give the district a proprietary interest in the funds. While the Legislature has chosen to encourage local responsibility for control of public education through local school districts, that is a matter of legislative choice rather than constitutional compulsion, and the authority that the Legislature has given to local districts remains subject to the ultimate and nondelegable responsibility of the Legislature.

(3) Property Taxes ß 7.8 -- Real Property Tax Limitation -- Exemptions and Special Taxes -- Federally Mandated Costs. --Pursuant to Rev. & Tax. Code, ß 2271 (local agency may levy rate in addition to maximum property tax rate to pay costs mandated by federal government that are not funded by federal or state government), costs mandated by the federal government are exempt from an agency's taxing and spending limits.

(4) State of California ß 11 -- Fiscal Matters -- Reimbursement to Local Governments -- State-mandated Costs -- Costs Incurred Before Effective Date of Constitutional Provision. --Since Cal. Const., art. XIII B, requiring subvention for state mandates enacted after Jan. 1, 1975, had an effective date of July 1, 1980, a local agency may seek subvention for costs imposed by legislation after Jan. 1, 1975, but reimbursement is limited to costs incurred after July 1, 1980. Reimbursement for costs incurred before July 1, 1980, must be obtained, if at all, under controlling statutory law.

(5) Schools ß 53 -- Parents and Students -- Right or Duty to Attend -- Handicapped Children -- Federal Rehabilitation Act -- Obligations Imposed on Districts. --Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. ß 794) does not only obligate local school districts to prevent handicapped children from being excluded from school. States typically purport to guarantee all of their children the opportunity for a basic education. In California, basic education is regarded as a fundamental right. All basic educational programs are essentially affirmative action activities in the sense that educational agencies are required to evaluate and accommodate the educational needs of the children in their districts. Section 504 does not permit local agencies to accommodate the educational needs of some children while ignoring the needs of others due to their handicapped condition. The statute imposes an obligation upon local school districts to take affirmative steps to accommodate the needs of handicapped children.

(6) Schools ß 53 -- Parents and Students -- Right or Duty to Attend -- Handicapped Children -- Education of the Handicapped Act. --The federal Education of the Handicapped Act (20 U.S.C. ß 1401 et seq.), which since its 1975 amendment has required recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education, is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states. Congress intended the act to establish a basic floor of opportunity that would bring into compliance all school districts with the constitutional right to equal protection with respect to handicapped children. It is also apparent that Congress intended to achieve nationwide application.

(7) Civil Rights ß 6 -- Education -- Handicapped -- Scope of Federal Statute. --Congress intended the Education of the Handicapped Act (20 U.S.C. ß 1401 et seq.) to serve as a means by which state and local educational agencies could fulfill their obligations under the equal protection and due process provisions of the Constitution and under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. ß 794). Accordingly, where it is applicable, the act supersedes claims under the Civil Rights Act (42 U.S.C. ß 1983) and section 504, and the administrative remedies provided by the act constitute the exclusive

Received
August 26, 2011
Commission on
State Mandates

remedy of handicapped children and their parents or other representatives. As a result of the exclusive nature of the Education of the Handicapped Act, dissatisfied parties in recipient states must exhaust their administrative remedies under the act before resorting to judicial intervention.

(8a) (8b) State of California ß 11 -- Fiscal Matters -- Reimbursement to Local Governments -- State-mandated Costs -- Special Education: Schools ß 4 -- School Districts; Financing; Funds -- Special Education Costs -- Reimbursement by State. --The 1975 amendments to the federal Education of the Handicapped Act (20 U.S.C. ß 1401 et seq.) constituted a federal mandate with respect to the state. However, even though the state had no real choice in deciding whether to comply with the act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention under Cal. Const., art. XIII B, ß 6. Thus, on remand of a proceeding by school districts to the Commission on State Mandates for consideration of whether special education programs constituted new programs or higher levels of service mandated by the state entitling the districts to reimbursement, the commission was required to focus on the costs incurred by local school districts and whether those costs were imposed by federal mandate or by the state's voluntary choice in its implementation of the federal program.

(9) State of California ß 11 -- Fiscal Matters -- Reimbursement to Local Governments -- Federally Mandated Costs. --The constitutional subvention provision (Cal. Const., art. XIII B, ß 6) and the statutory provisions which preceded it do not expressly say that the state is not required to provide a subvention for costs imposed by a federal mandate. Rather, that conclusion follows from the plain language of the subvention provisions themselves. The constitutional provision requires state subvention when "the Legislature or any State agency mandates a new program or higher level of service" on local agencies. Likewise, the earlier statutory provisions required subvention for new programs or higher levels of service mandated by legislative act or executive regulation. When the federal government imposes costs on local agencies, those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate, so long as the state had no "true choice" in the manner of implementation of the federal mandate.

(10) Statutes ß 28 -- Construction -- Language -- Consistency of Meaning Throughout Statute. --As a general rule and unless the context clearly requires otherwise, it must be assumed that the meaning of a term or phrase is consistent throughout the entire act or constitutional article of which it is a part.

(11) State of California ß 11 -- Fiscal Matters -- Reimbursement to Local Governments -- Federally Mandated Costs -- Subvention. --Subvention principles are part of a more comprehensive political scheme. The basic purpose of the scheme as a whole was to limit the taxing and spending powers of government. The taxing and spending powers of local agencies were to be "frozen" at existing levels with adjustments only for inflation and population growth. Since local agencies are subject to having costs imposed upon them by other governmental entities, the scheme provides relief in that event. If the costs are imposed by the federal government or the courts, then the costs are not included in the local government's taxing and spending limitations. If the costs are imposed by the state, then the state must provide a subvention to reimburse the local agency. Nothing in the scheme suggests that the concept of a federal mandate should have different meanings depending upon whether one is considering subvention or taxing and spending limitations. Thus, the criteria set forth in a California Supreme Court case concerning whether costs mandated by the federal government are exempt from an agency's taxing and spending limits are applicable when subvention is the issue.

(12) State of California ß 11 -- Fiscal Matters -- Reimbursement to Local Governments -- State-mandated Costs -- Special Education -- Applicable Criteria in Determining Whether Subvention Required. --In a proceeding for a writ of mandate to direct the Commission on State Mandates to set aside an administrative decision by the State Board of Control (the commission's predecessor), in which the board found that all local special education costs were state mandated and thus subject to state reimbursement, the trial court did not err in determining that the board failed to consider the issues under the appropriate criteria as set forth in a California Supreme Court case concerning whether costs mandated by the federal government are exempt from an agency's taxing and spending limits. The board relied upon the "cooperative federalism" nature of the Education of the Handicapped Act (20 U.S.C. ß 1401 et seq.) without any consideration of whether the act left the state any actual choice in the matter. It also relied on litigation involving another state. However, under the criteria set

Received
August 26, 2011
Commission on
State Mandates

forth in the Supreme Court's case, the litigation in the other state did not support the board's decision but in fact strongly supported a contrary result.

(13) Courts ß 34 -- Decisions and Orders -- Prospective and Retroactive Decisions -- Opinion Elucidating Existing Law. --In a California Supreme Court case concerning whether costs mandated by the federal government are exempt from an agency's taxing and spending limits, the court elucidated and enforced existing law. Under such circumstances, the rule of retrospective operation controls. Thus, in a proceeding for a writ of mandate to direct the Commission on State Mandates to set aside an administrative decision by the State Board of Control (the commission's predecessor), in which the board found that all local special education costs were state mandated and thus subject to state reimbursement, the trial court correctly applied the Supreme Court decision to the litigation pending before it.

COUNSEL: Biddle & Hamilton, W. Craig Biddle, Christian M. Keiner and F. Richard Ruderman for Real Party in Interest, Cross-complainant and Appellant.

Breon, O'Donnell, Miller, Brown & Dannis and Emi R. Uyehara as Amici Curiae on behalf of Real Party in Interest, Cross-complainant and Appellant.

No appearance for Real Party in Interest and Respondent.

Daniel E. Lungren, Attorney General, N. Eugene Hill, Assistant Attorney General, Cathy Christian and Marsha A. Bedwell, Deputy Attorneys General, and Daniel G. Stone for Plaintiff and Respondent.

Gary D. Hori for Defendant, Cross-defendant and Respondent.

Richard J. Chivaro and Patricia A. Cruz for Cross-defendants and Respondents.

JUDGES: Opinion by Sparks, Acting P. J., with Davis and Scotland, JJ., concurring.

OPINION BY: SPARKS, Acting P. J.

OPINION

[*1570] [**550] This appeal involves a decade-long battle over claims for subvention by two county superintendents of schools [***2] for reimbursement for mandated special education programs. Section 6 of article XIII B of the California Constitution directs, with exceptions not relevant here, that "[w]henever the Legislature or any State agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, ..." The issue on appeal is whether the special education programs in question constituted new programs or higher levels of service mandated by the state entitling the school districts to reimbursement under section 6 of article XIII B of the California Constitution and related statutes for the cost of implementing them or whether these programs were instead mandated by the federal government for which no reimbursement is due.

The Santa Barbara County Superintendent of Schools and the Riverside County Superintendent of Schools each filed claims with the Board of Control for state reimbursement for alleged state-mandated costs incurred in connection with special education programs. After a lengthy administrative process, the Board of Control rendered a decision [***3] finding that all local special education costs were state mandated and subject to state reimbursement. That decision was then successfully challenged in the Sacramento County Superior Court. The superior court entered a judgment by which it: (1) issued a writ of administrative mandate (Code Civ. Proc., ß 1094.5), directing the Commission on State Mandates (the successor to the Board of [*1571] Control) to set aside the administrative decision and to reconsider the matter in light of the California Supreme Court's intervening decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 [266 Cal.Rptr. 139, 785 P.2d 522]; and (2) denied the Riverside County Superintendent of School's petition for a writ of mandate (Code Civ. Proc., ß 1085), which would have directed the State Controller to issue a warrant in payment of the claim. The Riverside County Superintendent of Public Schools appeals. We shall clarify the criteria to be applied by the Commission on State Mandates on remand and affirm the judgment.

I. THE PARTIES

This action was commenced in July 1987 by Jesse R. Huff, then the Director of the [***4] California Department of Finance. Huff petitioned for a writ of administrative mandate to set aside the administrative decision which found all the special education costs to be state mandated. On appeal Huff appears as a respondent urging that we affirm the judgment.

The Commission on State Mandates (the Commission) is the administrative agency which now has jurisdiction over local agency claims for reimbursement for state-mandated costs. (Gov. Code, ß 17525.) In this respect the Commission is the successor to the Board of Control. The Board of Control rendered the administrative decision which is at issue here. Since an appropriation for payment of these claims was not included in a

Received
August 26, 2011
Commission on
State Mandates

local government claims bill before January 1, 1985, administrative jurisdiction over the claims has been transferred from the Board of Control to the Commission. (Gov. Code, ß 17630.) The Commission is the named defendant in the petition for a writ of administrative mandate. In the trial court and on appeal the Commission has appeared as the agency having administrative jurisdiction over the claims, but has not expressed a position on the merits of the litigation.

[**551] The Santa Barbara County Superintendent [***5] of Schools (hereafter Santa Barbara) is a claimant for state reimbursement of special education costs incurred in the 1979-1980 fiscal year. Santa Barbara is a real party in interest in the proceeding for administrative mandate. Santa Barbara has not appealed from the judgment of the superior court and, although a nominal respondent on appeal, has not filed a brief in this court.

The Riverside County Superintendent of Schools (hereafter Riverside) represents a consortium of school districts which joined together to provide special education programs to handicapped students. Riverside seeks reimbursement for special education costs incurred in the 1980-1981 fiscal year. [*1572] Riverside is a real party in interest in the proceeding for writ of administrative mandate. It filed a cross-petition for a writ of mandate directing the Controller to pay its claim. Riverside is the appellant in this appeal.

The State of California and the State Treasurer are named cross- defendants in Riverside's cross-petition for a writ of mandate. They joined with Huff in this litigation. The State Controller is the officer charged with drawing warrants for the payment of moneys from the State [***6] Treasury upon a lawful appropriation. (Cal. Const., art. XVI, ß 7.) The State Controller is a named defendant in Riverside's petition for a writ of mandate. In the trial court and on appeal the State Controller expresses no opinion on the merits of Riverside's reimbursement claim, but asserts that the courts lack authority to compel him to issue a warrant for payment of the claim in the absence of an appropriation for payment of the claim.

In addition to the briefing by the parties on appeal, we have permitted a joint amici curiae brief to be filed in support of Riverside by the Monterey County Office of Education, the Monterey County Office of Education Special Education Local Planning Area, and 21 local school districts.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Legislature has provided an administrative remedy for the resolution of local agency claims for reimbursement for state mandates. In *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62 [222 Cal.Rptr. 750], at pages 71 and 72, we described these procedures as follows (with footnotes deleted): " Section 2250 [Revenue & Taxation Code] and those following [***7] it provide a hearing procedure for the determination of claims by local governments. The State Board of Control is required to hear and determine such claims. (ß 2250.) For purposes of such hearings the board consists of the members of the Board of Control provided for in part 4 (commencing with ß 13900) of division 3 of title 2 of the Government Code, together with two local government officials appointed by the Governor. (ß 2251.) The board was required to adopt procedures for receiving and hearing such claims. (ß 2252.) The first claim filed with respect to a statute or regulation is considered a 'test claim' or a 'claim of first impression.' (ß 2218, subd. (a).) The procedure requires an evidentiary hearing where the claimant, the Department of Finance, and any affected department or agency can present evidence. (ß 2252.) If the board determines that costs are mandated, then it must adopt parameters and guidelines for the reimbursement of such claims. (ß 2253.2.) The claimant or the state is entitled to commence an action in administrative mandate pursuant to Code of Civil Procedure section 1094.5 to set aside a decision of the board on the grounds that the board's decision [***8] is not supported by substantial evidence. (ß 2253.5.)

[*1573] "At least twice each calendar year the board is required to report to the Legislature on the number of mandates it has found and the estimated statewide costs of these mandates. (ß 2255, subd. (a).) In addition to the estimate of the statewide costs for each mandate, the report must also contain the reasons for recommending reimbursement. (ß 2255, subd. (a).) Immediately upon receipt of the report a local government claims bill shall be introduced in the Legislature which, when introduced, must contain an appropriation sufficient to pay for the estimated costs of the mandates. [**552] (ß 2255, subd. (a).) In the event the Legislature deletes funding for a mandate from the local government claims bill, then it may take one of the following courses of action: (1) include a finding that the legislation or regulation does not contain a mandate; (2) include a finding that the mandate is not reimbursable; (3) find that a regulation contains a mandate and direct that the Office of Administrative Law repeal the regulation; (4) include a finding that the legislation or regulation contains a reimbursable mandate and direct that the [***9] legislation or regulation not be enforced against local entities until funds become available; (5) include a finding that the Legislature cannot determine whether there is a mandate and direct that the legislation or regulation shall remain in effect and be enforceable unless a court determines that the legislation or regulation contains a reimbursable mandate in which case the effectiveness of the legislation or regulation shall be suspended and it shall not be enforced against a local entity until funding becomes avail-

Received
August 26, 2011
Commission on
State Mandates

able; or (6) include a finding that the Legislature cannot determine whether there is a reimbursable mandate and that the legislation or regulation shall be suspended and shall not be enforced against a local entity until a court determines whether there is a reimbursable mandate. (ß 2255, subd. (b).) If the Legislature deletes funding for a mandate from a local government claims bill but does not follow one of the above courses of action or if a local entity believes that the action is not consistent with article XIII B of the Constitution, then the local entity may commence a declaratory relief action in the Superior Court of the County of Sacramento to declare [***10] the mandate void and enjoin its enforcement. (ß 2255, subd. (c).)

"Effective January 1, 1985, the Legislature has established a new commission to consider and determine claims based upon state mandates. This is known as the Commission on State Mandates and it consists of the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and Research, and a public member with experience in public finance, appointed by the Governor and approved by the Senate. (Gov. Code, ß 17525.) 'Costs mandated by the state' are defined as 'any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which [*1574] 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.' (Gov. Code, ß 17514.) The procedures before the Commission are similar to those which were followed before the Board of Control. (Gov. Code, ß 17500 et seq.) Any claims which had not been included in a local government claims [***11] bill prior to January 1, 1985, were to be transferred to and considered by the commission. (Gov. Code, ß 17630; [Rev. & Tax. Code,] ß 2239.)"

On October 31, 1980, Santa Barbara filed a test claim with the Board of Control seeking reimbursement for costs incurred in the 1979-1980 fiscal year in connection with the provision of special education services as required by Statutes 1977, chapter 1247, and Statutes 1980, chapter 797. Santa Barbara asserted that these acts should be considered an ongoing requirement of increased levels of service.

Santa Barbara's initial claim was based upon the "mandate contained in the two bills specified above [which require] school districts and county offices to provide full and formal due process procedures and hearings to pupils and parents regarding the special education assessment, placement and the appropriate education of the child." Santa Barbara asserted that state requirements exceeded those of federal law as reflected in section 504 of the Rehabilitation Act of 1973 (29 U.S.C. ß 794). [1] Santa [**553] Barbara's initial claim was for $ 10,500 in state-mandated costs for the 1979-1980 fiscal year.

1 Section 794 of title 29 of the United States Code will of necessity play an important part in our discussion of the issues presented in this case. That provision was enacted as section 504 of the Rehabilitation Act of 1973. (Pub.L. No. 93-112, tit. V, ß 504 (Sept. 26, 1973) 87 Stat. 394.) It has been amended several times. (Pub.L. No. 95-602, tit. I, ß 119, 122(d)(2) (Nov. 6, 1978) 92 Stat. 2982, 2987 [Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978]; Pub.L. No. 99- 506, tit. I, ß 103(d)(2)(B), tit. X, ß 1002(e)(4) (Oct. 21, 1986) 100 Stat. 1810, 1844; Pub.L. No. 100-259, ß 4 (Mar. 22, 1988) 102 Stat. 29; Pub.L. No. 100-630, tit. II, ß 206(d) (Nov. 7, 1988) 102 Stat. 3312.) The decisional authorities universally refer to the statute as "section 504." We will adhere to this nomenclature and subsequent references to section 504 will refer to title 29, United States Code, section 794.

[***12] During the administrative proceedings Santa Barbara amended its claim to reflect the following state-mandated activities alleged to be in excess of federal requirements: (1) the extension of eligibility to children younger and older than required by federal law; (2) the establishment of procedures to search for and identify children with special needs; (3) assessment and evaluation; (4) the preparation of "Individual Education Plans" (IEP's); (5) due process hearings in placement determinations; (6) substitute teachers; and (7) staff development programs. Santa Barbara was claiming reimbursement in excess of $ 520,000 for the cost of these services during the 1979- 1980 fiscal year.

[*1575] Also, during the administrative proceedings the focus of federally mandated requirements shifted from section 504 of the Rehabilitation Act to federal Public Law No. 94-142, which amended the Education of the Handicapped Act. (20 U.S.C. ß 1401 et seq.) [2]

2 The Education of the Handicapped Act was enacted in 1970. (Pub.L. No. 91-230, tit. VI (Apr. 13, 1970) 84 Stat. 175.) It has been amended many times. The amendment of primary interest here was enacted as the Education for All Handicapped Children Act of 1975. (Pub.L. No. 94-142 (Nov. 29, 1975) 89 Stat. 774.) The 1975 legislation significantly amended the Education of the Handicapped Act, but did not change its short title. The Education of the Handicapped Act has now been renamed the Individuals with Disabili-

Received
August 26, 2011
Commission on
State Mandates

ties Education Act. (Pub.L. No. 101-476, tit. IX, ß 901(b)(21) (Oct. 30, 1990) 104 Stat. 1143; Pub.L. No. 101-476, tit. IX, ß 901b; Pub.L. No. 102-119, ß 25(b) (Oct. 7, 1991) 105 Stat. 607.) Since at all times relevant here the federal act was known as the Education of the Handicapped Act, we will adhere to that nomenclature.

[***13] The Board of Control adopted a decision denying Santa Barbara's claim. The board concluded that the Education of the Handicapped Act resulted in costs mandated by the federal government, that state special education requirements exceed those of federal law, but that "the resulting mandate is not reimbursable because the Legislature already provides funding for all Special Education Services through an appropriation in the annual Budget Act."

Santa Barbara sought judicial review by petition for a writ of administrative mandate. The superior court found the administrative record and the Board of Control's findings to be inadequate. Judgment was rendered requiring the Board of Control to set aside its decision and to rehear the matter to establish a proper record, including findings. That judgment was not appealed.

On October 30, 1981, Riverside filed a test claim for reimbursement of $ 474,477 in special education costs incurred in the 1980-1981 fiscal year. Riverside alleged that the costs were state mandated by chapter 797 of Statutes 1980. The basis of Riverside's claim was Education Code section 56760, a part of the state special education funding formula which, according [***14] to Riverside, "mandates a 10%% cap on ratio of students served by special education and within that 10%% mandates the ratio of students to be served by certain services." Riverside explained that chapter 797 of Statutes 1980 was enacted as urgency legislation effective July 28, 1980, and that at that time it was already "locked into" providing special education services to more than 13 percent of its students in accordance with prior state law and funding formulae. [3]

3 The 1980 legislation required that a local agency adopt an annual budget plan for special education services. (Ed. Code, ß 56200.) Education Code section 56760 provided that in the local budget plan the ratio of students to be served should not exceed 10 percent of total enrollment. However, those proportions could be waived for undue hardship by the Superintendent of Public Instruction. (Ed. Code, ß 56760, 56761.) In addition, the 1980 legislation included provisions for a gradual transition to the new requirements. (Ed. Code, ß 56195 et seq.) The transitional provisions included a guarantee of state funding for 1980-1981 at prior student levels with an inflationary adjustment of 9 percent. (Ed. Code, ß 56195.8.) The record indicates that Riverside applied for a waiver of the requirements of Education Code section 56760, but that the waiver request was denied due to a shortage of state funding. It also appears that Riverside did not receive all of the 109 percent funding guarantee under Education Code section 56195.8. In light of the current posture of this appeal we need not and do not consider whether the failure of the state to appropriate sufficient funds to satisfy its obligations under the 1980 legislation can be addressed in a proceeding for the reimbursement of state-mandated costs or must be addressed in some other manner.

[***15] [**554] The Riverside claim, like Santa Barbara's, evolved over time with increases in the amount of reimbursement sought. Eventually the Board of [*1576] Control denied Riverside's claim for the same reasons the Santa Barbara claim was denied. Riverside sought review by petition for a writ of administrative mandate. In its decision the superior court accepted the board's conclusions that the Education of the Handicapped Act constitutes a federal mandate and that state requirements exceed those of the federal mandate. However, the court disagreed with the board that any appropriation in the state act necessarily satisfies the state's subvention obligation. The court concluded that the Board of Control had failed to consider whether the state had fully reimbursed local districts for the state-mandated costs which were in excess of the federal mandate, and the matter was remanded for consideration of that question. That judgment was not appealed.

On return to the Board of Control, the Santa Barbara claim and the Riverside claim were consolidated. The Board of Control adopted a decision holding that all special education costs under Statutes 1977, chapter 1247, and Statutes 1980, chapter [***16] 797, are state-mandated costs subject to subvention. The board reasoned that the federal Education of the Handicapped Act is a discretionary program and that section 504 of the Rehabilitation Act does not require school districts to implement any programs in response to federal law, and therefore special education programs are optional in the absence of a state mandate.

The claimants were directed to draft, and the Board of Control adopted, parameters and guidelines for reimbursement of special education costs. The board submitted a report to the Legislature estimating that the total statewide cost of reimbursement for the 1980-1981 through 1985-1986 fiscal years would be in excess of $ 2 billion. Riverside's claim for reimbursement for the 1980-1981 fiscal year was now in excess of $ 7 million. Proposed legislation which would have appropriated

Received
August 26, 2011
Commission on
State Mandates

funds for reimbursement of special education costs during the 1980-1981 through 1985- 1986 fiscal years failed to pass in the Legislature. (Sen. Bill No. 1082 (1985-1986 Reg. Sess.).) A separate bill which would have appropriated funds to reimburse Riverside [*1577] for its 1980-1981 claim also failed to pass. (Sen. Bill No. 238 [***17] (1987-1988 Reg. Sess.).)

At this point Huff, as Director of the Department of Finance, brought an action in administrative mandate seeking to set aside the decision of the Board of Control. Riverside cross-petitioned for a writ of mandate directing the state, the Controller and the Treasurer to issue a warrant in payment of its claim for the 1980-1981 fiscal year.

The superior court concluded that the Board of Control did not apply the appropriate standard in determining whether any portion of local special education costs are incurred pursuant to a federal mandate. The court found that the definition of a federal mandate set forth by the *Supreme Court in City of Sacramento v. State of California, supra,* 50 Cal.3d 51, "marked a departure from the narrower 'no discretion' test" of this court's earlier decision in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258]. It further found that the standard set forth in the high court's decision in *City of Sacramento* "is to be applied retroactively." Accordingly, the superior court issued a [***18] peremptory writ of mandate directing the Commission on State Mandates to set aside [**555] the decision of the Board of Control, to reconsider the claims in light of the decision in *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, and "to ascertain whether certain costs arising from Chapter 797/80 and Chapter 1247/77 are federally mandated, and if so, the extent, if any, to which the state-mandated costs exceed the federal mandate." Riverside's cross-petition for a writ of mandate was denied. This appeal followed.

III. PRINCIPLES OF SUBVENTION

(1) "Subvention" generally means a grant of financial aid or assistance, or a subsidy. (See Webster's Third New Internat. Dict. (1971) p. 2281.) As used in connection with state-mandated costs, the basic legal requirements of subvention can be easily stated; it is in the application of the rule that difficulties arise.

Essentially, the constitutional rule of state subvention provides that the state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202].) [***19] This does not mean that the state is required to reimburse local agencies for any incidental cost that may result from the enactment of a state law; rather, the subvention requirement is restricted to governmental services which the local agency is required by [*1578] state law to provide to its residents. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 70.) The subvention requirement is intended to prevent the state from transferring the costs of government from itself to local agencies. (*Id.* at p. 68.) Reimbursement is required when the state "freely chooses to impose on local agencies *any* peculiarly 'governmental' cost which they were not previously required to absorb." (*Id.* at p. 70, italics in original.)

The requirement of subvention for state-mandated costs had its genesis in the "Property Tax Relief Act of 1972" which is also known as "SB 90" (Senate Bill No. 90). (*City of Sacramento v. State of California, supra,* 156 Cal.App.3d at p. 188.) That act established limitations upon the power of local governments to levy taxes and concomitantly prevented [***20] the state from imposing the cost of new programs or higher levels of service upon local governments. (Ibid.) The Legislature declared: "It is the intent in establishing the tax rate limits in this chapter to establish limits that will be flexible enough to allow local governments to continue to provide existing programs, that will be firm enough to insure that the property tax relief provided by the Legislature will be long lasting and that will afford the voters in each local government jurisdiction a more active role in the fiscal affairs of such jurisdictions." (Rev. & Tax. Code, former ß 2162, Stats. 1972, ch. 1406, ß 14.7, p. 2961.) [4] The act provided that the state would pay each county, city and county, city, and special district the sums which were sufficient to cover the total cost of new state-mandated costs. (See Rev. & Tax. Code, former ß 2164.3, Stats. 1972, ch. 1406, ß 14.7, pp. 2962-2963.) New state-mandated costs would arise from legislative action or executive regulation after January 1, 1973, which mandated a new program or higher level of service under an existing mandated program. (Ibid.)

4 In addition to requiring subventions for new state programs and higher levels of service, Senate Bill No. 90 required the state to reimburse local governments for revenues lost by the repeal or reduction of property taxes on certain classes of property. In this connection the Legislature said: "It is the purpose of this part to provide property tax relief to the citizens of this state, as undue reliance on the property tax to finance various functions of government has resulted in serious detriment to one segment of the taxpaying public. The subventions from the State General Fund required under this part will serve to partially equalize tax burdens among all citizens, and the state as a

Received
August 26, 2011
Commission on
State Mandates

whole will benefit." (Gov. Code, ß 16101, Stats. 1972, ch. 1406, ß 5, p. 2953.)

[***21] **(2)** [**556] **(See fn. 5.)** Senate Bill No. 90 did not specifically include school districts in the group of agencies entitled to reimbursement for state-mandated costs. [5] (Rev. & Tax. Code, former ß 2164.3, Stats. 1972, ch. 1406. ß 14.7, pp. 2962-2963.) In fact, at that time methods of financing education in this state were [*1579] undergoing fundamental reformation as the result of the litigation in *Serrano v. Priest* (1971) 5 Cal.3d 584 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]. At the time of the *Serrano* decision local property taxes were the primary source of school revenue. (*Id.* at p. 592.) In *Serrano,* the California Supreme Court held that education is a fundamental interest, that wealth is a suspect classification, and that an educational system which produces disparities of opportunity based upon district wealth would violate principles of equal protection. (*Id.* at pp. 614-615, 619.) A major portion of Senate Bill No. 90 constituted new formulae for state and local contributions to education in a legislative response to the decision in *Serrano.* (Stats. 1972, ch. 1406, ß 1.5-2.74, pp. 2931-2953. See *Serrano v. Priest* (1976) 18 Cal.3d 728, 736- 737 [135 Cal.Rptr. 345, 557 P.2d 929].) [***22] [6]

5 A school district's relationship to the state is different from that of local governmental entities such as cities, counties, and special districts. Education and the operation of the public school system are matters of statewide rather than local or municipal concern. (*California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1524 [7 Cal.Rptr.2d 699].) Local school districts are agencies of the state and have been described as quasi-municipal corporations. (*Ibid*.) They are not distinct and independent bodies politic. (*Ibid*.) The Legislature's power over the public school system has been described as exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. (*Ibid*.) The Legislature has the power to create, abolish, divide, merge, or alter the boundaries of school districts. (*Id.* at p. 1525.) The state is the beneficial owner of all school properties and local districts hold title as trustee for the state. (*Ibid*.) School moneys belong to the state and the apportionment of funds to a school district does not give the district a proprietary interest in the funds. (*Ibid*.) While the Legislature has chosen to encourage local responsibility for control of public education through local school districts, that is a matter of legislative choice rather than constitutional compulsion and the authority that the Legislature has given to local districts remains subject to the ultimate and nondelegable responsibility of the Legislature. (*Id.* at pp. 1523-1524.)

[***23]

6 After the first *Serrano* decision, the United States Supreme Court held that equal protection does not require dollar-for-dollar equality between school districts. (*San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, 33-34 48-56, 61-62 [36 L.Ed.2d 16, 42-43, 51-56, 59-60, 93 S.Ct. 1278].) In the second *Serrano* decision, the California Supreme Court adhered to the first *Serrano* decision on independent state grounds. (*Serrano v. Priest, supra,* 18 Cal.3d at pp. 761-766.) The court concluded that Senate Bill No. 90 and Assembly Bill No. 1267, enacted the following year (Stats. 1973, ch. 208, p. 529 et seq.), did not satisfy equal protection principles. (*Serrano v. Priest, supra,* 18 Cal.3d at pp. 776-777.) Additional complications in educational financing arose as the result of the enactment of article XIII A of the California Constitution at the June 1978 Primary Election (Proposition 13), which limited the taxes which can be imposed on real property and forced the state to assume greater responsibility for financing education (see Ed. Code, ß 41060), and the enactment of Propositions 98 and 111 in 1988 and 1990, respectively, which provide formulae for minimum state funding for education. (See generally *California Teachers Assn. v. Huff, supra,* 5 Cal.App.4th 1513.)

[***24] The provisions of Senate Bill No. 90 were amended and refined in legislation enacted the following year. (Stats. 1973, ch. 358.) Revenue and Taxation Code section 2231, subdivision (a), was enacted to require the state to reimburse local agencies, including school districts, for the full costs of new programs or increased levels of service mandated by the Legislature after January 1, 1973. Local agencies except school districts were also entitled to reimbursement for costs mandated by executive regulation after January 1, 1973. (Rev. & Tax. Code, ß 2231, subd. (d), added by Stats. 1973, ch. 358, ß 3, p. 783 [*1580] and repealed by Stats. 1986, ch. 879, ß 23, p. 3045.) In subsequent years legislation was enacted to entitle school districts to subvention for state-mandated costs imposed by legislative acts after January 1, 1973, or by executive regulation after January 1, 1978. (Rev. & Tax. Code, former ß 2207.5, added by Stats. 1977, ch. 1135, ß 5, p. 3646 and amended by Stats. 1980, ch. 1256, ß 5, pp. 4248-4249.)

[**557] In the 1973 legislation, Revenue and Taxation Code section 2271 was enacted to provide, among other things: "A local agency may levy, or have levied on its behalf, [***25] a rate in addition to the maximum property tax rate established pursuant to this chapter

Received
August 26, 2011
Commission on
State Mandates

(commencing with Section 2201) to pay costs mandated by the federal government or costs mandated by the courts or costs mandated by initiative enactment, which are not funded by federal or state government." **(3)** In this respect costs mandated by the federal government are exempt from an agency's taxing and spending limits. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 71, fn. 17.)

At the November 6, 1979, General Election, the voters added article XIII B to the state Constitution by enacting Proposition 4. That article imposes spending limits on the state and all local governments. For purposes of article XIII B the term "local government" includes school districts. (Cal. Const., art. XIII B, ß 8, subd. (d).) The measure accomplishes its purpose by limiting a governmental entity's annual appropriations to the prior year's appropriations limit adjusted for changes in the cost of living and population growth, except as otherwise provided in the article. (Cal. Const., art. XIII B, ß 1.) [7] The appropriations subject [***26] to limitation do not include, among other things: "Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly." (Cal. Const., art. XIII B, ß 9, subd. (b).)

7 As it was originally enacted, article XIII B required that all governmental entities return revenues in excess of their appropriations limits to the taxpayers through tax rate or fee schedule revisions. In Proposition 98, adopted at the November 1988 General Election, article XIII B was amended to provide that half of state excess revenues would be transferred to the state school fund for the support of school districts and community college districts. (See Cal. Const., art. XVI, ß 8.5; *California Teachers Assn. v. Huff, supra,* 5 Cal.App.4th 1513.)

Like its statutory predecessor, the constitutional initiative measure includes a provision [***27] designed "to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of these restrictions on the taxing and spending power of the local entities." (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835-836 [244 Cal.Rptr. 677, 750 P.2d 318].) Section 6 of article XIII B of the state Constitution provides: "Whenever the Legislature or any State agency mandates a new program or higher level of service on any local government, the [*1581] State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [P] (a) Legislative mandates requested by the local agency affected; [P] (b) Legislation defining a new crime or changing an existing definition of a crime; or [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

Although article XIII B of the state Constitution [***28] requires subvention for state mandates enacted after January 1, 1975, the article had an effective date of July 1, 1980. (Cal. Const., art. XIII B, ß 10.) **(4)** Accordingly, under the constitutional provision, a local agency may seek subvention for costs imposed by legislation after January 1, 1975, but reimbursement is limited to costs incurred after July 1, 1980. (*City of Sacramento v. State of California, supra,* 156 Cal.App.3d at pp. 190-193.) Reimbursement for costs incurred before July 1, 1980, must be obtained, if at all, under controlling statutory law. (See 68 Ops.Cal.Atty.Gen. 244 (1985).)

The constitutional subvention provision, like the statutory scheme before it, requires state reimbursement whenever "the Legislature or any State agency" mandates a new program or higher level of service. (Cal. Const., art. XIII B, ß 6.) Accordingly, it has been held that state [**558] subvention is not required when the federal government imposes new costs on local governments. (*City of Sacramento v. State of California, supra,* 156 Cal.App.3d at p. 188; see also *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 543 [234 Cal.Rptr. 795].) [***29] In our *City of Sacramento* decision this court held that a federal program in which the state participates is not a federal mandate, regardless of the incentives for participation, unless the program leaves state or local government with no discretion as to alternatives. (156 Cal.App.3d at p. 198.)

In its *City of Sacramento* opinion, [8] the California Supreme Court rejected this court's earlier formulation. In doing so the high court noted that the vast bulk of cost-producing federal influence on state and local government is by inducement or incentive rather than direct compulsion. (50 Cal.3d at p. 73.) However, "certain regulatory standards imposed by the federal government [*1582] under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense." (*Id.* at pp. 73-74.) The test for determining whether there is a federal mandate is whether compliance with federal standards "is a matter of true choice," that is, whether participation in the federal program "is truly voluntary." (*Id.* at p. 76.) The court went on to say: "Given the variety [***30] of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the

Received
August 26, 2011
Commission on
State Mandates

nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (*Ibid*.)

8 The Supreme Court's decision in *City of Sacramento* was not a result of direct review of this court's decision. The Supreme Court denied a petition for review of this court's *City of Sacramento* decision. After the Board of Control had adopted parameters and guidelines for reimbursement under this court's decision, the Legislature failed to appropriate the funds necessary for such reimbursement. The litigation which resulted in the Supreme Court's *City of Sacramento* decision was commenced as an action to enforce the result on remand from this court's *City of Sacramento* decision. (See 50 Cal.3d at p. 60.)

[***31] IV. SPECIAL EDUCATION

The issues in this case cannot be resolved by consideration of a particular federal act in isolation. Rather, reference must be made to the historical and legal setting of which the particular act is a part. Our consideration begins in the early 1970's.

In considering the 1975 amendments to the Education of the Handicapped Act, Congress referred to a series of "landmark court cases" emanating from 36 jurisdictions which had established the right to an equal educational opportunity for handicapped children. (See *Smith v. Robinson* (1984) 468 U.S. 992, 1010 [82 L.Ed.2d 746, 763, 104 S.Ct. 3457].) Two federal district court cases, *Pennsylvania Ass'n, Ret'd Child. v. Commonwealth of Pa.* (E.D.Pa. 1972) 343 F.Supp. 279 (see also *Pennsylvania Ass'n, Retard. Child. v. Commonwealth of Pa.* (E.D.Pa. 1971) 334 F.Supp. 1257), and *Mills v. Board of Education of District of Columbia* (D.D.C. 1972) 348 F.Supp. 866, were the most prominent of these judicial decisions. (See *Hendrick Hudson Dist. Bd. of Ed. v. Rowley* (1982) 458 U.S. 176, 180, fn. 2 [73 L.Ed.2d 690, 695, 102 S.Ct. 3034].) [***32]

In the Pennsylvania case, an association and the parents of certain retarded children brought a class action against the commonwealth and local school districts in the commonwealth, challenging the exclusion of retarded children from programs of education and training in the public schools. (*Pennsylvania Ass'n, Ret'd. Child. v. Commonwealth of Pa., supra,* 343 F.Supp. at p. 282.) The matter was assigned to a three- judge panel which heard evidence on the plaintiffs' due process and equal protection claims. (*Id.* at p. 285.) The parties [**559] then agreed to resolve the litigation by means of a consent [*1583] judgment. (*Ibid*.) The consent agreement required the defendants to locate and evaluate all children in need of special education services, to reevaluate placement decisions periodically, and to accord due process hearings to parents who are dissatisfied with placement decisions. (*Id.* at pp. 303-306.) It required the defendants to provide "a free public program of education and training appropriate to the child's capacity." (*Id.* at p. 285, italics deleted.)

In view of the consent agreement the district court was not required to resolve the plaintiffs' equal [***33] protection and due process contentions. Rather, it was sufficient for the court to find that the suit was not collusive and that the plaintiffs' claims were colorable. The court found: "Far from an indication of collusion, however, the Commonwealth's willingness to settle this dispute reflects an intelligent response to overwhelming evidence against [its] position." (*Pennsylvania Ass'n, Ret'd. Child. v. Commonwealth of Pa., supra,* 343 F.Supp. at p. 291.) The court said that it was convinced the due process and equal protection claims were colorable. (*Id.* at pp. 295-296.)

In the *Mills* case, an action was brought on behalf of a number of school-age children with exceptional needs who were excluded from the Washington, D.C., public school system. (*Mills v. Board of Education of District of Columbia, supra,* 348 F.Supp. at p. 868.) The district court concluded that equal protection entitled the children to a public-supported education appropriate to their needs and that due process required a hearing with respect to classification decisions. (*Id.* at pp. 874-875.) The court said: "If sufficient funds are not available to finance [***34] all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." (*Id.* at p. 876.)

In the usual course of events, the development of principles of equal protection and due process as applied to special education, which had just commenced in the early 1970's with the authorities represented by the *Pennsylvania* and *Mills* cases, would have been fully expounded through appellate processes. However, the necessity of judicial development was truncated by congressional action. In the Rehabilitation Act of 1973, section 504, Congress provided: "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) [now 706(8)] of this title, [*1584]

Received
August 26, 2011
Commission on
State Mandates

shall, solely by reason of his handicap, [***35] be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...." (29 U.S.C. ß 794, Pub.L. No. 93- 112, tit. V, ß 504 (Sept. 26, 1973) 87 Stat. 394.) [9] Since federal assistance to education is pervasive (see, e.g., Ed. Code, ß 12000- 12405, 49540 et seq., 92140 et seq.), section 504 was applicable to virtually all public educational programs in this and other states.

9 In section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, the application of section 504 was extended to federal executive agencies and the United States Postal Service. (Pub.L. No. 95-602, tit. I, ß 119 (Nov. 6, 1978) 92 Stat. 2982.) The section is now subdivided and includes subdivision (b), which provides that the section applies to all of the operations of a state or local governmental agency, including local educational agencies, if the agency is extended federal funding for any part of its operations. (29 U.S.C. ß 794.) This latter amendment was in response to judicial decisions which had limited the application of section 504 to the particular activity for which federal funding is received. (See *Consolidated Rail Corporation v. Darrone* (1984) 465 U.S. 624, 635-636 [79 L.Ed.2d 568, 577-578, 104 S.Ct. 1248].)

[***36] The Department of Health, Education and Welfare (HEW) promulgated regulations to ensure compliance with section 504 [**560] by educational agencies. [10] The regulations required local educational agencies to locate and evaluate handicapped children in order to provide appropriate educational opportunities and to provide administrative hearing procedures in order to resolve disputes. The federal courts concluded that section 504 was essentially a codification of the equal protection rights of citizens with disabilities. (See *Halderman v. Pennhurst State School & Hospital* (E.D.Pa. 1978) 446 F.Supp. 1295, 1323.) Courts also held that section 504 embraced a private cause of action to enforce its requirements. (*Sherry v. New York State Ed. Dept.* (W.D.N.Y. 1979) 479 F.Supp. 1328, 1334; *Doe v. Marshall* (S.D.Tex. 1978) 459 F.Supp. 1190, 1192.) It was further held that section 504 imposed upon school districts and other public educational agencies "the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive [***37] an appropriate, free public education. The failure to perform this analysis and structure a program suited to the needs of each handicapped child, constitutes discrimination against that child and a failure to provide an appropriate, free [*1585] public education for the handicapped child." (*Doe v. Marshall, supra,* 459 F.Supp. at p. 1191. See also *David H. v. Spring Branch Independent School Dist.* (S.D.Tex. 1983) 569 F.Supp. 1324, 1334; *Halderman v. Pennhurst State School & Hospital, supra,* 446 F.Supp. at p. 1323.)

10 HEW was later dissolved and its responsibilities are now shared by the federal Department of Education and the Department of Health and Human Services. The promulgation of regulations to enforce section 504 had a somewhat checkered history. Initially HEW determined that Congress did not intend to require it to promulgate regulations. The Senate Public Welfare Committee then declared that regulations were intended. By executive order and by judicial decree in *Cherry v. Mathews* (D.D.C. 1976) 419 F.Supp. 922, HEW was required to promulgate regulations. The ensuing regulations were embodied in title 45 Code of Federal Regulations part 84, and are now located in title 34 Code of Federal Regulations part 104. (See *Southeastern Community College v. Davis* (1979) 442 U.S. 397, 404, fn. 4 [60 L.Ed.2d 980, 987, 99 S.Ct. 2361]; *N. M. Ass'n for Retarded Citizens v. State of N. M.* (10th Cir. 1982) 678 F.2d 847, 852.)

[***38] **(5)** Throughout these proceedings Riverside, relying upon the decision in *Southeastern Community College v. Davis, supra,* 442 U.S. 397 [60 L.Ed.2d 980], has contended that section 504 cannot be considered a federal mandate because it does not obligate local school districts to take any action to accommodate the needs of handicapped children so long as they are not excluded from school. That assertion is not correct.

In the *Southeastern Community College* case a prospective student with a serious hearing disability sought to be admitted to a postsecondary educational program to be trained as a registered nurse. As a result of her disability the student could not have completed the academic requirements of the program and could not have attended patients without full-time personal supervision. She sought to require the school to waive the academic requirements, including an essential clinical program, which she could not complete and to otherwise provide full-time personal supervision. That demand, the Supreme Court held, was beyond the scope of section 504, which did not require the school to modify its program affirmatively [***39] and substantially. (442 U.S. at pp. 409-410 [60 L.Ed.2d at pp. 990-991].)

The *Southeastern Community College* decision is inapposite. States typically do not guarantee their citizens that they will be admitted to, and allowed to complete, specialized postsecondary educational programs. State

Received
August 26, 2011
Commission on
State Mandates

educational institutions often impose stringent admittance and completion requirements for such programs in higher education. In the *Southeastern Community College* case the Supreme Court simply held that an institution of higher education need not lower or effect substantial modifications of its standards in order to accommodate a handicapped person. (442 U.S. at p. 413 [60 L.Ed.2d at pp. 992-993].) The court did not hold that a primary or secondary [**561] educational agency need do nothing to accommodate the needs of handicapped children. (See *Alexander v. Choate* (1985) 469 U.S. 287, 301 [83 L.Ed.2d 661, 672, 105 S.Ct. 712].)

States typically do purport to guarantee all of their children the opportunity for a basic [***40] education. In fact, in this state basic education is regarded as a fundamental right. (*Serrano v. Priest, supra,* 18 Cal.3d at pp. 765-766.) All basic educational programs are essentially affirmative action activities in the sense that educational agencies are required to evaluate and accommodate [*1586] the educational needs of the children in their districts. Section 504 would not appear to permit local agencies to accommodate the educational needs of some children while ignoring the needs of others due to their handicapped condition. (Compare *Lau v. Nichols* (1974) 414 U.S. 563 [39 L.Ed.2d 1, 94 S.Ct. 786], which required the San Francisco Unified School District to take affirmative steps to accommodate the needs of non-English speaking students under section 601 of the Civil Rights Act of 1964.)

Riverside's view of section 504 is inconsistent with congressional intent in enacting it. The congressional record makes it clear that section 504 was perceived to be necessary not to combat affirmative animus but to cure society's benign neglect of the handicapped. [***41] The record is replete with references to discrimination in the form of the denial of special educational assistance to handicapped children. In *Alexander v. Choate, supra,* 469 U.S. at pages 295 to 297 [83 L.Ed.2d at pages 668- 669], the Supreme Court took note of these comments in concluding that a violation of section 504 need not be proven by evidence of purposeful or intentional discrimination. With respect to the *Southeastern Community College v. Davis, supra,* 442 U.S. 397 case, the high court said: "The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made. ..." (*Alexander v. Choate, supra,* 469 U.S. at p. 301 [83 L.Ed.2d at p. 672], [***42] fn. omitted.)

Federal appellate courts have rejected the argument that the *Southeastern Community College* case means that pursuant to section 504 local educational agencies need do nothing affirmative to accommodate the needs of handicapped children. (*N. M. Ass'n for Retarded Citizens v. State of N. M., supra,* 678 F.2d at pp. 852-853; *Tatro v. State of Texas* (5th Cir. 1980) 625 F.2d 557, 564 [63 A.L.R. Fed. 844].) [11] We are satisfied that section 504 does impose an obligation upon local school districts to accommodate the needs of handicapped children. However, as was the case with constitutional principles, full judicial development of section 504 as it relates to special education in elementary and secondary school districts was truncated by congressional action.

11 Following a remand and another decision by the Court of Appeals, the *Tatro* litigation, *supra,* eventually wound up in the Supreme Court. (*Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883 [82 L.Ed.2d 664, 104 S.Ct. 3371].) However, by that time the Education of the Handicapped Act had replaced section 504 as the means for vindicating the education rights of handicapped children and the litigation was resolved, favorably for the child, under that act.

[***43] [*1587] In 1974 Congress became dissatisfied with the progress under earlier efforts to stimulate the states to accommodate the educational needs of handicapped children. (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at p. 180 [73 L.Ed.2d at p. 695].) These earlier efforts had included a 1966 amendment to the Elementary and Secondary Education Act of 1965, and the 1970 version of the Education of the Handicapped Act. (*Ibid*.) The prior acts had been grant programs that did not contain specific guidelines for a state's use of grant funds. (*Ibid*.) In 1974 Congress greatly increased federal funding for education of the handicapped and simultaneously required recipient [**562] states to adopt a goal of providing full educational opportunities to all handicapped children. ([73 L.Ed.2d at pp. 695-696].) The following year Congress amended the Education of the Handicapped Act by enacting the Education for All Handicapped Children Act of 1975. ([73 L.Ed.2d at p. 696].)

Since the 1975 amendment, the Education [***44] of the Handicapped Act has required recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education. (20 U.S.C. ß 1412(1).) **(6)** The act is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states. (*Smith v. Robinson, supra,* 468 U.S. at p. 1010 [82 L.Ed.2d at p. 764].) To accomplish this purpose the act incorporates the major substantive and procedural re-

Received
August 26, 2011
Commission on
State Mandates

quirements of the "right to education" cases which were so prominent in the congressional consideration of the measure. (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at p. 194 [73 L.Ed.2d at p. 704].) The substantive requirements of the act have been interpreted in a manner which is "strikingly similar" to the requirements of section 504 of the Rehabilitation Act of 1973. (*Smith v. Robinson, supra,* 468 U.S. at pp. 1016-1017 [82 L.Ed.2d at p. 768].) The Supreme [***45] Court has noted that Congress intended the act to establish "'a basic floor of opportunity that would bring into compliance all school districts with the constitutional right to equal protection with respect to handicapped children.'" (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at p. 200 [73 L.Ed.2d at p. 708] citing the House of Representatives Report.) [12]

12 Consistent with its "basic floor of opportunity" purpose, the act does not require local agencies to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Rather, the act requires that handicapped children be accorded meaningful access to a free public education, which means access that is sufficient to confer some educational benefit. (Ibid.)

It is demonstrably manifest that in the view of Congress the substantive requirements of the 1975 amendment to the Education of the Handicapped Act were commensurate with the [***46] constitutional obligations of state and local [*1588] educational agencies. Congress found that "State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children;" and "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." (20 U.S.C. former ß 1400(b)(8) & (9).) [13]

13 That Congress intended to enforce the Fourteenth Amendment to the United States Constitution in enacting the Education of the Handicapped Act has since been made clear. In *Dellmuth v. Muth* (1989) 491 U.S. 223 at pages 231232 [105 L.Ed.2d 181, 189-191, 109 S.Ct. 2397], and the court noted that Congress has the power under section 5 of the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity from suit in federal court, but concluded that the Education of the Handicapped Act did not clearly evince such a congressional intent. In 1990 Congress responded by expressly abrogating state sovereign immunity under the act. (20 U.S.C. ß 1403.)

[***47] It is also apparent that Congress intended the act to achieve nationwide application: "It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children." (20 U.S.C. former ß 1400(c).)

[**563] In order to gain state and local acceptance of its substantive provisions, the Education of the Handicapped Act employs a "cooperative federalism" scheme, which has also been referred to as the "carrot and stick" approach. (See *City of Sacramento v. State of California, supra,* 50 Cal.3d at pp. 73-74; *City of Sacramento v. State of California, supra,* 156 Cal.App.3d at p. 195.) [***48] As an incentive Congress made substantial federal financial assistance available to states and local educational agencies that would agree to adhere to the substantive and procedural terms of the act. (20 U.S.C. ß 1411, 1412.) For example, the administrative record indicates that for fiscal year 1979- 1980, the base year for Santa Barbara's claim, California received $ 71.2 million in federal assistance, and during fiscal year 1980-1981, the base year for Riverside's claim, California received $ 79.7 million. We cannot say that such assistance on an ongoing basis is trivial or insubstantial.

Contrary to Riverside's argument, federal financial assistance was not the only incentive for a state to comply with the Education of the Handicapped Act. **(7)** Congress intended the act to serve as a means by which state and [*1589] local educational agencies could fulfill their obligations under the equal protection and due process provisions of the Constitution and under section 504 of the Rehabilitation Act of 1973. Accordingly, where it is applicable the act supersedes claims under the Civil Rights Act (42 U.S.C. ß 1983) [***49] and section 504 of the Rehabilitation Act of 1973, and the administrative remedies provided by the act constitute the exclusive remedy of handicapped children and their parents or other representatives. (*Smith v. Robinson, supra,* 468 U.S. at pp. 1009, 1013, 1019 [82 L.Ed.2d at pp. 763, 766, 769].) [14]

14 In *Smith v. Robinson, supra,* the court concluded that since the Education of the Handicapped Act did not include a provision for attorney fees, a successful complainant was not enti-

Received
August 26, 2011
Commission on
State Mandates

tled to an award of such fees even though such fees would have been available in litigation under section 504 of the Rehabilitation Act of 1973 or section 1983 of the Civil Rights Act. Congress reacted by adding a provision for attorney fees to the Education of the Handicapped Act. (20 U.S.C. ß 1415(e)(4)(B).)

As a result of the exclusive nature of the Education of the Handicapped [***50] Act, dissatisfied parties in recipient states must exhaust their administrative remedies under the act before resorting to judicial intervention. (*Smith v. Robinson, supra,* 468 U.S. at p. 1011 [82 L.Ed.2d at p. 764].) This gives local agencies the first opportunity and the primary authority to determine appropriate placement and to resolve disputes. (*Ibid*.) If a party is dissatisfied with the final result of the administrative process then he or she is entitled to seek judicial review in a state or federal court. (20 U.S.C. ß 1415(e)(2).) In such a proceeding the court independently reviews the evidence but its role is restricted to that of review of the local decision and the court is not free to substitute its view of sound educational policy for that of the local authority. (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* 458 U.S. at pp. 206-207 [73 L.Ed.2d at p. 712].) And since the act provides the exclusive remedy for addressing a handicapped child's right to an appropriate education, where the act applies a party [***51] cannot pursue a cause of action for constitutional violations, either directly or under the Civil Rights Act (42 U.S.C. ß 1983), nor can a party proceed under section 504 of the Rehabilitation Act of 1973. (*Smith v. Robinson, supra,* 468 U.S. at pp. 1013, 1020 [82 L.Ed.2d at pp. 766, 770].)

Congress's intention to give the Education of the Handicapped Act nationwide application was successful. By the time of the decision in *Hendrick Hudson Dist. Bd. of Ed. v. Rowley, supra,* all states except New Mexico had become recipients under the act. (458 U.S. at pp. 183-184 [73 L.Ed.2d at p. 698].) It is important at this point in our discussion to consider the experience of New Mexico, both because the Board of Control relied upon that state's failure to adopt the Education [**564] of the Handicapped Act as proof that the act is not federally mandated, and because it illustrates the consequences of a failure to adopt the act. [*1590]

In *N. M. Ass'n for Retarded Citizens v. State of N. M.* (D.N.M. 1980) 495 F.Supp. 391, [***52] a class action was brought against New Mexico and its local school districts based upon the alleged failure to provide a free appropriate public education to handicapped children. The plaintiffs' causes of action asserting constitutional violations were severed and stayed pending resolution of the federal statutory causes of action. (*Id.* at p. 393.) The district court concluded that the plaintiffs could not proceed with claims under the Education of the Handicapped Act because the state had not adopted that act and, without more, that was a governmental decision within the state's power. (*Id.* at p. 394.) [15] The court then considered the cause of action under section 504 and found that both the state and its local school districts were in violation of that section by failing to provide a free appropriate education to handicapped children within their territories. (495 F.Supp. at pp. 398-399.)

15 The plaintiffs alleged that the failure of the state to apply for federal funds under the Education of the Handicapped Act was itself an act of discrimination. The district court did not express a view on that question, leaving it for resolution in connection with the constitutional causes of action. (Ibid.)

[***53] After the district court entered an injunctive order designed to compel compliance with section 504, the matter was appealed. (*N. M. Ass'n for Retarded Citizens v. State of N. M., supra,* 678 F.2d 847.) The court of appeals rejected the defendants' arguments that the plaintiffs were required to exhaust state administrative remedies before bringing their action and that the district court should have applied the doctrine of primary jurisdiction to defer ruling until the Office of Civil Rights could complete its investigation into the charges. (*Id.* at pp. 850-851.) The court also rejected the defendants' arguments that section 504 does not require them to take action to accommodate the needs of handicapped children and that proof of disparate treatment is essential to a violation of section 504. (678 F.2d at p. 854.) The court found sufficient evidence in the record to establish discrimination against handicapped children within the meaning of section 504. (678 F.2d at p. 854.) However, the reviewing court concluded that the district court had applied an erroneous standard in reaching its decision, [***54] and the matter was remanded for further proceedings. (*Id.* at p. 855.)

On July 19, 1984, during the proceedings before the Board of Control, a representative of the Department of Education testified that New Mexico has since implemented a program of special education under the Education of the Handicapped Act. We have no doubt that after the litigation we have just recounted New Mexico saw the handwriting on the wall and realized that it could either establish a program of special education with federal financial assistance under the Education of the Handicapped Act, or be compelled through litigation to accommodate the educational needs of handicapped [*1591] children without federal assistance and at the risk of losing other forms of federal financial aid. In any event, with the capitulation of New Mexico the Education of the Handicapped Act achieved the nationwide application intended by Congress. (20 U.S.C. ß 1400(c).)

Received
August 26, 2011
Commission on
State Mandates

California's experience with special education in the time period leading up to the adoption of the Education of the Handicapped Act is examined as a case study in Kirp et al., *Legal Reform of Special Education*: *Empirical* [***55] *Studies and Procedural Proposals* (1974) 62 Cal.L.Rev. 40, at pages 96 through 115. As this study reflects, during this period the state and local school districts were struggling to create a program to accommodate adequately the educational needs of the handicapped. (*Id.* at pp. 97-110.) Individuals and organized groups, such as the California Association for the Retarded and the California Association for Neurologically Handicapped Children, were exerting pressure through political and other means at every level of the educational system. (Ibid.) Litigation was becoming so prevalent [**565] that the authors noted: "Fear of litigation over classification practices, prompted by the increasing number of lawsuits, is pervasive in California." (*Id.* at p. 106, fn. 295.) [16]

16 Lawsuits primarily fell into three types: (1) Challenges to the adequacy or even lack of available programs and services to accommodate handicapped children. (*Id.* at p. 97, fns. 255, 257.) (2) Challenges to classification practices in general, such as an overtendency to classify minority or disadvantaged children as "retarded." (*Id.* at p. 98, fns. 259, 260.) (3) Challenges to individual classification decisions. (*Id.* at p. 106.) In the absence of administrative procedures for resolving classification disputes, dissatisfied parents were relegated to self-help remedies, such as pestering school authorities, or litigation. (*Ibid*.)

[***56] In the early 1970's the state Department of Education began working with local school officials and university experts to design a "California Master Plan for Special Education." (Kirp et al., *Legal Reform of Special Education*: *Empirical Studies and Procedural Proposals, supra,* 62 Cal.L.Rev. at p. 111.) In 1974 the Legislature enacted legislation to give the Superintendent of Public Instruction the authority to implement and administer a pilot program pursuant to a master plan adopted by State Board of Education in order to determine whether services under such a plan would better meet the needs of children with exceptional needs. (Stats. 1974, ch. 1532, ß 1, p. 3441, enacting Ed. Code, ß 7001.) In 1977 the Legislature acted to further implement the master plan. (Stats. 1977, ch. 1247, especially ß 10, pp. 4236-4237, enacting Ed. Code, ß 56301.) In 1980 the Legislature enacted urgency legislation revising our special education laws with the express intent of complying with the 1975 amendments to the Education of the Handicapped Act. (Stats. 1980, ch. 797, especially ß 9, pp. 2411-2412, enacting Ed. Code, ß 56000.)

As this history demonstrates, in determining whether to [***57] adopt the requirements of the Education of the Handicapped Act as amended in 1975, our [*1592] Legislature was faced with the following circumstances: (1) In the *Serrano* litigation, our Supreme Court had declared basic education to be a fundamental right and, without even considering special education in the equation, had found our educational system to be violative of equal protection principles. (2) Judicial decisions from other jurisdictions had established that handicapped children have an equal protection right to a free public education appropriate to their needs and due process rights with regard to placement decisions. (3) Congress had enacted section 504 of the Rehabilitation Act of 1973 to codify the equal protection rights of handicapped children in any school system that receives federal financial assistance and to threaten the state and local districts with the loss of all federal funds for failure to accommodate the needs of such children. (4) Parents and organized groups representing handicapped children were becoming increasingly litigious in their efforts to secure an appropriate education for handicapped children. (5) In enacting the 1975 amendments to [***58] the Education of the Handicapped Act, Congress did not intend to require state and local educational agencies to do anything more than the Constitution already required of them. The act was intended to provide a means by which educational agencies could fulfill their constitutional responsibilities and to provide substantial federal financial assistance for states that would agree to do so.

(8a) Under these circumstances we have no doubt that enactment of the 1975 amendments to the Education of the Handicapped Act constituted a federal mandate under the criteria set forth in *City of Sacramento v. State of California, supra,* 50 Cal.3d at page 76. The remaining question is whether the state's participation in the federal program was a matter of "true choice" or was "truly voluntary." The alternatives were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event. We conclude [***59] that so far [**566] as the state is concerned the Education of the Handicapped Act constitutes a federal mandate.

V. SUBVENTION FOR SPECIAL EDUCATION

Our conclusion that the Education of the Handicapped Act is a federal mandate with respect to the state marks the starting point rather than the end of the consideration which will be required to resolve the Santa Barbara and Riverside test claims. In *City of Sacramento v. State of California, supra,* 50 Cal.3d at pages 66

Received
August 26, 2011
Commission on
State Mandates

through 70, the California Supreme Court concluded that the costs at issue in that case (unemployment insurance premiums) were not subject to state subvention because they were incidental to a law of general [*1593] application rather than a new governmental program or increased level of service under an existing program. The court addressed the federal mandate issue solely with respect to the question whether the costs were exempt from the local government's taxing and spending limitations. (*Id.* at pp. 70-71.) It observed that prior authorities had assumed that if a cost was federally mandated it could not be a state mandated cost subject to subvention, and [***60] said: "We here express no view on the question whether 'federal' and 'state' mandates are mutually exclusive for purposes of state subvention, but leave that issue for another day. ..." (*Id.* at p. 71, fn. 16.) The test claims of Santa Barbara and Riverside present that question which we address here for the guidance of the Commission on remand.

(9) The constitutional subvention provision and the statutory provisions which preceded it do not expressly say that the state is not required to provide a subvention for costs imposed by a federal mandate. Rather, that conclusion follows from the plain language of the subvention provisions themselves. The constitutional provision requires state subvention when "the Legislature or any State agency mandates a new program or higher level of service" on local agencies. (Cal. Const., art. XIII B, ß 6.) Likewise, the earlier statutory provisions required subvention for new programs or higher levels of service mandated by legislative act or executive regulation. (See Rev. & Tax. Code, former ß 2164.3 [Stats. 1972, ch. 1406, ß 14.7, pp. 2962- 2963], 2231 [Stats. 1973, ch. 358, ß 3, pp. 783-784], 2207 [Stat. 1975, ch. 486, ß 1.8, pp. 997-998], 2207.5 [***61] [Stats. 1977, ch. 1135, ß 5, pp. 3646-3647].) When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations. This should be true even though the state has adopted an implementing statute or regulation pursuant to the federal mandate so long as the state had no "true choice" in the manner of implementation of the federal mandate. (See *City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 76.)

This reasoning would not hold true where the manner of implementation of the federal program was left to the true discretion of the state. A central purpose of the principle of state subvention is to prevent the state from shifting the cost of government from itself to local agencies. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 68.) Nothing in the statutory or constitutional subvention provisions would suggest that the state is free to shift state costs to local agencies [***62] without subvention merely because those costs were imposed upon the state by the federal government. In our view the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which [*1594] is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed [**567] upon the state by the federal government.

The Education of the Handicapped Act is a comprehensive measure designed to provide all handicapped children with basic educational opportunities. While the act includes certain substantive and procedural requirements which must be included in a state's plan for implementation of the act, it leaves primary responsibility for implementation to the state. (20 U.S.C. ß 1412, 1413.) **(8b)** In short, even though the state had no real choice in deciding whether to comply with the federal act, the act did not necessarily require the state to impose all of [***63] the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention.

We can illustrate this point with a hypothetical situation. Subvention principles are intended to prevent the state from shifting the cost of state governmental services to local agencies and thus subvention is required where the state imposes the cost of such services upon local agencies even if the state continues to perform the services. (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 835-836.) The Education of the Handicapped Act requires the state to provide an impartial, state-level review of the administrative decisions of local or intermediate educational agencies. (20 U.S.C. ß 1415(c), (d).) Obviously, the state could not shift the actual performance of these new administrative reviews to local districts, but it could attempt to shift the costs to local districts [***64] by requiring local districts to pay the expenses of reviews in which they are involved. An attempt to do so would trigger subvention requirements. In such a hypothetical case, the state could not avoid its subvention responsibility by pleading "federal mandate" because the federal statute does not require the state to impose the costs of such hearings upon local agencies. Thus, as far as the local agency is concerned, the burden is imposed by a state rather than a federal mandate.

In the administrative proceedings the Board of Control did not address the "federal mandate" question under the appropriate standard and with proper focus on local

Received
August 26, 2011
Commission on
State Mandates

school districts. In its initial determination the board concluded that the Education of the Handicapped Act constituted a federal mandate and that the state-imposed costs on local school districts in excess of the federally imposed costs. However, the board did not consider the [*1595] extent of the state-mandated costs because it concluded that any appropriation by the state satisfied its obligation. On Riverside's petition for a writ of administrative mandate the superior court remanded to the Board of Control to consider whether [***65] the state appropriation was sufficient to reimburse local school districts fully for the state-mandated costs. On remand the board clearly applied the now-discredited criteria set forth in this court's decision in *City of Sacramento v. State of California, supra,* 156 Cal.App.3d 182, and concluded that the Education of the Handicapped Act is not a federal mandate at any level of government. Under these circumstances we agree with the trial court that the matter must be remanded to the Commission for consideration in light of the criteria set forth in the Supreme Court's *City of Sacramento* decision. We add that on remand the Commission must focus upon the costs incurred by local school districts and whether those costs were imposed *on local districts* by federal mandate or by the state's voluntary choice in its implementation of the federal program.

VI. RIVERSIDE'S OBJECTIONS

In light of this discussion we may now consider Riverside's objections to the trial court's decision to remand the matter to the Commission for reconsideration.

Riverside asserts that the California Supreme Court opinion in *City of Sacramento* is not [***66] on point because the court did not address the federal mandate question with respect to state subvention principles. Riverside implies that the definition of a federal mandate may be different [**568] with respect to state subvention than with respect to taxing and spending limitations. **(10)** As a general rule and unless the context clearly requires otherwise, we must assume that the meaning of a term or phrase is consistent throughout the entire act or constitutional article of which it is a part. (*Lungren v. Davis* (1991) 234 Cal.App.3d 806, 823 [285 Cal.Rptr. 777].) **(11)** Subvention principles are part of a more comprehensive political scheme. The basic purpose of the scheme as a whole was to limit the taxing and spending powers of government. The taxing and spending powers of local agencies were to be "frozen" at existing levels with adjustments only for inflation and population growth. Since local agencies are subject to having costs imposed upon them by other governmental entities, the scheme provides relief in that event. If the costs are imposed by the federal government or the courts, then the costs are not included in the local government's [***67] taxing and spending limitations. If the costs are imposed by the state then the state must provide a subvention to reimburse the local agency. Nothing in this scheme suggests that the concept of a federal mandate should have different meanings depending upon whether one is considering subvention or taxing and spending limitations. Accordingly, we reject the claim that the criteria set forth in [*1596] the Supreme Court's *City of Sacramento* decision do not apply when subvention is the issue.

(12) Riverside asserts that the trial court erred in concluding that the Board of Control did not consider the issues under the appropriate criteria and that the board did in fact consider the factors set forth in the Supreme Court's *City of Sacramento* decision. From our discussion above it is clear that we must reject these assertions. In its decision the board relied upon the "cooperative federalism" nature of the Education of the Handicapped Act without any consideration whether the act left the state any actual choice in the matter. In support of its conclusion the board relied upon the New Mexico litigation which we have also discussed. However, as we have pointed out, under [***68] the criteria set forth in the Supreme Court's *City of Sacramento* decision, the New Mexico litigation does not support the board's decision but in fact strongly supports a contrary result. We are satisfied that the trial court correctly concluded that the board did not apply the appropriate criteria in reaching its decision.

Riverside asserts that the Supreme Court's *City of Sacramento* decision elucidated and enforced prior law and thus no question of retroactivity arises. (See *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 37 [196 Cal.Rptr. 704, 672 P.2d 110].) **(13)** We agree that in *City of Sacramento* the Supreme Court elucidated and enforced existing law. Under such circumstances the rule of retrospective operation controls. (See also *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 953-954 [148 Cal.Rptr. 379, 582 P.2d 970]; *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 680-681 [312 P.2d 680].) Pursuant to that rule the trial court correctly applied the *City of Sacramento* decision to the [***69] litigation pending before it. As we have seen, that decision supports the trial court's determination to remand the matter to the Commission for reconsideration.

Riverside asserts that if further consideration under the criteria of the Supreme Court's *City of Sacramento* decision is necessary then the trial court should have, and this court must, engage in such consideration to reach a final conclusion on the question. To a limited extent we agree. In our previous discussion we have concluded that under the criteria set forth in *City of Sacramento,* the Education of the Handicapped Act constitutes a federal mandate as far as the state is concerned. We are satisfied that is the only conclusion which may be drawn and we so hold as a matter of law. However, that conclusion

Received
August 26, 2011
Commission on
State Mandates

does not resolve the question whether new special education costs were imposed upon local school districts by federal mandate or by state choice in the implementation of the federal program. The issues were not addressed by the parties or the Board of Control in this light. The [*1597] Commission on State Mandates is the entity with the responsibility for considering the issues in [**569] the first instance [***70] and which has the expertise to do so. We agree with the trial court that it is appropriate to remand the matter to the Commission for reconsideration in light of the appropriate criteria which we have set forth in this appeal.

In view of the result we have reached we need not and do not consider whether it would be appropriate otherwise to fashion some judicial remedy to avoid the rule, based upon the separation of powers doctrine, that a court cannot compel the State Controller to make a disbursement in the absence of an appropriation. (See *Carmel Valley Fire Protection Dist. v. State of California, supra,* 190 Cal.App.3d at pp. 538- 541.)

DISPOSITION

The judgment is affirmed.

Davis, J., and Scotland, J., concurred. The petition of plaintiff and respondent for review by the Supreme Court was denied April 1, 1993. Lucas, C.J., Kennard, J., and Arabian, J., were of the opinion that the petition should be granted.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 7

Received
August 26, 2011
Commission on
State Mandates

FRANCES KINLAW et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents

No. S014349

Supreme Court of California

54 Cal. 3d 326; 814 P.2d 1308; 285 Cal. Rptr. 66; 1991 Cal. LEXIS 3745; 91 Cal. Daily Op. Service 7086; 91 Daily Journal DAR 10744

August 30, 1991

PRIOR HISTORY: Superior Court of Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, Judges.

DISPOSITION: The judgment of the Court of Appeal is reversed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Medically indigent adults and taxpayers brought an action pursuant to Code Civ. Proc., ß 526a, against the state, alleging that it had violated Cal. Const., art. XIII B, ß 6 (reimbursement of local governments for state-mandated new programs), by shifting its financial responsibility for the funding of health care for the poor onto the county without providing the necessary funding, and that as a result the state had evaded its constitutionally mandated spending limits. The trial court granted summary judgment for the State after concluding plaintiffs lacked standing to prosecute the action. (Superior Court of Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, Judges.) The Court of Appeal, First Dist., Div. Two, Nos. A041426 and A043500, reversed.

The Supreme Court reversed the judgment of the Court of Appeal, holding the administrative procedures established by the Legislature (Gov. Code, ß 17500 et seq.), which are available only to local agencies and school districts directly affected by a state mandate, were the exclusive means by which the state's obligations under Cal. Const., art. XIII B, ß 6, were to be determined and enforced. Accordingly, the court held plaintiffs lacked standing to prosecute the action. (Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, and Arabian, JJ., concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) State of California ß 7--Actions--State-mandated Costs--Reimbursement--Exclusive Statutory Remedy. -- Gov. Code, ß 17500 et seq., creates an administrative forum for resolution of state mandate claims arising under Cal. Const., art. XIII B, ß 6, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid. In view of the comprehensive nature of the legislative scheme, and from the expressed intent, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce Cal. Const., art. XIII B, ß 6.

(2) State of California ß 7--Actions--State-mandated Costs--Reimbursement--Private Action to Enforce--Standing. --In an action by medically indigent adults and taxpayers seeking to enforce Cal. Const., art. XIII B, ß 6, for declaratory and injunctive relief requiring the state to reimburse the county for the cost of providing

Received
August 26, 2011
Commission on
State Mandates

health care services to medically indigent adults who, prior to 1983, had been included in the state Medi-Cal program, the Court of Appeal erred in holding that the existence of an administrative remedy (Gov. Code, ß 17500 et seq.) by which affected local agencies could enforce their constitutional right under art. XIII B, ß 6 to reimbursement for the cost of state mandates did not bar the action. Because the right involved was given by the Constitution to local agencies and school districts, not individuals either as taxpayers or recipients of government benefits and services, the administrative remedy was adequate to fully implement the constitutional provision. The Legislature has the authority to establish procedures for the implementation of local agency rights under art. XIII B, ß 6; unless the exercise of a constitutional right is unduly restricted, a court must limit enforcement to the procedures established by the Legislature. Plaintiffs' interest, although pressing, was indirect and did not differ from the interest of the public at large in the financial plight of local government. Relief by way of reinstatement to Medi-Cal pending further action by the state was not a remedy available under the statute, and thus was not one which a court may award.

[See 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, ß 112.]

COUNSEL: Stephen D. Schear, Stephen E. Ronfeldt, Armando M. Menocal III, Lois Salisbury, Laura Schulkind and Kirk McInnis for Plaintiffs and Appellants.

Catherine I. Hanson, Astrid G. Meghrigian, Alice P. Mead, Alan K. Marks, County Counsel (San Bernardino), Paul F. Mordy, Deputy County Counsel, De Witt W. Clinton, County Counsel (Los Angeles), Robert M. Fesler, Assistant County Counsel, Frank J. DaVanzo, Deputy County Counsel, Weissburg & Aronson, Mark S. Windisch, Carl Weissburg and Howard W. Cohen as Amici Curiae on behalf of Plaintiffs and Appellants.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, N. Eugene Hill, Assistant Attorney General, Richard M. Frank, Asher Rubin and Carol Hunter, Deputy Attorneys General, for Defendants and Respondents.

JUDGES: Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, and Arabian, JJ., concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.

OPINION BY: BAXTER

OPINION

[*328] [**1309] [***67] Plaintiffs, medically indigent adults and taxpayers, seek to enforce section 6 of article XIII B (hereafter, section 6) of the California Constitution through an action for declaratory and injunctive relief. They invoked the jurisdiction of the superior court as taxpayers pursuant to Code of Civil Procedure section 526a and as persons affected by the alleged failure of the state to comply with section 6. The superior court granted summary judgment for defendants State of California and Director of the Department of Health Services, after concluding that plaintiffs lacked standing to prosecute the action. On appeal, the Court of Appeal held that plaintiffs have standing and that the action is not barred by the availability of administrative remedies.

[**1310] [***68] We reverse. The administrative procedures established by the Legislature, which are available only to local agencies and school districts directly affected by a state mandate, are the exclusive means by which the state's obligations under section 6 are to be determined and enforced. Plaintiffs therefore lack standing.

I

State Mandates

Section 6, adopted on November 6, 1979, as part of an initiative measure imposing spending limits on state and local government, also imposes on the state an obligation to reimburse local agencies for the cost of most programs and services which they must provide pursuant to a state mandate if the local agencies were not under a preexisting duty to fund the activity. It provides:

[*329] "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

"(a) Legislative mandates requested by the local agency affected;

"(b) Legislation defining a new crime or changing an existing definition of a crime; or

"(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

A complementary provision, section 3 of article XIII B, provides for a shift from the state to the local agency of a portion of the spending or "appropriation" limit of the state when responsibility for funding an activity is shifted to a local agency:

Received
August 26, 2011
Commission on
State Mandates

"The appropriations limit for any fiscal year . . . shall be adjusted as follows: [para.] (a) In the event that the financial responsibility of providing services is transferred, in whole or in part, . . . from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount."

II

Plaintiffs' Action

The underlying issue in this action is whether the state is obligated to reimburse the County of Alameda, and shift to Alameda County a concomitant portion of the state's spending limit, for the cost of providing health care services to medically indigent adults who prior to 1983 had been included in the state Medi-Cal program. Assembly Bill No. 799 (1981-1982 Reg. Sess.) (AB 799) (Stats. 1982, ch. 328, p. 1568) removed medically indigent adults from Medi-Cal effective January 1, 1983. At the time section 6 was adopted, the state was funding Medi-Cal coverage for these persons without requiring any county financial contribution.

Plaintiffs initiated this action in the Alameda County Superior Court. They sought relief on their own behalf and on behalf of a class of similarly [*330] situated medically indigent adult residents of Alameda County. The only named defendants were the State of California, the Director of the Department of Health Services, and the County of Alameda.

In the complaint for declaratory and injunctive relief, plaintiffs sought an injunction compelling the state to restore Medi-Cal eligibility to medically indigent adults or to reimburse the County of Alameda for the cost of providing health care to those persons. They also prayed for a declaration that the transfer of responsibility from the state-financed Medi-Cal program to the counties without adequate reimbursement violated the California Constitution. [1]

1 The complaint also sought a declaration that the county was obliged to provide health care services to indigents that were equivalent to those available to nonindigents. This issue is not before us. The County of Alameda aligned itself with plaintiffs in the superior court and did not oppose plaintiffs' effort to enforce section 6.

[**1311] [***69] At the time plaintiffs initiated their action neither Alameda County, nor any other county or local agency, had filed a reimbursement claim with the Commission on State Mandates (Commission). [2]

2 On November 23, 1987, the County of Los Angeles filed a test claim with the Commission. San Bernardino County joined as a test claimant. The Commission ruled against the counties, concluding that no state mandate had been created. The Los Angeles County Superior Court subsequently granted the counties' petition for writ of mandate (Code Civ. Proc., ß 1094.5), reversing the Commission, on April 27, 1989. (No. C-731033.) An appeal from that judgment is presently pending in the Court of Appeal. (*County of Los Angeles* v. *State of California*, No. B049625.)

Whether viewed as an action seeking restoration of Medi-Cal benefits, one to compel state reimbursement of county costs, or one for declaratory relief, therefore, the action required a determination that the enactment of AB 799 created a state mandate within the contemplation of section 6. Only upon resolution of that issue favorably to plaintiffs would the state have an obligation to reimburse the county for its increased expense and shift a portion of its appropriation limit, or to reinstate Medi-Cal benefits for plaintiffs and the class they seek to represent.

The gravamen of the action is, therefore, enforcement of section 6. [3]

3 Plaintiffs argue that they seek only a declaration that AB 799 created a state mandate and an injunction against the shift of costs until the state decides what action to take. This is inconsistent with the prayer of their complaint which sought an injunction requiring defendants to restore Medi-Cal eligibility to all medically indigent adults until the state paid the cost of full health services for them. It is also unavailing.

An injunction against enforcement of a state mandate is available only after the Legislature fails to include funding in a local government claims bill following a determination by the Commission that a state mandate exists. (Gov. Code, ß 17612.) Whether plaintiffs seek declaratory relief and/or an injunction, therefore, they are seeking to enforce section 6.

All further statutory references are to the Government Code unless otherwise indicated.

[*331] III

Enforcement of Article XIII B, Section 6

In 1984, almost five years after the adoption of article XIII B, the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6. (ß 17500.) The Legislature did so because the absence of a uniform procedure had resulted in

Received
August 26, 2011
Commission on
State Mandates

inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. The necessity for the legislation was explained in section 17500:

"The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, *it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs*." (Italics added.)

In part 7 of division 4 of title 2 of the Government Code, "State-Mandated Costs," which commences with section 17500, the Legislature created the Commission (ß 17525), to adjudicate disputes over the existence of a state mandated program (ßß 17551, 17557) and to adopt procedures for submission and adjudication of reimbursement claims (ß 17553). The five-member Commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and [**1312] [***70] Research, and a public member experienced in public finance. (ß 17525.)

The legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies (ß 17554), [4] establishes the method of [*332] payment of claims (ßß 17558, 17561), and creates reporting procedures which enable the Legislature to budget adequate funds to meet the expense of state mandates (ßß 17562, 17600, 17612, subd. (a).)

4 The test claim by the County of Los Angeles was filed prior to that proposed by Alameda County. The Alameda County claim was rejected for that reason. (See ß 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the issues the majority elects to address instead in this proceeding. Los Angeles County declined a request from Alameda County that it be included in the test claim because the two counties' systems of documentation were so similar that joining Alameda County would not be of any benefit. Alameda County and these plaintiffs were, of course, free to participate in the Commission hearing on the test claim. (ß 17555.)

Pursuant to procedures which the Commission was authorized to establish (ß 17553), local agencies [5] and school districts [6] are to file claims for reimbursement of state-mandated costs with the Commission (ßß 17551, 17560), and reimbursement is to be provided only through this statutory procedure. (ßß 17550, 17552.)

5 "'Local agency' means any city, county, special district, authority, or other political subdivision of the state." (ß 17518.)

6 "'School district' means any school district, community college district, or county superintendant of schools." (ß 17519.)

The first reimbursement claim filed which alleges that a state mandate has been created under a statute or executive order is treated as a "test claim." (ß 17521.) A public hearing must be held promptly on any test claim. At the hearing on a test claim or on any other reimbursement claim, evidence may be presented not only by the claimant, but also by the Department of Finance and any other department or agency potentially affected by the claim. (ß 17553.) Any interested organization or individual may participate in the hearing. (ß 17555.)

A local agency filing a test claim need not first expend sums to comply with the alleged state mandate, but may base its claim on estimated costs. (ß 17555.) The Commission must determine both whether a state mandate exists and, if so, the amount to be reimbursed to local agencies and school districts, adopting "parameters and guidelines" for reimbursement of any claims relating to that statute or executive order. (ß 17557.) Procedures for determining whether local agencies have achieved statutorily authorized cost savings and for offsetting these savings against reimbursements are also provided. (ß 17620 et seq.) Finally, judicial review of the Commission decision is available through petition for writ of mandate filed pursuant to Code of Civil Procedure section 1094.5. (ß 17559.)

The legislative scheme is not limited to establishing the claims procedure, however. It also contemplates reporting to the Legislature and to departments and agencies of the state which have responsibilities related to funding state mandates, budget planning, and payment. The parameters and guidelines adopted by the Commission must be submitted to the Controller, who is to pay subsequent claims arising out of the mandate. (ß 17558.) Executive orders mandating costs are to be accompanied by an appropriations [*333] bill to cover the costs if the costs are not included in the budget bill, and in subsequent years the costs must be included in the

Received
August 26, 2011
Commission on
State Mandates

budget bill. (ß 17561, subds. (a) & (b).) Regular review of the costs is to be made by the Legislative Analyst, who must report to the Legislature and recommend whether the mandate should be continued. (ß 17562.) The Commission is also required to make semiannual reports to the Legislature of the number of mandates found and the estimated reimbursement cost to the state. (ß 17600.) The Legislature must then adopt a "local government claims bill." If that bill does not include funding for a state mandate, an affected local agency or school district may seek a declaration from the superior court for the County of Sacramento that the mandate is unenforceable, [**1313] [***71] and an injunction against enforcement. (ß 17612.)

Additional procedures, enacted in 1985, create a system of state-mandate apportionments to fund reimbursement. (ß 17615 et seq.)

(1) It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of section 6 lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid (ß 17612).

The legislative intent is clearly stated in section 17500: "It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution. . . ." And section 17550 states: "Reimbursement of local agencies and school districts for costs mandated by the state shall be provided pursuant to this chapter."

Finally, section 17552 provides: "This chapter shall provide *the sole and exclusive procedure* by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." (Italics added.)

In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce section 6.

[*334] IV

Exclusivity

(2) Plaintiffs argued, and the Court of Appeal agreed, that the existence of an administrative remedy by which affected local agencies could enforce their right under section 6 to reimbursement for the cost of state mandates did not bar this action because the administrative remedy is available only to local agencies and school districts.

The Court of Appeal recognized that the decision of the County of Alameda, which had not filed a claim for reimbursement at the time the complaint was filed, was a discretionary decision which plaintiffs could not challenge. (*Dunn* v. *Long Beach L. & W. Co.* (1896) 114 Cal. 605, 609, 610-611 [46 P. 607]; *Silver* v. *Watson* (1972) 26 Cal.App.3d 905, 909 [103 Cal.Rptr. 576]; *Whitson* v. *City of Long Beach* (1962) 200 Cal.App.2d 486, 506 [19 Cal.Rptr. 668]; *Elliott* v. *Superior Court* (1960) 180 Cal.App.2d 894, 897 [5 Cal.Rptr. 116].) The court concluded, however, that public policy and practical necessity required that plaintiffs have a remedy for enforcement of section 6 independent of the statutory procedure.

The right involved, however, is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services. Section 6 provides that the "state shall provide a subvention of funds *to reimburse . . . local governments* . . . ." (Italics added.) The administrative remedy created by the Legislature is adequate to fully implement section 6. That Alameda County did not file a reimbursement claim does not establish that the enforcement remedy is inadequate. Any of the 58 counties was free to file a claim, and other counties did so. The test claim is now before the Court of Appeal. The administrative procedure has operated as intended.

The Legislature has the authority to establish procedures for the implementation of local agency rights under section 6. Unless the exercise of a constitutional right is unduly restricted, the court must limit enforcement to the procedures established by the Legislature. (*People* v. [**1314] [***72] *Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 637 [268 P.2d 723]; *Chesney* v. *Byram* (1940) 15 Cal.2d 460, 463 [101 P.2d 1106]; *County of Contra Costa* v. *State of California* (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750].)

Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost [*335] of services to medically indigent adults is unpersuasive. Plaintiffs' interest, although pressing, is indirect and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reim-

Received
August 26, 2011
Commission on
State Mandates

burse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind. Nothing in article XIII B or other provision of law controls the county's expenditure of the funds plaintiffs claim must be paid to the county. To the contrary, section 17563 gives the local agency complete discretion in the expenditure of funds received pursuant to section 6, providing: "Any funds received by a local agency or school district pursuant to the provisions of this chapter may be used for any public purpose."

The relief plaintiffs seek in their prayer for state reimbursement of county expenses is, in the end, a reallocation of general revenues between the state and the county. Neither public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues. The Legislature has established a procedure by which the county may claim any revenues to which it believes it is entitled under section 6. That test-claim statute expressly provides that not only the claimant, but also "any other interested organization or individual may participate" in the hearing before the Commission (ß 17555) at which the right to reimbursement of the costs of such mandate is to be determined. Procedures for receiving any claims must "provide for presentation of evidence by the claimant, the Department of Finance and any other affected department or agency, *and any other interested person*." (ß 17553. Italics added.) Neither the county nor an interested individual is without an opportunity to be heard on these questions. These procedures are both adequate and exclusive. [7]

7 Plaintiffs' argument, that the Legislature's failure to make provision for individual enforcement of section 6 before the Commission demonstrates an intent to permit legal actions, is not persuasive. The legislative statement of intent to relegate all mandate disputes to the Commission is clear. A more likely explanation of the failure to provide for test cases to be initiated by individuals lies in recognition that (1) because section 6 creates rights only in governmental entities, individuals lack sufficient beneficial interest in either the receipt or expenditure of reimbursement funds to accord them standing; and (2) the number of local agencies having a direct interest in obtaining reimbursement is large enough to ensure that citizen interests will be adequately represented.

The alternative relief plaintiffs seek -- reinstatement to Medi-Cal pending further action by the state -- is not a remedy available under the statute, and thus is not one which this court may award. The remedy for the failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission has determined that a mandate exists [*336] and the Legislature has failed to include the cost in a local government claims bill, and only on petition by the county. (ß 17612.) [8]

8 Plaintiffs are not without a remedy if the county fails to provide adequate health care, however. They may enforce the obligation imposed on the county by Welfare and Institutions Code sections 17000 and 17001, and by judicial action. (See, e.g., *Mooney* v. *Pickett* (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231].)

Moreover, the judicial remedy approved by the Court of Appeal permits resolution of the issues raised in a state mandate claim without the participation of those officers and individuals the Legislature deems necessary to a full and fair exposition and resolution of the issues. Neither the Controller nor the Director of Finance [**1315] [***73] was named a defendant in this action. The Treasurer and the Director of the Office of Planning and Research did not participate. All of these officers would have been involved in determining the question as members of the Commission, as would the public member of the Commission. The judicial procedures were not equivalent to the public hearing required on test claims before the Commission by section 17555. Therefore, other affected departments, organizations, and individuals had no opportunity to be heard. [9]

9 For this reason, it would be inappropriate to address the merits of plaintiff's claim in this proceeding. (Cf. *Dix* v. *Superior Court* (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063].) Unlike the dissent, we do not assume that in representing the state in this proceeding, the Attorney General necessarily represented the interests and views of these officials.

Finally, since a determination that a state mandate has been created in a judicial proceeding rather than one before the Commission does not trigger the procedures for creating parameters and guidelines for payment of claims, or for inclusion of estimated costs in the state budget, there is no source of funds available for compliance with the judicial decision other than the appropriations for the Department of Health Services. Payment from those funds can only be at the expense of another program which the department is obligated to fund. No public policy supports, let alone requires, this result.

The superior court acted properly in dismissing this action.

Received
August 26, 2011
Commission on
State Mandates

The judgment of the Court of Appeal is reversed.

DISSENT BY: BROUSSARD

DISSENT

ROUSSARD, J.

I dissent. For nine years the Legislature has defied the mandate of article XIII B of the California Constitution (hereafter article XIII B). Having transferred responsibility for the care of medically indigent adults (MIA's) to county governments, the Legislature has failed to provide the counties with sufficient money to meet this responsibility, yet the [*337] Legislature computes its own appropriations limit as if it fully funded the program. The majority, however, declines to remedy this violation because, it says, the persons most directly harmed by the violation -- the medically indigent who are denied adequate health care -- have no standing to raise the matter. I disagree, and will demonstrate that (1) plaintiffs have standing as citizens to seek a declaratory judgment to determine whether the state is complying with its constitutional duty under article XIII B; (2) the creation of an administrative remedy whereby counties and local districts can enforce article XIII B does not deprive the citizenry of its own independent right to enforce that provision; and (3) even if plaintiffs lacked standing, our recent decision in *Dix* v. *Superior Court* (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063] permits us to reach and resolve any significant issue decided by the Court of Appeal and fully briefed and argued here. I conclude that we should reach the merits of the appeal.

On the merits, I conclude that the state has not complied with its constitutional obligation under article XIII B. To prevent the state from avoiding the spending limits imposed by article XIII B, section 6 of that article prohibits the state from transferring previously state-financed programs to local governments without providing sufficient funds to meet those burdens. In 1982, however, the state excluded the medically indigent from its Medi-Cal program, thus shifting the responsibility for such care to the counties. Subvention funds provided by the state were inadequate to reimburse the counties for this responsibility, and became less adequate every year. At the same time, the state continued to compute its spending limit as if it fully financed the entire program. The result is exactly what article XIII B was intended to prevent: the state enjoys a falsely inflated spending limit; the county is compelled to assume a burden it cannot afford; and the medically indigent receive inadequate health care.

I. Facts and Procedural History

Plaintiffs -- citizens, taxpayers, and persons in need of medical care -- allege that [**1316] [***74] the state has shifted its financial responsibility for the funding of health care for MIA's to the counties without providing the necessary funding and without any agreement transferring appropriation limits, and that as a result the state is violating article XIII B. Plaintiffs further allege they and the class they claim to represent cannot, consequently, obtain adequate health care from the County of Alameda, which lacks the state funding to provide it. The county, although nominally a defendant, aligned [*338] itself with plaintiffs. It admits the inadequacy of its program to provide medical care for MIA's but blames the absence of state subvention funds. [1]

> 1 The majority states that "Plaintiffs are not without a remedy if the county fails to provide adequate health care . . . . They may enforce the obligation imposed on the county by Welfare and Institutions Code sections 17000 and 17001, and by judicial action." (Maj. opn., *ante*, p. 336, fn. 8)
>
> The majority fails to note that plaintiffs have already tried this remedy, and met with the response that, owing to the state's inadequate subvention funds, the county cannot afford to provide adequate health care.

At hearings below, plaintiffs presented uncontradicted evidence regarding the enormous impact of these statutory changes upon the finances and population of Alameda County. That county now spends about $ 40 million annually on health care for MIA's, of which the state reimburses about half. Thus, since article XIII B became effective, Alameda County's obligation for the health care of MIA's has risen from zero to more than $ 20 million per year. The county has inadequate funds to discharge its new obligation for the health care of MIA's; as a result, according to the Court of Appeal, uncontested evidence from medical experts presented below shows that, "The delivery of health care to the indigent in Alameda County is in a state of shambles; the crisis cannot be overstated . . . ." "Because of inadequate state funding, some Alameda County residents are dying, and many others are suffering serious diseases and disabilities, because they cannot obtain adequate access to the medical care they need . . . ." "The system is clogged to the breaking point. . . . All community clinics . . . are turning away patients." "The funding received by the county from the state for MIAs does not approach the actual cost of providing health care to the MIAs. As a consequence, inadequate resources available to county health services jeopardize the lives and health of thousands of people . . . ."

The trial court acknowledged that plaintiffs had shown irreparable injury, but denied their request for a

Received
August 26, 2011
Commission on
State Mandates

preliminary injunction on the ground that they could not prevail in the action. It then granted the state's motion for summary judgment. Plaintiffs appealed from both decisions of the trial court.

The Court of Appeal consolidated the two appeals and reversed the rulings below. It concluded that plaintiffs had standing to bring this action to enforce the constitutional spending limit of article XIII B, and that the action is not barred by the existence of administrative remedies available to counties. It then held that the shift of a portion of the cost of medical indigent care by the state to Alameda County constituted a state-mandated new program under the provisions of article XIII B, which triggered that article's provisions requiring a subvention of funds by the state to reimburse Alameda [*339] County for the costs of such program it was required to assume. The judgments denying a preliminary injunction and granting summary judgment for defendants were reversed. We granted review.

II. Standing

A. *Plaintiffs have standing to bring an action for declaratory relief to determine whether the state is complying with article XIII B*.

Plaintiffs first claim standing as taxpayers under Code of Civil Procedure section 526a, which provides that: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county . . . , may be maintained [**1317] [***75] against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. . . ." As in *Common Cause* v. *Board of Supervisors* (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574, 777 P.2d 610], however, it is "unnecessary to reach the question whether plaintiffs have standing to seek an injunction under Code of Civil Procedure section 526a, because there is an independent basis for permitting them to proceed." Plaintiffs here seek a declaratory judgment that the transfer of responsibility for MIA's from the state to the counties without adequate reimbursement violates article XIII B. A declaratory judgment that the state has breached its duty is essentially equivalent to an action in mandate to compel the state to perform its duty. (See *California Assn. of Psychology Providers* v. *Rank* (1990) 51 Cal.3d 1, 9 [270 Cal.Rptr. 796, 793 P.2d 2], which said that a declaratory judgment establishing that the state has a duty to act provides relief equivalent to mandamus, and makes issuance of the writ unnecessary.) Plaintiffs further seek a mandatory injunction requiring that the state pay the health costs of MIA's under the Medi-Cal program until the state meets its obligations under article XIII B. The majority similarly characterize plaintiffs' action as one comparable to mandamus brought to enforce section 6 of article XIII B.

We should therefore look for guidance to cases that discuss the standing of a party seeking a writ of mandate to compel a public official to perform his or her duty. [2] Such an action may be brought by any person "beneficially interested" in the issuance of the writ. (Code Civ. Proc., ß 1086.) In *Carsten* [*340] v. *Psychology Examining Com*. (1980) 27 Cal.3d 793, 796 [166 Cal.Rptr. 844, 614 P.2d 276], we explained that the "requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." We quoted from Professor Davis, who said, "One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." (Pp. 796-797, quoting 3 Davis, Administrative Law Treatise (1st ed. 1958) p. 291.) Cases applying this standard include *Stocks* v. *City of Irvine* (1981) 114 Cal.App.3d 520 [170 Cal.Rptr. 724], which held that low-income residents of Los Angeles had standing to challenge exclusionary zoning laws of suburban communities which prevented the plaintiffs from moving there; *Taschner* v. *City Council, supra*, 31 Cal.App.3d 48, which held that a property owner has standing to challenge an ordinance which may limit development of the owner's property; and *Felt* v. *Waughop* (1924) 193 Cal. 498 [225 P. 862], which held that a city voter has standing to compel the city clerk to certify a correct list of candidates for municipal office. Other cases illustrate the limitation on standing: *Carsten* v. *Psychology Examining Com., supra*, 27 Cal.3d 793, held that a member of the committee who was neither seeking a license nor in danger of losing one had no standing to challenge [**1318] [***76] a change in the method of computing the passing score on the licensing examination; *Parker* v. *Bowron* (1953) 40 Cal.2d 344 [254 P.2d 6] held that a union official who was neither a city employee nor a city resident had no standing to compel a city to follow a prevailing wage ordinance; and *Dunbar* v. *Governing Board* (1969) 275 Cal.App.2d 14 [79 Cal.Rptr. 662] held that a member of a student organization had standing to challenge a college district's rule barring a speaker from campus, but persons who merely planned to hear him speak did not.

2 It is of no importance that plaintiffs did not request issuance of a writ of mandate. In *Taschner* v. *City Council* (1973) 31 Cal.App.3d 48, 56 [107 Cal.Rptr. 214] (overruled on other grounds in *Associated Home Builders etc., Inc.* v. *City of Livermore* (1976) 18 Cal.3d 582, 596 [135

Received
August 26, 2011
Commission on
State Mandates

Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]), the court said that "[a]s against a general demurrer, a complaint for declaratory relief may be treated as a petition for mandate [citations], and where a complaint for declaratory relief alleges facts sufficient to entitle plaintiff to mandate, it is error to sustain a general demurrer without leave to amend."

In the present case, the trial court ruled on a motion for summary judgment, but based that ruling not on the evidentiary record (which supported plaintiffs' showing of irreparable injury) but on the issues as framed by the pleadings. This is essentially equivalent to a ruling on demurrer, and a judgment denying standing could not be sustained on the narrow ground that plaintiffs asked for the wrong form of relief without giving them an opportunity to correct the defect. (See *Residents of Beverly Glen, Inc.* v. *City of Los Angeles* (1973) 34 Cal.App.3d 117, 127-128 [109 Cal.Rptr. 724].)

No one questions that plaintiffs are affected by the lack of funds to provide care for MIA's. Plaintiffs, except for plaintiff Rabinowitz, are not merely citizens and taxpayers; they are medically indigent persons living in Alameda County who have been and will be deprived of proper medical care if funding of MIA programs is inadequate. Like the other plaintiffs here, [*341] plaintiff Kinlaw, a 60-year-old woman with diabetes and hypertension, has no health insurance. Plaintiff Spier has a chronic back condition; inadequate funding has prevented him from obtaining necessary diagnostic procedures and physiotherapy. Plaintiff Tsosie requires medication for allergies and arthritis, and claims that because of inadequate funding she cannot obtain proper treatment. Plaintiff King, an epileptic, says she was unable to obtain medication from county clinics, suffered seizures, and had to go to a hospital. Plaintiff "Doe" asserts that when he tried to obtain treatment for AIDS-related symptoms, he had to wait four to five hours for an appointment and each time was seen by a different doctor. All of these are people personally dependent upon the quality of care of Alameda County's MIA program; most have experienced inadequate care because the program was underfunded, and all can anticipate future deficiencies in care if the state continues its refusal to fund the program fully.

The majority, however, argues that the county has no duty to use additional subvention funds for the care of MIA's because under Government Code section 17563 "[a]ny funds received by a local agency . . . pursuant to the provisions of this chapter may be used for any public purpose." Since the county may use the funds for other purposes, it concludes that MIA's have no special interest in the subvention. [3]

3 The majority's argument assumes that the state will comply with a judgment for plaintiffs by providing increased subvention funds. If the state were instead to comply by restoring Medi-Cal coverage for MIA's, or some other method of taking responsibility for their health needs, plaintiffs would benefit directly.

This argument would be sound if the county were already meeting its obligations to MIA's under Welfare and Institutions Code section 17000. If that were the case, the county could use the subvention funds as it chose, and plaintiffs would have no more interest in the matter than any other county resident or taxpayer. But such is not the case at bar. Plaintiffs here allege that the county is not complying with its duty, mandated by Welfare and Institutions Code section 17000, to provide health care for the medically indigent; the county admits its failure but pleads lack of funds. Once the county receives adequate funds, it must perform its statutory duty under section 17000 of the Welfare and Institutions Code. If it refused, an action in mandamus would lie to compel performance. (See *Mooney* v. *Pickett* (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231].) In fact, the county has made clear throughout this litigation that it would use the subvention funds to provide care for MIA's. The majority's conclusion that plaintiffs lack a special, beneficial interest in the state's compliance with article XIII B ignores the practical realities of health care funding.

Moreover, we have recognized an exception to the rule that a plaintiff must be beneficially interested. "Where the question is one of public right [*342] and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question [**1319] [***77] enforced." (*Bd. of Soc. Welfare* v. *County of L. A.* (1945) 27 Cal.2d 98, 100-101 [162 P.2d 627].) We explained in *Green* v. *Obledo* (1981) 29 Cal.3d 126, 144 [172 Cal.Rptr. 206, 624 P.2d 256], that this "exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right. . . . It has often been invoked by California courts. [Citations.]"

Green v. *Obledo* presents a close analogy to the present case. Plaintiffs there filed suit to challenge whether a state welfare regulation limiting deductibility of work-related expenses in determining eligibility for aid to families with dependent children (AFDC) assistance complied with federal requirements. Defendants claimed that plaintiffs were personally affected only by a portion of

Received
August 26, 2011
Commission on
State Mandates

the regulation, and had no standing to challenge the balance of the regulation. We replied that "[t]here can be no question that the proper calculation of AFDC benefits is a matter of public right [citation], and plaintiffs herein are certainly citizens seeking to procure the enforcement of a public duty. [Citation.] It follows that plaintiffs have standing to seek a writ of mandate commanding defendants to cease enforcing [the regulation] in its entirety." (29 Cal.3d at p. 145.)

We again invoked the exception to the requirement for a beneficial interest in *Common Cause* v. *Board of Supervisors, supra*, 49 Cal.3d 432. Plaintiffs in that case sought to compel the county to deputize employees to register voters. We quoted *Green* v. *Obledo, supra*, 29 Cal.3d 126, 144, and concluded that "[t]he question in this case involves a public right to voter outreach programs, and plaintiffs have standing as citizens to seek its vindication." (49 Cal.3d at p. 439.) We should reach the same conclusion here.

B. *Government Code sections 17500- 17630 do not create an exclusive remedy which bars citizen-plaintiffs from enforcing article XIII B*.

Four years after the enactment of article XIII B, the Legislature enacted Government Code sections 17500 through 17630 to implement article XIII B, section 6. These statutes create a quasi-judicial body called the Commission on State Mandates, consisting of the state Controller, state Treasurer, state Director of Finance, state Director of the Office of Planning and Research, and one public member. The commission has authority to "hear and decide upon [any] claim" by a local government that it "is entitled to be reimbursed by the state" for costs under article XIII B. (Gov. Code, ß 17551, [*343] subd. (a).) Its decisions are subject to review by an action for administrative mandamus in the superior court. (See Gov. Code, ß 17559.)

The majority maintains that a proceeding before the Commission on State Mandates is the exclusive means for enforcement of article XIII B, and since that remedy is expressly limited to claims by local agencies or school districts (Gov. Code, ß 17552), plaintiffs lack standing to enforce the constitutional provision. [4] I disagree, for two reasons.

4 The majority emphasizes the statement of purpose of Government Code section 17500: "The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under section 6 of article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary, and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs."

The "existing system" to which Government Code section 17500 referred was the Property Tax Relief Act of 1972 (Rev. & Tax. Code, ßß 2201- 2327), which authorized local agencies and school boards to request reimbursement from the state Controller. Apparently dissatisfied with this remedy, the agencies and boards were bypassing the Controller and bringing actions directly in the courts. (See, e.g., *County of Contra Costa* v. *State of California* (1986) 177 Cal.App.3d 62 [222 Cal.Rptr. 750].) The legislative declaration refers to this phenomena. It does not discuss suits by individuals.

[**1320] [***78] First, Government Code section 17552 expressly addressed the question of exclusivity of remedy, and provided that "[t]his chapter shall provide the sole and exclusive procedure by which *a local agency or school district* may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." (Italics added.) The Legislature was aware that local agencies and school districts were not the only parties concerned with state mandates, for in Government Code section 17555 it provided that "any other interested organization or individual may participate" in the commission hearing. Under these circumstances the Legislature's choice of words -- "the sole and exclusive procedure by which a local agency or school district may claim reimbursement" -- limits the procedural rights of those claimants only, and does not affect rights of other persons. *Expressio unius est exclusio alterius* -- "the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (*Henderson* v. *Mann Theatres Corp*. (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266].)

The case is similar in this respect to *Common Cause* v. *Board of Supervisors, supra*, 49 Cal.3d 432. Here defendants contend that the counties' right of action under Government Code sections 17551- 17552 impliedly excludes [*344] any citizen's remedy; in *Common Cause* defendants claimed the Attorney General's right of action under Elections Code section 304 impliedly excluded any citizen's remedy. We replied that "the plain lan-

Received
August 26, 2011
Commission on
State Mandates

guage of section 304 contains no limitation on the right of private citizens to sue to enforce the section. To infer such a limitation would contradict our long-standing approval of citizen actions to require governmental officials to follow the law, expressed in our expansive interpretation of taxpayer standing [citations], and our recognition of a 'public interest' exception to the requirement that a petitioner for writ of mandate have a personal beneficial interest in the proceedings [citations]." (49 Cal.3d at p. 440, fn. omitted.) Likewise in this case the plain language of Government Code sections 17551- 17552 contain no limitation on the right of private citizens, and to infer such a right would contradict our long-standing approval of citizen actions to enforce public duties.

The United States Supreme Court reached a similar conclusion in *Rosado* v. *Wyman* (1970) 397 U.S. 397 [25 L.Ed.2d 442, 90 S.Ct. 1207]. In that case New York welfare recipients sought a ruling that New York had violated federal law by failing to make cost-of-living adjustments to welfare grants. The state replied that the statute giving the Department of Health, Education and Welfare authority to cut off federal funds to noncomplying states constituted an exclusive remedy. The court rejected the contention, saying that "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." (P. 420 [25 L.Ed.2d at p. 460].) The principle is clear: the persons actually harmed by illegal state action, not only some administrator who has no personal stake in the matter, should have standing to challenge that action.

Second, article XIII B was enacted to protect taxpayers, not governments. Section 1 and 2 of article XIII B establish strict limits on state and local expenditures, and require the refund of all taxes collected in excess of those limits. Section 6 of article XIII B prevents the state from evading those limits and burdening county taxpayers by transferring financial responsibility for a program to a county, yet counting the cost of that program toward the limit on state expenditures.

These provisions demonstrate a profound distrust of government and a disdain for excessive government spending. An exclusive remedy under which only governments can enforce article XIII B, and the taxpayer-citizen can appear only if a government [**1321] [***79] has first instituted proceedings, is inconsistent with the ethos that led to article XIII B. The drafters of article XIII B and the voters who enacted it would not accept that the state Legislature -- the principal body regulated by the article -- could establish a procedure [*345] under which the only way the article can be enforced is for local governmental bodies to initiate proceedings before a commission composed largely of state financial officials.

One obvious reason is that in the never-ending attempts of state and local government to obtain a larger proportionate share of available tax revenues, the state has the power to coerce local governments into forgoing their rights to enforce article XIII B. An example is the Brown-Presley Trial Court Funding Act (Gov. Code, ß 77000 et seq.), which provides that the county's acceptance of funds for court financing may, in the discretion of the Governor, be deemed a waiver of the counties' rights to proceed before the commission on all claims for reimbursement for state-mandated local programs which existed and were not filed prior to passage of the trial funding legislation. [5] The ability of state government by financial threat or inducement to persuade counties to waive their right of action before the commission renders the counties' right of action inadequate to protect the public interest in the enforcement of article XIII B.

5 "(a) The initial decision by a county to opt into the system pursuant to Section 77300 *shall constitute a waiver of all claims for reimbursement for state-mandated local programs not theretofore approved by the State Board of Control, the Commission on State Mandates, or the courts to the extent the Governor, in his discretion, determines that waiver to be appropriate*; provided, that a decision by a county to opt into the system pursuant to Section 77300 beginning with the second half of the 1988-89 fiscal year shall not constitute a waiver of a claim for reimbursement based on a statute chaptered on or before the date the act which added this chapter is chaptered, which is filed in acceptable form on or before the date the act which added this chapter is chaptered. A county may petition the Governor to exempt any such claim from this waiver requirement; and the Governor, in his discretion, may grant the exemption in whole or in part. The waiver shall not apply to or otherwise affect any claims accruing after initial notification. Renewal, renegotiation, or subsequent notification to continue in the program shall not constitute a waiver. [para.] (b) The initial decision by a county to opt into the system pursuant to Section 77300 shall constitute a waiver of any claim, cause of action, or action whenever filed, with respect to the Trial Court Funding Act of 1985, Chapter 1607 of the Statutes of 1985, or Chapter 1211 of the Statutes of 1987." (Gov. Code, ß 77203.5, italics added.)

"As used in this chapter, 'state-mandated local program' *means any and all reimbursements owed or owing by operation of either Section 6 of Article XIII B of the California Constitution*, or

Received
August 26, 2011
Commission on
State Mandates

Section 17561 of the Government Code, or both." (Gov. Code, ß 77005, italics added.)

The facts of the present litigation also demonstrate the inadequacy of the commission remedy. The state began transferring financial responsibility for MIA's to the counties in 1982. Six years later no county had brought a proceeding before the commission. After the present suit was filed, two counties filed claims for 70 percent reimbursement. Now, nine years after the 1982 legislation, the counties' claims are pending before the Court of Appeal. After that court acts, and we decide whether to review its decision, the matter may still have to go back to the commission for hearings to [*346] determine the amount of the mandate -- which is itself an appealable order. When an issue involves the life and health of thousands, a procedure which permits this kind of delay is not an adequate remedy.

In sum, effective, efficient enforcement of article XIII B requires that standing to enforce that measure be given to those harmed by its violation -- in this case, the medically indigent -- and not be vested exclusively in local officials who have no personal interest at stake and are subject to financial and political pressure to overlook violations.

C. *Even if plaintiffs lack standing this court should nevertheless address and resolve the merits of the appeal.*

Although ordinarily a court will not decide the merits of a controversy if the plaintiffs lack standing (see *McKinny* v. *Board of Trustees* (1982) 31 Cal.3d 79, 90 [181 Cal.Rptr. 549, 642 P.2d 460]), we recognized [**1322] [***80] an exception to this rule in our recent decision in *Dix* v. *Superior Court, supra*, 53 Cal.3d 442 (hereafter *Dix*). In *Dix*, the victim of a crime sought to challenge the trial court's decision to recall a sentence under Penal Code section 1170. We held that only the prosecutor, not the victim of the crime, had standing to raise that issue. We nevertheless went on to consider and decide questions raised by the victim concerning the trial court's authority to recall a sentence under Penal Code section 1170, subdivision (d). We explained that the sentencing issues "are significant. The case is fully briefed and all parties apparently seek a decision on the merits. Under such circumstances, we deem it appropriate to address [the victim's] sentencing arguments for the guidance of the lower courts. Our discretion to do so under analogous circumstances is well settled. [Citing cases explaining when an appellate court can decide an issue despite mootness.]" (53 Cal.3d at p. 454.) In footnote we added that "Under article VI, section 12, subdivision (b) of the California Constitution . . . , we have jurisdiction to 'review the *decision of a Court of Appeal* in any cause.' (Italics added.) Here the Court of Appeal's decision addressed two issues -- standing and merits. Nothing in article VI, section 12(b) suggests that, having rejected the Court of Appeal's conclusion on the preliminary issue of standing, we are foreclosed from 'review[ing]' the second subject addressed and resolved in its decision." (Pp. 454-455, fn. 8.)

I see no grounds on which to distinguish *Dix*. The present case is also one in which the Court of Appeal decision addressed both standing and merits. It is fully briefed. Plaintiffs and the county seek a decision on the merits. While the state does not seek a decision on the merits in this proceeding, its appeal of the superior court decision in the mandamus proceeding brought by the County of Los Angeles (see maj. opn., *ante*, p. 330, fn. 2) shows that it is not opposed to an appellate decision on the merits.

[*347] The majority, however, notes that various state officials -- the Controller, the Director of Finance, the Treasurer, and the Director of the Office of Planning and Research -- did not participate in this litigation. Then in a footnote, the majority suggests that this is the reason they do not follow the *Dix* decision. (Maj. opn., *ante*, p. 336, fn. 9.) In my view, this explanation is insufficient. The present action is one for declaratory relief against the state. It is not necessary that plaintiffs also sue particular state officials. (The state has never claimed that such officials were necessary parties.) I do not believe we should refuse to reach the merits of this appeal because of the nonparticipation of persons who, if they sought to participate, would be here merely as amici curiae. [6]

6 It is true that these officials would participate in a proceeding before the Commission on State Mandates, but they would do so as members of an administrative tribunal. On appellate review of a commission decision, its members, like the members of the Public Utilities Commission or the Workers' Compensation Appeals Board, are not respondents and do not appear to present their individual views and positions. For example, in *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318], in which we reviewed a commission ruling relating to subvention payments for education of handicapped children, the named respondents were the state Superintendent of Public Instruction, the Department of Education, and the Commission on State Mandates. The individual members of the commission were not respondents and did not participate.

The case before us raises no issues of departmental policy. It presents solely an issue of law which this court is competent to decide on the briefs and arguments pre-

Received
August 26, 2011
Commission on
State Mandates

sented. That issue is one of great significance, far more significant than any raised in *Dix*. Judges rarely recall sentencing under Penal Code section 1170, subdivision (d); when they do, it generally affects only the individual defendant. In contrast, the legal issue here involves immense sums of money and affect budgetary planning for both the state and counties. State and county governments need to know, as soon as possible, what their [**1323] [***81] rights and obligations are; legislators considering proposals to deal with the current state and county budget crisis need to know how to frame legislation so it does not violate article XIII B. The practical impact of a decision on the people of this state is also of great importance. The failure of the state to provide full subvention funds and the difficulty of the county in filling the gap translate into inadequate staffing and facilities for treatment of thousands of persons. Until the constitutional issues are resolved the legal uncertainties may inhibit both levels of government from taking the steps needed to address this problem. A delay of several years until the Los Angeles case is resolved could result in pain, hardship, or even death for many people. I conclude that, whether or not plaintiffs have standing, this court should address and resolve the merits of the appeal.

D. *Conclusion as to standing*.

As I have just explained, it is not necessary for plaintiffs to have standing for us to be able to decide the merits of the appeal. Nevertheless, I conclude [*348] that plaintiffs have standing both as persons "beneficially interested" under Code of Civil Procedure section 1086 and under the doctrine of *Green* v. *Obledo, supra*, 29 Cal.3d 126, to bring an action to determine whether the state has violated its duties under article XIII B. The remedy given local agencies and school districts by Government Code sections 17500- 17630 is, as Government Code section 17552 states, the exclusive remedy by which those bodies can challenge the state's refusal to provide subvention funds, but the statute does not limit the remedies available to individual citizens.

III. Merits of the Appeal

A. *State funding of care for MIA's*.

Welfare and Institutions Code section 17000 requires every county to "relieve and support" all indigent or incapacitated residents, except to the extent that such persons are supported or relieved by other sources. [7] From 1971 until 1982, and thus at the time article XIII B became effective, counties were not required to pay for the provision of health services to MIA's, whose health needs were met through the state-funded Medi-Cal program. Since the medical needs of MIA's were fully met through other sources, the counties had no duty under Welfare and Institutions Code section 17000 to meet those needs. While the counties did make general contributions to the Medi-Cal program (which covered persons other than MIA's) from 1971 until 1978, at the time article XIII B became effective in 1980 the counties were not required to make any financial contributions to Medi-Cal. It is therefore undisputed that the counties were not required to provide financially for the health needs of MIA's when article XIII B became effective. The state funded all such needs of MIA's.

> 7 Welfare and Institutions Code section 17000 provides that "[e]very county . . . shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions."

In 1982, the Legislature passed Assembly Bill No. 799 (1981-1982 Reg. Sess.; Stats. 1982, ch. 328, pp. 1568-1609) (hereafter AB No. 799), which removed MIA's from the state-funded Medi-Cal program as of January 1, 1983, and thereby transferred to the counties, through the County Medical Services Plan which AB No. 799 created, the financial responsibility to provide health services to approximately 270,000 MIA's. AB No. 799 required that the counties provide health care for MIA's, yet appropriated only 70 percent of what the state would have spent on MIA's had those persons remained a state responsibility under the Medi-Cal program.

Since 1983, the state has only partially defrayed the costs to the counties of providing health care to MIA's. Such state funding to counties was [*349] initially relatively constant, generally more than $ 400 million per year. By 1990, however, state [***82] funding [**1324] had decreased to less than $ 250 million. The state, however, has always included the full amount of its former obligation to provide for MIA's under the Medi-Cal program in the year preceding July 1, 1980, as part of its article XIII B "appropriations limit," i.e., as part of the base amount of appropriations on which subsequent annual adjustments for cost-of-living and population changes would be calculated. About $ 1 billion has been added to the state's adjusted spending limit for population growth and inflation *solely* because of the state's inclusion of all MIA expenditures in the appropriation limit established for its base year, 1979-1980. The state has not made proportional increases in the sums provided to counties to pay for the MIA services funded by the counties since January 1, 1983.

B. *The function of article XIII B*.

Our recent decision in *County of Fresno* v. *State of California* (1991) 53 Cal.3d 482, 486-487 [280 Cal.Rptr.

Received
August 26, 2011
Commission on
State Mandates

92, 808 P.2d 235] (hereafter *County of Fresno*), explained the function of article XIII B and its relationship to article XIII A, enacted one year earlier:

"At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new 'special taxes.' (*Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281].) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*).)

"At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

"'Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes.' (*City of Sacramento, supra*, 50 Cal.3d at p. 59, fn. 1.)

"Article XIII B of the Constitution was intended . . . to provide 'permanent protection for taxpayers from excessive taxation' and 'a reasonable way to provide discipline in tax spending at state and local levels.' (See *County of Placer* v. *Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232], quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument [*350] in favor of Prop. 4, p. 18.) To this end, it establishes an 'appropriations limit' for both state and local governments (Cal. Const., art. XIII B, ß 8, subd. (h)) and allows no 'appropriations subject to limitation' in excess thereof (*id*., ß 2). [8] (See *County of Placer* v. *Corin, supra*, 113 Cal.App.3d at p. 446.) It defines the relevant 'appropriations subject to limitation' as 'any authorization to expend during a fiscal year the proceeds of taxes . . . .' (Cal. Const., art. XIII B, ß 8, subd. (b).)" (*County of Fresno, supra*, 53 Cal.3d at p. 486.)

8 Article XIII B, section 1 provides: "The total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of such entity of government for the prior year adjusted for changes in the cost of living and population except as otherwise provided in this Article."

Under section 3 of article XIII B the state may transfer financial responsibility for a program to a county if the state and county mutually agree that the appropriation limit of the state will be decreased and that of the county increased by the same amount. [9] [**1325] [***83] Absent such an agreement, however, section 6 of article XIII B generally precludes the state from avoiding the spending limits it must observe by shifting to local governments programs and their attendant financial burdens which were a state responsibility prior to the effective date of article XIII B. It does so by requiring that "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the cost of such program or increased level of service . . . ." [10]

9 Section 3 of article XIII B reads in relevant part: "The appropriations limit for any fiscal year . . . shall be adjusted as follows:

"(a) In the event that the financial responsibility of providing services is transferred, in whole or in part . . . from one entity of government to another, then for the year in which such transfer becomes effective the appropriation limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount. . . ."

10 Section 6 of article XIII B further provides that the "Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." None of these exceptions apply in the present case.

"Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles [*v. *State of California* (1987)] 43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202].) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid*.; see *Lucia Mar Unified School Dist.* v. *Honig, supra*, 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax [*351] revenues of local governments from state mandates that would require expenditure of such revenues." (*County of Fresno, supra*, 53 Cal.3d at p. 487.)

Received
August 26, 2011
Commission on
State Mandates

C. *Applicability of article XIII B to health care for MIA's*.

The state argues that care of the indigent, including medical care, has long been a county responsibility. It claims that although the state undertook to fund this responsibility from 1979 through 1982, it was merely temporarily (as it turned out) helping the counties meet their responsibilities, and that the subsequent reduction in state funding did not impose any "new program" or "higher level of service" on the counties within the meaning of section 6 of article XIII B. Plaintiffs respond that the critical question is not the traditional roles of the county and state, but who had the fiscal responsibility on November 6, 1979, when article XIII B took effect. The purpose of article XIII B supports the plaintiffs' position.

As we have noted, article XIII A of the Constitution (Proposition 13) and article XIII B are complementary measures. The former radically reduced county revenues, which led the state to assume responsibility for programs previously financed by the counties. Article XIII B, enacted one year later, froze both state and county appropriations at the level of the 1978-1979 budgets -- a year when the budgets included state financing for the prior county programs, but not county financing for these programs. Article XIII B further limited the state's authority to transfer obligations to the counties. Reading the two together, it seems clear that article XIII B was intended to limit the power of the Legislature to retransfer to the counties those obligations which the state had assumed in the wake of Proposition 13.

Under article XIII B, both state and county appropriations limits are set on the basis of a calculation that begins with the budgets in effect when article XIII B was enacted. If the state could transfer to the county a program for which the state at that time had full financial responsibility, the county could be forced to assume additional financial obligations without the right to appropriate additional moneys. The state, at the same time, would get credit toward its appropriations limit for expenditures it did not pay. County taxpayers [**1326] [***84] would be forced to accept new taxes or see the county forced to cut existing programs further; state taxpayers would discover that the state, by counting expenditures it did not pay, had acquired an actual revenue surplus while avoiding its obligation to refund revenues in excess of the appropriations limit. Such consequences are inconsistent with the purpose of article XIII B.

Our decisions interpreting article XIII B demonstrate that the state's subvention requirement under section 6 is not vitiated simply because the [*352] "program" existed before the effective date of article XIII B. The alternate phrase of section 6 of article XIII B, "'higher level of service[,]' . . . must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that *the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs*.'" (*County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202], italics added.)

Lucia Mar Unified School Dist. v. *Honig, supra*, 44 Cal.3d 830, presents a close analogy to the present case. The state Department of Education operated schools for severely handicapped students, but prior to 1979 *school districts were required by statute to contribute* to education of those students from the district at the state schools. In 1979, in response to the restrictions on school district revenues imposed by Proposition 13, the statutes requiring such district contributions were repealed and the state assumed full responsibility for funding. The state funding responsibility continued until June 28, 1981, when Education Code section 59300 (hereafter section 59300), requiring school districts to share in these costs, became effective.

The plaintiff districts filed a test claim before the commission, contending they were entitled to state reimbursement under section 6 of article XIII B. The commission found the plaintiffs were not entitled to state reimbursement, on the rationale that the increase in costs to the districts compelled by section 59300 imposed no new program or higher level of services. The trial and intermediate appellate courts affirmed on the ground that section 59300 called for only an "'adjustment of costs'" of educating the severely handicapped, and that "*a shift in the funding of an existing program is not a new program or a higher level of service*" within the meaning of article XIII B. (*Lucia Mar Unified School Dist.* v. *Honig, supra*, 44 Cal.3d at p. 834, italics added.)

We reversed, rejecting the state's theories that the funding shift to the county of the subject program's costs does not constitute a new program. "[There can be no] doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are concerned, since *at the time section 59300 became effective* they were not required to contribute to the education of students from their districts at such schools. [para.] . . . To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIIIB. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIIIA, which severely limited the taxing [*353] power of local governments. . . . [para.] The intent of the section would plainly be violated if the state could, while retaining administrative control [11] of

Received
August 26, 2011
Commission on
State Mandates

programs it has supported with state [***85] tax money, [**1327] simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIIIB, the result seems equally violative of the fundamental purpose underlying section 6 of that article*." (*Lucia Mar Unified School Dist.* v. *Honig, supra*, 44 Cal.3d at pp. 835-836, fn. omitted, italics added.)

11 The state notes that, in contrast to the program at issue in *Lucia Mar*, it has not retained administrative control over aid to MIA's. But the quoted language from *Lucia Mar*, while appropriate to the facts of that case, was not intended to establish a rule limiting article XIII B, section 6, to instances in which the state retains administrative control over the program that it requires the counties to fund. The constitutional language admits of no such limitation, and its recognition would permit the Legislature to evade the constitutional requirement.

The state seeks to distinguish *Lucia Mar* on the ground that the education of handicapped children in state schools had never been the responsibility of the local school district, but overlooks that the local district had previously been required to contribute to the cost. Indeed the similarities between *Lucia Mar* and the present case are striking. In *Lucia Mar*, prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-1979 the state and county shared the cost of caring for MIA's under the Medi-Cal program. In 1979, following enactment of Proposition 13, the state took full responsibility for both programs. Then in 1981 (for handicapped children) and 1982 (for MIA's), the state sought to shift some of the burden back to the counties. To distinguish these cases on the ground that care for MIA's is a county program but education of handicapped children a state program is to rely on arbitrary labels in place of financial realities.

The state presents a similar argument when it points to the following emphasized language from *Lucia Mar Unified School Dist.* v. *Honig, supra*, 44 Cal.3d 830: "[B]ecause section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts -- *an obligation the school districts did not have at the time article XIII B was adopted* -- it calls for plaintiffs to support a 'new program' within the meaning of section 6." (P. 836, fn. omitted, italics added.) It urges *Lucia Mar* reached its result *only* because the "program" requiring school district funding in that case *was not required by statute* at the effective date of [*354] article XIII B. The state then argues that the case at bench is distinguishable because it contends Alameda County had a continuing obligation *required by statute* antedating that effective date, which had only been "temporarily" [12] suspended when article XIII B became effective. I fail to see the distinction between a case -- *Lucia Mar* -- in which no existing statute as of 1979 imposed an obligation on the local government and one -- this case -- in which the statute existing in 1979 imposed no obligation on local government.

12 The state's repeated emphasis on the "temporary" nature of its funding is a form of post hoc reasoning. At the time article XIII B was enacted, the voters did not know which programs would be temporary and which permanent.

The state's argument misses the salient point. As I have explained, the application of section 6 of article XIII B does not depend upon when the program was created, but upon who had the burden of funding it when article XIII B went into effect. Our conclusion in *Lucia Mar* that the educational program there in issue was a "new" program as to the school districts was not based on the presence or absence of any antecedent statutory obligation therefor. *Lucia Mar* determined that whether the program was new *as to the districts* depended on *when* they were compelled to assume the obligation to partially fund an existing program which they had not funded at the time article XIII B became effective.

The state further relies on two decisions, *Madera Community Hospital* v. *County of Madera* (1984) 155 Cal.App.3d 136 [201 Cal.Rptr. 768] and *Cooke* v. *Superior Court* (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706], which hold that the county has a statutory obligation to provide medical care for indigents, but that it need not provide precisely [**1328] [***86] the same level of services as the state provided under Medi-Cal. [13] Both are correct, but irrelevant to this case. [14] The county's obligation to MIA's is defined by Welfare and Institutions Code section 17000, not by the former Medi-Cal program. [15] If the [*355] state, in transferring an obligation to the counties, permits them to provide less services than the state provided, the state need only pay for the lower level of services. But it cannot escape its responsibility entirely, leaving the counties with a state-mandated obligation and no money to pay for it.

13 It must, however, provide a *comparable* level of services. (See *Board of Supervisors* v. *Superi-*

Received
August 26, 2011
Commission on
State Mandates

or Court (1989) 207 Cal.App.3d 552, 564 [254 Cal.Rptr. 905].)

14 Certain language in *Madera Community Hospital* v. *County of Madera, supra*, 155 Cal.App.3d 136, however, is questionable. That opinion states that the "Legislature intended that County bear an obligation to its poor and indigent residents, *to be satisfied from county funds*, notwithstanding federal or state programs which exist concurrently with County's obligation and alleviate, to a greater or lesser extent, County's burden." (P. 151.) Welfare and Institutions Code section 17000 by its terms, however, requires the county to provide support to residents only "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Consequently, to the extent that the state or federal governments provide care for MIA's, the county's obligation to do so is reduced pro tanto.

15 The county's right to subvention funds under article XIII B arises because its duty to care for MIA's is a state-mandated responsibility; if the county had no duty, it would have no right to funds. No claim is made here that the funding of medical services for the indigent shifted to Alameda County is not a program "'mandated'" by the state; i.e., that Alameda County has any option other than to pay these costs. (*Lucia Mar Unified School Dist.* v. *Honig, supra*, 44 Cal.3d at pp. 836-837.)

The state's arguments are also undercut by the fact that it continues to use the approximately $ 1 billion in spending authority, generated by its previous total funding of the health care program in question, as a portion of its initial *base spending limit* calculated pursuant to sections 1 and 3 of article XIII B. In short, the state may maintain here that care for MIA's is a county obligation, but when it computes its appropriation limit it treats the entire cost of such care as a state program.

IV. Conclusion

This is a time when both state and county governments face great financial difficulties. The counties, however, labor under a disability not imposed on the state, for article XIII A of the Constitution severely restricts their ability to raise additional revenue. It is, therefore, particularly important to enforce the provisions of article XIII B which prevent the state from imposing additional obligations upon the counties without providing the means to comply with these obligations.

The present majority opinion disserves the public interest. It denies standing to enforce article XIII B both to those persons whom it was designed to protect -- the citizens and taxpayers -- and to those harmed by its violation -- the medically indigent adults. And by its reliance on technical grounds to avoid coming to grips with the merits of plaintiffs' appeal, it permits the state to continue to violate article XIII B and postpones the day when the medically indigent will receive adequate health care.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 8

Received
August 26, 2011
Commission on
State Mandates

LONG BEACH UNIFIED SCHOOL DISTRICT, Plaintiff and Appellant, v. THE STATE OF CALIFORNIA et al., Defendants and Appellants; MARK H. BLOODGOOD, as Auditor-Controller, etc., et al., Defendants and Respondents

No. B033742

Court of Appeal of California, Second Appellate District, Division Five

225 Cal. App. 3d 155; 275 Cal. Rptr. 449; 1990 Cal. App. LEXIS 1198

November 15, 1990

SUBSEQUENT HISTORY: [***1] Appellants' petitions for review by the Supreme Court were denied February 28, 1991. Lucas, C. J., did not participate therein.

PRIOR HISTORY: Superior Court of Los Angeles County, No. C606020, Robert I. Weil, Judge.

DISPOSITION: We conclude that because the doctrines of collateral estoppel and waiver are inapplicable to the facts of this case, the trial court should have allowed State to challenge the decisions of the Board. However, we also determine, as a question of law, that the Executive Order requires local school boards to provide a higher level of service than is required constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to article XIII B, section 6 of the California Constitution. Former Revenue and Tax Code section 2234 does not provide reimbursement of the subject claim. Based on uncontradicted evidence, we modify the decision of the trial court by striking as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts." We also modify the judgment to include charging orders against certain funds appropriated through subsequent budget acts. We affirm the decision of the trial court that the Fines [***2] and Forfeitures Funds are not "reasonably available" to satisfy the Claim. Finally, we remand the matter to the trial court to determine whether at the time of its order, unexpended, unencumbered funds sufficient to satisfy the judgment remained in the approved budget line item account numbers. The trial court is also directed to determine this same issue with respect to the charging order. The judgment is affirmed as modified. Each party is to bear its own costs on appeal.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A school district filed a claim with the state Board of Control asserting that its expenditures related to its efforts to alleviate racial and ethnic segregation in its schools had been mandated by the state through an executive order (in the form of regulations issued by the state Department of Education) and were reimbursable pursuant to former Rev. & Tax. Code, ß 2234, and Cal. Const., art. XIII B, ß 6. The board approved the claim, but the Legislature deleted the requested funding from an appropriations bill and enacted a "finding" that the executive order did not impose a statemandated local program. The district then filed a petition to compel reimbursement pursuant to Code Civ. Proc., ß 1085, and a complaint for declaratory relief. The trial court ruled that the doctrines of administrative collateral estoppel and waiver prevented the state from challenging the board's decisions. The court's judgment in favor of the district identified certain funds previously appropriated by the Legislature as "reasonably available" for reimbursement of the claimed expenditures. (Superior Court of Los Angeles County, No. C606020, Robert I. Weil, Judge.)

The Court of Appeal modified the trial court's decision by striking as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts," and by including charging orders against certain funds appropriated through subsequent budget acts. The court affirmed the judgment as so modified and remanded to the trial court to determine whether at the time of its order, there were, in the funds from which

Received
August 26, 2011
Commission on
State Mandates

reimbursement could properly be paid, unexpended, unencumbered funds sufficient to satisfy the judgment. The court held that since the doctrines of collateral estoppel and waiver were inapplicable to the facts of the case, the trial court should have allowed the state to challenge the board's decisions. However, the court also held that the executive order required local school boards to provide a higher level of service than is required constitutionally or by case law and that the order was a reimbursable state mandate pursuant to Cal. Const., art. XIII B, ß 6. The court further held that former Rev. & Tax. Code, ß 2234, did not provide reimbursement of the subject claim. (Opinion by Lucas, P. J., with Ashby and Boren, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1a) (1b) (1c) (1d) Judgments ß 88--Collateral Estoppel--Finality of Judgment--Administrative Order--Where Appeal Still Possible. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the doctrine of administrative collateral estoppel was inapplicable and did not prevent the state from litigating whether the state Board of Control properly considered the subject claim and whether the claim was reimbursable. The board had approved the claim but the Legislature had deleted the requested funding from an appropriations bill. The board's decisions were administratively final, for collateral estoppel purposes, since no party requested reconsideration within the applicable 10-day period, and no statute or regulation provided for further consideration of the matter by the board. However, a decision will not be given collateral estoppel effect if an appeal has been taken or if the time for such appeal has not lapsed. The applicable statute of limitations for review of the board's decisions was three years, and the school district's action was filed before this period lapsed.

(2) Judgments ß 88--Collateral Estoppel--Finality of Judgment. --Collateral estoppel precludes a party from relitigating in a subsequent action matters previously litigated and determined. The traditional elements of collateral estoppel include the requirement that the prior judgment be "final."

(3a) (3b) Administrative Law ß 81--Judicial Review and Relief--Finality of Administrative Action--For Collateral Estoppel Purposes. --Finality for the purposes of administrative collateral estoppel may be understood as a two-step process: the decision must be final with respect to action by the administrative agency, and the decision must have conclusive effect. A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear the claim. To have conclusive effect, the decision must be free from direct attack.

(4) Limitation of Actions ß 30--Commencement of Period. --A statute of limitations commences to run at the point where a cause of action accrues and a suit may be maintained thereon.

(5a) (5b) (5c) Estoppel and Waiver ß 23--Waiver--State's Right to Contest Board of Control's Findings as to State-mandated Costs. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the doctrine of waiver did not preclude the state from contesting the state Board of Control's previous findings that the subject claim was reimbursable (the Legislature subsequently deleted the requested funding from an appropriations bill). The statute of limitations applicable to an appeal by the state from the board's decisions had not run at the time the state raised its affirmative defenses in the district's action, and this assertion of defenses was inconsistent with an intent on the state's part to waive its right to contest the board's decisions.

(6) Estoppel and Waiver ß 19--Waiver--Requisites. --A waiver occurs when there is an existing right, actual or constructive knowledge of its existence, and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that it has been waived. Ordinarily the issue of waiver is a question of fact that is binding on the appellate court if the determination is supported by substantial evidence. However, the question is one of law when the evidence is not in conflict and is susceptible of only one reasonable inference.

(7) Estoppel and Waiver ß 6--Equitable Estoppel--Challenge to State Board of Control's Findings as to State-mandated Costs--Absence of Confidential Relationship. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the state was not equitably estopped from challenging the state Board of Control's decisions finding that the subject claim was reimbursable as a state-mandated cost (the Legislature subsequently deleted the requested funding from an appropriations bill). In

Received
August 26, 2011
Commission on
State Mandates

the absence of a confidential relationship, the doctrine of equitable estoppel is inapplicable where there is a mistake of law. There was no confidential relationship, and since the statute of limitations did not bar the state from litigating the mandate and reimbursability issues, the doctrine was inapplicable.

(8) Appellate Review ß 145--Function of Appellate Court--Questions of Law. --On appeal by the state in an action by a school district to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the appellate court's conclusion that the trial court erred in failing to consider the merits of the state's challenge to the state Board of Control's decisions that the subject claims were reimbursable as state-mandated costs did not require that the matter be remanded to the trial court for a full hearing, since the question of whether a cost is state-mandated is one of law.

(9a) (9b) (9c) Schools ß 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures. --A school district was entitled to reimbursement pursuant to Cal. Const., art. XIII B, ß 6 (reimbursement of local governments for state-mandated costs or increased levels of service), for expenditures related to its efforts to alleviate racial and ethnic segregation in its schools, since an executive order (in the form of regulations issued by the state Department of Education) required a higher level of service and constituted a state mandate. The requirements of the order went beyond constitutional and case law requirements in that they required specific actions to alleviate segregation. Although under Cal. Const., art. XIII B, ß 6, subd. (c), the state has discretion whether to reimburse pre-1975 mandates that are either statutes or executive orders implementing statutes, it cannot be inferred from this exception that reimbursability is otherwise dependent on the form of the mandate. Further, the district's claim was not defeated by Gov. Code, ßß 17561 and 17514, limiting reimbursement to certain costs incurred after July 1, 1980, the effective date of Cal. Const., art. XIII B, since the limitations contained in those sections are confined to the exception contained in Cal. Const., art. XIII B, ß 6, subd. (c).

(10) State of California ß 11--Fiscal Matters--Reimbursement to Local Governments for State-mandated Costs. --The subvention requirement of Cal. Const., art. XIII B, ß 6 (reimbursement of local governments for state-mandated costs or increased levels of service), is directed to state-mandated increases in the services provided by local agencies in existing "programs." The drafters and electorate had in mind the commonly understood meaning of the term--programs that carry out the governmental function of providing services to the public, or laws that, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

[See 9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Taxation, ß 123.]

(11) Constitutional Law ß 13--Construction of Constitutions--Language of Enactments. --In construing a constitutional provision enacted by the voters, a court must determine the intent of the voters by first looking to the language itself, which should be construed in accordance with the natural and ordinary meaning of its words.

(12) State of California ß 11--Fiscal Matters--Reimbursement to Local Governments for State-mandate Costs--Executive Order as Mandate. --In Cal. Const., art. XIII B, ß 6 (reimbursement of local governments for state-mandated costs or increased levels of service), "mandates" means "orders" or "commands," concepts broad enough to include executive orders as well as statutes. The concern that prompted the inclusion of ß 6 in art. XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services that the state believed should be extended to the public. It is clear that the primary concern of the voters was the increased financial burdens being shifted to local government, not the form in which those burdens appeared.

(13) Administrative Law ß 88--Judicial Review and Relief--Exhaustion of Administrative Remedies--Claim by School District for Reimbursement of State-mandated Costs. --A school district did not fail to exhaust its administrative remedies in seeking reimbursement for expenditures related to its efforts to alleviate racial and ethnic segregation, based on its claim that the expenditures were mandated by a state executive order, where the state Board of Control approved the district's reimbursement claim, even though the state Commission on State Mandates subsequently succeeded to the functions of the board and the district never made a claim to the commission. The board's decisions in favor of the district became administratively final before the commission was in place, and there was no evidence that the commission did not consider these decisions by the board to be final. Although the commission was given jurisdiction over all claims that had not been included in a local government claims bill enacted before January 1, 1985, the subject claim was included in such a bill (which was signed into law only after the recommended appropriation was deleted). Under the statutory scheme,

Received
August 26, 2011
Commission on
State Mandates

the district pursued the only relief that a disappointed claimant at such a juncture could pursue--an action in declaratory relief to declare an executive order void or unenforceable and to enjoin its enforcement. There was no requirement to seek further administrative review.

(14) Courts ß 20--Subject Matter Jurisdiction--When Issue May Be Raised. --Lack of subject matter jurisdiction may be raised at any time.

(15a) (15b) Schools ß 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--Applicability of Statute Requiring Reimbursement of Subsequently Mandated Costs. --A school district was not entitled to reimbursement on the basis of former Rev. & Tax. Code, ß 2234 (reimbursement of school district for costs it is incurring that are subsequently mandated by a state), for expenditures related to its efforts to alleviate racial and ethnic segregation in its schools, since the executive order (in the form of regulations issued by the state Department of Education) that required the district to take specific actions to alleviate segregation fell outside the purview of ß 2234. The "subsequently mandated" provision of ß 2234 originally was contained in sections that set forth specific date limitations, and the Legislature likewise intended to limit claims made pursuant to ß 2234. The use of the language "subsequently mandated" merely describes an additional circumstance in which the state will reimburse costs. Since the executive order fell outside the January 1, 1978, limits set by Rev. & Tax. Code, ß 2207.5, Rev. & Tax. Code, ß 2234, did not provide reimbursement to the district.

(16) Statutes ß 39--Construction--Giving Effect to Statute--Conformation of Parts. --A statute should be construed with reference to the whole system of law of which it is a part in order to ascertain the intent of the Legislature. The legislative history of the statute may be considered in ascertaining legislative design.

(17a) (17b) (17c) Constitutional Law ß 40--Distribution of Governmental Powers--Judicial Power--Appropriation of Funds--Reimbursement of State-mandated Costs. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court's award of reimbursement to the district, on the ground that the district's expenditures were mandated by an executive order, from appropriated funds and specified budgets and accounts did not constitute an invasion of the province of the Legislature or a judicial usurpation of the republican form of government guaranteed by U.S. Const., art. IV, ß 4, except insofar as it designated the Special Fund for Economic Uncertainties as a source for reimbursement. The specified line item accounts for the Department of Education, the Commission on State Mandates, and the Reserve for Contingencies and Emergencies provided funds for a broad range of activities similar to those specified in the executive order and thus were reasonably available for reimbursement. However, remand to the trial court was necessary to determine whether these sources contained sufficient unexhausted funds to cover the award.

(18) Constitutional Law ß 40--Distribution of Governmental Powers--Judicial Power--Appropriation of Funds. --A court cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated. However, no violation of the separation of powers doctrine occurs when a court orders appropriate expenditures from already existing funds. The test is whether such funds are reasonably available for the expenditures in question. Funds are "reasonably available" for reimbursement of local government expenditures when the purposes for which those funds were appropriated are generally related to the nature of costs incurred. There is no requirement that the appropriation specifically refer to the particular expenditure, nor must past administrative practice sanction coverage from a particular fund.

(19) Appellate Review ß 162--Modification--To Add Charge Order. --An appellate court is empowered to add a directive that a trial court order be modified to include charging orders against funds appropriated by subsequent budgets acts.

(20) Schools ß 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--Effect of Legislative Finding That Costs Not State-mandated. --A school district was entitled to reimbursement pursuant to Cal. Const., art. XIII B, ß 6 (reimbursement of local governments for state-mandated costs or increased levels of service), for expenditures related to its efforts to alleviate racial and ethnic segregation in its schools, notwithstanding that after the state Board of Control approved the district's reimbursement claim, the Legislature enacted a "finding" that the executive order requiring the district to undertake desegregation activities did not impose a state-mandated local program. Unsupported legislative disclaimers are insufficient to defeat reimbursement. The district had a constitutional right to reimbursement, and the Legislature could not limit that right.

(21) Schools ß 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--Department of Education Budget as Source. --In an action by a school dis-

Received
August 26, 2011
Commission on
State Mandates

trict against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court, after finding that the executive order requiring the district to undertake desegregation activities was a reimbursable state mandate, did not err in ordering reimbursement to take place in part from the state Department of Education budget. Logic dictated that department funding be the initial and primary source for reimbursement: given the fact that the executive order was issued by the department, the evidence overwhelmingly supported the trial court's finding of a general relationship between the department budget items and the reimbursable expenditures.

(22) Interest ß 8--Rate--Reimbursement of School District's State-mandated Costs. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court, after finding that the executive order requiring the district to undertake desegregation activities was a reimbursable state mandate, did not err in awarding the district interest at the legal rate (Cal. Const., art. XV, ß 1, par. (2)), rather than at the rate of 6 percent per annum pursuant to Gov. Code, ß 926.10. Gov. Code, ß 926.10, is part of the California Tort Claims Act (Gov. Code, ß 900 et seq.), which provides a statutory scheme for the filing of claims against public entities for alleged injuries. It makes no provision for claims for reimbursement for state-mandated expenditures.

(23) Schools ß 4--School Districts; Financing; Funds--Reimbursement of State-mandated Costs--Desegregation Expenditures--County Fines and Forfeitures Funds as Source. --In an action by a school district against the state to compel the state to reimburse the district for expenditures related to its efforts to alleviate racial and ethnic segregation, the trial court, after finding that the executive order requiring the district to undertake desegregation activities was a reimbursable state mandate, did not err in determining that moneys in the Fines and Forfeiture Funds in the custody and possession of the county auditor-controller for transfer to the state treasury were not reasonably available for reimbursement purposes. There was no evidence in the record showing the use of those funds once they were transmitted to the state, nor was there any evidence indicating that those funds were then reasonably available to satisfy the district's claim. It could not be concluded as a matter of law that a general relationship existed between the funds and the nature of the costs incurred pursuant to the executive order. Further, there was no ground on which the funds could be made available to the district while in the possession of the auditor-controller.

COUNSEL: John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Henry G. Ullerich and Martin H. Milas, Deputy Attorneys General, Joseph R. Symkowick and Joanne Lowe for Defendants and Appellants.

De Witt W. Clinton, County Counsel, and Lawrence B. Launer, Assistant County Counsel, for Defendants and Respondents.

Ball, Hunt, Hart, Brown & Baerwitz, Anthony Murray, Allan E. Tebbetts, Agnes H. Mulhearn, Ross & Scott, William D. Ross, Corin L. Kahn and Diana P. Scott for Plaintiff and Appellant.

JUDGES: Opinion by Lucas, P. J., with Ashby and Boren, JJ., concurring.

OPINION BY: LUCAS

OPINION

[*163] [**454] Introduction

Long Beach Unified School District (LBUSD) filed a claim with the Board of Control of the State of California [***3] (Board), asserting that certain expenditures related to its efforts to alleviate racial and ethnic segregation in its schools had been mandated by the state through regulations (Executive Order) issued by the Department of Education (DOE) and were [*164] reimbursable pursuant to former Revenue and Taxation Code section 2234 and article XIII B, section 6 of the California Constitution. The Board eventually approved the claim and reported to the Legislature its recommendation that funds be appropriated to cover the statewide estimated costs of compliance with the Executive Order. When the Legislature deleted the requested funding from an appropriations bill, LBUSD filed a petition to compel reimbursement (Code Civ. Proc., ß 1085) and complaint for declaratory relief. The trial court held that the doctrines of administrative collateral estoppel and waiver prevented the state from challenging the decisions of the Board, and it gave judgment to LBUSD. It also ruled that certain funds previously appropriated by the Legislature were "reasonably available" for reimbursement of the claimed expenditures, subject to audit by the state Controller.

We conclude that the doctrines of collateral [***4] estoppel and waiver are inapplicable to the facts of this case. However, we determine as a question of law that the Executive Order requires local school boards to provide a higher level of service than is required either constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to article XIII

Received
August 26, 2011
Commission on
State Mandates

B, section 6 of the California Constitution. We also decide that former Revenue and Taxation Code section 2234 does not provide for reimbursement of the claim.

Based on uncontradicted evidence, we modify the decision of the trial court regarding which budget line item account numbers provide "reasonably available" funds to reimburse LBUSD for appropriate expenditures under the claim. We further modify the decision to include charging orders against funds appropriated by subsequent budget acts. Finally, we remand the matter to the trial court to determine whether at the time of its order unexpended, unencumbered funds sufficient to satisfy the judgment remained in the approved budget line item account numbers. The trial court must resolve this same issue with respect to the charging order.

[**455] Background and Procedural History

The California Property [***5] Tax Relief Act of 1972 (Stats. 1972, ch. 1406, ß 1, p. 2931) limited the power of local governmental entities to levy property taxes. It also mandated that when the state requires such entities to provide a new program or higher level of service, the state must reimburse those costs. Over time, amendments to the California Constitution and numerous legislative changes impacted both the right and procedure for obtaining reimbursement.

[*165] Sometime prior to September 8, 1977, LBUSD, at its option, voluntarily began to incur substantial costs to alleviate the racial and ethnic segregation of students within its jurisdiction.

On or about the above date, DOE adopted certain regulations which added sections 90 through 101 to title 5 of the California Administrative Code, effective September 16, 1977. We refer to these regulations as the Executive Order.

The Executive Order and related guidelines for implementation required in part that school districts which identified one or more schools as either having or being in danger of having segregation of its minority students "shall, no later than January 1, 1979, and each four years thereafter, develop and adopt a reasonably feasible [***6] plan for the alleviation and prevention of racial and ethnic segregation of minority students in the district."

On or about June 4, 1982, LBUSD submitted a "test claim" (Claim) [1] to the Board for reimbursement of $ 9,050,714 -- the total costs which LBUSD claimed it had incurred during fiscal years 1977-1978 through 1981-1982 for activities required by the Executive Order and guidelines. LBUSD cited former Revenue and Taxation Code section 2234 as authority for the requested reimbursement, asserting that the costs had been "subsequently mandated" by the state. [2]

1 Former Revenue and Taxation Code section 2218 defines "test claim" as "the first claim filed with the State Board of Control alleging that a particular statute or executive order imposes a mandated cost on such local agency or school district." (Stats. 1980, ch. 1256, ß 7, p. 4249.)

2 All statutory references are to the Revenue and Taxation Code unless otherwise stated.

Former section 2234 provided: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for such costs incurred after the operative date of such mandate." (Stats. 1980, ch. 1256, ß 11, pp. 4251-4252.)

[***7] The Board denied the Claim on the grounds that it had no jurisdiction to accept a claim filed under section 2234. LBUSD petitioned superior court for review of the Board decision. (Code Civ. Proc., ß 1094.5.) That court concluded the Board had jurisdiction to accept a section 2234 claim and ordered it to hear the matter on its merits. The Board did not appeal this decision.

On February 16, 1984, the Board conducted a hearing to consider the Claim. LBUSD presented written and oral argument that the Claim was reimbursable pursuant to section 2234 and, in addition, under article XIII B, section 6 of the California Constitution. DOE and the State Department [*166] of Finance (Finance) participated in the hearing. [3] The Board concluded that the Executive Order constituted a state mandate. On April 26, 1984, the Board adopted parameters and guidelines proposed by LBUSD for reimbursement of the expenditures. No state entity either sought reconsideration of the Board decisions, [**456] available pursuant to former section 633.6 of the California Administrative Code, [4] or petitioned for judicial review. [5]

3 The DOE recommended that the Claim be denied on the grounds that the requirements of the Executive Order were constitutionally mandated and court ordered and because the Executive Order was effective prior to January 1, 1978 (issues discussed *post*). However, counsel for the DOE expressed dismay that school districts which had voluntarily instituted desegregation programs had been having problems receiving funding from the Legislature, while schools which had been forced to do so had been receiving "substantial amounts of money."

A spokesman from Finance recalled there had been some doubt whether the Board had ju-

Received
August 26, 2011
Commission on
State Mandates

risdiction to hear a 2234 claim. He stated that, assuming the Board did have jurisdiction, the Executive Order contained at least one state mandate, which possibly consisted of administrative kinds of tasks related to the identification of "problem areas and the like."

[***8]

4 Former section 633.6 of the California Administrative Code (now renamed California Code of Regulations) provided in relevant part: "(b) Request for Reconsideration. [para.] (1) A request for reconsideration of a Board determination on a specific test claim . . . shall be filed, in writing, with the Board of Control, no later than ten (10) days after any determination regarding the claim by the Board . . . ." (Title 2, Cal. Admin. Code)

5 Former section 2253.5 provided: "A claimant or the state may commence a proceeding in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure to set aside a decision of the Board of Control on the grounds that the board's decision is not supported by substantial evidence. The court may order the board to hold another hearing regarding such claim and may direct the board on what basis the claim is to receive a rehearing." (Stats. 1978, ch. 794, ß 8, p. 2551.)

In December 1984, pursuant to former section 2255, the Board reported to the Legislature the number of mandates it had found and the estimated statewide costs of each mandate. [***9] With respect to the Executive Order mandate, the Board adopted an estimate by Finance that reimbursement of school districts, including LBUSD, for costs expended in compliance with the Executive Order would total $ 95 million for fiscal years 1977-1978 through 1984-1985. The Board recommended that the Legislature appropriate that amount.

Effective January 1, 1985, the Commission on State Mandates (Commission) succeeded to the functions of the Board. (Gov. Code, ßß 17525, 17630.)

On March 4, 1985, Assembly Bill No. 1301 was introduced. It included an appropriation of $ 95 million to the state controller "for payment of claims of school districts seeking reimbursable state-mandated costs incurred pursuant to [the Executive Order] . . . ." On June 27, the Assembly amended the bill by deleting this $ 95 million appropriation and adding a [*167] "finding" that the Executive Order did not impose a state-mandated local program. [6] On September 28, 1985, the Governor approved the bill as amended.

6 Former Section 2255 provided in part: "(b) If the Legislature deletes from a local government claims bill funding for a mandate imposed either by legislation or by a regulation . . . , it may take one of the following courses of action: (1) Include a finding that the legislation or regulation does not contain a mandate . . . ." (Stats. 1982, ch. 1638, ß 7, p. 6662.)

[***10] On June 26, 1986, LBUSD petitioned for writ of mandate (Code Civ. Proc., ß 1085) and filed a complaint for declaratory relief against defendants State of California; Commission; Finance; DOE; holders of the offices of State Controller and State Treasurer and holder of the office of Auditor-Controller of the County of Los Angeles, and their successors in interest. LBUSD requested issuance of a writ of mandate commanding the respondents to comply with section 2234 (fn. 2, *ante*) [7] and, in an amended petition, its successor, Government Code section 17565, and with California Constitution, article XIII B, section 6. [8] It further requested respondents to reimburse LBUSD $ 24,164,593 for fiscal years 1977-1978 through 1982-1983, $ 3,850,276 for fiscal years 1983-1984 and 1984-1985, and accrued interest, for activities mandated by the Executive Order.

7 The language of Government Code section 17565 is nearly identical to that of section 2234 (fn. 2, *ante*), and provides: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate." (Stats. 1986, ch. 879, ß 10, p. 3043.)

[***11]

8 Article XIII B, section 6 provides in pertinent part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . ."

The trial court let stand the conclusion of the Board that the Executive Order constituted a reimbursable state mandate and ruled in favor of LBUSD. No party requested a statement of decision.

The judgment stated that the Executive Order constituted a reimbursable state mandate which state entities could not challenge because of the doctrines of administrative collateral estoppel and waiver. It provided that certain previously appropriated [**457] funds were "'reasonably available'" to reimburse LBUSD for its claimed expenditures, applicable interest, and court costs. The judgment also stated that funds denominated the "Fines and Forfeitures Funds," under the custody of the Auditor-Controller of the County of Los Angeles, were not reasonably available. The judgment further de-

Received
August 26, 2011
Commission on
State Mandates

creed [***12] that the State Controller retained the right to audit the claims and records of LBUSD to verify the amount of the reimbursement award sum.

[*168] State respondents (State) and DOE separately filed timely notices of appeal, and LBUSD cross-appealed. [9]

9 Although an "Amended Notice to Prepare Clerk's Transcript" filed by DOE on April 11, 1988, requests the clerk of the superior court to incorporate in the record its notice of appeal filed April 1, 1988, this latter document does not appear in the record before us, and the original apparently is lost within the court system. Respondent LBUSD received a copy of the notice on April 4, 1988.

Discussion

State asserts that neither the doctrine of collateral estoppel nor the doctrine of waiver is applicable to this case, the costs incurred by LBUSD are not reimbursable, and the remedy authorized by the trial court is inconsistent with California law and invades the province of the Legislature, a violation of article IV, section 4 of the United States Constitution.

The [***13] thrust of the DOE appeal is that its budget is not an appropriate source of funding for the reimbursement.

LBUSD has argued in its cross-appeal that an additional source of funding, the "Fines and Forfeiture Funds," should be made available for reimbursement of its costs and, in supplementary briefing, requests this court to order a modification of the judgment to include as "reasonably available funding" specific line item accounts from the 1988-1989 and 1989-1990 state budgets.

I. State Not Barred From Challenging Decisions of the Board

A. Administrative Collateral Estoppel

(1a) State first contends that the doctrine of administrative collateral estoppel is not applicable to the facts of this case and does not prevent State from litigating whether the Board properly considered the subject claim and whether the claim is reimbursable.

(2) Collateral estoppel precludes a party from relitigating in a subsequent action matters previously litigated and determined. (*Teitelbaum Furs, Inc.* v. *Dominion Ins. Co., Ltd*. (1962) 58 Cal.2d 601, 604 [25 Cal.Rptr. 559, 375 P.2d 439].) The traditional elements of collateral estoppel include the requirement [***14] that the prior judgment be "final." (*Ibid*.)

(3a) Finality for the purposes of administrative collateral estoppel may be understood as a two-step process: (1) the decision must be final with [*169] respect to action by the administrative agency (see Code Civ. Proc., ß 1094.5, subd. (a)); and (2) the decision must have conclusive effect (*Sandoval* v. *Superior Court* (1983) 140 Cal.App.3d 932, 936-937 [190 Cal.Rptr. 29]).

A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses "no further power to reconsider or rehear the claim. [Fn. omitted.]" (*Chas. L. Harney, Inc.* v. *State of California* (1963) 217 Cal.App.2d 77, 98 [31 Cal.Rptr. 524].)

(1b) In the case at bar, former section 633.6 of the Administrative Code provided a 10-day period during which any party could request reconsideration of any Board determination (fn. 4, *ante*). The Board decided on February 16, 1984, that the Executive Order constituted a state mandate, and on April 26, 1984, it adopted parameters and guidelines for the reimbursement of the claimed expenditures. No party requested [***15] reconsideration, no statute or regulation provided for further consideration of the matter by the Board (see, e.g., *Olive Proration etc. Com.* v. *Agri. etc. Com*. (1941) 17 Cal.2d 204, 209 [109 P.2d 918]), and the decisions became administratively final on February [**458] 27, 1984, and May 7, 1984, respectively [10] (*Ziganto* v. *Taylor* (1961) 198 Cal.App.2d 603, 607 [18 Cal.Rptr. 229]).

10 We take judicial notice pursuant to Evidence Code section 452, subdivision (h), that February 26, 1984, and May 6, 1984, fall on Sundays.

(3b) Next, the decision must have conclusive effect. (*Sandoval* v. *Superior Court, supra*, 140 Cal.App.3d 932, 936-937.) In other words, the decision must be free from direct attack. (*People* v. *Sims* (1982) 32 Cal.3d 468, 486 [186 Cal.Rptr. 77, 651 P.2d 321].) A direct attack on an administrative decision may be made by appeal to the superior court for review [***16] by petition for administrative mandamus. (Code Civ. Proc., ß 1094.5.)

(1c) A decision will not be given collateral estoppel effect if such appeal has been taken or if the time for such appeal has not lapsed. (*Sandoval* v. *Superior Court, supra*, 140 Cal.App.3d at pp. 936-937; *Producers Dairy Delivery Co.* v. *Sentry Ins. Co*. (1986) 41 Cal.3d 903, 911 [226 Cal.Rptr. 558, 718 P.2d 920].) The applicable statute of limitations for such review in the case at bar is

Received
August 26, 2011
Commission on
State Mandates

three years. (*Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 534 [234 Cal.Rptr. 795]; *Green* v. *Obledo* (1981) 29 Cal.3d 126, 141, fn. 10 [172 Cal.Rptr. 206, 624 P.2d 256].)

(4) A statute of limitations commences to run at the point where a cause of action accrues and a suit may be maintained thereon. (*Dillon* v. *Board of Pension Comm'rs*. (1941) 18 Cal.2d 427, 430 [116 P.2d 37, 136 A.L.R. 800].)

(1d) In the instant case, State's causes of action accrued when the Board made the two decisions [***17] adverse to State on February 16 and April 26, 1984, [*170] as discussed. State did not request reconsideration, and the decisions became administratively final on February 27 and May 7, 1984. [11] For purposes of discussion, we will assume the applicable three-year statute of limitations period for the two Board decisions commenced on February 28 and May 8, 1984, and ended on February 28 and May 8, 1987. [12] LBUSD filed its petition for ordinary mandamus (Code Civ. Proc., ß 1085) and complaint for declaratory relief on June 26, 1986. At that point, the limitations periods had not run against State and the Board decisions lacked the necessary finality to satisfy that requirement of the doctrine of administrative collateral estoppel. [13]

11 We do not address the contention of LBUSD that State failed to exhaust its administrative remedies (*Abelleira* v. *District Court of Appeal* (1941) 17 Cal.2d 280, 292 [109 P.2d 942, 132 A.L.R. 715]; *Morton* v. *Superior Court* (1970) 9 Cal.App.3d 977, 982 [88 Cal.Rptr. 533]) and therefore State cannot assert its affirmative defenses in response to the petition and complaint of the school district. Traditionally, the doctrine has been raised as a bar only with respect to the party seeking judicial relief, not against the responding party (*ibid.*); we have found no case holding otherwise.

[***18]

12 If State had sought reconsideration and its request been denied, or if its request had been granted but the matter again decided in favor of LBUSD, the Board decision would have been final 10 days after the Board action, and at that point the statute would have commenced to run against State.

13 State argues that its statute of limitations did not commence until the legislation was enacted without the appropriation (Sept. 28, 1985), citing *Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at page 548. However, *Carmel Valley* held that the *claimant* does not exhaust its administrative remedies and cannot come under the court's jurisdiction until the legislative process is complete, which occurred in that case when the legislation was enacted without the subject appropriations. At that point, *Carmel Valley* reasoned, the state had breached its duty to reimburse, and the claimant's right of action in traditional mandamus accrued. (*Ibid.*) However, *Carmel Valley* decided, as do we in the case at bar, that the state's statute of limitations commenced on the date the Board made decisions adverse to its interests. (*Id*. at p. 534.)

In addition, we see no reason to permit State to rely on the fortuitous actions of the Legislature, an independent branch of government, to bail it out of obligations established in the distant past by state agents -- especially given the lengthy three-year statute of limitations. (Compare, e.g., Gov. Code, ß 11523 [mandatory time limit within which to petition for administrative mandamus can be 30 days after last day on which administrative reconsideration can be ordered]; Lab. Code, ß 1160.8, and *Jackson & Perkins Co.* v. *Agricultural Labor Relations Board* (1978) 77 Cal.App.3d 830, 834 [144 Cal.Rptr. 166] [30 days from issuance of board order even if party has filed a motion to reconsider].)

[***19] [**459] *B. Waiver*

(5a) State also asserts that the doctrine of waiver is not applicable.

(6) A waiver occurs when there is "an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce [*171] a reasonable belief that it has been waived. [Citations.]" (*Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at p. 534.) Ordinarily, the issue of waiver is a question of fact which is binding on the appellate court if the determination is supported by substantial evidence. (*Napa Association of Public Employees* v. *County of Napa* (1979) 98 Cal.App.3d 263, 268 [159 Cal.Rptr. 522].) However, the question is one of law when the evidence is not in conflict and is susceptible of only one reasonable inference. (*Glendale Fed. Sav. & Loan Assn.* v. *Marina View Heights Dev. Co*. (1977) 66 Cal.App.3d 101, 151-152 [135 Cal.Rptr. 802].)

(5b) In the instant case, the right to contest the findings of the Board is at issue, and there is no dispute that [***20] the state was aware of the existence of this

Received
August 26, 2011
Commission on
State Mandates

right. As discussed, the statute of limitations had not run when State raised its affirmative defenses, and during this time State could have filed a separate petition for administrative mandamus.

(7) (See fn. 14.)

(5c) State's assertion of its affirmative defenses during this period is inconsistent with an intent to waive its right to contest the Board decisions, and therefore the doctrine of waiver is not applicable. [14]

14 LBUSD contends that State should be equitably estopped from challenging the Board decisions. In the absence of a confidential relationship, the doctrine of equitable estoppel is inapplicable where there is a mistake of law. (*Gilbert* v. *City of Martinez* (1957) 152 Cal.App.2d 374, 378 [313 P.2d 139]; *People* v. *Stuyvesant Ins. Co*. (1968) 261 Cal.App.2d 773, 784 [68 Cal.Rptr. 389].) There is no confidential relationship herein, and since we conclude as a matter of law and contrary to the trial court that the statute of limitations does not bar State from litigating the mandate and reimbursability issues, the doctrine is inapplicable.

[***21] *II. Issue of State Mandate*

(8) Ordinarily, our conclusion that the trial court erred in failing to consider the merits of the State's challenge to the decisions of the Board would require that the matter be remanded to the trial court for a full hearing. However, because the question of whether a cost is state mandated is one of law in the instant case (cf. *Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at p. 536), we now decide that the expenditures are reimbursable pursuant to article XIII B, section 6 of the California Constitution and that no relief is available under section 2234. [15]

15 We invited State, DOE, and LBUSD to submit additional briefing on the following issues: "1. Can it be determined as a question of law whether sections 90 through 101 of Title 5 of the California Administrative Code [Executive Order] constitute a state mandate within the meaning of article XIII B, section 6 of the California Constitution? 2. Do the above sections constitute such mandate?" State and LBUSD submitted additional argument; DOE declined the invitation.

[***22] [*172] *A. Recovery Under Article XIII B, Section 6*

(9a) On November 6, 1979, California voters passed initiative measure Proposition 4, which added article XIII B to the state Constitution. This measure, a corollary to the previously passed Proposition 13 (art. XIII A, which restricts governmental taxing authority), placed limits on the growth of state and local government appropriations. It also provided reimbursement to local governments for the costs of complying with certain requirements mandated by the state. LBUSD argues that section 6 of this provision is an additional ground for reimbursement.

1. The Executive Order Requires a Higher Level of Service

In relevant part article XIII B, section 6 (Section 6) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any [**460] local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . ."

(10) The subvention requirement of Section 6 "is directed to state mandated increases in the services provided by local agencies in existing 'programs.'" (*County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202].) [***23] "[T]he drafters and the electorate had in mind the commonly understood meanings of the term -- programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Ibid*.)

(9b) In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly governmental function. (Cf. *Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at p. 537.) Further, public education is administered by local agencies to provide service to the public. Thus public education constitutes a "program" within the meaning of Section 6.

State argues that the Executive Order does not mandate a higher level of service -- or a new program -- because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. In support of its argument, State cites *Brown* v. *Board of Education* (1952) 347 U.S. 483, 495 [98 L.Ed. 873, 881, 74 S.Ct. 686, 38 A.L.R.2d 1180]; [***24] *Jackson* v. *Pasadena City School District* (1963) 59 Cal.2d 876, 881 [31 Cal.Rptr. 606, 382 P.2d 878]; *Crawford* v. *Board of Education* (1976) 17 Cal.3d

Received
August 26, 2011
Commission on
State Mandates

280 [130 Cal.Rptr. 724, 551 P.2d 28] and cases cited therein; and *National Assn. for Advancement of Colored People* v. *San Bernardino* [*173] *City Unified Sch. Dist*. (1976) 17 Cal.3d 311 [130 Cal.Rptr. 744, 551 P.2d 48]. These cases show that school districts do indeed have a constitutional obligation to alleviate racial segregation, and on this ground the Executive Order does not constitute a "new program." However, although school districts are required to "'take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause[]'" (*Crawford, supra*, at p. 305, italics omitted, citing *Jackson*), the courts have been wary of requiring specific steps in advance of a demonstrated need for intervention (*Crawford*, at pp. 305-306; *Jackson, supra*, at pp. 881-882; *Swann* v. *Board of Education* (1971) 402 U.S. 1, 18-21 [28 L.Ed.2d 554, 567-570, 91 S.Ct. 1267]). [***25] On the other hand, courts have required specific factors be considered in determining whether a school is segregated (*Keyes* v. *School District No. 1, Denver, Colo*. (1973) 413 U.S. 189, 202-203 [37 L.Ed.2d 548, 559-560, 93 S.Ct. 2686]; *Jackson, supra*, at p. 882).

The phrase "higher level of service" is not defined in article XIII B or in the ballot materials. (*County of Los Angeles* v. *State of California, supra*, 43 Cal.3d 46, 50.) A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. (*Id*., at pp. 54-56.) However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. Where courts have *suggested* that certain steps and approaches may be helpful, the Executive Order and guidelines *require* specific actions. For example, school districts are to conduct mandatory biennial [***26] racial and ethnic surveys, develop a "reasonably feasible" plan every four years to alleviate and prevent segregation, include certain specific elements in each plan, and take mandatory steps to involve the community, including public hearings which have been advertised in a specific manner. While all these steps fit within the "reasonably feasible" description of *Jackson* and *Crawford*, the point is that these steps are no longer merely being suggested as options which the local school district may [**461] wish to consider but are required acts. These requirements constitute a higher level of service. We are supported in our conclusion by the report of the Board to the Legislature regarding its decision that the Claim is reimbursable: "[O]nly those costs that are above and beyond the regular level of service for like pupils in the district are reimbursable."

2. The Executive Order Constitutes a State Mandate

For the sake of clarity we quote Section 6 in full: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to [*174] reimburse such local government for the [***27] costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [para.] (a) Legislative mandates requested by the local agency affected; [para.] (b) Legislation defining a new crime or changing an existing definition of a crime; or [para.] *(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975*." (Italics added.) This amendment became effective July 1, 1980. (Art. XIII B, ß 10.) Again, the Executive Order became effective September 16, 1977.

State argues there is no constitutional ground for reimbursement because (a) with reference to the language of exception (c) of Section 6, the Executive Order is neither a statute nor an executive order or regulation implementing a statute; (b) recent legislation limits reimbursement to certain costs incurred after July 1, 1980, the effective date of the constitutional amendment; and (c) LBUSD failed to exhaust administrative procedures for reimbursement of Section 6 claims (Gov. Code, ß 17500 et seq.). We conclude that recovery is available [***28] under Section 6.

(a) *Form of Mandate*

State argues the Executive Order is not a state mandate because, with reference to exception (c) of Section 6, it is neither a statute nor an executive order implementing a statute.

(11) In construing the meaning of Section 6, we must determine the intent of the voters by first looking to the language itself (*County of Los Angeles* v. *State of California, supra*, 43 Cal.3d 46, 56), which "'should be construed in accordance with the natural and ordinary meaning of its words.' [Citation.]" (*ITT World Communications, Inc.* v. *City and County of San Francisco* (1985) 37 Cal.3d 859, 865 [210 Cal.Rptr. 226, 693 P.2d 811].) The main provision of Section 6 states that whenever the Legislature or any state agency "mandates" a new program or higher level of service, the state must provide reimbursement.

(12) We understand the use of "mandates" in the ordinary sense of "orders" or "commands," concepts broad enough to include executive orders as well as statutes. As has been noted, "[t]he concern which prompted the inclusion of section 6 in article XIII B was the perceived [***29] attempt by the state to enact legislation *or adopt administrative orders* creating programs to be adminis-

Received
August 26, 2011
Commission on
State Mandates

tered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles* v. *State of California, supra*, 43 Cal.3d at p. 56.) It is clear that the primary concern of the voters was the increased financial [*175] burdens being shifted to local government, not the form in which those burdens appeared.

We derive support for our interpretation by reference to the ballot summary presented to the electorate. (Cf. *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281].) The legislative analyst determined that the amendment would limit the rate of growth of governmental appropriations, require the return of taxes which exceeded amounts appropriated, and "[r]equire the state to reimburse local governments for the costs of complying with 'state mandates.'" [**462] The term "state mandates" was [***30] defined as "requirements imposed on local governments by legislation *or executive orders*." (Italics added; Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979) p. 16.)

(9c) Although exception (c) of Section 6 gives the state discretion whether to reimburse pre-1975 mandates which are either statutes or executive orders implementing statutes, we do not infer from this exception that reimbursability is otherwise dependent on the form of the mandate. We conclude that since the voters provided for mandatory reimbursement except for the three narrowly drawn exceptions found in (a), (b), and (c), there was no intent to exclude recovery for state mandates in the form of executive orders. Further, as State sets forth in its brief, the adoption of the Executive Order was "arguably prompted" by the decision in *Crawford* v. *Board of Education, supra*, 17 Cal.3d 280, a case decided after the 1975 cutoff date of exception (c). Since case law and statutory law are of equal force, there appears to be no basis on which to exclude executive orders which implement case law or constitutional law [***31] while permitting reimbursement for executive orders implementing statutes. We see no relationship between the proposed distinction and the described purposes of the amendment (*County Los Angeles* v. *State of California, supra*, 43 Cal.3d at p. 56; *County of Los Angeles* v. *Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545 [263 Cal.Rptr. 351]).

(b) *Recent Legislative Limits*

State contends that LBUSD cannot claim reimbursement under Section 6 because Government Code sections 17561 (Stats. 1986, ch. 879, ß 6, p. 3041) and 17514 (Stats. 1984, ch. 1459, ß 1, p. 5114) limit such recovery to mandates created by statutes or executive orders implementing statutes, and only for costs incurred after July 1, 1980.

As discussed above, the voters did not intend to limit reimbursement of costs only to those incurred pursuant to statutes or executive orders implementing [*176] statutes except as set forth in exception (c) of Section 6. We presume that when the Legislature passed Government Code sections 17561 and 17514 it was aware of Section 6 as a related law and intended to maintain a consistent [***32] body of rules. (*Fuentes* v. *Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449].) As discussed above, the limitations suggested by State are confined to exception (c).

Further, the state must reimburse costs incurred pursuant to mandates enacted after January 1, 1975, although actual payments for reimbursement were not required to be made prior to July 1, 1980, the effective date of Section 6. (*Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at pp. 547-548; *City of Sacramento* v. *State of California* (1984) 156 Cal.App.3d 182, 191-194 [203 Cal.Rptr. 258], disapproved on other grounds in *County of Los Angeles* v. *State of California, supra*, 43 Cal.3d at p. 58, fn. 10.)

(c) *Administrative Procedures*

The Legislature passed Government Code section 17500 et seq. (Stats. 1984, ch. 1459, ß 1, p. 5113), effective January 1, 1985 (Stats. 1984, ch. 1459, ß 1, p. 5123), to aid the implementation of Section 6 and to consolidate the procedures for reimbursement [***33] under statutes found in the Revenue and Taxation Code. This legislation created the Commission, which replaced the Board, and instituted a number of procedural changes. (Gov. Code, ßß 17525, 17527, subd. (g), 17550 et seq.) The Legislature intended the new system to provide "the sole and exclusive procedure by which a local agency or school district" could claim reimbursement. (Gov. Code, ß 17552.)

(13) State argues that since LBUSD never made its claim before the Commission, it failed to exhaust its administrative [**463] remedies and cannot now receive reimbursement under section 6.

As discussed, the Board decisions favorable to LBUSD became administratively final in 1984. The Commission was not in place until January 1, 1985. There is no evidence in the record that the Commission did not consider these decisions to be final.

State argues the Commission was given jurisdiction over all claims which had not been included in a local government claims bill enacted before January 1, 1985. (Gov. Code, ß 17630.) State is correct. However, the subject claim was included in such a bill, but the bill was signed into law after the recommended appropriation had

Received
August 26, 2011
Commission on
State Mandates

been deleted. Under the statutory [***34] scheme, the only relief offered a disappointed claimant at such juncture is an action in declaratory relief to declare a subject executive order void [*177] (former Rev. & Tax Code, ß 2255, subd. (c); Stats. 1982, ch. 1638, ß 7, pp. 6662-6663) or unenforceable (Gov. Code, ß 17612, subd. (b); Stats. 1984, ch. 1459, ß 1, p. 5121) and to enjoin its enforcement. LBUSD pursued this remedy and in addition petitioned for writ of mandate (Code Civ. Proc., ß 1085) to compel reimbursement. There is no requirement to seek further administrative review. Indeed, to do so after the Legislature has spoken would appear to be an exercise in futility.

We conclude that Section 6 provides reimbursement to LBUSD because the Executive Order required a higher level of service and because the Executive Order constitutes a state mandate.

B. Section 2234

As set forth in the procedural history of this case, the Board originally declined to consider the Claim as a claim made under section 2234 on the ground that it lacked jurisdiction to do so. LBUSD petitioned for judicial relief, and the trial court held that the Board had jurisdiction and must consider the claim on its merits. The Board did not [***35] appeal that decision. State raised the jurisdiction issue as an affirmative defense to the second petition for writ of mandate filed by LBUSD and presents it again for our consideration.

(14) Of course, lack of subject matter jurisdiction may be raised at any time. (*Stuck* v. *Board of Medical Examiners* (1949) 94 Cal.App.2d 751, 755 [211 P.2d 389].)

Former section 2250 provided: "The State Board of Control, pursuant to the provisions of this article, shall hear and decide upon a claim by a local agency or school district that such local agency or school district has not been reimbursed for *all costs mandated by the state as required by Section 2231 or 2234*. [para.] Notwithstanding any other provision of law, this article shall provide the sole and exclusive procedure by which the Board of Control shall hear and decide upon a claim that a local agency or school district has not been reimbursed for *all costs mandated by the state as required by Section 2231 or 2234*." (Italics added; Stats. 1978, ch. 794, ß 5, p. 2549.) Given the clear, unambiguous language of the statute, there is no need for construction. (*West Covina Hospital* v. *Superior Court* (1986) 41 Cal.3d 846, 850 [226 Cal.Rptr. 132, 718 P.2d 119, 60 A.L.R.4th 1257].)

[***36] **(15a)** We conclude that the Board had jurisdiction to consider a claim filed under former section 2234. However, as discussed below, the 1977 Executive Order falls outside the purview of section 2234.

Former section 2231 provided: "(a) . . . The state shall reimburse each school district only for those 'costs mandated by the state', as defined in [*178] Section 2207.5." (Stats. 1982, ch. 1586, ß 3, p. 6264.) In part, former section 2207.5 defines "costs mandated by the state" as increased costs which a school district is required to incur as a result of certain new programs or certain increased program levels or services mandated by an executive order issued *after* January 1, 1978. (Stats. 1980, ch. 1256, ß 5, pp. 4248-4249.) As previously stated, the Executive Order in the case at bar was issued September 8, 1977.

Former section 2234, pursuant to which LBUSD initially filed its claim, does not itself contain language indicating a time limitation: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the [**464] local agency or school district for such costs incurred after the operative [***37] date of such mandate." (Stats. 1980, ch. 1256, ß 11, p. 4251.)

State asserts that the January 1, 1978, limitation of sections 2231 and 2207.5 applies to section 2234, preventing reimbursement for costs expended pursuant to the September 8, 1977, Executive Order; LBUSD argues section 2234 is self-contained and without time limitation.

(16) It is a fundamental rule of statutory construction that a statute should be construed with reference to the whole system of law of which it is a part in order to ascertain the intent of the Legislature. (*Moore* v. *Panish* (1982) 32 Cal.3d 535, 541 [186 Cal.Rptr. 475, 652 P.2d 32]; *Pitman* v. *City of Oakland* (1988) 197 Cal.App.3d 1037, 1042 [243 Cal.Rptr. 306].) The legislative history of a statute may be considered in ascertaining legislative design. (*Walters* v. *Weed* (1988) 45 Cal.3d 1, 10 [246 Cal.Rptr. 5, 752 P.2d 443].)

The earliest version of section 2234 is found in former section 2164.3, subdivision (f), which provided reimbursement to a city, county, or special district for "a service or program [provided] at its [***38] option which is subsequently mandated by the state . . . ." Reimbursement was limited to costs mandated by statutes or executive orders enacted or issued after January 1, 1973. (Stats. 1972, ch. 1406, ß 3, pp. 2962-2963.)

In 1973, section 2164.3 was amended to provide reimbursement to school districts for costs mandated by statutes enacted after January 1, 1973 (subd. (a)), *but it expressly excluded school districts from reimbursement for costs mandated by executive orders* (subd. (d)). (Stats. 1973, ch. 208, ß 51, p. 565.) Later that same year, the Legislature repealed section 2164.3 (Stats. 1973, ch.

Received
August 26, 2011
Commission on
State Mandates

358, ß 2, p. 779) and added section 2231, which took over the pertinent [*179] reimbursement provisions of section 2164.3 virtually unchanged. (Stats. 1973, ch. 358, ß 3, pp. 779, 783-784.)

In 1975, the Legislature removed the time limitation language from section 2231 and incorporated it into a new section, 2207. (Stats. 1975, ch. 486, ß 1.8, pp. 997-998.) After this change, section 2231 then provided in pertinent part: "(a) The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207. *The state shall reimburse each school* [***39] *district only for those 'costs mandated by the state' specified in subdivision (a) of Section 2207* . . . ." (Italics added; Stats. 1975, ch. 486, ß 7, pp. 999-1000.) Subdivision (a) of section 2207 limited reimbursement solely to costs mandated by statutes enacted after January 1, 1973.

At this same juncture, the Legislature further amended section 2231 by deleting the provision for "subsequently mandated" services or programs and incorporating that provision into a new section, 2234 (Stats. 1975, ch. 486, ß 9, p. 1000), the section under which LBUSD would eventually make its claim. The substance of section 2234 (see fn. 2, *ante*) remained unchanged until its repeal in 1986. (Stats. 1977, ch. 1135, ß 8.6, p. 3648; Stats. 1980, ch. 1256, ß 11, pp. 4251-4252; Stats. 1986, ch. 879, ß 25, p. 3045.)

Next, section 2231 was amended to show that with regard to school districts, "costs mandated by the state" were now defined by a new section, 2207.5. (Stats. 1977, ch. 1135, ß 7, pp. 3647-3648.) Section 2207.5 limited reimbursement to costs mandated by statutes enacted after January 1, 1973, and *executive orders issued after January 1, 1978*. (Stats. 1977, ch. 1135, ß 5, pp. [***40] 3646-3647.) (No further pertinent amendments to section 2231 occurred; see Stats. 1978, ch. 794, ß 1.1, p. 2546; Stats. 1980, ch. 1256, ß 8, pp. 4249-4250; Stats. 1982, ch. 734, ß 3, p. 2912.) The distinction between statutes and executive orders was preserved when section 2207.5 was amended in 1980 (Stats. 1980, ch. 1256, ß 5, pp. 4248-4249) and was in effect at the time of the Board hearing.

(15b) This survey teaches us that with respect to the reimbursement process, the Legislature has treated school districts differently than it has treated other local government entities. The Legislature initially did not give school districts the right to recover costs mandated by executive orders; and when this option was made available, the [**465] effective date differed from that applicable to other entities. The Legislature consistently limited reimbursement of costs by reference to the effective dates of statutes and executive orders and nothing indicates the state intended recovery of costs to be open-ended.

[*180] Because the "subsequently mandated" provision of section 2234 originally was contained in sections which set forth specific date limitations (former sections 2164.3 and 2231), we conclude [***41] the Legislature likewise intended to limit claims made pursuant to section 2234. The use of the language "subsequently mandated" merely describes an additional circumstance in which the state will reimburse costs, provided the claimant meets other requirements. Since the September 1977 Executive Order falls outside the January 1, 1978, limit set by section 2207.5, section 2234 does not provide for reimbursement to LBUSD.

III. The Award

The full text of the award as provided by the judgment is set forth in an appendix to this opinion. In part, the judgment states that there are appropriated funds in budgets for the DOE, the Commission, the Reserve for Contingencies or Emergencies, and the Special Fund for Economic Uncertainties, "or similarly designated accounts" which are "'reasonably available'" to reimburse LBUSD for the state mandated costs it has incurred. (Appendix, pars. 3, 2.) The State Controller is commanded to pay the claims plus interest "at the legal rate" from the described appropriations for fiscal years 1984-1985 through 1987-1988 and "subsequently enacted State Budget Acts." (Appendix, par. 7.) The judgment declares that the deletion of funding for reimbursement [***42] of costs incurred in compliance with the Executive Order was invalid and unconstitutional. (Appendix, par. 12.) Finally, the Fines and Forfeiture Funds in the custody of the Auditor-Controller of Los Angeles County are held to be not reasonably available for reimbursement. (Appendix, par. 5.)

A. State Position

(17a) State contends the trial court's award is contrary to California law, asserting that it constitutes an invasion of the province of the Legislature and therefore a judicial usurpation of the republican form of government guaranteed by the United States Constitution, Article IV, section 4.

(18) A court cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated. (Cal. Const., art. III, ß 3; art. XVI, ß 7; *Mandel* v. *Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935]; *Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at p. 538.) However, no violation of the separation of powers doctrine occurs

Received
August 26, 2011
Commission on
State Mandates

when a court orders appropriate expenditures from already existing funds. (*Mandel*, at p. 540; *Carmel Valley*, at [***43] pp. 539-540.) The test is whether such funds are "reasonably available for the [*181] expenditures in question . . . ." (*Mandel*, at p. 542; *Carmel Valley*, at pp. 540-541.) Funds are "reasonably available" for reimbursement when the purposes for which those funds were appropriated are "generally related to the nature of costs incurred . . . ." (*Carmel Valley*, at p. 541.) There is no requirement that the appropriation specifically refer to the particular expenditure (*Mandel* at pp. 543-544, *Carmel Valley* at pp. 540; *Committee to Defend Reproductive Rights* v. *Cory* (1982) 132 Cal.App.3d 852, 857-858 [183 Cal.Rptr. 475]), nor must past administrative practice sanction coverage from a particular fund (*Carmel Valley*, at p. 540).

(17b) As previously stated, the trial court found the subject funds were "reasonably available." No party requested a statement of decision, and therefore it is implied that the trial court found all facts necessary to support its judgment. (*Michael* [**466] *U.* v. *Jamie B.* (1985) 39 Cal.3d 787, 792-793 [218 Cal.Rptr. 39, 705 P.2d 362]; *Homestead Supplies, Inc.* v. *Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 984 [147 Cal.Rptr. 22].) [***44] We now examine the record to ascertain whether substantial evidence supports the decision of the trial court.

The Board having approved reimbursement under the Executive Order, reported to the Legislature that "[t]he categories of reimbursable costs include, but are not limited to: (1) voluntary pupil assignment or reassignment programs, (2) magnet schools or centers, (3) transportation of pupils to alternative schools or programs, (5) [*sic*, no item (4)] racially isolated minority schools, (6) costs of planning, recruiting, administration and/or evaluation, and (7) overhead costs." The guidelines set out comprehensive steps to be taken by school districts in order to be in compliance with the Executive Order.

The peremptory writ of mandate, issued the same date as the judgment, designated funds in specific account numbers and, in addition, a special fund as available for reimbursement. We take judicial notice of the relevant budget enactments and Government Code sections 16418 and 16419 (Evid. Code, ßß 459, subd. (a), 452) and address these designations seriatim.

The line item account numbers for the DOE for fiscal years 1984-1985 through 1987-1988 set forth in the writ are [***45] as follows: 6100-001-001, 6100-001-178, 6100-015-001, 6100-101-001, 6100-114-001, 6100-115-001, 6100-121-001, 6100-156-001, 6100-171-178, 6100-206-001, 6100-226-001.

An examination of the relevant budget acts Statutes 1985, chapter 111; Statutes 1986, chapter 186; Statutes 1987, chapter 135; and final budgetary changes as published by the Department of Finance for each year, shows [*182] that appropriations in the 11 DOE line item account numbers have supported a very broad range of activities including reimbursement of costs for both mandated and voluntary integration programs, assessment programs, child nutrition, meals for needy pupils, participation in educational commissions, administration costs of various programs, proposal review, teacher recruitment, analysis of cost data, school bus driver instructor training, shipping costs for instructional materials, local assistance for school district transportation aid, summer school programs, local assistance to districts with high concentrations of limited- and non-English-speaking children, adult education, driver training, Urban Impact Aid, and cost of living increases for specific programs. Further evidence regarding the [***46] uses of these funds is found in the deposition testimony of William C. Pieper, Deputy Superintendent for Administration with the State Department of Education, who stated that local school districts were being reimbursed for the costs of desegregation programs from line item account numbers 6100-114-001 and 6100-115-001 in the 1986 State Budget Act.

Comparing the requirements of the Executive Order and guidelines with the broad range of activities supported by the DOE budget, we conclude that the subject funds, although not specifically appropriated for the reimbursement in question, were generally related to the nature of the costs incurred.

With regard to the Commission, the writ sets out three line item account numbers: 8885-001-001; 8885-101-001; and 8885-101-214. A review of the relevant budget acts shows that the first line item provides funding for support of the Commission, and line item number 8885-101-001 provides funding specifically for local assistance "in accordance with the provisions of Section 6 of Article XIII B of the California Constitution . . . ." (Stats. 1986, ch. 186.) Line item number 8885-101-214 also provides funds for "local assistance." Since the Commission [***47] was created specifically to effect reimbursements for qualifying claims, we conclude there is a general relationship between the purpose of the appropriations and the requirements of the Executive Order.

Line item 9840-001-001 of the Reserve for Contingencies or Emergencies defines "contingencies" as "proposed expenditures [**467] arising from unexpected conditions or losses for which no appropriation, or insuf-

Received
August 26, 2011
Commission on
State Mandates

ficient appropriation, has been made by law and which, in the judgment of the Director of Finance, constitute cases of actual necessity." (All relevant budget acts.) In the instant case, previous to the issuance of the Executive Order, LBUSD could not have anticipated the expenditures necessary to bring it into compliance. Further, the Legislature refused to appropriate the necessary funds [*183] to directly reimburse the district for these expenditures. The necessity exists by virtue of the writ and judgment issued by the trial court. Therefore, this line item, and three others which also support the reserve (9840-001-494, 9840-001-988, 9840-011-001) are generally related to the costs. [16]

16 The costs do not come within past or current definitions of "emergency," which are, respectively, as follows. "[P]roposed expenditures arising from unexpected conditions or losses for which no appropriation, or insufficient appropriation, has been made by law and which in the judgment of the Director of Finance require immediate action to avert undesirable consequences or to preserve the public peace, health or safety." (Fiscal years 1984-1985, 1985-1986.) "[E]xpenditure incurred in response to conditions of disaster or extreme peril which threaten the health or safety of persons or property within the state." (Fiscal years 1986-1987 forward.)

[***48] Finally the writ lists as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts . . . ." An examination of Government Code sections 16418 and 16419 relating to the special fund shows only one use of this reserve: establishment of the Disaster Relief Fund "for purposes of funding disbursements made for response to and recovery from the earthquake, aftershocks, and any other related casualty." No evidence in the record indicates a general relationship between this purpose and the costs incurred by LBUSD. We conclude, therefore, that this source of funding cannot be used for reimbursement. This source is stricken from the judgment.

The description of further sources of funding as "similarly designated accounts" fails to sufficiently identify these sources and we therefore strike this part of the judgment.

In a supplemental brief, LBUSD requests this court to take judicial notice of the Budget Acts of 1988-1989 (Stats. 1988, ch. 313) and 1989-1990 (Stats. 1989, ch. 93) pursuant to the Evidence Code (Evid. Code, ßß 451, subd. (a), 452, subd. (a), 452, subd. (c), 459) and to order that the amounts set forth in the judgment and writ be [***49] satisfied from specific line item accounts in these later budgets and from the Special Fund for Economic Uncertainties. [17]

17 LBUSD identifies the line items accounts as follows: DOE -- 6110-001-001, 6110-001-178, 6110-015-001, 6110-101-001, 6110-114-001, 6110-115-001, 6110-121-001, 6110-156-001, 6110-171-178, 6110-226-001, 6110-230-001; Commission -- 8885-001-001, 8885-101-001, 8885-101-214; Reserve for Contingencies or Emergencies -- 9840-001-001, 9840-001-494, 9840-001-988, 9840-011-001.

(19) "An appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts. [Citation.]" (*Carmel Valley, supra*, 190 Cal.App.3d at p. 557.)

(17c) We have reviewed the designated budget acts and conclude that the specified line item accounts for DOE, the Commission, [*184] and the Reserve for Contingencies and Emergencies provide funds for a broad range of activities similar to those set out above and therefore [***50] are generally related to the nature of the costs incurred. However, for the reasons previously discussed, we decline to designate the Special Fund for Economic Uncertainties as a source for reimbursement.

While we have concluded that certain line item accounts are generally related to the nature of the costs incurred, there must also be evidence that at the time of the order the enumerated budget items contained sufficient funds to cover the award. (Gov. Code, ß 12440; *Mandel* v. *Myers, supra*, 29 Cal.3d at p. 543; *Carmel Valley, supra*, 190 Cal.App.3d at p. 541; cf. *Baggett* v. *Dunn* (1886) 69 Cal. 75, 78 [10 P. 125]; *Marshall* v. *Dunn* (1886) 69 Cal. 223, 225 [10 P. 399].) The record before [**468] us contains evidence regarding balances at various points in time for some of the line item accounts, but that evidence is primarily in the form of uninterpreted statistical data. We have not found a clear statement which would satisfy this requirement. Furthermore, not every line item was in existence every fiscal year. In addition, those which [***51] entered the budgetary process did not always survive it unscathed. Therefore, we remand the matter to the trial court to determine with regard to the line item account numbers approved above whether funds sufficient to satisfy the award were available at the time of the order. (Cf. *County of Sacramento* v. *Loeb* (1984) 160 Cal.App.3d 446, 454-455 [206 Cal.Rptr. 626].) If the trial court determines that the unexhausted funds remaining in the specified appropriations are insufficient, the trial court order can be further amended to reach subsequent appropriated funds. (*County of Sacramento* at p. 457; *Serrano*

Received
August 26, 2011
Commission on
State Mandates

v. Priest (1982) 131 Cal.App.3d 188, 198 [182 Cal.Rptr. 387].)

(20) Having concluded that certain appropriations are generally available to reimburse LBUSD, we turn to an additional issue raised by State: that the "finding" by the Legislature that the Executive Order does not impose a "state-mandated local program" prevents reimbursement.

Unsupported legislative disclaimers are insufficient to defeat reimbursement. (*Carmel Valley, supra*, 190 Cal.App.3d at pp. 541-544.) As discussed, [***52] LBUSD, pursuant to Section 6, has a constitutional right to reimbursement of its costs in providing an increased service mandated by the state. The Legislature cannot limit a constitutional right. (*Hale* v. *Bohannon* (1952) 38 Cal.2d 458, 471 [241 P.2d 4].)

B. DOE Contentions

DOE is sympathetic to LBUSD's position. On appeal, it takes no stand on the issue whether the Executive Order constitutes a state mandate within [*185] the meaning of Section 6.

(21) The thrust of its appeal is that, if there is a mandate, the DOE budget is an inappropriate source of funding in comparison with other budget line item accounts included in the order.

We conclude to the contrary because logic dictates that DOE funding be the initial and primary source for reimbursement. As discussed, the test set forth in *Mandel* and *Carmel Valley* is whether there is a general relationship between budget items and reimbursable expenditures. Since the Executive Order was issued by DOE, it is not surprising that the evidence overwhelmingly supports the finding of the trial court that this general relationship exists with regard to the DOE budget.

While we also have concluded [***53] that certain line item accounts for entities other than DOE are also appropriate sources of funding, the record does not provide the statistical data necessary to determine how far the order will reach with regard to these additional sources of support.

DOE also contends that reimbursement for expenditures in fiscal years 1977-1978, 1978-1979, and 1979-1980 cannot be awarded under Section 6 because the amendment was not effective until July 1, 1980. As discussed, this argument has been previously rejected. (*Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at pp. 547-548; *City of Sacramento* v. *State of California, supra*, 156 Cal.App.3d 182, 191-194, disapproved on other grounds in *County of Los Angeles* v. *State of California, supra*, 43 Cal.3d 46, 58, fn. 10.)

(22) Finally, DOE contends that interest should have been awarded at the rate of 6 percent per annum pursuant to Government Code section 926.10 rather than at the legal rate provided under article XV, section 1, paragraph (2) of the California Constitution.

Government Code section [***54] 926.10 is part of the California Tort Claims Act (Gov. Code, ß 900 et seq.) which provides a statutory scheme for the filing of claims against public entities for alleged injuries; it makes no provision for claims for reimbursement [**469] for state mandated expenditures. In *Carmel Valley* a judgment awarding interest at the legal rate was affirmed. (*Carmel Valley Fire Protection Dist.* v. *State of California, supra*, 190 Cal.App.3d at p. 553.) We decline the invitation of DOE to apply another rule.

C. Cross Appeal of LBUSD

(23) LBUSD seeks reversal of that part of the judgment holding that monies in the Fines and Forfeitures Funds in the custody and possession of [*186] cross-respondent Auditor-Controller of the County of Los Angeles (County Controller) for transfer to the state treasury are not reasonably available for reimbursement of its state mandated expenditures. [18]

18 In its first amended petition, LBUSD listed the following code sections as appropriate sources of reimbursement: " Penal Code Sections 1463.02, 1463.03, 1403.5A and 1464; Government Code Sections 13967, 26822.3 and 72056; Health and Safety Code Section 11502; and Vehicle Code Sections 1660.7, 42003, and 41103.5."

[***55] As previously stated, funds are "reasonably available" when the purposes for which those funds were appropriated are generally related to the nature of the costs incurred. (*Carmel Valley, supra*, 190 Cal.App.3d at pp. 540-541.) LBUSD does not cite, nor have we found, any evidence in the record showing the use of those funds once they are transmitted to the state and that those funds are then "reasonably available" to satisfy the Claim. We cannot conclude as a matter of law that a general relationship exists between those funds and the nature of the costs incurred pursuant to the Executive Order. LBUSD has failed to carry its burden of proof and the trial court correctly decided these funds were not "reasonably available" for reimbursement.

Nor have we concluded that there is any ground on which the funds could be made available to LBUSD while in the possession of the county Auditor-Controller. The instant case differs from *Carmel Valley* wherein we affirmed an order which authorized a county to satisfy its claims against the state by offsetting fines and forfeitures

Received
August 26, 2011
Commission on
State Mandates

it held which were due the state. The *Carmel Valley, supra*, 190 Cal.App.3d 521, [***56] holding was based on the right of offset as "a long-established principle of equity." (*Id*. at p. 550.) That is a different standard than the standard of "generally related to the nature of costs incurred." In the case at bar there is no set-off relationship between county and LBUSD.

We conclude that because the doctrines of collateral estoppel and waiver are inapplicable to the facts of this case, the trial court should have allowed State to challenge the decisions of the Board. However, we also determine, as a question of law, that the Executive Order requires local school boards to provide a higher level of service than is required constitutionally or by case law and that the Executive Order is a reimbursable state mandate pursuant to article XIII B, section 6 of the California Constitution. Former Revenue and Tax Code section 2234 does not provide reimbursement of the subject claim.

[*187] Based on uncontradicted evidence, we modify the decision of the trial court by striking as sources of reimbursement the Special Fund for Economic Uncertainties "or similarly designated accounts." We also modify the judgment to include charging orders against [***57] certain funds appropriated through subsequent budget acts.

We affirm the decision of the trial court that the Fines and Forfeitures Funds are not "reasonably available" to satisfy the Claim.

Finally, we remand the matter to the trial court to determine whether at the time of its order, unexpended, unencumbered funds sufficient to satisfy the judgment remained in the approved budget line item account numbers. The trial court is also directed to determine this same issue with respect to the charging order.

The judgment is affirmed as modified. Each party is to bear its own costs on appeal.

[*188] [**470] Appendix

The superior court judgment provides in pertinent part: "It Is Ordered, Adjudged and Decreed That: "1. The requirements contained in Title 5, California Administrative Code, Sections 90-101 constitute a reimbursable State-mandate which cannot be challenged by State Respondents or Respondent DOE because of the doctrines of administrative collateral estoppel and waiver.

"2. There are appropriated funds from specified line items in the 1984, 1985, 1986 and 1987 budgets which are 'reasonably available' to reimburse Petitioner for State-mandated costs it has occurred [*sic*] as [***58] a result of its compliance with the requirements of Title 5, California Administrative Code, Sections 90-101.

"3. The funds appropriated by the Legislature for:

"(a) the support of the Department of Education, including, but not limited, to the Department's General Fund;

"(b) the Commission on State Mandates, including, but not limited to the State Mandates Claim Fund; and

"(c) the 'Reserve for Contingencies or Emergencies', 'Special Fund for Economic Uncertainties' or similarly designated accounts, are 'reasonably available' and may properly be and should be encumbered and expended for the reimbursement of State-mandated costs in the amount of $ 28,014,869.00, plus applicable interest, as incurred by Petitioner and as computed by Petitioner in compliance with Parameters and Guidelines adopted by the State Board of Control.

"4. The law in effect at the time that Petitioner's claim was processed provided for the computation of a specific claim amount for specific fiscal years based on Parameters and Guidelines, or claiming instructions, adopted in April 1984 and a Statewide Cost Estimate adopted on August 23, 1984, both of which are administrative actions of the State Board of Control [***59] which have not been challenged by State Respondents. The computations made pursuant to the Parameters and Guidelines and Statewide Cost Estimate are specific and ascertainable and subject to audit by the State Controller under Government Code section 17558.

"5. The Court decrees that State funds entitled the 'Fines and Forfeitures Funds' under the custody and control of Respondent Bloodgood, are not reasonably available for satisfaction of Petitioner's claim for reimbursement of State-mandated costs.

"6. A peremptory writ of mandamus shall issue under the seal of this Court, commanding State Respondents and Respondent Doe to comply with Article XIIIB, Section 6 of the California Constitution and Government Code Section 17565 and reimburse petitioner for:

"(a) State-mandated costs in the amount of $ 24,164,593.00, incurred as a result of its compliance with the requirements of Title 5, California Administrative Code, Sections 90-101 during fiscal years 1977-78 through 1982-1983, plus interest at the legal rate from September 28, 1985; and

"(b) State-mandated costs in the amount of $ 3,850,276.00, incurred as a result of Petitioner's compliance with the requirements of Title 5, California [***60] Administrative Code, Sections 90-101 during fiscal years 1983-84 and 1984-85, plus interest at the legal rate from September 28, 1985.

"7. Said peremptory writ shall command Respondent Gray Davis, State Controller, or his successor-in-interest,

Received
August 26, 2011
Commission on
State Mandates

to pay the claims of Petitioner, plus interest at the legal rate from [*189] September 28, 1985 from the appropriations in the State Budget Acts for the 1984-85, 1985-86, 1986-87 and 1987-88 fiscal years, and the subsequently enacted State Budget Acts, which include, or will include appropriations for:

"(a) the support of the Department of Education, including, but not limited to the Department's General Fund;

"(b) the Commission on State Mandates, including, but not limited to the State Mandates Claim Fund; and

"(c) the 'Reserve for Contingencies or Emergencies', Special Fund for Economic [**471] Uncertainties' or similarly designated accounts, which are 'reasonably available' to be encumbered and expended for the reimbursement of State-mandated costs incurred by Petitioner and further shall compel Elizabeth Whitney, Acting State Treasurer, or her successor-in-interest, to make payments on the warrants drawn by Respondent Gray Davis, State Controller [***61] upon their presentation for payment by Petitioner without offset or attempt to offset against other monies due and owing Petitioner until Petitioner is reimbursed for all such costs.

"8. Said Peremptory Writ of Mandate also shall command Respondent Jesse R. Huff, Director of the State Department of Finance, to perform such actions as may be necessary to effect reimbursement required by other portions of this Judgment, including but not limited to, those actions specified in Chapter 135, Statutes of 1987, Section 2.00, pp. 549-553, or with respect to the Special Fund for Economic Uncertainties.

"9. Pending the final disposition of this proceeding, State Respondents and Respondent DOE, and each of them, their successors in office, agents, servants and employees and all persons acting in concert or participation with them, are hereby enjoined or restrained from directly or indirectly expending from the appropriations described in Paragraph No. 7 hereinabove any sums greater than that which would leave in said appropriations at the conclusion of the respective fiscal years an amount less than the reimbursement amounts claimed by Petitioner together with interest at the legal rate through [***62] payment of said reimbursement amount. Said amounts are hereinafter referred to collectively as the 'reimbursement award sum'.

"10. Pending the final disposition of this proceeding State Respondents and Respondent DOE, and each of them, their successors in office, agents, servants and employees, and all persons acting in concert or participation with them, are hereby enjoined and restrained from directly or indirectly causing to revert the reimbursement award sum from the appropriations described in Paragraph No. 7 hereinabove to the general funds of the State of California and from otherwise dissipating the reimbursement award sum in a manner that would make it unavailable to satisfy this Court's judgment.

"11. The State Respondents and Respondent Doe have a continuing obligation to reimburse Petitioner for costs incurred in compliance with the requirements contained in Title 5, California Administrative Code, Section 90-101 in the fiscal years subsequent to it's [*sic*] claims for expenditures in fiscal years 1977-78 through 1984-85 as set forth in the First Amended Petition, as amended, and the accompanying Motion For the Issuance Of A Writ Of Mandate.

"12. The deletion of funding [***63] for reimbursement of State-mandated costs incurred in compliance with Title 5, California Administrative Code, Sections 90-101 from Chapter 1175, Statutes of 1985 was invalid and unconstitutional.

"13. Respondent Gray Davis, State Controller, shall retain the right to audit the claims and records of the Petitioner pursuant to Government Code Section 17561(d) to verify the actual dollar amount of the reimbursement award sum.

"14. The Court reserves and retains jurisdiction to effect any appropriate remedy at law or equity which may be necessary to enforce its judgment or order.

[*190] "15. Petitioner shall recover from State Respondents and Respondent DOE costs in this proceeding in the amount of 1,863.54.

"Dated: 3-2, 1988	"/s/ Weil
	"Robert I. Weil
	"Judge of The Superior Court"

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 9

Received
August 26, 2011
Commission on
State Mandates

SAN DIEGO UNIFIED SCHOOL DISTRICT, Plaintiff and Respondent, v. COMMISSION ON STATE MANDATES, Defendant and Appellant; CALIFORNIA DEPARTMENT OF FINANCE, Real Party in Interest and Appellant.

S109125

SUPREME COURT OF CALIFORNIA

33 Cal. 4th 859; 94 P.3d 589; 16 Cal. Rptr. 3d 466; 2004 Cal. LEXIS 7079; 2004 Daily Journal DAR 9404

August 2, 2004, Filed

PRIOR HISTORY: Superior Court of San Diego County, No. GIC737638, Linda B. Quinn, Judge. Court of Appeal, Fourth Dist., Div. One, No. D038027.
San Diego Unified School Dist. v. Commission on State Mandates, 99 Cal. App. 4th 1270, 122 Cal. Rptr. 2d 614, 2002 Cal. App. LEXIS 4369 (Cal. App. 4th Dist., 2002)

DISPOSITION: Judgment of the Court of Appeal affirmed in part and reversed in part.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A school district filed a test claim with the Commission on State Mandates, asserting entitlement to reimbursement for the costs of hearings triggered by mandatory expulsion recommendations, and those hearings resulting from discretionary expulsion recommendations. After holding hearings on the district's claim, the commission determined that Ed. Code, ß 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession constituted a new program or higher level of service, and found that because costs related to some of the resulting hearing provisions set forth in Ed. Code, ß 48918 (primarily various notice, right of inspection, and recording provisions) exceeded the requirements of federal due process, those additional hearing costs constituted reimbursable state-mandated costs. As to the vast majority of the remaining hearing procedures triggered by Ed. Code, ß 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession--for example, procedures governing such matters as the hearing itself and the board's decision; a statement of facts and charges; notice of the right to representation by counsel; written findings; recording of the hearing; and the making of a record of the expulsion--the commission found that those procedures were enacted to comply with federal due process requirements, and hence fell within the exception set forth in Gov. Code, ß 17556, subd. (c), and did not impose a reimbursable state mandate. The commission further found that with respect to Ed. Code, ß 48915's discretionary expulsions, there was no right to reimbursement for costs incurred in holding expulsion hearings, because such expulsions do not constitute a new program or higher level of service, and in any event such expulsions are not mandated by the state, but instead represent a choice by the principal and the school board. The district then brought a proceeding for an administrative writ of mandate, challenging the commission's decision. The trial court issued a writ commanding the commission to render a new decision finding (i) all costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations are reimbursable, and (ii) hearing costs associated with discretionary expulsions are reimbursable to [*860] the limited extent that required hearing procedures exceed federal due process mandates. (Superior Court of San Diego County, No. GIC737638, Linda B. Quinn, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D038027, affirmed the judgment rendered by the trial court.

The Supreme Court affirmed the judgment of the Court of Appeal insofar as it provided for full reimbursement of all costs related to hearings triggered by the mandatory expulsion provision of Ed. Code, ß 48915, but reversed the judgment insofar as it provided for reimbursement of any costs related to hearings triggered by

Received
August 26, 2011
Commission on
State Mandates

the discretionary provision of ß 48915. The court held that to the extent that ß 48915 compels suspension and mandates a recommendation of expulsion for certain offenses, it constitutes a higher level of service under Cal. Const., art. XIII B, ß 6, and imposes a reimbursable state mandate for all resulting hearing costs--even those costs attributable to procedures required by federal law. The immediate suspension and mandatory expulsion of a student who possesses a firearm on school property provides a higher level of service to the public in that it enhances the safety of those who attend public schools. The court held, however, that to the extent Ed. Code, ß 48915, makes expulsions discretionary, it does not constitute a higher level of service related to an existing program, because provisions recognizing discretion to suspend or expel students were set forth in statutes predating 1975, when ß 48915 was first enacted. Even if any of the hearing procedures set forth in Ed. Code, ß 48918, and applicable to mandatory and discretionary and mandatory expulsions under Ed. Code, ß 48915, constitute a higher level of service, the statute does not trigger any right to reimbursement. The hearing procedures of Ed. Code, ß 48918, should be considered to have been adopted to implement a federal due process mandate and hence are nonreimbursable under Cal. Const., art. XIII B, ß 6, and Gov. Code, ß 17556, subd. (c). (Opinion by George, C. J., expressing the unanimous view of the court.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension or Expulsion of Student.--Ed. Code, ß 48915, insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a higher level of service under Cal. Const., art. XIII B, ß 6, and imposes a reimbursable state mandate for all resulting hearing costs--even those costs attributable to procedures required by federal law. [*861]

(2) State of California ß 11--Fiscal Matters--Nonreimbursable State Mandate--No Higher Level of Service--Discretionary Suspension or Expulsion of Student--Hearing Procedures Excepted From Reimbursement as Federal Mandate.--No hearing costs incurred in carrying out expulsions that are discretionary under Ed. Code, ß 48915--including costs related to hearing procedures claimed to exceed the requirements of federal law--are reimbursable. To the extent that statute makes expulsions discretionary, it does not reflect a new program or a higher level of service related to an existing program. Moreover, even if the hearing procedures set forth in Ed. Code, ß 48918, constitute a new program or higher level of service, the statute does not trigger any right to reimbursement, because the hearing provisions that assertedly exceed federal requirements are merely incidental to fundamental federal due process requirements and the added costs of such procedures are de minimis. Such hearing provisions should be treated, for purposes of ruling upon a request for reimbursement, as part of the nonreimbursable underlying federal mandate and not as a state mandate.

[7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, ß 549; 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, ß 123A.]

(3) Schools ß 61--Students--Suspension or Expulsion--Expulsion Hearing Mandated.--In identifying the right to a hearing, Ed. Code, ß 48918, subd. (a), declares that a student is entitled to an expulsion hearing within 30 days after the school principal determines that the student has committed an act warranting expulsion. In practical effect, this means that whenever a school principal makes such a determination and recommends to the school board that a student be expelled, an expulsion hearing is mandated.

(4) Schools ß 61--Parents and Students--Suspension or Expulsion--Mandatory and Discretionary Expulsion.--Discrete subdivisions of Ed. Code, ß 48915, address circumstances in which a principal must recommend to the school board that a student be expelled, and circumstances in which a principal may recommend that a student be expelled.

(5) State of California ß 11--Fiscal Matters--Reimbursable State Mandate.--Procedures governing the constitutional requirement of reimbursement under Cal. Const., art. XIII B, ß 6, are set forth in Gov. Code, ß 17500 et seq. The Commission on State Mandates (Gov. Code, ß 17525) is charged with the responsibility of hearing and deciding, subject to judicial review by an administrative writ of mandate, claims for reimbursement made by local governments or school districts. (Gov. [*862] Code, ß 17551.) Gov. Code, ß 17561, subd. (a), provides that the state shall reimburse each school district for all costs mandated by the state, as defined in Gov. Code, ß 17514. Section 17514, in turn, defines costs mandated by the state to mean, in relevant part, any increased costs which a school district is required to incur as a result of any statute which mandates a new program or higher level of service of an existing program within the meaning of Cal. Const., art. XIII B, ß 6. Finally, Gov. Code, ß 17556, sets forth circumstances in which there shall be no reimbursement, including,

Received
August 26, 2011
Commission on
State Mandates

under Gov. Code, ß 17556, subd. (c), circumstances in which the statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

(6) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--New Program or Higher Level of Service--Alternative Tests.--The requirement for increased or higher level of service under Cal. Const., art. XIII B, ß 6, is directed to state mandated increases in the services provided by local agencies in existing programs. The Constitution's phrase "new program or higher level of service" refers to either of two alternatives--(1) programs that carry out the governmental function of providing services to the public, or (2) laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

(7) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--Increase in Costs.--Simply because a state law or order may increase the costs borne by local government in providing services does not necessarily establish that the law or order constitutes an increased or higher level of the resulting service to the public under Cal. Const., art. XIII B, ß 6, and Gov. Code, ß 17514.

(8) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--Increase in Level or Quality of Governmental Services Provided.--A reimbursable higher level of service concerning an existing program exists when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided.

(9) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion for Student Firearm Possession.--The statutory requirements of Ed. Code, ß 48915--immediate suspension and mandatory recommendation of expulsion for students who possess a firearm, and the limitation [*863] upon the ensuing options of the school board (expulsion or referral)--provide a "higher level of service" to the public under the commonly understood sense of that term: (i) the requirements are new in comparison with the preexisting scheme; and (ii) the requirements were intended to provide an enhanced service to the public--safer schools for the vast majority of students.

(10) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion for Student Firearm Possession.--Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public. The mandatory suspension and expulsion recommendation requirements of Ed. Code, ß 48915, together with restrictions placed upon a district's resolution of such a case, constitute an increased or higher level of service to the public under Cal. Const., art. XIII B, ß 6, and the implementing statutes.

(11) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion of Student--State Requires School District to Incur Costs of an Expulsion Hearing.--In the absence of the operation of Ed. Code, ß 48915's mandatory provision (specifically, compulsory immediate suspension and a mandatory expulsion recommendation), a school district would not automatically incur the due process hearing costs that are mandated by federal law and codified in Ed. Code, ß 48918. Instead, a district would incur such hearing costs only if a school principal first were to exercise discretion to recommend expulsion. Accordingly, in its mandatory aspect, Ed. Code, ß 48915, appears to constitute a state mandate in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.

(12) Schools ß 61--Parents and Students--Suspension or Expulsion--Expulsion Hearings--Not Federal Mandate.--Ed. Code, ß 48918, sets out requirements for expulsion hearings that must be held when a district seeks to expel a student--but neither ß 48918 nor federal law requires that any such expulsion recommendation be made in the first place. Section 48918 does not implement any federal mandate that school districts hold such hearings and incur such costs whenever a student is found in possession of a firearm. Accordingly, the so-called exception to reimbursement described in Gov. Code, ß 17556, subd. (c), is inapplicable in this context of a mandatory hearing. [*864]

(13) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension and Expulsion of Student--Hearing Costs Triggered by Mandatory Expulsion.--When it is state law (Ed. Code, ß 48915's mandatory expulsion provision), and not federal due process law, that requires a school district to take steps that in turn require it to incur hearing costs, the hearing costs incurred by a school district, triggered by the mandatory

Received
August 26, 2011
Commission on
State Mandates

provision of Ed. Code, ß 48915, do not constitute a nonreimbursable federal mandate. Under the statutes in effect through mid-1994, all such hearing costs--those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements--were, with respect to the mandatory expulsion provision of ß 48915, state mandated costs, fully reimbursable by the state.

(14) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--Higher Level of Service--Mandatory Suspension or Expulsion of Student.--All hearing costs triggered by Ed. Code, ß 48915's mandatory expulsion provision constitute reimbursable state mandated expenses under the statutes in effect through mid-1994. 20 U.S.C. ß 7151, or its predecessor, 20 U.S.C. ß 8921, may lead to a different conclusion when applied to versions of Ed. Code, ß 48915, effective in years 1995 and thereafter.

(15) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--New Program or Higher Level of Service--Discretionary Suspension or Expulsion of Student: Schools ß 61--Parents and Students--Discretionary Suspension or Expulsion--Cost of Proceedings Not Reimbursable.--The discretionary expulsion provision of Ed. Code, ß 48915, does not constitute a new program or higher level of service related to an existing program, under Cal. Const., art. XIII B, ß 6, because provisions recognizing discretion to suspend or expel students were set forth in statutes predating 1975, when the provision was first enacted.

(16) Schools ß 61--Parents and Students--Suspension or Expulsion--Hearing Procedures--Federal Due Process Mandate--Nonreimbursable State Mandate.--All hearing procedures set forth in Ed. Code, ß 48918, properly should be considered to have been adopted to implement a federal due process mandate, and hence all such hearing costs are nonreimbursable under Cal. Const., art. XIII B, ß 6, and Government Code ß 17557, subd. (c).

(17) State of California ß 11--Fiscal Matters--Reimbursable State Mandate--Implementation of Federal Law--Discretionary Suspension or [*865] **Expulsion of a Student: Schools ß 61--Parents and Students--Discretionary Suspension or Expulsion--Federal Mandate to Provide a Hearing.**--An initial discretionary decision to seek expulsion of a student in turn triggers a federal constitutional mandate to provide an expulsion hearing. The Legislature, in adopting specific statutory procedures under Ed. Code, ß 48918, to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. For purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Gov. Code, ß 17556, subd. (c).

(18) Schools ß 61--Parents and Students--Discretionary Suspension or Expulsion--Federal Due Process Requirements--Not Reimbursable As State Mandate.--All hearing costs incurred under Ed. Code, ß 48918, triggered by a school district's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under Gov. Code, ß 17556, subd. (c).

COUNSEL: Paul M. Starkey, Camille Shelton and Katherine A. Tokarski for Defendant and Appellant.

Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Pamela Smith-Steward, Chief Assistant Attorney General, Andrea Lynn Hoch, Assistant Attorney General, Louis R. Mauro and Susan R. Oie, Deputy Attorneys General, for Real Party in Interest and Appellant.

Jo Anne Sawyerknoll, Tad Seth Parzen, Jose A. Gonzales and Arthur M. Palkowitz for Plaintiff and Respondent.

Lozano Smith, Diana McDonough, Harold M. Freiman, Jan E. Tomsky and Gregory A. Floyd for California School Boards Association Education Legal Alliance as Amicus Curiae on behalf of Plaintiff and Respondent.

[*866] Steven M. Woodside, County Counsel (Sonoma) as Amicus Curiae on behalf of Plaintiff and Respondent.

JUDGES: George, C. J., expressing the unanimous view of the court.

OPINION BY: GEORGE [***467]

OPINION

[**591] **GEORGE, C. J.**--Article XIII B, section 6, of the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse

Received
August 26, 2011
Commission on
State Mandates

such local government for the costs of such program or increased level of service ... ." [1] (Hereafter article XIII B, section 6.)

1 The provision continues: "except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [∂] (a) Legislative mandates requested by the local agency affected; [∂] (b) Legislation defining a new crime or changing an existing definition of a crime; or [∂] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." (Cal. Const., art. XIII B, ß 6.)

Plaintiff San Diego Unified School District (District), like all other public school districts in the state, is, and was at the time relevant in this proceeding, governed by statutes that regulate the expulsion of students. (Ed. Code, ß 48900 et seq.) Whenever an expulsion recommendation is made (and before a student may be expelled), the District is required by Education Code section 48918 to afford the student a hearing with various procedural protections--including notice of the hearing and the right to representation by [***468] counsel, preparation of findings of fact, notices related to any expulsion and the right of appeal, and preparation of a hearing record. Providing these procedural protections requires the District to expend funds, for which the District asserts a right to reimbursement from the state pursuant to article XIII B, section 6, and implementing legislation, Government Code section 17500 et seq.

We granted review to consider two questions: (1) Are the hearing costs incurred as a result of the *mandatory* actions related to expulsions that are compelled by Education Code section 48915 fully reimbursable--or are those hearing costs reimbursable only to the extent such costs are attributable to hearing procedures that exceed the procedures required by federal law? (2) Are any hearing costs incurred in carrying out expulsions that are *discretionary* under Education Code section 48915 reimbursable? After we granted review and filed our decision in *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727 [134 Cal. Rptr. 2d 237, 68 P.3d 1203] (*Kern High School Dist.*), we added the following preliminary question to be addressed: Do the Education Code [*867] statutes cited above establish a "new program" or "higher level of service" under article XIII B, section 6? Finally, we also asked the parties to brief the effect of the decision in *Kern High School Dist., supra,* 30 Cal.4th 727, on the present case.

(1) We conclude that Education Code section 48915, insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a "higher level of service" under article XIII B, section 6, and imposes a reimbursable state mandate for *all* resulting hearing costs--even those costs attributable to procedures required by federal law. In this respect, we shall affirm the judgment of the Court of Appeal.

(2) We also conclude that *no* hearing costs incurred in carrying out those expulsions that are *discretionary* under Education Code section 48915--including costs related to hearing procedures claimed to exceed the requirements of federal law--are reimbursable. As we shall explain, to the extent that statute makes expulsions discretionary, it does not reflect a new program or a higher level of service related to an existing program. Moreover, even if the hearing *procedures* set forth in Education Code section *48918* constitute a new program or higher level of service, we conclude that *this* statute does not trigger any right to reimbursement, because the hearing provisions that assertedly exceed federal requirements are merely incidental to fundamental federal due process requirements and the added costs of such procedures are de minimis. For these reasons, we conclude such hearing provisions should be treated, for purposes of ruling upon a request for reimbursement, as part of the nonreimbursable underlying *federal* mandate and not as a state mandate. Accordingly, we shall reverse the judgment of the Court of Appeal insofar as it compels reimbursement [**592] of any costs incurred pursuant to discretionary expulsions.

I

A. *Education Code sections 48918 and 48915*

We first describe the relevant provisions of two statutes--Education Code sections 48918 and 48915--pertaining to the expulsion of students from public schools.

Education Code section 48918 specifies the right of a student to an expulsion hearing and sets forth procedures that a school district must [*868] follow when conducting [***469] such a hearing. (Stats. 1990, ch. 1231, ß 2, pp. 5136-5139.) [2]

2 For purposes of our present inquiry, Education Code, section 48918, at the time relevant here (mid-1993 through mid-1994) read essentially as it had for the prior decade, and as it has in the ensuing decade. That provision first was enacted in 1975 (see Stats. 1975, ch. 1253, ß 4, pp. 3277-3278) as Education Code, former section 10608. (This enactment apparently was a response to the United States Supreme Court's decision in *Goss v. Lopez* (1975) 419 U.S. 565, 581 [42 L. Ed. 2d 725, 95 S. Ct. 729] (*Goss*) [recog-

Received
August 26, 2011
Commission on
State Mandates

nizing due process requirements applicable to public school students who are suspended for more than 10 days].) The statute was renumbered as Education Code, former section 48914 in 1976 (Stats. 1976, ch. 1010, ß 2, pp. 3589-3590) and was substantially augmented in 1977 (Stats. 1977, ch. 965, ß 24, pp. 2924-2926). After relatively minor amendments in 1978 and 1982, the section in 1983 was substantially restated, further augmented, and renumbered as Education Code section 48918 (Stats. 1983, ch. 498, ß 91, p. 2118). Amendments adopted in 1984 and 1988 made relatively minor changes, and further similar modifications were made in 1990, reflecting the version of the statute here at issue. Subsequent amendments in 1995, 1996, 1998, and 1999 made further changes that are irrelevant to the issue presented in the case now before us.

(3) In identifying the right to a hearing, subdivision (a) of Education Code, section 48918, declares that a student is "entitled" to an expulsion hearing within 30 days after the school principal determines that the student has committed an act warranting expulsion. [3] *In practical effect, this means that whenever a school principal makes such a determination and recommends to the school board that a student be expelled, an expulsion hearing is mandated.* [4]

3 The provision reads: "The pupil shall be entitled to a hearing to determine whether the pupil should be expelled. An expulsion hearing shall be held within 30 schooldays after the date the principal or the superintendent of schools determines that the pupil has committed any of the acts enumerated in Section 48900 ... ." (Ed. Code, ß 48918, subd. (a).). (Subdivision (b) of section 48900 presently includes--as it did at the time relevant here--the offense of possession of a firearm.)

4 Of course, if a student does not invoke his or her entitlement to such a hearing, and instead waives the right to such a hearing, the hearing need not be held.

In specifying the substantive and procedural requirements for such an expulsion hearing, Education Code section 48918 sets forth rules and procedures, some of which, the parties agree, codify requirements of federal due process and some of which may exceed those requirements. [5] These rules and procedures govern, among other things, notice of a hearing and the right to representation by counsel, preparation of findings of fact, notices related to the expulsion and the right of appeal, and preparation of a hearing record. (See ß 48918, subds. (a) through former subd. (j), currently subd. (k).)

5 See *Goss, supra,* 419 U.S. 565, 581; *Gonzales v. McEuen* (C.D.Cal. 1977) 435 F. Supp. 460, 466-467 (concluding that former Education Code section 10608 [current ß 48918] met federal due process requirements pertaining to expulsions from public schools); 7 Witkin, Summary of California Law (9th ed. 1988), Constitutional Law, section 549, page 754 (noting that Education Code section 48918 and related legislation were enacted in response to the decision in *Goss*).

[*869] **(4)** The second statute at issue in this matter is Education Code section 48915. Discrete subdivisions of this statute address circumstances in which a principal *must* recommend to the school board that a student be expelled, and circumstances in which a principal *may* recommend that a student be expelled.

First, there is what the parties characterize as the "mandatory expulsion provision," Education Code section 48915, former subdivision (b). As it read during the time relevant in this proceeding (mid-1993 [***470] through mid-1994), this subdivision (1) compelled a school principal to *immediately suspend* any [**593] student found to be in possession of a firearm at school or at a school activity off school grounds, and (2) mandated a *recommendation* to the school district governing board that the student be *expelled*. The provision further required the governing board, upon confirmation of the student's knowing possession of a firearm, either to expel the student or "refer" him or her to an alternative education program housed at a separate school site. [6] (Compare this former provision with *current* Ed. Code, ß 48915, subds. (c), (d).) [7]

6 An earlier and similar, albeit broader, version of the provision--extending not only to possession of firearms but also to possession of explosives and certain knives--existed briefly and was effective for approximately two and one-half months in late 1993. That initial statute, former section 48915, subdivision (b) (as amended Stats. 1993, ch. 1255, ß 2, pp. 7284-7285), which was effective only from October 11, 1993 through December 31, 1993, provided: "The principal or the superintendent of schools shall immediately suspend pursuant to Section 48911, and shall recommend to the governing board the expulsion of, any pupil found to be in possession of a firearm, knife of no reasonable use to the pupil, or explosive at school or at a school activity off school grounds. The governing board shall expel that pupil or, as an alternative, refer that pupil to an alternative education program, whenever the principal or the superintendent of schools and the

Received
August 26, 2011
Commission on
State Mandates

governing board confirm that: [∂] (1) The pupil was in knowing possession of the firearm, knife, or explosive. [∂] (2) Possession of the firearm, knife of no reasonable use to the pupil, or explosive was verified by an employee of the school district. [∂] (3) There was no reasonable cause for the pupil to be in possession of the firearm, knife, or explosive."

As subsequently amended by Statutes 1993, chapter 1256, section 2, pages 7286-7287, effective January 1, 1994, Education Code section 48915, former subdivision (b), read: "The principal or the superintendent of schools shall immediately suspend, pursuant to Section 48911, any pupil found to be in possession of a firearm at school or at a school activity off school grounds and shall recommend expulsion of that pupil to the governing board. The governing board shall expel that pupil or refer that pupil to a program of study that is appropriately prepared to accommodate students who exhibit discipline problems and is not provided at a comprehensive middle, junior, or senior high school or housed at the schoolsite attended by the pupil at the time the expulsion was recommended to the school board, whenever the principal or superintendent of schools and the governing board confirm the following: [∂] (1) The pupil was in knowing possession of the firearm. [∂] (2) An employee of the school district verifies the pupil's possession of the firearm."

7 The current subdivisions of Education Code section 48915 set forth a list of mandatory expulsion conduct broader than that set forth in former subdivision (b), and require a school board both to *expel and refer* to other institutions all students found to have committed such conduct. The present subdivisions read: "(c) The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds: [∂] (1) Possessing, selling, or otherwise furnishing a firearm. This subdivision does not apply to an act of possessing a firearm if the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district. [∂] (2) Brandishing a knife at another person. [∂] (3) Unlawfully selling a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code. [∂] (4) Committing or attempting to commit a sexual assault as defined in subdivision (n) of Section 48900 or committing a sexual battery as defined in subdivision (n) of Section 48900. [∂] (5) Possession of an explosive. [∂] (d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c), and shall refer that pupil to a program of study that meets all of the following conditions: [∂] (1) Is appropriately prepared to accommodate pupils who exhibit discipline problems. [∂] (2) Is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school. [∂] (3) Is not housed at the schoolsite attended by the pupil at the time of suspension." (Stats. 2001, ch. 116 ß 1.)

[*870] [***471] This provision, as it read at the time relevant here, did not mandate expulsion per se [8]--but it *did* require immediate suspension followed by a mandatory expulsion recommendation (and it provided that a student found by the governing board to have possessed [**594] a firearm would be removed from the school site by limiting disposition to either expulsion or "referral" to an alternative school). Moreover, as noted above, whenever expulsion is recommended a student has a right to an expulsion hearing. Accordingly, it is appropriate to characterize the former provision as *mandating* immediate suspension, a recommendation of expulsion, *and hence, an expulsion hearing*. For convenience, we accept the parties' description of this aspect of Education Code section 48915 as constituting a "mandatory expulsion provision."

8 As the Department of Finance observed in an August 22, 1994, communication to the Commission on State Mandates in this matter, "nothing in [Education Code section 48915] ... requires a district governing board or a county board of education to expel a pupil," and even "unauthorized and knowing possession of a firearm, does not result in mandated expulsion. Section 48915 subdivision (b) provides for the choice of the governing board to either expel the pupil in possession of a firearm, or refer the pupil to an alternative program of study. ..."

The second aspect of Education Code section 48915 relevant here consists of what we shall call the "discretionary expulsion provision." (*Id*., former subd. (c), subsequently subd. (d), currently subd. (e).) During the period relevant in this proceeding (as well as currently), this subdivision of Education Code section 48915 recognized that a principal possesses *discretion* to recommend that a student be expelled for specified conduct other than fire-

Received
August 26, 2011
Commission on
State Mandates

arm possession (conduct such as damaging or stealing school property or private property, using or selling illicit drugs, receiving stolen property, possessing tobacco or drug paraphernalia, or engaging in disruptive behavior). The former provision (like the current provision) further specified that the school district governing board "may" order a student expelled upon finding that the [*871] student, while at school or at a school activity off school grounds, engaged in such conduct. [9]

9 Education Code, section 48915, former subdivision (c) (as amended Stats. 1992, ch. 909, ß 3, p. 4226; amended and redesignated as former subd. (d) by Stats. 1993, ch. 1255, ß 2, pp. 7284-7285; further amended Stats. 1993, ch. 1256, ß 2, p. 7287, and Stats. 1994, ch. 1198, ß 7, p. 7271) provided, at the time relevant here: "Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to subdivision (d) of Section 48918, the governing board *may* order a pupil expelled upon finding that the pupil violated subdivision (f), (g), (h), (i), (j), (k), or (l) of Section 48900, or Section 48900.2 or 48900.3, and either of the following: [∂] (1) That other means of correction are not feasible or have repeatedly failed to bring about proper conduct. [∂] (2) That due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others." (Italics added.)

At the time relevant here, subdivisions (f) through (l) of Education Code section 48900 (as amended Stats. 1992, ch. 909, ß 1, pp. 4224-4225; Stats. 1994, ch. 1198, ß 5, pp. 7269-7270) provided: "A pupil shall *not* be suspended from school or recommended for expulsion *unless* the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has: [∂] ... [∂] (f) Caused or attempted to cause damage to school property or private property. [∂] (g) Stolen or attempted to steal school property or private property. [∂] (h) Possessed or used tobacco, or any products containing tobacco or nicotine products ... . However, this section does not prohibit use or possession by a pupil of his or her own prescription products. [∂] (i) Committed an obscene act or engaged in habitual profanity or vulgarity. [∂] (j) Had unlawful possession of, or unlawfully offered, arranged, or negotiated to sell any drug paraphernalia, as defined in Section 11014.5 of the Health and Safety Code. [∂] (k) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties. [∂] (l) Knowingly received stolen school property or private property." (Italics added.)

At the time relevant here, Education Code, section 48900.2 (Stats. 1992, ch. 909, ß 2, p. 4225) provided: "In addition to the reasons specified in Section 48900, a pupil may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment as defined in Section 212.5. [∂] For the purposes of this chapter, the conduct described in Section 212.5 must be considered by a reasonable person of the same gender as the victim to be sufficiently severe or pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive educational environment. This section shall not apply to pupils enrolled in kindergarten and grades 1 to 3, inclusive."

Education Code, section 48900.3 (Stats. 1994, ch. 1198, ß 6, p. 7270), at the time relevant here, provided: "In addition to the reasons specified in Sections 48900 and 48900.2, a pupil in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has caused, attempted to cause, threatened to cause, or participated in an act of, hate violence, as defined in subdivision (e) of [former] Section 33032.5 [current section 233]."

In addition, Education Code, section 48900.4 (Stats. 1994, ch. 1017, ß 1, p. 6196) provided, at the time relevant here: "In addition to the grounds specified in Sections 48900 and 48900.2, a pupil enrolled in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has intentionally engaged in harassment, threats, or intimidation, directed against a pupil or group of pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of that pupil or group of pupils by creating an intimidating or hostile educational environment."

(All of these current provisions--sections 48915, subdivision (e), 48900, 48900.2, 48900.3,

Received
August 26, 2011
Commission on
State Mandates

and 48900.4--read today substantially the same as they did at the time relevant in the present case.)

[*872] [**595]

[***472] B. *Proceedings Under Government Code section 17500 et seq.*

(5) Procedures governing the constitutional requirement of reimbursement under article XIII B, section 6, are set forth in Government Code section 17500 et seq. The Commission on State Mandates (Commission) (Gov. Code, ß 17525) is charged with the responsibility of hearing and deciding, subject to judicial review by an administrative writ of mandate, claims for reimbursement made by local governments or school districts. (Gov. Code, ß 17551.) Government Code section 17561, subdivision (a), provides that the "state shall reimburse each ... school district for all 'costs mandated by the state,' as defined in section 17514." Government Code section 17514, in turn, defines "costs mandated by the state" to mean, in relevant part, "any increased costs which a ... school district is required to incur ... as a result of any statute ... which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution." Finally, Government Code section 17556 sets forth circumstances in which there shall be no reimbursement, including, under subdivision (c), circumstances in which "[t]he statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or [***473] executive order mandates costs which exceed the mandate in that federal law or regulation."

In March 1994, the District filed a "test claim" with the Commission, asserting entitlement to reimbursement for the costs of hearings provided with respect to both categories of cases described above--that is, those hearings triggered by mandatory expulsion recommendations, and those hearings resulting from discretionary expulsion recommendations. (See Gov. Code, ß 17521; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-333 [285 Cal. Rptr. 66, 814 P.2d 1308].) [10] The District sought reimbursement for costs incurred between July 1, 1993, and June 30, 1994, under statutes effective through the latter date.

10 As observed by amicus curiae California School Boards Association, a "test claim is like a class action--the Commission's decision applies to all school districts in the state. If the district is successful, the Commission goes to the Legislature to fund the statewide costs of the mandate for that year and annually thereafter as long as the statute is in effect."

In August 1998, after holding hearings on the District's claim (as amended in April 1995, to reflect legislation that became effective in 1994), the Commission issued a "Corrected Statement of Decision" in which it determined that Education Code section 48915's requirement of suspension and a [*873] mandatory recommendation of expulsion for firearm possession constituted a "new program or higher level of service," and found that because costs related to some of the resulting hearing provisions set forth in Education Code section 48918 (primarily various notice, right of inspection, and recording provisions) exceeded the requirements of federal due process, those additional hearing costs constituted reimbursable state-mandated costs. [11] As to the vast majority of the remaining [**596] hearing procedures triggered by Education Code section 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession--for example, procedures governing such matters as the hearing itself and the board's decision; a statement of facts and charges; notice of the right to representation by counsel; written findings; recording of the hearing; and the making of a record of the expulsion--the Commission found that those procedures were enacted to comply with federal due process requirements, and hence fell within the exception set forth in Government Code section 17556, subdivision (c), and [***474] did not impose a reimbursable state mandate. The Commission further found that with respect to Education Code section 48915's *discretionary* expulsions, there was no right to reimbursement for costs incurred in holding expulsion hearings, because such expulsions do not constitute a new program or higher level of service, and in any event such expulsions are not *mandated* by the state, but instead represent a choice by the principal and the school board.

11 The Commission concluded that the costs incurred in providing the following state-mandated procedures under Education Code section 48918 exceeded federal due process requirements, and were reimbursable: (i) adoption of rules and regulations pertaining to pupil expulsions (ß 48918, first par. & *passim*); (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing (ß 48918, subd. (b)); (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing (ß 48918, subd. (b)); (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period

Received
August 26, 2011
Commission on
State Mandates

of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion (ß 48918, former subd. (i), currently subd. (j)); (v) maintenance of a record of each expulsion, including the cause thereof (ß 48918, former subd. (j), currently subd. (k)); and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls) (ß 48918, former subd. (j), currently subd. (k)).

In October 1999, the District brought this proceeding for an administrative writ of mandate challenging the Commission's decision. The trial court issued a writ commanding the Commission to render a new decision finding (i) all costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations are reimbursable, and (ii) hearing costs associated with discretionary expulsions are reimbursable to the limited [*874] extent that required hearing procedures exceed federal due process mandates. The Commission (defendant) and the Department of Finance (real party in interest, hereafter Department) appealed, and the Court of Appeal affirmed the judgment rendered by the trial court.

II

A. *Costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations*

1. *"New program or higher level of service"?*

We address first the issue that we asked the parties to brief: Does Education Code section 48915, former subdivision (b) (current subds. (c) & (d)), which mandated suspension and an expulsion recommendation for those students who possess a firearm at school or at a school activity off school grounds, and which also required a school board, if it found the charge proved, either to expel or to "refer" such a student to an alternative educational program housed at a separate school site, constitute a "new program or higher level of service" under article XIII B, section 6 of the state Constitution, and under Government Code section 17514?

We addressed the meaning of the Constitution's phrase "new program or higher level of service" in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal. Rptr. 38, 729 P.2d 202] (*County of Los Angeles*). That case concerned whether local governments are entitled to reimbursement for costs incurred in complying with legislation that required local agencies to provide the same increased level of workers' compensation benefits for their employees as private individuals or organizations were required to provide for their employees. We stated:

(6) "Looking at the language of [article XIIIB, section 6] then, it seems clear that by itself the term 'higher level of service' is meaningless. It must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.' But the term 'program' itself is not defined in article XIIIB. What programs [**597] then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term--[(1)] programs that carry out the governmental function of providing services to the public, or [(2)] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents [***475] and entities in the state." (*County of Los Angeles, supra,* 43 Cal.3d 46, 56.)

[*875] We continued in *County of Los Angeles*: "The concern which prompted the inclusion of section 6 in article XIIIB was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIIIB explained section 6 to the voters: 'Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them.' (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase 'to force programs on local governments' confirms that *the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities*." (*County of Los Angeles, supra,* 43 Cal.3d 46, 56-57, italics added.)

It was clear in *County of Los Angeles, supra,* 43 Cal.3d 46, that the law at issue did not meet the second test for a "program or higher level of service"--it did not implement a state policy by imposing unique requirements upon local governments, but instead applied workers' compensation contribution rules generally to all employers in the state. Nor, we held, did the law requiring local agencies to shoulder a general increase in workers' compensation benefits amount to a reimbursa-

Received
August 26, 2011
Commission on
State Mandates

ble "program or higher level of service" under the first test described above. (*Id.*, at pp. 57-58.) The law increased the cost of employing public servants, but it did not in any tangible manner increase the level of service provided by those employees to the public.

We reaffirmed and applied the test set out in *County of Los Angeles, supra,* 43 Cal.3d 46, in *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830 [244 Cal. Rptr. 677, 750 P.2d 318] (*Lucia Mar*). The state law at issue in *Lucia Mar* required local school districts to pay a portion of the cost of educating pupils in *state* schools for the severely handicapped--costs that the state previously had paid in full.

We determined that the contributions called for under the law were used to fund a "program" within both definitions of that term set forth in *County of Los Angeles.* (*Lucia Mar, supra,* 44 Cal.3d 830, 835.) We stated: "[T]he education of handicapped children is clearly a governmental function providing a service to the public, and the [state law] imposes requirements on school districts not imposed on all the state's residents. Nor can there be any doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are [*876] concerned, since at the time [the state law] became effective they were not required to contribute to the education of students from their districts at such schools. [∂] ... To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIIIB. ... Section 6 was intended to preclude the state from shifting to local agencies the [***476] financial responsibility for providing public services in view of ... restrictions on the taxing and spending power of the local entities." (*Lucia Mar, supra,* 44 Cal.3d 830, 835-836; see also *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 98 [61 Cal. Rptr. 2d [**598] 134, 931 P.2d 312] [legislation excluding indigents from Medi-Cal coverage transferred obligation for such costs from state to counties, and constituted a reimbursable "new program or higher level of service"].)

We again applied the alternative tests set forth in *County of Los Angeles, supra*, 43 Cal.3d 46, in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 [266 Cal. Rptr. 139, 785 P.2d 522] (*City of Sacramento*). In that case we considered whether a state law implementing federal "incentives" that encouraged states to extend unemployment insurance coverage to all public employees constituted a program or higher level of service under article XIII B, section 6. We concluded that it did not because, as in *County of Los Angeles,* (1) providing unemployment compensation protection to a city's own employees was not a service to the public; and (2) the statute did not apply uniquely to local governments--indeed, the same requirements previously had been applied to most employers, and extension of the requirement (by eliminating a prior exemption for local governments) merely placed local government employers on the same footing as most private employers. (*City of Sacramento, supra,* 50 Cal.3d at pp. 67-68.)

Subsequently, the Court of Appeal in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 [75 Cal. Rptr. 2d 754] (*City of Richmond*), following *County of Los Angeles, supra*, 43 Cal.3d 46, and *City of Sacramento, supra,* 50 Cal.3d 51, concluded that requiring local governments to provide death benefits to local safety officers, under both the Public Employees' Retirement System (PERS) and the workers' compensation system, did not constitute a higher level of service to the public. The Court of Appeal arrived at that determination even though--as might also have been argued in *County of Los Angeles* and *City of Sacramento*--such benefits may "generate a higher quality of local safety officers" and thereby, in a general and indirect sense, provide the public with a "higher level of service" by its employees. (*City of Richmond, supra*, 64 Cal.App.4th 1190, 1195.)

(7) Viewed together, these cases (*County of Los Angeles, supra*, 43 Cal.3d 46, *City of Sacramento, supra,* 50 Cal.3d 51, and *City of Richmond,* [*877] *supra,* 64 Cal.App.4th 1190) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [12]

12 Indeed, as the court in *City of Richmond, supra,* 64 Cal.App.4th 1190, observed: "Increasing the cost of providing services cannot be equated with requiring an increased level of service under [article XIII B,] section 6 ... . A higher cost to the local government for compensating its employees is not the same as a higher cost of providing [an increased level of] services to the public." (*Id*., at p. 1196; accord, *City of Anaheim v. State of California* (1987) 189 Cal. App. 3d 1478, 1484 [235 Cal. Rptr. 101] [temporary increase in PERS benefit to retired employees, resulting in higher contribution rate by local government, does not constitute a higher level of service to the public].)

[***477] **(8)** By contrast, Courts of Appeal have found a reimbursable "higher level of service" concerning an existing "program" when a state law or executive order mandates not merely some change that increases

Received
August 26, 2011
Commission on
State Mandates

the cost of providing services, but an increase in the actual level or quality of governmental services provided. In *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal. App. 3d 521, 537-538 [234 Cal. Rptr. 795] (*Carmel Valley*), for example, an executive order required that county firefighters be provided with protective clothing and safety equipment. Because this increased safety equipment apparently was designed to result in more effective fire protection, the mandate evidently was intended to produce a higher level of service to the public, thereby satisfying the first alternative test set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56. Similarly, in *Long Beach Unified School District v. State of California* (1990) 225 Cal. App. 3d 155, 173 [**599] [275 Cal. Rptr. 449] (*Long Beach*), an executive order required school districts to take specific steps to measure and address racial segregation in local public schools. The appellate court held that this constituted a "higher level of service" to the extent the order's requirements exceeded federal constitutional and case law requirements by mandating school districts to undertake defined remedial actions and measures that were merely advisory under prior governing law.

The District and the Commission assert that the "mandatory" aspect of Education Code section 48915, insofar as it compels suspension and mandates an expulsion recommendation for firearm possession (and thereafter restricts the board's options to expulsion or referral to an off-site alternative school), carries out a governmental function of providing services to the public and hence constitutes an increased or higher level of service concerning an existing program under the first alternative test of *County of Los Angeles, supra*, 43 Cal.3d 46, 56. They argue, in essence, that the present matter is more analogous to the latter cases (*Carmel Valley, supra,* 190 [*878] Cal. App. 3d 521, and *Long Beach, supra,* 225 Cal. App. 3d 155)--both of which involved measures designed to increase the level of governmental service provided to the public--than to the former cases (*County of Los Angeles, supra*, 43 Cal.3d 46, *City of Sacramento, supra,* 50 Cal.3d 51, and *City of Richmond, supra*, 64 Cal.App.4th 1190)--in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased. As we shall explain, we agree with the District and the Commission.

(9) The statutory requirements here at issue--immediate suspension and mandatory recommendation of expulsion for students who possess a firearm, and the limitation upon the ensuing options of the school board (expulsion or referral)--reasonably are viewed as providing a "higher level of service" to the public under the commonly understood sense of that term: (i) the requirements are new in comparison with the preexisting scheme in view of the circumstance that they did not exist prior to the enactment of Statutes of 1993, chapters 1255 (Assem. Bill No. 342 (1993-1994 Reg. Sess.) (Assembly Bill No. 342)) and 1256 (Senate Bill [***478] No. 1198 (1993-1994 Reg. Sess.) (Senate Bill No. 1198)); and (ii) the requirements were intended to provide an enhanced service to the public--*safer schools for the vast majority of students* (that is, those who are not expelled or referred to other school sites). In other words, the legislation was premised upon the idea that by removing potentially violent students from the general school population, the safety of those students who remain thereby is increased. (See, e.g., Stats. 1993, ch. 1255, ß 4, pp. 7285-7286 ["In order to ensure public safety on school campuses ... it is necessary that this act take effect immediately"]; Sen. Com. on Education (Apr. 28, 1993), Analysis of Assem. Bill No. 342, p. 2 [noting legislative purpose to enhance public safety]; see also Assem. Com. on Education (July 14, 1993), Analysis of Sen. Bill No. 1198, p. 1 [noting legislative purpose to remove those who possess firearms from the general school population by increasing the frequency of expulsion for such conduct].)

In challenging this conclusion, the Department relies upon *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal. App. 3d 1538 [263 Cal. Rptr. 351] (*Department of Industrial Relations*). In that case, the state enacted enhanced statewide safety regulations that governed all public and private elevators, and thereafter the County of Los Angeles sought reimbursement for the costs of complying with the new regulations. The Court of Appeal found that the regulations constituted neither a new program nor a higher level of service concerning an existing program under either of the two alternative tests set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56. The court concluded that the elevator regulations did not meet the first alternative test, because the regulations did not carry out a governmental function of providing services to the public; the court found instead that [*879] "[p]roviding elevators equipped with fire and earthquake [**600] safety features simply is not a 'government function of providing services to the public.' " (*Department of Industrial Relations, supra,* 214 Cal. App. 3d at p. 1546.) Moreover, the court found, the second ("uniqueness") test was not met--the regulation applied to all elevators, not only those owned or operated by local governments.

(10) The Department asserts that *Department of Industrial Relations, supra,* 214 Cal. App. 3d 1538, is analogous, and argues that the "service" afforded by mandatory suspensions followed by a required expulsion recommendation, etc., is "not qualitatively different from the safety regulations at issue in [*Department of Industrial Relations*]. School districts carrying out such expul-

Received
August 26, 2011
Commission on
State Mandates

sions are not providing a service to the public ... ." We disagree. Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public. Moreover, here, unlike the situation in *Department of Industrial Relations,* the law implementing this state policy applies uniquely to local public schools. We conclude that *Department of Industrial Relations* does not conflict with the conclusion that the mandatory suspension and expulsion recommendation requirements, together with restrictions placed upon a district's resolution of such a case, constitute an increased or higher level of service to the public under the constitutional provision and the implementing statutes.

Of course, even if, as we have concluded above, a statute effectuates an increased or higher level of governmental service to the public concerning an existing program, this "does not necessarily lead to the conclusion that the program is a *state* mandate [***479] under California Constitution, article XIIIB, section 6." (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818 [38 Cal. Rptr. 2d 304], italics added (*County of Los Angeles II*).) We turn to the question whether the hearing costs at issue, flowing from compulsory suspensions and mandatory expulsion recommendations, are mandated by the state.

2. *Are the hearing costs state mandated?*

As noted above, a compulsory suspension and a mandatory recommendation of expulsion under Education Code section 48915 in turn trigger a mandatory expulsion hearing. All parties agree that any such resulting expulsion hearing must comply with basic federal due process requirements, such as notice of charges, a right to representation by counsel, an explanation of the evidence supporting the charges, and an opportunity to call and cross-examine witnesses and to present evidence. (See *ante*, fn. 5.) But as also noted above, article XIII B, section 6, and the implementing statutes [*880] (Gov. Code, ß 17500 et seq.), by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs. The Commission and the Department assert that this circumstance raises the question: Do all or some of a district's costs in complying with the mandatory expulsion provision of Education Code section 48915 constitute a nonreimbursable *federal* mandate?

(11) In the absence of the operation of Education Code section 48915's mandatory provision (specifically, compulsory immediate suspension and a mandatory expulsion recommendation), a school district would not automatically incur the due process hearing costs that are mandated by federal law pursuant to *Goss, supra,* 419 U.S. 565, and related cases, and codified in Education Code section 48918. Instead, a district would incur such hearing costs only if a school principal first were to exercise discretion to recommend expulsion. Accordingly, in its mandatory aspect, Education Code section 48915 appears to constitute a state mandate, in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.

The Department and the Commission agree to a point, but argue that a district's costs incurred in complying with this state mandate are reimbursable only if, and to the extent that, hearing procedures set forth in Education Code section 48918 exceed the requirements of federal due process. In support, they rely upon Government Code section 17556, [**601] which--in setting forth circumstances in which the Commission shall *not* find costs to be mandated by the state--provides that "[t]he commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: [∂] ... [∂] (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation." [13]

13 Government Code section 17556 reads in full: "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: [∂] (a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph. [∂] (b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts. [∂] (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation. [∂] (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or in-

Received
August 26, 2011
Commission on
State Mandates

creased level of service. [∂] (e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, 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 imposed duties which were expressly included in a ballot measure approved by the voters in a statewide 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."

[*881] [***480] **(12)** We agree with the District and the Court of Appeal below that, as applied to the present case, it cannot be said that Education Code section 48915's mandatory expulsion provision "*implemented a federal law or regulation*." (Italics added.) Education Code section 48915, at the time relevant here, did not implement any federal law; as explained below, federal law did not *then* mandate an expulsion recommendation--or expulsion--for firearm possession. [14] Moreover, although the Department argues that in this context Government Code section 17556, subdivision (c)'s phrase "the statute" should be viewed as referring not to Education Code section 48915's mandatory expulsion recommendation requirement, but instead to the mandatory due process hearing under Education Code section 48918 that is triggered by such an expulsion recommendation, it still cannot be said that section 48918 itself required the District to incur any costs. As noted above, Education Code section 48918 sets out requirements for expulsion hearings that must be held when a district seeks to expel a student--but neither section 48918 nor federal law requires that any such expulsion recommendation be made in the first place, and hence section 48918 does not implement any federal mandate that school districts hold such hearings and incur such costs whenever a student is found in possession of a firearm. Accordingly, we conclude that the so-called exception to reimbursement described in Government Code section 17556, subdivision (c), is inapplicable in this context.

14 Subsequent amendments to federal law may alter this conclusion with regard to future test claims concerning Education Code section 48915's mandatory expulsion provision--see *post*, pages 882-883.

(13) Because it is state law (Education Code section 48915's mandatory expulsion provision), and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows, contrary to the view of the Commission and the Department, that we cannot characterize *any* of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable). We conclude [**602] that under the statutes existing at the time of the test claim in this case (state legislation in effect through [***481] mid-1994), *all* such hearing costs--those designed to satisfy the minimum requirements of federal due process, and those that may exceed [*882] those requirements--are, with respect to the mandatory expulsion provision of section 48915, state-mandated costs, fully reimbursable by the state. [15]

15 In exhibit No. 1 to its claim, the District presented the declaration of a District official, estimating that in order to process "350 proposed expulsions" during the period spanning July 1, 1993, to June 30, 1994, the District would incur approximately $ 94,200 "in staffing and other costs"--yielding an average estimated cost of approximately $ 270 per hearing during the relevant period. It is unclear from the record how many of these 350 hearings would be triggered by Education Code section 48915's mandatory expulsion provision (and constitute state-mandated costs subject to reimbursement under article XIII B, section 6), and how many of these 350 hearings would be triggered by Education Code section 48915's discretionary provision (and, as explained *post*, in part II.B., constitute a nonreimbursable *federal* mandate).

We note that in the proceedings below, the Commission did not confine reimbursement only to those matters as to which the District on its own initiative would not have sought expulsion in the absence of the statutory requirement that it seek expulsion--and the Department has not raised that point in the trial court or on appeal.

Against this conclusion, the Department, in its supplemental briefing, offers a wholly new theory, not advanced in any of the proceedings below, in support of its belated claim that *all* hearing costs triggered by Education Code section 48915's mandatory expulsion provision are in fact nonreimbursable *federal* mandates, and not, as we have concluded above, reimbursable state mandates. As we shall explain, we reject the Department's contention, as applied to the test case here at issue (involving state statutes in effect through mid-1994).

The Department cites 20 United States Code section 7151, part of the federal No Child Left Behind Act of 2001, which provides, as relevant here: "Each State receiving Federal funds under any [subchapter of this

Received
August 26, 2011
Commission on
State Mandates

chapter] shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing." [16]

16 "Firearm," as defined in 18 United States Code section 921, includes guns and explosives.

The Department further asserts that more than $ 2.8 billion in federal funds under the No Child Left Behind Act are included "for local use" in the 2003-2004 state budget. (Cal. State Budget, 2003-2004, Budget Highlights, p. 4.) The Department argues that in light of the requirements set forth in 20 United States Code section 7151, and the amount of federal program funds at issue under the No Child Left Behind Act, the financial consequences to the state and to the school districts of failing to comply with 20 United States Code section 7151 are such that as a practical matter, Education Code section [*883] 48915's mandatory expulsion provision in reality constitutes an implementation of federal law, and hence resulting costs are nonreimbursable except to the extent they exceed the requirements of federal law. (See Gov. Code, ß 17556, subd. (c); see also *Kern High School Dist., supra*, 30 Cal.4th 727, 749-751; *City of Sacramento, supra*, 50 Cal.3d 51, 70-76.) Moreover, the Department asserts, to the extent school districts are [***482] compelled by federal law, through Education Code section 48915's mandatory expulsion provision, to hold hearings pursuant to section 48918 in cases of firearm possession on school grounds, under 20 United States Code section 7164 (defining prohibited uses of program funds), *all* costs of such hearings properly may be paid out of federal program funds, and hence we should "view the ... provision of program funding as satisfying, in advance, any reimbursement requirement." (*Kern High School Dist., supra,* 30 Cal.4th 727, 747.)

[**603] Although the Department asserts that this federal law and program existed at the time relevant in this matter (that is, through mid-1994), our review of the statutes and relevant history suggests otherwise. Title 20 of the United States Code, section 7151, and the remainder of the No Child Left Behind Act, became effective on January 8, 2002. The predecessor legislation cited by the Department--the Gun-Free Schools Act of 1994 (former 20 U.S.C. ß 8921(a)), although containing a substantially identical mandatory expulsion provision (*id*., ß 8921(b)(1)) [17]--was not effective until July 1, 1995 (108 Stat. 3518, ß 3). In turn, the predecessor legislation to *that* act cited by the Department, the Elementary and Secondary Education Act of 1965 (former 20 U.S.C. ß 6301 et seq.) as it existed at the time relevant here (July 1, 1993, through June 30, 1994)--contained no such mandatory expulsion provision. Accordingly, it appears that despite the Department's late discovery of 20 United States Code section 7151, at the time relevant here (regarding legislation in effect through mid-1994), neither 20 United States Code section 7151, nor either of its predecessors, compelled states to enact a law such as Education Code section 48915's mandatory expulsion provision. Therefore, we reject the Department's assertion that, during the time period at issue in this case, Education Code section 48915's mandatory expulsion provision constituted an implementation of a federal, rather than a state, mandate.

17 The prior law stated: "Except as provided in paragraph (3), each State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis." (Pub.L. No. 103-382, ß 14601(b)(1) (Oct. 20, 1994) 108 Stat. 3518.)

(14) Although we conclude that all hearing costs triggered by Education Code section 48915's mandatory expulsion provision constitute reimbursable state-mandated expenses under the statutes as they existed during the period [*884] covered by the District's present test claim, we do not foreclose the possibility that 20 United States Code section 7151 or its predecessor, 20 United States Code section 8921, may lead to a different conclusion when applied to versions of Education Code section 48915 effective in years 1995 and thereafter. Indeed, we note that at least one subsequent test claim that has been filed with the Commission may raise the federal statutory issue advanced by the Department. [18]

18 See Pupil Expulsions II (4th Amendment), CSM No. 01-TC-18 (filed June 3, 2002). This claim, filed by the San Juan Unified School District, asserts reimbursable state mandates with respect to, among numerous other statutes, Education Code section 48915, as amended effective in 2002.

B. *Costs associated with hearings triggered by discretionary expulsion recommendations*

Received
August 26, 2011
Commission on
State Mandates

We next consider whether reimbursement is required for the costs associated [***483] with hearings triggered under discretionary expulsion provisions. Again, we address first the issue that we asked the parties to brief: Does the discretionary expulsion provision of Education Code section 48915 (former subd. (c), thereafter subd. (d), currently subd. (e)), which, as noted above, recognized that a principal possesses *discretion* to recommend that a student be expelled for specified conduct other than firearm possession (conduct such as damaging or stealing property, using or selling illicit drugs, possessing tobacco or drug paraphernalia, etc.), and further specified that the school district governing board "may" order a student expelled upon finding that the student, while at school or at a school activity off school grounds, engaged in such conduct, constitute a "new program or higher level of service" under article XIII B, section 6 of the state Constitution, and under Government Code section 17514?

(15) We answer this question in the negative. The discretionary expulsion provision of Education Code section 48915 does not constitute a "new" program or higher level of service, because provisions recognizing discretion to suspend or expel were set forth in statutes predating 1975. (See Educ. Code, former ß 10601, Stats. 1959, ch. 2, ß 3, p. 860 [**604] [providing that a student may be suspended for good cause]; *id*., former ß 10602, Stats. 1970, ch. 102, ß 102, p. 159 [defining "good cause"]; *id*., former section 10601.6, Stats. 1972, ch. 164, ß 2, p. 384 [further defining "good cause"].) [19] Accordingly, the discretionary expulsion provision of Education Code section 48915 is not a "new" program under article XIII B, section 6, and the implementing statutes, [*885] nor does it reflect a higher level of service related to an existing program. (*County of Los Angeles, supra*, 43 Cal.3d 46, 56.)

19 As the Commission observed in its Corrected Statement of Decision in this matter: "The authorization for governing boards to expel pupils from school for inappropriate behaviors has been in existence since before 1975. The behaviors defined as inappropriate under current law, subdivisions (a) though (l) of section 48900, 48900.2, and 48900.3, meet prior laws' definitions of 'good cause' and 'misconduct' as reasons for expulsion." (Italics deleted.)

The District maintains, nevertheless, that once it elects to pursue expulsion, it is obligated to abide by the procedural hearing requirements of Education Code section 48918 and accordingly is mandated by that section to incur costs associated with such compliance. The District asserts that in this respect, *section 48918* constitutes a "new program or higher level of service" related to an existing program under article XIII B, section 6 and under Government Code section 17514. We shall assume for analysis that this is so. [20]

20 The requirements of Education Code section 48918 would appear to be "new" for purposes of the reimbursement provisions, in that they did not exist prior to 1975 and were enacted in that year and subsequently. (See *ante*, fn. 2.) The requirements also would appear to meet both alternative tests set forth in *County of Los Angeles, supra*, 43 Cal.3d 46, 56--that is, by implementing procedures that direct and guide the process of expulsion from public school, the statute appears to carry out a governmental function of providing services to public school students who face expulsion; or, it would seem, section 48918 constitutes a law that, to implement state policy, imposes unique requirements on local governments.

The District recognizes, of course, that under Government Code, section 17556, subdivision (c), it is not entitled to reimbursement to the extent Education Code section 48918 merely implements federal due process law, but the District argues that it has a right to reimbursement for its costs of complying with section 48918 *to* [***484] *the extent* those costs are attributable to hearing procedures that *exceed* federal due process requirements. (See Gov. Code, ß 17556, subd. (c).) The District asserts that its costs in complying with various notice, right of inspection, and recording requirements (see *ante*, fn. 11) fall into this category and are reimbursable.

The Department and the Commission argue in response that any right to reimbursement for hearing costs triggered by discretionary expulsions--even costs limited to those procedures that assertedly exceed federal due process hearing requirements--is foreclosed by virtue of the circumstance that when a school pursues a discretionary expulsion, it is not acting under compulsion of any law but instead is exercising a choice. In support, the Department and the Commission rely upon *Kern High School Dist., supra,* 30 Cal.4th 727, and *City of Merced v. State of California* (1984) 153 Cal. App. 3d 777 [200 Cal. Rptr. 642] (*City of Merced*).

In *Kern High School Dist., supra,* 30 Cal.4th 727, school districts asserted that costs incurred in complying with statutory notice and agenda requirements for committee meetings concerning various state and federally funded educational programs constituted a reimbursable state mandate, because once [*886] school districts *elected* to participate in the underlying state and federal programs, the districts had no option but to hold program-related committee meetings and abide by the challenged notice and agenda requirements. (*Id*., at p. 742.)

Received
August 26, 2011
Commission on
State Mandates

We rejected the school districts' position, reasoning in part that because the districts' participation in the underlying programs was voluntary, the notice and agenda costs incurred as a result of that voluntary participation were not the product of legal compulsion and did not constitute a reimbursable state mandate on that basis. (*Id*., [**605] at p. 745.) [21]

21 We also proceeded to hold that in any event, because the school districts were free to use program funds to pay for the challenged increased costs, the districts had, in practical effect, already been given funds by the Legislature to cover the challenged costs. (*Kern High School Dist*., *supra*, 30 Cal.4th at pp. 748-754.)

In reaching that conclusion in *Kern High School Dist., supra,* 30 Cal.4th 727, we discussed *City of Merced, supra,* 153 Cal. App. 3d 777. In that case, the city wished either to purchase or to condemn, pursuant to its eminent domain authority, certain privately owned real property. The city elected to proceed by eminent domain, under which it was required by then recent legislation (Code Civ. Proc., ß 1263.510) to compensate the property owner for loss of "business goodwill." The city so compensated the property owner and then sought reimbursement from the state, arguing that the new statutory requirement that it compensate for business goodwill amounted to a reimbursable state mandate. (*City of Merced, supra,* 153 Cal. App. 3d at p. 780.) The Court of Appeal concluded that the city's increased costs flowing from its election to condemn the property did not constitute a reimbursable state mandate. (*Id*., at pp. 781-783.) The court reasoned: "[W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is* [***485] *exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost*." (*Id*., at p. 783, italics added.)

Summarizing this aspect of *City of Merced, supra,* 153 Cal. App. 3d 777, in *Kern High School Dist.*, *supra*, 30 Cal.4th 727, we stated: "[T]he core point articulated by the court in *City of Merced* is 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 of funds--even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice*." (*Kern High School Dist*., at p. 742, italics added.)

The Department and the Commission argue that in the present case the District, like the claimants in *Kern High School Dist.*, errs by focusing upon [*887] the final result--a school district's legal obligation to comply with statutory hearing procedures--rather than focusing upon whether the school district has been *compelled* to put itself in the position in which such a hearing (with resulting costs) is required.

The District and amici curiae on its behalf (consistently with the opinion of the Court of Appeal below) argue that the holding of *City of Merced, supra,* 153 Cal. App. 3d 777, should not be extended to apply to situations beyond the context presented in that case and in *Kern High School Dist., supra,* 30 Cal.4th 727. The District and amici curiae note that although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program. [22]

22 Indeed, the Court of Appeal below suggested that the present case is distinguishable from *City of Merced, supra,* 153 Cal. App. 3d 777, in light of article I, section 28, subdivision (c), of the state Constitution. That constitutional subdivision, part of Proposition 8 (known as the Victims' Bill of Rights initiative, adopted by the voters at the Primary Election in June 1982), states: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." The Court of Appeal below concluded: "In light of a school district's constitutional obligation to provide a safe educational environment ... , the incurring of [hearing] costs [under Education Code section 48918] cannot properly be viewed as a nonreimbursable 'downstream' consequence of a decision to [seek to] expel a student under [Education Code section 48915's discretionary provision] for damaging or stealing school or private property, using or selling illicit drugs, receiving stolen property, engaging in sexual harassment or hate violence, or committing other specified acts of misconduct ... that warrant such expulsion."

Building upon this theme, amicus curiae on behalf of the District, California School Boards Association, argues that based upon article I, section 28, subdivision (c), of the state Constitution, together with Education Code section 48200 et seq. and article IX, section 5 of the state Constitution (establishing and implementing a right of public education), *no* expulsion recommendation is "truly discretionary." Indeed, amicus curiae ar-

Received
August 26, 2011
Commission on
State Mandates

> gues, school districts may not, "either as a matter of law or policy, realistically choose to [forgo] expelling [a] student [who commits one of the acts, other than firearm possession, referenced in Education Code section 48915's discretionary provision], because doing so would fail to meet that school district's legal obligations to provide a safe, secure and peaceful learning environment for the other students."

[**606] Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement [***486] 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 [*888] 6 of the state Constitution and Government Code section 17514 [23] and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, 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 and equipment. (*Id*., at pp. 537-538.) 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, supra*, 153 Cal. App. 3d 777, 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.

> 23 As we observed in *Kern High School Dist., supra,* 30 Cal.4th 727, 751-752, "article XIII B, section 6's 'purpose 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.' "

(16) In any event, we have determined that we need not address in this case the problems posed by such an application of the rule articulated in *City of Merced,* because this aspect of the present case can be resolved on an alternative basis. As we shall explain, we conclude, regarding the reimbursement claim that we face presently, that *all* hearing procedures set forth in Education Code section 48918 properly should be considered to have been adopted to implement a federal due process mandate, and hence that all such hearing costs are nonreimbursable under article XIII B, section 6, and Government Code section 17557, subdivision (c).

In this regard, we find the decision in *County of Los Angeles II, supra,* 32 Cal.App.4th 805, to be instructive. That case concerned Penal Code section 987.9, which requires counties to provide indigent criminal defendants with defense funds for ancillary investigation services related to capital trials and certain other trials, and further provides related procedural protections--namely, the confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request. The county in that case asserted that funds expended under the statute constituted reimbursable [**607] state mandates. The Court of Appeal disagreed, finding instead that the Penal Code section merely implements the requirements of federal constitutional law, and that "even in the [*889] absence of [Penal Code] section 987.9, ... [***487] counties would be responsible for providing ancillary services under the constitutional guarantees of due process ... and [under] the Sixth Amendment ... ." (32 Cal.App.4th at p. 815.) Moreover, the Court of Appeal concluded, the procedural protections that the Legislature had built into the statute--requirements of confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request--were merely incidental to the federal rights codified by the statute, and their "financial impact" was de minimis. (*Id*., at p. 817, fn. 7.) Accordingly, the Court of Appeal concluded, the Penal Code section, in its entirety--that is, *even those incidental aspects of the statute that articulated specific procedures, not expressly set forth in federal law, for the filing and resolution of requests for funds*--constituted an implementation of federal law, and hence those costs were nonreimbursable under article XIII B, section 6.

(17) We conclude that the same reasoning applies in the present setting, concerning the District's request for reimbursement for procedural hearing costs triggered by its discretionary decision to seek expulsion. As in *County of Los Angeles II, supra,* 32 Cal.App.4th 805, the initial discretionary decision (in the former case, to file charges and prosecute a crime; in the present case, to

Received
August 26, 2011
Commission on
State Mandates

seek expulsion) in turn triggers a federal constitutional mandate (in the former case, to provide ancillary defense services; in the present case, to provide an expulsion hearing). In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *County of Los Angeles II* concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code, section 17556, subdivision (c). We reach the same conclusion here.

Indeed, to proceed otherwise in the context of a reimbursement claim would produce impractical and detrimental consequences. The present case demonstrates the point. The record reveals that in the extended proceedings before the Commission, the parties spent numerous hours producing voluminous pages of analysis directed toward determining whether various provisions of Education Code section 48918 exceeded federal due process requirements. That task below was complicated by the circumstance that this area of federal due process law is not well developed. The Commission, which is not a judicial body, did as best it could and concluded that in certain [*890] respects the various provisions (as observed *ante*, footnote 11, predominantly concerning notice, right of inspection, and recording requirements) "exceeded" the requirements of federal due process.

Even for an appellate court, it would be difficult and problematic in this setting to categorize the various notice, right of inspection, and recording requirements here at issue as falling either within or without the general federal due process mandate. The difficulty results not only from the circumstance that, as noted, the case law [***488] in the area of due process procedures concerning expulsion matters is relatively undeveloped, but also from the circumstance that when such an issue is raised in an action for reimbursement, as opposed to its being raised in litigation challenging an actual expulsion on the ground of allegedly inadequate hearing procedures, the issue inevitably is presented in the abstract, without any factual context that might help frame the legal issue. In such circumstances, courts are--and should be-- [**608] wary of venturing pronouncements (especially concerning matters of constitutional law).

In light of these considerations, we agree with the conclusion reached by the Court of Appeal in *County of Los Angeles II, supra,* 32 Cal.App.4th 805: for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law--and whose costs are, in context, de minimis--should be treated as part and parcel of the underlying federal mandate.

(18) Applying that approach to the case now before us, we conclude there can be no doubt that the assertedly "excessive due process" aspects of Education Code section 48918 for which the District seeks reimbursement in connection with hearings triggered by discretionary expulsions (see *ante*, footnote 11--primarily, as noted, various notice, right of inspection, and recording rules) fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost. Accordingly, for purposes of the District's reimbursement claim, all hearing costs incurred under Education Code section 48918, triggered by the District's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under Government Code section 17556, subdivision (c). [24]

24 We do not foreclose the possibility that a local government might, under appropriate facts, demonstrate that a state law, though codifying federal requirements in part, also imposes more than "incidental" or "de minimis" expenses in excess of those demanded by federal law, and thus gives rise to a reimbursable state mandate to that extent.

[*891] **III**

The judgment of the Court of Appeal is affirmed insofar as it provides for full reimbursement of all costs related to hearings triggered by the mandatory expulsion provision of Education Code section 48915. The judgment of the Court of Appeal is reversed insofar as it provides for reimbursement of any costs related to hearings triggered by the discretionary provision of section 48915. All parties shall bear their own costs on appeal.

Kennard, J., Baxter, J., Werdegar, J., Chin, J., Brown, J., and Moreno, J., concurred.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 10

Received
August 26, 2011
Commission on
State Mandates

UNITED STATES CODE SERVICE
Copyright © 2011 Matthew Bender & Company,Inc.
a member of the LexisNexis Group (TM)
All rights reserved.

*** CURRENT THROUGH PL 112-28, APPROVED 8/12/2011 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
RESEARCH AND RELATED PROGRAMS

Go to the United States Code Service Archive Directory

33 USCS ß 1251

ß 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act [33 USCS ßß 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 USCS ßß 1251 et seq.]--
(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;
(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and
(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act [33 USCS ßß 1251 et seq.] to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act [33 USCS ßß 1251 et seq.]. It is the policy of Congress that the States manage the construction grant program under this Act [33 USCS ßß 1251 et seq.] and implement the permit programs under sections 402 and 404 of this Act [33 USCS ßß 1342, 1344]. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries. It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines

Received
August 26, 2011
Commission on
State Mandates

appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer 33 USCS ßß 1251 et seq. Except as otherwise expressly provided in this Act [33 USCS ßß 1251 et seq.], the Administrator of the Environmental Protection Agency (hereinafter in this Act called "Administrator") shall administer this Act [33 USCS ßß 1251 et seq.].

(e) Public participation in development, revision, and enforcement of any regulation, etc. Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act [33 USCS ßß 1251 et seq.] shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing 33 USCS ßß 1251 et seq. It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act [33 USCS ßß 1251 et seq.] shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water. It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act [33 USCS ßß 1251 et seq.]. It is the further policy of Congress that nothing in this Act [33 USCS ßß 1251 et seq.] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

HISTORY:

(June 30, 1948, ch 758, Title I, ß 101, as added, Oct. 18, 1972, P.L. 92-500, ß 2, 86 Stat. 816; Dec. 27, 1977, P.L. 95-217, ßß 5(a), 26(b), 91 Stat. 1567, 1575; Feb. 4, 1987, P.L. 100-4, Title III, ß 316(b), 101 Stat. 60.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The Federal Water Pollution Control Act, contained in this chapter, was originally enacted by Act June 30, 1948, ch 758, 62 Stat. 1155, and amended by Acts July 17, 1952, ch 927, 66 Stat. 755; July 9, 1956, ch 518, 70 Stat. 498; June 25, 1959, P.L. 86-70, 73 Stat. 141; July 12, 1960, P.L. 86-624, 74 Stat. 411; July 20, 1961, P.L. 87-88, 75 Stat. 204; Oct. 2, 1965, P.L. 89-234, 79 Stat. 903; Nov. 3, 1966, P.L. 89-753, 80 Stat. 1246; April 3, 1970, P.L. 91-224, 84 Stat. 91; Dec. 31, 1970, P.L. 91-611, 84 Stat. 1818; July 9, 1971, P.L. 92-50, 85 Stat. 124; Oct. 13, 1971, P.L. 92-137, 85 Stat. 379; March 1, 1972, P.L. 92-40, 86 Stat. 47. It formerly appeared as 33 USC ßß 466 et seq. and then was transferred to 33 USC ßß 1151 et seq. The Act is shown as having been added by Act Oct. 18, 1972, without reference to intervening amendments because of the extensive amendment, reorganization and expansion of the Act's provisions by Act Oct. 18, 1972.

Amendments:

1977. Act Dec. 27, 1977, in subsec. (b), inserted "It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act."; and added subsec. (g).

Received
August 26, 2011
Commission on
State Mandates

1987. Act Feb. 4, 1987, in subsec. (a), in para. (5), deleted "and" following "each State;", in para. (6), substituted "; and" for the concluding period, and added para. (7).

Short titles:

Act June 30, 1948, ch 758, Title V, ß 519 [518], as added Oct. 18, 1972, P.L. 92-500, ß 2, 86 Stat. 896 and amended Feb. 4, 1987, P.L. 100-4, Title V, ß 506, in part, 101 Stat. 76; Dec. 27, 1977, P.L. 95-217, ß 2, 91 Stat. 1566 provided: "This Act [33 USCS ßß 1251 et seq.] may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act).".

Act Oct. 18, 1972, P.L. 92-500, ß 1, 86 Stat 816, provided: "This Act [33 USCS ßß 1251 et seq. generally; for full classification, consult USCS Tables volumes] may be cited as the 'Federal Water Pollution Control Act Amendments of 1972'.".

Act Dec. 27, 1977, P.L. 95-217, ß 1, 91 Stat. 1566, provided: "This Act may be cited as the 'Clean Water Act of 1977'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 29, 1981, P.L. 97-117, ß 1, 95 Stat. 1623, provided: "This Act may be cited as the 'Municipal Wastewater Treatment Construction Grant Amendments of 1981'.". For full classification of such Act, consult USCS Tables volumes.

Act Feb. 4, 1987, P.L. 100-4, ß 1(a), 101 Stat. 7, provides: "This Act may be cited as the 'Water Quality Act of 1987'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 14, 1988, P.L. 100-653, Title X, ß 1001, 102 Stat. 3835, provides: "This title may be cited as the 'Massachusetts Bay Protection Act of 1988'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 16, 1990, P.L. 101-596, ß 1, 104 Stat. 3000, provides: "This Act may be cited as the 'Great Lakes Critical Programs Act of 1990'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 16, 1990, P.L. 101-596, Title II, ß 201, 104 Stat. 3004, provides: "This part [Title II of Act Nov. 16, 1990, P.L. 101-596] may be cited as the 'Long Island Sound Improvement Act of 1990'.". For full classification of such Title, consult USCS Tables volumes.

Act Nov. 16, 1990, P.L. 101-596, Title III, ß 301, 104 Stat. 3006, provides: "This title may be cited as the 'Lake Champlain Special Designation Act of 1990'.". For full classification of such title, consult USCS Tables volumes.

Act Oct. 31, 1994, P.L. 103-431, ß 1, 108 Stat. 4396, provides: "This Act may be cited as the 'Ocean Pollution Reduction Act'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 10, 2000, P.L. 106-284, ß 1, 114 Stat. 870, provides: "This Act may be cited as the 'Beaches Environmental Assessment and Coastal Health Act of 2000'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 7, 2000, P.L. 106-457, Title II, ß 201, 114 Stat. 1967, provides: "This title [amending 33 USCS ß 1267 and appearing in part as a note to such section] may be cited as the 'Chesapeake Bay Restoration Act of 2000'.".

Act Nov. 7, 2000, P.L. 106-457, Title IV, ß 401, 114 Stat. 1973, provides: "This title [amending 33 USCS ß 1269] may be cited as the 'Long Island Sound Restoration Act'.".

Act Nov. 7, 2000, P.L. 106-457, Title V, ß 501, 114 Stat. 1973, provides: "This title [adding 33 USCS ß 1273] may be cited as the 'Lake Pontchartrain Basin Restoration Act of 2000'.".

Act Nov. 7, 2000, P.L. 106-457, Title VI, ß 601, 114 Stat. 1975, provides: "This title [adding 33 USCS ß 1300] may be cited as the 'Alternative Water Sources Act of 2000'.".

Act Nov. 27, 2002, P.L. 107-303, ß 1(a), 116 Stat. 2355, provides: "This Act may be cited as the 'Great Lakes and Lake Champlain Act of 2002'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 27, 2002, P.L. 107-303, Title I, ß 101, 116 Stat. 2355, provides: "This title [amending 33 USCS ß 1268 and appearing in part as 33 USCS ß 1271a] may be cited as the 'Great Lakes Legacy Act of 2002'.".

Act Nov. 27, 2002, P.L. 107-303, Title II, ß 201, 116 Stat. 2358, provides: "This title [amending 33 USCS ß 1270] may be cited as the 'Daniel Patrick Moynihan Lake Champlain Basin Program Act of 2002'.".

Act July 30, 2008, P.L. 110-288, ß 1, 122 Stat. 2650, provides: "This Act [amending 33 USCS ßß 1322, 1342, and 1362] may be cited as the 'Clean Boating Act of 2008'.".

Act Oct. 8, 2008, P.L. 110-365, ß 1, 122 Stat. 4021, provides: "This Act [amending 33 USCS ßß 1268 and 1271a] may be cited as the 'Great Lakes Legacy Reauthorization Act of 2008'.".

Received
August 26, 2011
Commission on
State Mandates

Other provisions:

Separability of provisions. Act June 30, 1948, ch 758, Title V, ß 512, as added Oct. 18, 1972, P.L. 92-500, ß 2, 86 Stat. 894, provided: "If any provision of this Act [33 USCS ßß 1251 et seq.], or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, [33 USCS ßß 1251 et seq.] shall not be affected thereby.".

Ex. Or. No. 11548 superseded. Ex. Or. No. 11548 of July 20, 1970, 35 Fed. Reg. 11677, formerly located at 33 USC ß 1151 note, which related to the delegation of Presidential functions, was superseded by Ex. Or. No. 11735 of Aug. 3, 1973, 38 Fed. Reg. 21243, located at 33 USCS ß 1321 note.

Act Oct. 18, 1972; savings provisions. Act Oct. 18, 1972, P.L. 92-500, ß 4, 86 Stat. 896, provided:

"(a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act shall abate by reason of the taking effect of the amendment made by section 2 of this Act [adding 33 USCS ßß 1251 et seq.]. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

"(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act, and pertaining to any functions, powers, requirements, and duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act, shall continue in full force and effect after the date of enactment of this Act until modified or rescinded in accordance with the Federal Water Pollution Control Act as amended by this Act [33 USCS ßß 1251 et seq.].

"(c) The Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act shall remain applicable to all grants made from funds authorized for the fiscal year ending June 30, 1972, and prior fiscal years, including any increases in the monetary amount of any such grant which may be paid from authorizations for fiscal years beginning after June 30, 1972, except as specifically otherwise provided in Section 202 of the Federal Water Pollution Control Act as amended by this Act [33 USCS ß 1282] and in subsection (c) of section 3 of this Act [note to this section].".

Oversight study. Act Oct. 18, 1972, P.L. 92-500, ß 5, 86 Stat. 897, provided that the Comptroller General of the United States should conduct a study and review of the research, pilot, and demonstration programs related to prevention and control of water pollution, including waste treatment and disposal techniques, which are conducted, supported, or assisted by any agency of the Federal Government pursuant to any Federal law or regulation and assess conflicts between, and the coordination and efficacy of, such programs, and make a report to the Congress thereon by October 1, 1973.

International trade study. Act Oct. 18, 1972, P.L. 92-500, ß 6, 86 Stat. 898, provided:

"(a) The Secretary of Commerce, in cooperation with other interested Federal agencies and with representatives of industry and the public, shall undertake immediately an investigation and study to determine--

"(1) the extent to which pollution abatement and control programs will be imposed on, or voluntarily undertaken by, United States manufacturers in the near future and the probable short- and long-range effects of the costs of such programs (computed to the greatest extent practicable on an industry-by-industry basis) on (A) the production costs of such domestic manufacturers, and (B) the market prices of the goods produced by them;

"(2) the probable extent to which pollution abatement and control programs will be implemented in foreign industrial nations in the near future and the extent to which the production costs (computed to the greatest extent practicable on an industry-by-industry basis) of foreign manufacturers will be affected by the costs of such programs;

"(3) the probable competitive advantage which any article manufactured in a foreign nation will likely have in relation to a comparable article made in the United States if that foreign nation--

"(A) does not require its manufacturers to implement pollution abatement and control programs,

"(B) requires a lesser degree of pollution abatement and control in its programs, or

"(C) in any way reimburses or otherwise subsidizes its manufacturers for the costs of such program;

"(4) alternative means by which any competitive advantage accruing to the products of any foreign nation as a result of any factor described in paragraph (3) may be (A) accurately and quickly determined, and (B) equalized, for example, by the imposition of a surcharge or duty, on a foreign product in an amount necessary to compensate for such advantage; and

"(5) the impact, if any, which the imposition of a compensating tariff of other equalizing measure may have in encouraging foreign nations to implement pollution and abatement control programs.

Received
August 26, 2011
Commission on
State Mandates

"(b) The Secretary shall make an initial report to the President and Congress within six months after the date of enactment of this section of the results of the study and investigation carried out pursuant to this section and shall make additional reports thereafter at such times as he deems appropriate taking into account the development of relevant data, but not less than once every twelve months.".

International agreements. Act Oct. 18, 1972, P.L. 92-500, ß 7, 86 Stat. 898, provided: "The President shall undertake to enter into international agreements to apply uniform standards of performance for the control of the discharge and emission of pollutants from new sources, uniform controls over the discharge and emission of toxic pollutants, and uniform controls over the discharge of pollutants into the ocean. For this purpose the President shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums.".

National policies and goal study. Act Oct. 18, 1972, P.L. 92-500, ß 10, 86 Stat. 899, provided that the President should make a full and complete investigation and study of all of the national policies and goals established by law for the purpose of determining what the relationship should be between these policies and goals, taking into account the resources of the Nation and report the results of such investigation and study together with his recommendations to Congress not later than two years after the date of enactment of this Oct. 18, 1972.

Efficiency study. Act Oct. 18, 1972, P.L. 92-500, ß 11, 86 Stat. 899, provided that the President should conduct a full and complete investigation and study of ways and means of utilizing in the most effective manner all of the various resources, facilities, and personnel of the Federal Government in order most efficiently to carry out the objective of 33 USCS ßß 1251 et seq. should utilize in conducting such investigation and study, the General Accounting Office, and should report the results of such investigation and study together with his recommendations to Congress not later than two hundred and seventy days after Oct. 18, 1972.

Sex discrimination. Act Oct. 18, 1972, P.L. 92-500, ß 13, 86 Stat. 903, provided: "No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance under this Act [33 USCS ßß 1251 et seq., generally; for full classification, consult USCS Tables volumes], the Federal Water Pollution Control Act [33 USCS ßß 1251 et seq.], or the Environmental Financing Act [33 USCS ß 1281 note]. This section shall be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964 [42 USCS ßß 2000d et seq.]. However, this remedy is not exclusive and will not prejudice or cut off any other legal remedies available to a discriminatee.".

Delegation of functions to Secretary of State respecting the negotiation of international agreements relating to the enhancement of the environment. Ex. Or. No. 11742 of Oct. 23, 1973, 38 Fed. Reg. 29457 provided: "Under and by virtue of the authority vested in me by section 301 of title 3 of the United States Code and as President of the United States, I hereby authorize and empower the Secretary of State, in coordination with the Council on Environmental Quality, the Environmental Protection Agency, and other appropriate Federal agencies, to perform, without the approval, ratification, or other action of the President, the functions vested in the President by section 7 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 898) [note to this section] with respect to international agreements relating to the enhancement of the environment.".

Seafood processing study; submittal of results to Congress not later than January 1, 1979. Act Dec. 27, 1977, P.L. 95-217, ß 74, 91 Stat. 1609, provided that the Administrator of the Environmental Protection Agency should conduct a study to examine the geographical, hydrological, and biological characteristics of marine waters to determine the effects of seafood processes which dispose of untreated natural wastes into such waters, and, additionally, to examine technologies which may be used in such processes to facilitate the use of the nutrients in these wastes or to reduce the discharge of such wastes into the marine environment and submit the result of such study to Congress not later than January 1, 1979.

Prevention, control, and abatement of environmental pollution at Federal facilities. See Ex. Or. No. 12088 of Oct. 13, 1978, 43 Fed. Reg. 47707, located at 42 USCS ß 4321 note, for provisions relating to the prevention, control, and abatement of environmental pollution at Federal facilities.

Standards. For provisions relating to the responsibility of the head of each Executive agency for compliance with applicable pollution control standards, see Ex. Or. No. 12088 of Oct. 13, 1978, 43 Fed. Reg. 47707, which appears as 42 USCS ß 4321 note.

Definition of Administrator. Act Feb. 4, 1987, P.L. 100-4, ß 1(d), 101 Stat. 8, provides: "For purposes of this Act, the term 'Administrator' means the Administrator of the Environmental Protection Agency.".

Limitation on payments. Act Feb. 4, 1987, P.L. 100-4, ß 2, 101 Stat. 8, provides: "No payments may be made under this Act except to the extent provided in advance in appropriation Acts.".

Received
August 26, 2011
Commission on
State Mandates

National shellfish indicator program. Act Oct. 29, 1992, P.L. 102-567, Title III, ß 308, 106 Stat. 4286; Nov. 10, 1998, P.L. 105-362, Title II, ß 201(b), 112 Stat. 3282, provides:

"(a) Establishment of a research program. The Secretary of Commerce, in cooperation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, shall establish and administer a 5-year national shellfish research program (hereafter in this section referred to as the 'Program') for the purpose of improving existing classification systems for shellfish growing waters using the latest technological advancements in microbiology and epidemiological methods. Within 12 months after the date of enactment of this Act, the Secretary of Commerce, in cooperation with the advisory committee established under subsection (b) and the Consortium, shall develop a comprehensive 5-year plan for the Program which shall at a minimum provide for--

"(1) environmental assessment of commercial shellfish growing areas in the United States, including an evaluation of the relationships between indicators of fecal contamination and human enteric pathogens;

"(2) the evaluation of such relationships with respect to potential health hazards associated with human consumption of shellfish;

"(3) a comparison of the current microbiological methods used for evaluating indicator bacteria and human enteric pathogens in shellfish and shellfish growing waters with new technological methods designed for this purpose;

"(4) the evaluation of current and projected systems for human sewage treatment in eliminating viruses and other human enteric pathogens which accumulate in shellfish;

"(5) the design of epidemiological studies to relate microbiological data, sanitary survey data, and human shellfish consumption data to actual hazards to health associated with such consumption; and

"(6) recommendations for revising Federal shellfish standards and improving the capabilities of Federal and State agencies to effectively manage shellfish and ensure the safety of shellfish intended for human consumption.

"(b) Advisory committee.

(1) For the purpose of providing oversight of the Program on a continuing basis, an advisory committee (hereafter in this section referred to as the 'Committee') shall be established under a memorandum of understanding between the Interstate Shellfish Sanitation Conference and the National Marine Fisheries Service.

"(2) The Committee shall--

"(A) identify priorities for achieving the purpose of the Program;

"(B) review and recommend approval or disapproval of Program work plans and plans of operation;

"(C) review and comment on all subcontracts and grants to be awarded under the Program;

"(D) receive and review progress reports from the Consortium and program subcontractors and grantees; and

"(E) provide such other advice on the Program as is appropriate.

"(3) The Committee shall consist of at least ten members and shall include--

"(A) three members representing agencies having authority under State law to regulate the shellfish industry, of whom one shall represent each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions;

"(B) three members representing persons engaged in the shellfish industry in the Atlantic, Pacific, and Gulf Mexico shellfish growing regions (who shall be appointed from among at least six recommendations by the industry members of the Interstate Shellfish Sanitation Conference executive Board), of whom one shall represent the shellfish industry in each region;

"(C) three members, of whom one shall represent each of the following Federal agencies: the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, and the Food and Drug Administration; and

"(D) one member representing the Shellfish Institute of North America.

"(4) The Chairman of the Committee shall be selected from among the Committee members described in paragraph (3)(A).

"(5) The Committee shall establish and maintain a subcommittee of scientific experts to provide advice, assistance, and information relevant to research funded under the Program, except that no individual who is awarded, or whose application is being considered for, a grant or subcontract under the program may serve on such subcommittee. The membership of the subcommittee shall, to the extent practicable, be regionally balanced with experts who have scientific knowledge concerning each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions. Scientists from the National Academy of Sciences and appropriate Federal agencies (including the National Oceanic and Atmospheric Administration, Food and Drug Administration, Centers for Disease Control, National Institutes of Health, Environmental Protection Agency, and National Science Foundation) shall be considered for membership on the subcommittee.

"(6) Members of the Committee and its scientific subcommittee established under this subsection shall not be paid for serving on the Committee or subcommittee but shall receive travel expenses as authorized by section 5703 of title 5, United States Code.

Received
August 26, 2011
Commission on
State Mandates

"(c) Contract with consortium. Within 30 days after the date of enactment of this Act, the Secretary of Commerce shall seek to enter into a cooperative agreement or contract with the Consortium under which the Consortium will--
"(1) be the academic administrative organization and fiscal agent for the Program;
"(2) award and administer such grants and subcontracts as are approved by the Committee under subsection (b);
"(3) develop and implement a scientific peer review process for evaluating grant and subcontractor applications prior to review by the Committee;
"(4) in cooperation with the Secretary of Commerce and the Committee, procure the services of a scientific project director;
"(5) develop and submit budgets, progress reports, work plans, and plans of operation for the Program to the Secretary of Commerce and the Committee; and
"(6) make available to the Committee such staff, information, and assistance as the Committee may reasonably require to carry out its activities.
"(d) Authorization of appropriations.
(1) Of the sums authorized under section 4(a) of the National Oceanic and Atmospheric Administration Marine Fisheries Program Authorization Act (Public Law 98-210; 97 Stat. 1409) [unclassified], there are authorized to be appropriated to the Secretary of Commerce $ 5,200,000 for each of the fiscal years 1993 through 1997 for carrying out the Program. Of the amounts appropriated pursuant to this authorization, not more than 5 percent of such appropriation may be used for administrative purposes by the National Oceanic and Atmospheric Administration. The remaining 95 percent of such appropriation shall be used to meet the administrative and scientific objectives of the Program.
"(2) The Interstate Shellfish Sanitation Conference shall not administer appropriations authorized under this section, but may be reimbursed from such appropriations for its expenses in arranging for travel, meetings, workshops, or conferences necessary to carry out the Program.
"(e) Definitions. As used in this section, the term--
"(1) 'Consortium' means the Louisiana Universities Marine Consortium; and
"(2) 'shellfish' means any species of oyster, clam, or mussel that is harvested for human consumption.".

NOTES:

Code of Federal Regulations:
Environmental Protection Agency--Nonprocurement debarment and suspension, 2 CFR 1532.10 et seq.
Natural Resources Conservation Service, Department of Agriculture--Rural clean water program, 7 CFR 634.1 et seq.
Environmental Protection Agency--Cross-media electronic reporting, 40 CFR 3.1 et seq.
Environmental Protection Agency--Nondiscrimination in programs receiving Federal assistance from the Environmental Protection Agency, 40 CFR 7.10 et seq.
Environmental Protection Agency--OMB approvals under the Paperwork Reduction Act, 40 CFR 9.1 et seq.
Environmental Protection Agency--Public participation in programs under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act, 40 CFR 25.1 et seq.
Environmental Protection Agency--Uniform administrative requirements for grants and agreements with institutions of higher education, hospitals, and other non-profit organizations, 40 CFR 30.1 et seq.
Environmental Protection Agency--Uniform administrative requirements for grants and cooperative agreements to State and local governments, 40 CFR 31.1 et seq.
Environmental Protection Agency--New restrictions on lobbying, 40 CFR 34.100 et seq.
Environmental Protection Agency--Public hearings on effluent standards for toxic pollutants, 40 CFR 104.1 et seq.
Environmental Protection Agency--Employee protection hearings, 40 CFR 108.1 et seq.
Environmental Protection Agency--Oil pollution prevention, 40 CFR 112.1 et seq.
Environmental Protection Agency--Liability limits for small onshore storage facilities, 40 CFR 113.1 et seq.
Environmental Protection Agency--Designation of hazardous substances, 40 CFR 116.1 et seq.
Environmental Protection Agency--Determination of reportable quantities for hazardous substances, 40 CFR 117.1 et seq.
Environmental Protection Agency--EPA administered permit programs: The National Pollutant Discharge Elimination System, 40 CFR 122.1 et seq.
Environmental Protection Agency--State program requirements, 40 CFR 123.1 et seq.
Environmental Protection Agency--Procedures for decisionmaking, 40 CFR 124.1 et seq.
Environmental Protection Agency--Criteria and standards for the National Pollutant Discharge Elimination System, 40 CFR 125.1 et seq.

Received
August 26, 2011
Commission on
State Mandates

Environmental Protection Agency--Toxic pollutant effluent standards, 40 CFR 129.1 et seq.
Environmental Protection Agency--Water quality planning management, 40 CFR 130.0 et seq.
Environmental Protection Agency--Water quality standards, 40 CFR 131.1 et seq.
Environmental Protection Agency--Water quality guidance for the Great Lakes System, 40 CFR 132.1 et seq.
Environmental Protection Agency--Secondary treatment regulation, 40 CFR 133.100 et seq.
Environmental Protection Agency--Guidelines establishing test procedures for the analysis of pollutants, 40 CFR 136.1 et seq.
Environmental Protection Agency--Underground injection control program, 40 CFR 144.1 et seq.
Environmental Protection Agency--State UIC program requirements, 40 CFR 145.1 et seq.
Environmental Protection Agency--404 State program transfer regulations, 40 CFR 233.1 et seq.
Environmental Protection Agency--EPA administered permit programs: the hazardous waste permit program, 40 CFR 270.1 et seq.
Environmental Protection Agency--Requirements for authorization of State hazardous waste programs, 40 CFR 271.1 et seq.
Environmental Protection Agency--General provisions, 40 CFR 401.10 et seq.
Environmental Protection Agency--General pretreatment regulations for existing and new sources of pollution, 40 CFR 403.1 et seq.
Environmental Protection Agency--Dairy products processing point source category., 40 CFR 405.10 et seq.
Environmental Protection Agency--Grain mills point source category, 40 CFR 406.10 et seq.
Environmental Protection Agency--Canned and preserved fruits and vegetables processing point source category, 40 CFR 407.10 et seq.
Environmental Protection Agency--Canned and preserved seafood processing point source category, 40 CFR 408.10 et seq.
Environmental Protection Agency--Sugar processing point source category, 40 CFR 409.10 et seq.
Environmental Protection Agency--Cement manufacturing point source category, 40 CFR 411.10 et seq.
Environmental Protection Agency--Concentrated animal feeding operations (CAFO) point source category, 40 CFR 412.1 et seq.
Environmental Protection Agency--Electroplating point source category, 40 CFR 413.01 et seq.
Environmental Protection Agency--Soap and detergent manufacturing point source category, 40 CFR 417.10 et seq.
Environmental Protection Agency--Fertilizer manufacturing point source category, 40 CFR 418.10 et seq.
Environmental Protection Agency--Nonferrous metals manufacturing point source category, 40 CFR 421.1 et seq.
Environmental Protection Agency--Phosphate manufacturing point source category, 40 CFR 422.10 et seq.
Environmental Protection Agency--Steam electric power generating point source category, 40 CFR 423.10 et seq.
Environmental Protection Agency--Ferroalloy manufacturing point source category, 40 CFR 424.10 et seq.
Environmental Protection Agency--Glass manufacturing point source category, 40 CFR 426.10 et seq.
Environmental Protection Agency--Asbestos manufacturing point source category, 40 CFR 427.10 et seq.
Environmental Protection Agency--Rubber manufacturing point source category, 40 CFR 428.10 et seq.
Environmental Protection Agency--Meat products point source category, 40 CFR 432.1 et seq.
Environmental Protection Agency--Metal finishing point source category, 40 CFR 433.10 et seq.
Environmental Protection Agency--Coal mining point source category; BPT, BAT, BCT limitations and new source performance standards, 40 CFR 434.10 et seq.
Environmental Protection Agency--Mineral mining and processing point source category, 40 CFR 436.20 et seq.
Environmental Protection Agency--Effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources for the paving and roofing materials (tars and asphalt) point source category, 40 CFR 443.10 et seq.
Environmental Protection Agency--Paint formulating point source category, 40 CFR 446.10 et seq.
Environmental Protection Agency--Ink formulating point source category, 40 CFR 447.10 et seq.
Environmental Protection Agency--Construction and development point source category, 40 CFR 450.1 et seq.
Environmental Protection Agency--Concentrated aquatic animal production point source category, 40 CFR 451.1 et seq.
Environmental Protection Agency--Gum and wood chemicals manufacturing point source category, 40 CFR 454.10 et seq.
Environmental Protection Agency--Explosives manufacturing point source category, 40 CFR 457.10 et seq.
Environmental Protection Agency--Carbon black manufacturing point source category, 40 CFR 458.10 et seq.
Environmental Protection Agency--Photographic point source category, 40 CFR 459.10 et seq.

Received
August 26, 2011
Commission on
State Mandates

Environmental Protection Agency--Hospital point source category, 40 CFR 460.10 et seq.
Environmental Protection Agency--State sludge management program regulations, 40 CFR 501.1 et seq.
Environmental Protection Agency--Standards for the use or disposal of sewage sludge, 40 CFR 503.1 et seq.

Related Statutes & Rules:
Excavations and deposit of debris in navigable waters, 33 USCS ßß 403 through 407.
Definition of "navigable waters", 33 USCS ß 1362.
Congressional declaration of national environmental policy, 42 USCS ß 4321.
Solid waste disposal, 42 USCS ßß 6901 et seq.
Air pollution prevention and control, 42 USCS ßß 7401 et seq.
This section is referred to in 33 USCS ßß 1267, 1268, 1311, 1377.

Research Guide:

Federal Procedure:
1 Moore's Federal Practice (Matthew Bender 3d ed.), ch 2, One Form of Action ß 2.06.
10 Moore's Federal Practice (Matthew Bender 3d ed.), ch 54, Judgment; Costs ß 54.101.
29 Moore's Federal Practice (Matthew Bender 3d ed.), ch 707, Particular Admiralty Actions ß 707.06.
2 Civil Rights Actions (Matthew Bender), ch 7, Deprivation of Rights Under Color of State Law--General Principles (Civil Rights Act of 1871, 42 U.S.C. ß 1983) P 7.06.
1 Administrative Law (Matthew Bender), ch 3, Separation and Delegation of Powers ß 3.01.
4 Administrative Law (Matthew Bender), ch 22, Admissibility of Evidence ß 22.03.
6 Administrative Law (Matthew Bender), ch 53, Federal Grant Dispute Resolution ß 53.02.
6 Administrative Law (Matthew Bender), ch 54, Grant Dispute Resolution Procedures of Particular Agencies ß 54.06.
6 Fed Proc L Ed, Civil Rights ßß 11:286, 641.
11 Fed Proc L Ed, Environmental Protection ßß 32:49, 51.
11A Fed Proc L Ed, Environmental Protection ßß 32:755, 1005.
24A Fed Proc L Ed, Natural and Marine Resources ß 56:2059.
25 Fed Proc L Ed, Navigable Waters ß 57:405.

Am Jur:
2 Am Jur 2d, Admiralty ß 103.
9B Am Jur 2d, Bankruptcy ß 1978.
61B Am Jur 2d, Pollution Control ß 1.
61C Am Jur 2d, Pollution Control ßß 675, 676, 791, 862, 949, 1166, 1459, 1460, 1574, 1619, 1850.
78 Am Jur 2d, Waters ßß 119, 128, 136, 337, 395.

Am Jur Trials:
2 Am Jur Trials, Locating Scientific and Technical Experts, p. 293.
2 Am Jur Trials, Selecting and Preparing Expert Witnesses, p. 585.
18 Am Jur Trials, Subterranean Water Pollution, p. 495.
53 Am Jur Trials, Challenging Wetland Regulation of Land Development, p. 511.
57 Am Jur Trials, Private Cost Recovery Actions Under CERCLA, p. 1.
57 Am Jur Trials, Handling Toxic Tort Litigation, p. 395.
59 Am Jur Trials, Contractual Indemnifications and Releases From Environmental Liability, p. 231.
85 Am Jur Trials, Residential Mold As a Toxic Tort Under Homeowners Policy, p. 1.

Received
August 26, 2011
Commission on
State Mandates

Am Jur Proof of Facts:

24 Am Jur Proof of Facts 3d, Admissibility and Reliability of Laboratory Analysis of Soil, Water, and Air Samples in Environmental Litigation, p. 609.

25 Am Jur Proof of Facts 3d, Liability for Dioxin Contamination, p. 473.

26 Am Jur Proof of Facts 3d, Water pollution: Proof of water quality under The Clean Water Act, p. 395.

33 Am Jur Proof of Facts 3d, Diminished Property Value Due to Environmental Contamination, p. 163.

34 Am Jur Proof of Facts 3d, CERCLA Liability of Parent, Subsidiary and Successor Corporations, p. 387.

34 Am Jur Proof of Facts 3d, Validity and Applicability of Contractual Allocations of Environmental Risk, p. 465.

35 Am Jur Proof of Facts 3d, Proof of Standing in Environmental Citizen Suits, p. 493.

36 Am Jur Proof of Facts 3d, Proof of Wrongful Discharge of Pollutant Into Waterway Under Federal Clean Water Act, p. 533.

37 Am Jur Proof of Facts 3d, Recovery of Damages for Injury to Landowner's Property From Environmental Condition on Neighboring Land, p. 439.

38 Am Jur Proof of Facts 3d, Insured's Proof That Pollution Exclusion Clause Does Not Bar Coverage for Environmental Claims, p. 477.

38 Am Jur Proof of Facts 3d, Necessity and Sufficiency of Environmental Impact Statements Under the National Environmental Policy Act, p. 547.

39 Am Jur Proof of Facts 3d, Insured's Proof That Environmental Cleanup Costs are Covered "Damages" Under CGL Insurance Policy, p. 483.

39 Am Jur Proof of Facts 3d, Proof of Contamination in Toxic Tort Cases Through Expert Testimony, p. 539.

40 Am Jur Proof of Facts 3d, Wrongful Handling or Disposal of Solid or Hazardous Waste, p. 457.

55 Am Jur Proof of Facts 3d, Citizen's Suits Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right-To-Know Act (EPCRA), p.155.

58 Am Jur Proof of Facts 3d, Denial of Wetland Permit As Basis for Landowner's Regulatory Taking Claim, p. 81.

67 Am Jur Proof of Facts 3d, Citizens' Suits Under the Safe Drinking Water Act, p. 95.

25 Am Jur Proof of Facts, Water Pollution--Sewage and Industrial Wastes, p. 233.

Forms:

2 Bender's Federal Practice Forms, Form 8(IV):3, Federal Rules of Civil Procedure.

33 Rabkin & Johnson, Current Legal Forms, Form 25.57, Environmental Considerations in Real Estate Transactions.

9 Fed Procedural Forms L Ed, Environmental Protection ßß 29:39, 40, 53.

15C Am Jur Legal Forms 2d, Real Estate Sales ß 219:739.

20A Am Jur Legal Forms 2d, Wharves and Port Facilities ß 265:11.

18C Am Jur Pl & Pr Forms (Rev ed), Nuisances ß 99.

19C Am Jur Pl & Pr Forms (Rev ed), Pollution Control ßß 89, 92, 93.

20B Am Jur Pl & Pr Forms (Rev ed), Public Lands ß 7.

24B Am Jur Pl & Pr Forms (2011), Waters, ßß 130, 131, 146, 157, 188, 189.

Commercial Law:

1 Goods in Transit (Matthew Bender), ch 5, Carrier Litigation ß 5.11.

2 Goods in Transit (Matthew Bender), ch 13, Limitation of Damages and Liability ß 13.08.

5 Goods in Transit (Matthew Bender), ch 44, Liability Insurance Financial Responsibility Laws ß 44.04.

Criminal Law and Practice:

6 Business Crime (Matthew Bender), ch 31, Environmental Law Violations P 31.01.

Received
August 26, 2011
Commission on
State Mandates

Corporate and Business Law:
1 Liability of Corporate Officers and Directors (Matthew Bender), ch 8, Criminal Liability ß 8.07.
1 Liability of Corporate Officers and Directors (Matthew Bender), ch 10, Environmental Liability ßß 10.05, 10.08.

Annotations:
Validity, construction, and application of Clean Water Act (CWA) (Federal Water Pollution Control Act) (33 U.S.C.S. ß 1251 et seq.)--Supreme Court cases. 168 L Ed 2d 813.
Construction and Application of Clean Water Act's Total Maximum Daily Loads (TMDLs) Requirement for Waters Failing to Achieve Water Quality Standards Under 33 U.S.C.A. ß 1313(d) [33 USCS ß 1313(d)]. 53 ALR Fed 2d 1.
Damages compensable under federal maritime law for injuries caused by discharge of oil into navigable waters. 26 ALR Fed 346.
Federal common law of nuisances as basis for relief in environmental pollution cases. 29 ALR Fed 137.
What are "navigable waters" subject to Federal Water Pollution Control Act (33 U.S.C.A. ßß 1251 et seq. [33 USCS ßß 1251 et seq.]). 160 ALR Fed 585.
Actions brought under Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) (33 U.S.C.A. ßß 1251 et seq. [33 USCS ßß 1251 et seq.])--Supreme Court cases. 163 ALR Fed 531.
Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in value of property or its use. 25 ALR5th 568.
Liability insurance coverage for violations of antipollution laws. 87 ALR4th 444.
Validity and construction of anti-water pollution statutes or ordinances. 32 ALR3d 215.
Pollution Control: Validity and construction of statutes, ordinances, or regulations controlling discharge of industrial wastes into sewer systems. 47 ALR3d 1224.
Pollution control: Preliminary mandatory injunction to prevent, correct, or reduce effects of polluting practices. 49 ALR3d 1239.
Applicability of zoning regulations to waste disposal facilities of state or local governmental entities. 59 ALR3d 1244.
Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency. 60 ALR3d 665.

Texts:
3-IX Benedict on Admiralty, The Law of American Admiralty Its Jurisdication, Law and Practice with Forms and Directions, Marine Oil Pollution ß 114.
8-III Benedict on Admiralty, Desk Reference, Admiralty Practice and Procedure ß 3.04.
8-XI Benedict on Admiralty, Desk Reference, Marine Oil Pollution ß 11.04.
Cohen's Handbook of Federal Indian Law (Matthew Bender), ch 1, History and Background of Federal Indian Policy ß 1.07.
Cohen's Handbook of Federal Indian Law (Matthew Bender), ch 10, Environmental Regulation in Indian Country ß 10.03.
Cohen's Handbook of Federal Indian Law (Matthew Bender), ch 19, Water Rights ß 19.03.
Cohen's Handbook of Federal Indian Law (Matthew Bender), ch 21, Economic Development ß 21.04.
1 Energy Law & Transactions (Matthew Bender), ch 3, Federal Regulation of Energy Transactions ß 3.05.
2 Energy Law & Transactions (Matthew Bender), ch 50, Natural Gas ß 50.04.
2 Energy Law & Transactions (Matthew Bender), ch 52, Electricity ß 52.06.
2 Energy Law & Transactions (Matthew Bender), ch 53, Hydroelectric Power ßß 53.04, 53.05.
3 Energy Law & Transactions (Matthew Bender), ch 56, Synthetic Natural Gas (SNG) and Liquefied Natural Gas (LNG) ß 56.02.
3 Energy Law & Transactions (Matthew Bender), ch 59, Energy Policy Act of 2005 ß 59.03.
4 Energy Law & Transactions (Matthew Bender), ch 86, Ocean Tanker Transport ß 86.03.

Received
August 26, 2011
Commission on
State Mandates

5 Energy Law & Transactions (Matthew Bender), ch 120, Energy and the Environment ßß 120.01, 120.05.
1 Environmental Law Practice Guide (Matthew Bender), ch 3, Land Preservation ßß 3.02, 3.10.
1 Environmental Law Practice Guide (Matthew Bender), ch 4, Information Disclosure and Access ß 4.01.
1 Environmental Law Practice Guide (Matthew Bender), ch 5, Consultants and Contractors ß 5.01.
1 Environmental Law Practice Guide (Matthew Bender), ch 5A, Environmental Due Diligence in Corporate Transactions ß 5A.03.
1A Environmental Law Practice Guide (Matthew Bender), ch 6B, Document Retention Issues in Environmental Law ßß 6B.01, 6B.07.
2 Environmental Law Practice Guide (Matthew Bender), ch 11A, Practice Before the EPA ßß 11A.01, 11A.02.
2A Environmental Law Practice Guide (Matthew Bender), ch 11C, Alternative Dispute Resolution ß 11C.14.
2A Environmental Law Practice Guide (Matthew Bender), ch 12, Civil Enforcement ßß 12.02, 12.03.
2A Environmental Law Practice Guide (Matthew Bender), ch 12C, Criminal Enforcement ß 12C.08.
2A Environmental Law Practice Guide (Matthew Bender), ch 15A, Indian Country Environmental Law ßß 15A.02, 15A.05.
3 Environmental Law Practice Guide (Matthew Bender), ch 16, Common-Law Controls ßß 16.01, 16.05.
4 Environmental Law Practice Guide (Matthew Bender), ch 18, Water Pollution ßß 18.11, 18.14, 18.20, 18.23.
4 Environmental Law Practice Guide (Matthew Bender), ch 18A, Pollution Prevention ßß 18A.01, 18A.03.
4 Environmental Law Practice Guide (Matthew Bender), ch 19, Wetlands ß 19.01.
4 Environmental Law Practice Guide (Matthew Bender), ch 23, Oceans ßß 23.01, 23.04.
4 Environmental Law Practice Guide (Matthew Bender), ch 23A, Coasts ßß 23A.01, 23A.03, 23A.04.
4A Environmental Law Practice Guide (Matthew Bender), ch 29A, Hazardous Materials Transportation ß 29A.02.
5 Environmental Law Practice Guide (Matthew Bender), ch 32, Real Property Transfers and Brownfields Development ßß 32.14, 32.15.
5 Environmental Law Practice Guide (Matthew Bender), ch 33, Toxic Torts ß 33.01.
5 Environmental Law Practice Guide (Matthew Bender), ch 34A, Agricultural Environmental Law ß 34A.02.
5A Environmental Law Practice Guide (Matthew Bender), ch 36B, PCBs ß 36B.03.
5A Environmental Law Practice Guide (Matthew Bender), ch 37, Used Oil Management ß 37.02.
6 Environmental Law Practice Guide (Matthew Bender), ch 41, Federal-State Relationships ßß 41.01, 41.02.
6 Environmental Law Practice Guide (Matthew Bender), ch 46, California ß 46.23.
6 Environmental Law Practice Guide (Matthew Bender), ch 56, Indiana ß 56.27.
6 Environmental Law Practice Guide (Matthew Bender), ch 59, Kentucky ß 59.01.
7 Environmental Law Practice Guide (Matthew Bender), ch 69, Nebraska ß 69.14.
7 Environmental Law Practice Guide (Matthew Bender), ch 72, New Jersey ß 72.27.
8 Environmental Law Practice Guide (Matthew Bender), ch 80, Pennsylvania ß 80.28.
1 Treatise on Environmental Law (Matthew Bender), ch 2, Air Pollution ßß 2.03, 2.05.
2 Treatise on Environmental Law (Matthew Bender), ch 3, Water Pollution ßß 3.03-3.05.
3 Treatise on Environmental Law (Matthew Bender), ch 4, Solid Waste ß 4.03.
3 Treatise on Environmental Law (Matthew Bender), ch 4A, Disposal of Hazardous Waste--The "Superfund Law" ß 4A.02.
3 Treatise on Environmental Law (Matthew Bender), ch 4B, Toxic Substances ß 4B.01.
4 Treatise on Environmental Law (Matthew Bender), ch 6, Radiation ß 6.02.
4 Treatise on Environmental Law (Matthew Bender), ch 7, Fertilizer and Feedlot Pollution ß 7.02.
4 Treatise on Environmental Law (Matthew Bender), ch 9, The National Environmental Policy Act of 1969 and Related Provisions ß 9.03.
5 Treatise on Environmental Law (Matthew Bender), ch 11, Regulation of Energy Generation and Transmission ßß 11.02, 11.03.
5 Treatise on Environmental Law (Matthew Bender), ch 12, Public Lands and Conservation ßß 12.03-12.05.
6 Treatise on Environmental Law (Matthew Bender), ch 14, Attorneys' Fees in Environmental Litigation ß 14.01.
6 Treatise on Environmental Law (Matthew Bender), ch 16, Native Americans and Environmental Protection ß 16.06.
6 Treatise on Environmental Law (Matthew Bender), ch 18, Developments in Common Law Remedies ß 18.01.

Law Review Articles:

Received
August 26, 2011
Commission on
State Mandates

Levine. Federal Control of Water Pollution--An Ounce of Prevention is Worth a Pound of Cure. 9 of the Beverly Hills Bar Asso. 34, May-June 1975.
Flatt. Spare the Rod and Spoil the Law: Why the Clean Water Act Has Never Grown Up. 55 Ala L Rev 595, Summer 2004.
Klein. Integrity: Some Considerations for Water Law. 56 Ala L Rev 1009, Summer 2005.
Henner. Rapanos and Warren -- A Tale of Two Cases: The Supreme Court Bats. 12 Alb L Envtl Outlook 52, 2007.
Rogers. Some New Regulations Involving the Clean Water Act. 4 Ali-Aba Course Materials Journal 113, April 1980.
Stern; Mazze. Federal Water Pollution Control Act Amendments of 1972. 12 American Business LJ 81, Spring 1974.
Roberts. Benefit-Cost Analysis: Its Use (Misuse) in Evaluating Water Resource Projects. 14 American Business LJ 73, Spring 1976.
Glenn. Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions. 11 American Criminal L Rev 835, Summer 1973.
Stein; Feldman; Fraser; Sobarzo; Frick; Bilder; Bacon. Rehabilitating Our Continental Neighborhood: Rivers, Lakes, Fisheries, and Pollution Zones: A Panel Discussion. 68 American Society of International Law Proceedings 138, April 1974.
Water Pollution. 1977 Annual Survey of American Law 303, 1977.
The Federal Water Pollution Control Act Amendments of 1972. 14 Boston College Industrial & Commercial L Rev 672, April 1973.
Arnold. Effluent Limitations and NPDES: Federal and State Implementation of the Federal Water Pollution Control Act Amendments of 1972. 15 Boston College Industrial & Commercial L Rev 667, April 1974.
Arnold. Federal and State Implementation of the Federal Water Pollution Control Act Amendments of 1972. 15 Boston College Industrial & Commercial L Rev 767, April 1974.
Smith; Janke; McDonald; Strelow; Lettow; Bray; Vaughn. Air and Water Enforcement Problems--A Case Study: A Program. 34 Business Lawyer 665, January 1979.
Caginalp. The Fifth Amendment Privilege Against Self-Incrimination and Compulsory Self-Disclosure Under the Clean Air and Clean Water Acts. 9 BC Envtl Aff L Rev 359, 1980/81.
Craig; Miller. Ocean Discharge Criteria and Marine Protected Areas: Ocean Water Quality Protection Under the Clean Water Act. 29 BC Envtl Aff L Rev 1, 2001.
Driesen. Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform. 32 BC Envtl Aff L Rev 1, 2005.
Murchison. Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future. 32 BC Envtl Aff L Rev 527, 2005.
Handl. Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited. 13 Canadian Yearbook of International L 156, 1975.
Craig. Removing "the Cloak of a Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis . 29 Cardozo L Rev 149, October 2007.
Mensah. International Environmental Law: International Conventions Concerning Oil Pollution at Sea. 8 Case Western Reserve J of International Law 84, Winter 1976.
Preliminary Injunctive Relief Under the Federal Water Pollution Control Act, 60 Chi-Kent L Rev 123, 1984.
Dickstein. International Lake and River Pollution Control: Questions of Method. 12 Colum J of Transnational L 487, 1973.
Baum. Legislating Cost-Benefit Analysis: The Federal Water Pollution Control Act Experience. 9 Colum J Envt'l L 75, 1983.
Hackett. Remining and the Water Quality Act of 1987: Operators Beware! 13 Colum J Envt'l L 99, 1987.
Drelich. Restoring the Cornerstone of the Clean Water Act. 34 Colum J Envtl L 267, 2009.
Palfrey. Energy and the Environment: The Special Case of Nuclear Power. 74 Colum L Rev 1375, 1974.
Currie; Goodman. Judicial Review of Federal Administrative action: Quest for the Optimum Forum. 75 Colum L Rev 1, 1975.
Porter. Good Alliances make Good Neighbors: The Case for Tribal-State-Federal Watershed Partnerships. 16 Cornell J L & Pub Pol'y 495, Summer 2007.
Up to Our Wastes in Wet Suits: The Federal Law on Water Pollution. 8 Cumber L Rev 731, Winter 1978.
Clean Water Act Compliance. 13 Current Mun Prob 313, 1987.
Ficken. Wyandotte and its Progeny: The Quest for Environmental Protection Through the Original Jurisdiction of the Supreme Court. 78 Dickenson L Rev 429, Spring 1974.
Smith. Highlights of the Federal Water Pollution Control Act of 1972. 77 Dickinson L Rev 459, Spring 1973.

Received
August 26, 2011
Commission on
State Mandates

Fisher-Ogden; Saxer. World Religions and Clean Water Laws. 17 Duke Envtl L & Pol'y F 63, Fall 2006.
Olds. Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts. 17 Duquesne L Rev 1, 1978-1979.
Parenteau; Tauman. The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972? 6 Ecology L Q 1, 1976.
Kalsi. Oil in Neptune's Kingdom: Problems and Responses to Contain Environmental Degradation of the Oceans by Oil Pollution. 3 Environmental Affairs 79, 1974.
Greer. Obstacles to Taming Corporate Polluters: Water Pollution Politics in Gary, Indiana. 3 Environmental Affairs 199, 1974.
Wenner. Federal Water Pollution Control Statutes in Theory and Practice. 4 Environmental L 251, Winter 1974.
Abrams. Environmental Problem of the Oceans: An International Stepchild of National Egotism. 5 Environmental Affairs 3, Winter 1976.
Schuster. Nuclear Ship Pollution: National and International Regulation and Liability. 5 Environmental L 203, Winter 1975.
Wilson. Groundwaters: Are They Beneath the Reach of the Federal Water Pollution Control Act Amendments? 5 Environmental Affairs 545, 1976.
Highlights of the Clean Water Act of 1977. 8 Environmental L 869, Spring 1978.
Craig. Idaho Sporting Congress v. Thomas and Sovereign Immunity: Federal Facility Nonpoint Sources, the APA, and the Meaning of "in the Same Manner and to the Same Extent as any Nongovernmental Entity". 30 Envtl L 527, Summer 2000.
Craig. Justice Kennedy and Ecosystem Services: A Functional Approach to Clean Water Act Jurisdiction after Rapanos. 38 Envtl L 635, Summer 2008.
Centner. Courts and the EPA Interpret NPDES General Permit Requirements for CAFOS. 38 Envtl L 1215, Fall 2008.
Pierce. Some Observations About the Federal Water Pollution Control Act Amendments of 1972. 24 Federation of Insurance Councils Q 41, Fall 1973.
Colburn. Waters of the United States: Theory, Practice, and Integrity at the Supreme Court. 34 Fla St UL Rev 183, Winter 2007.
Davison. Defining "Addition" of a Pollutant into Navigable Waters from a Point Source Under the Clean Water Act: The Questions Answered -- and Those not Answered -- by South Florida Water Management District v. Miccosukee Tribe of Indians. 16 Fordham Envtl Law Rev 1, Fall 2004.
Davis; Glasser. The Discharge Permit Program Under the Federal Water Pollution Control Act of 1972--Improvement of Water Quality Through the Regulation of Discharges From Industrial Facilities. 2 Fordham Urban LJ 179, Winter 1974.
Cartwright. Handling of Air and Water Pollution Cases by the Plaintiff. 9 Forum 639, Spring 1974.
Villareal. Water Quality Improvement Act of 1970, The 1972 Amendments and State Antipollution Laws. 13 Forum 438, Winter 1978.
Blomquist. Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under The Clean Water Act: Some Overlooked Problems of Outcome-Independent Values. 22 Ga L Rev 337, Winter 1988.
Clearing Muddy Waters: The Evolving Federalization of Water Pollution Control. 60 Georgetown LJ 742, February 1972.
Rabago. What comes out must go in: cooling water intakes and the Clean Water Act. 16 Harv Envtl L Rev 429, 1992.
Adler. Integrated Approaches to Water Pollution: Lessons from the Clean Air Act. 23 Harv Envtl L Rev 203, 1999.
Klein. The Environmental Commerce Clause. 27 Harv Envtl L Rev 1, 2003.
Cassuto. The Law of Words: Standing, Environment, and Other Contested Terms. 28 Harv Envtl L Rev 79, 2004.
Miller. Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions. 28 Harv Envtl L Rev 401, 2004.
Miller. Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two: Statutory Preclusions on EPA Enforcement. 29 Harv Envtl L Rev 1, 2005.
Gaba. Generally Illegal: NPDES General Permits Under the Clean Water Act. 31 Harv Envtl L Rev 409, 2007.
Tripp. Tensions and Conflicts in Federal Pollution Control and Water Resource Policy. 14 Harv J on Legis 225, Fall 1977.
Hersh. The Clean Water Act's Antidegradation Policy and Its Role in Watershed Protection in Washington State. 15 Hastings W-NW J Env L & Pol'y 217, Summer 2009.
Zellmer. Preemption by Stealth. 45 Hous L Rev 1659, Winter 2009.

Received
August 26, 2011
Commission on
State Mandates

Bogert. Even Heroes have the Right to Bleed: The Endangered Species Act and Categorical Statutory Commands after National Association of Home Builders v. Defenders of Wildlife. 44 Idaho L Rev 543, 2008.
Mank. Implementing Rapanos--Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers? 40 Ind L Rev 291, 2007.
Flournoy. Missing Information: The Scientific Data Gap in Conversation and Chemical Regulation: Supply, Demand, and Consequences: The Impact of Information Flow on Individual Permitting Decisions Under Section 404 of the Clean Water Act. 83 Ind LJ 537, Spring 2008.
Currie. Judicial Review Under Federal Pollution Laws. 62 Iowa L Rev 1221, June 1977.
Roushdy. Marine Pollution and the Absolute Civil Liability of the Shipowner Under the Laws of the United States and Egypt. 10 J of International L and Economics 117, April 1975.
Milsten. Enforcing International Law: US Agencies and the Regulation of Oil Pollution in American Waters. 6 J of Maritime L 273, January 1975.
Cummins; Logue; Tollison; Willett. Oil Tanker Pollution Control: Design Criteria Versus Effective Liability Assessment. 7 J of Maritime L 169, October 1975.
Bridgman. Pollution--Vessel Owner Held Guilty of Willful Misconduct Under Federal Water Pollution Control Act. 10 J of Maritime L 449, April 1979.
Owley. Tribal Sovereignty over Water Quality. 20 J Land Use & Envtl Law 61, Fall 2004.
Begley; Williams. Coal Mine Water Pollution: An Acid Problem with Murky Solutions. 64 Ky LJ 507, 1975-1976.
Goldfarb. Better Than Best: A Crosscurrent in the Federal Water Pollution Control Act Amendments of 1972. 11 Land & Water L Rev 1, 1976.
Currie. Relaxation of Implementation Plans Under The 1977 Clean Air Act Amendments. 78 Michigan L Rev 155, December 1979.
Tarlock. Oil Pollution on Lake Superior: The Uses of State Regulation. 61 Minn L Rev 63, 1976/77.
Adler. Reckoning with Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation. 14 Mo Envtl L & Pol'y Rev 1, Fall 2006.
Centner. Enforcing Environmental Regulations: Concentrated Animal Feeding Operations. 69 Mo L Rev 697, Summer 2004.
Hanlon. A Non-Indian Entity is Polluting Indian Waters: "Water" your Rights to the Waters, and "Water" Ya Gonna do About it? 69 Mont L Rev 173, Winter 2008.
Lah. Rights to Trial by Jury in an Action for Civil Penalties and Injunctive Relief Under the Clean Water Act. 28 Nat Resources J 607, Summer 1988.
Fitzgerald. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers: Isolated Waters, Migratory Birds, Statutory and Constitutional Interpretation. 43 Nat Resources J 11, Winter 2003.
Aitkins; Robie; Romanek; Speth. Water Quality Control: Federal Water Pollution Control Act Amendments of 1972. 7 Natural Resources Lawyer 189, Spring 1974.
Scherr. Admiralty's Power in Re Oil Pollution: The Ability of the State to Set More Stringent Penalties Than Those of the Federal Government. 7 Natural Resources Lawyer 635, Fall 1974.
Eckert. EPA Jurisdiction Over Well Injection Under the Federal Water Pollution Control Act. 9 Natural Resources Lawyer 455, 1976.
Hall. Evolution and Implementation of EPA's Regulatory Program to Control the Discharge of Toxic Pollutants to the Nation's Waters. 10 Natural Resources Lawyer 507, 1977.
Hall. The Clean Water Act of 1977. 11 Natural Resources Lawyer 343, 1979.
Garrett. Hazardous Substances Under the Clean Water Act. 12 Natural Resources Lawyer 693, 1980/81.
Utton. International Water Quality Law. 13 Natural Resources J 282, April 1973.
Geltman. Regulation of Non-Adjacent Wetlands Under Section 404 of the Clean Water Act. 23 New Eng L Rev 615, Winter/Spring 1989.
Husband. "Knowing endangerment" under the Clean Water Act and the Resource Conservation and Recovery Act: be aware of this toxic crime. 31 NH BJ 89, 1990.
Hardy. Offshore Development and Marine Pollution. 1 Ocean Development and International Law 239, Fall 1973.
Kolb. Congress and the Ocean Policy Process. 3 Ocean Development and International Law 261, 1976.
Okidi. Toward Regional Arrangements for Regulation of Marine Pollution: An Appraisal of Options. 4 Ocean Development & International L 1, 1977.
Waldichuk. Control of Marine Pollution: An Essay Review. 4 Ocean Development and International Law 269, 1977.
Ruggiero. Toward a Law of the Land: The Clean Water Act as a Federal Mandate for the Implementation of an Ecosystem Approach to Land Management. 20 Pub Land & Resources L Rev 31, 1999.

Received
August 26, 2011
Commission on
State Mandates

Schmidt. Private Wetlands and Public Values: "Navigable Waters" and the Significant Nexus Test under the Clean Water Act. 26 Pub Land & Resources L Rev 97, 2005.
White. Effect of Waste Discharge Regulations on Real Property Development. 11 Real Property Probate & Trust J 490, Fall 1976.
Beatty. Federal Water Pollution Control in Transition. 18 Rocky Mt Mineral L Inst 493, 1973.
Kiechel; Burke. Federal-State Relations in Water Resources Adjudication and Administration; Integration of Reserved Rights with Appropriative Rights. 18 Rocky Mt Mineral L Inst 531, 1973.
Krieger. Environmental Impact of Water: The Best and Worst of Times. 19 Rocky Mt Mineral L Inst 555, 1974.
Keppler. Mining and the Federal Water Pollution Control Act Amendments of 1972. 20 Rocky Mt Mineral L Inst 501, 1975.
Clyde. Coal Mining, Development and Processing--The Associated Water Problems. 21 Rocky Mt Mineral L Inst 163, 1976.
Zener. Public Law 92-500--What's Next on the Regulatory Agenda? 22 Rocky Mt Mineral L Inst 891, 1976.
Bloom. Effects of Interstate Water Quality Controls on Legal and Institutional Water Allocation Mechanisms--Can the Environmental Protection Agency Amend an Interstate Compact? 22 Rocky Mt Mineral L Inst 917, 1976.
Harrison; Woodruff. Accommodations of the Appropriation Doctrine and Federal Goals under Sections 208 and 404 of Public Law 92-500 and Section 10 of the Rivers and Harbors Act of 1899. 22 Rocky Mt Mineral L Inst 941, 1976.
Muys. Quality v Quantity: The Federal Water Pollution Control Act's Quiet Revolution in Western Water Rights Administration. 23 Rocky Mt Mineral Law Inst 1013, 1977.
Lozeau. Preliminary injunctions and the Federal Water Pollution Control Act: the clean water permit program as a limitation on the courts' equitable discretion. 42 Rutgers L Rev 701, 1990.
D'Ovidio. Clean Water Act: A Citizen's Right to Litigate 55 RI Bar Jnl 5, March/April 2007.
Adler. The Ducks Stop Here? The Environmental Challenge to Federalism. 9 S Ct Econ Rev 205, 2001.
Hickey. Custom and Land-Based Pollution of the High Seas, 15 San Diego L Rev 409, April 1978.
Minan. Municipal Separate Storm Sewer System (MS4) Regulation Under the Federal Clean Water Act: The Role of Water Quality Standards? 42 San Diego L Rev 1215, Fall 2005.
Shaw. Sovereign Immunity: Federal Compliance with State Permit Requirements Under Clean Air Act and the Federal Water Pollution Control Act Amendments. 6 San Fernando Valley L Rev 117, Spring 1978.
Rhodes. Federal Legislative Involvement in the Area of Water Pollution Control. 38 Saskatchewan L Rev 325, 1973-1974.
Hines. Farmers, Feedlots and Federalism: The Impact of the 1972 Federal Water Pollution and Control Act Amendments on Agriculture. 19 South Dakota L Rev 540, Summer 1974.
Breeden. Federalism and the Development of Outer Continental Shelf Mineral Resources. 28 Stan L Rev 1107, 1976.
FWPCA Permit System Enforced by District Court Exercising Discretion. 7 Suffolk Transnat'l LJ 539, 1983.
Raisch. The Clean Water Act of 1977. 7 The Colorado Lawyer 536, April, 1978.
Montgomery. Control of Agricultural Water Pollution: A Continuing Regulatory Dilemma. 1976 U of Ill L Forum 533, 1976.
Post. Solution to the Problem of Private Compensation in Oil Discharge Situations. 28 U of Miami L Rev 524, Spring 1974.
Brull. An Evaluation of Nonpoint Source Pollution Regulation in the Chesapeake Bay. 13 U Balt J Envtl L 221, Spring 2006.
Craig. Climate Change, Regulatory Fragmentation, and Water Triage. 79 U Colo L Rev 825, Summer 2008.
Ingelson; Gray. The Regulation Of Produced Water From Coalbed Methane Development Under The Clean Water Act: Northern Plains Resource Council V. Fidelity Exploration & Development Company. 8 U Denv Water L Rev 200, 2004.
Squillace. From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulation. 40 U Mich JL Reform 799, Summer 2007.
Latham. The Rehnquist Court and the Pollution Control Cases: Anti-Environmental and Pro-Business? 10 U Pa J Const L 133, December 2007.
Janisch. Scope of Federal Jurisdiction under Section 404 of the Clean Water Act: Rethinking "Navigable Waters" after Rapanos v. United States. 11 U. Denv Water L Rev 91, Fall 2007.
Federman. 1972 Water Pollution Control Act: Unforeseen Implications for Land Use Planning. 8 Urban L 140, Winter 1976.
Phillips. Developments in Water Quality and Land Use Planning: Problems in the Application of the Federal Water Pollution Control Act Amendments of 1972. 10 Urban L Annual 43, 1975.

Received
August 26, 2011
Commission on
State Mandates

Wagstaff. Citizen Suits and the Clean Water Act: The Supreme Court Decision in Gwaltney of Smithfield v Chesapeake Bay Foundation. 1988 Utah L Rev 891.
Frank. Environmental Aspects of Deep Sea Mining. 15 Va J of International L 815, Summer 1975.
Murchison. Waivers of Intergovernmental Immunity in Federal Environmental Statutes. 62 Va L Rev 1177, 1976.
Silver. Problems in Attempting to Translate Statutory Standards into Emission Limitations Under Air and Water Pollution Control Legislation. 22 Villanova L Rev 1122, October 1977.
Boudreaux. Covert Opinion: Revealing a New Interpretation of Environmental Laws. 9 Vt J Envtl L 239, 2007-2008.
Adler. The Supreme Court and Ecosystems: Environmental Science in Environmental Law. 27 Vt L Rev 249, Winter 2003.
Arceneaux. Potential criminal liability in the coal fields under the Clean Water Act: a defense perspective. 95 W Va L Rev 691, Spring 1993.
Cowell. Law at the Air/Water Interface: Is There a Gap Between the Regulation of Toxic Pollutants Under the Clean Air Act and Clean Water Act? 8 Wis Envtl LJ 51, Spring 2002.
Adler. Watersheds and the Integration of U.S. Water Law and Policy: Bridging the Great Divides. 25 Wm & Mary Envtl L & Pol'y Rev 1, Fall 2000.
Cannon. Choices and Institutions in Watershed Management. 25 Wm & Mary Envtl L & Pol'y Rev 379, Winter 2000.
Gelpe; Barnes. Penalties in settlements of citizen suit enforcement actions under the Clean Water Act. 16 Wm Mitchell L Rev 1025, Autumn 1990.

Interpretive Notes and Decisions:

I.IN GENERAL 1. Generally 2. Constitutionality 3. Purpose 4. Construction 5. Legislative intent 6. Relationship with other laws 7.--Other environmental laws 8.--Federal common law of nuisance 9.--Civil rights laws 10. Effect on state and local law 11.--More stringent standards 12. Effect on existing remedies

II.SCOPE OF CHAPTER 13. Persons subject to regulation 14.--Federal agencies 15. Acts covered 16.--Pollutants covered 17. Waters covered 18.--Arroyos 19.--Wetlands 20. Interests protected

III.IMPLEMENTATION OF CHAPTER 21. Duty of Environmental Protection Agency to enforce chapter 22. Actions by state or local governments to enforce chapter 23. Actions by private entities to enforce chapter 24. Forum for enforcement proceedings 25. Remedies 26. Impoundment of funds 27. Public participation 28. Miscellaneous

I.IN GENERAL 1. Generally

Control of pollution in interstate streams may be appropriate subject for national legislation. West Virginia ex rel. Dyer v Sims (1951) 341 US 22, 95 L Ed 713, 71 S Ct 557, 44 Ohio Ops 364, 62 Ohio L Abs 584.

Language of Federal Water Pollution Control Act and its legislative history show that Congress was convinced that uncontrolled pollution of nation's waterways is threat to health and welfare of country, as well as threat to interstate commerce. United States v Ashland Oil & Transp. Co. (1974, CA6 Ky) 504 F2d 1317, 7 Envt Rep Cas 1114, 4 ELR 20784, 50 OGR 133.

Seventh Amendment requires jury trial to determine liability, but not amount of fine, in action by Federal Government seeking civil penalties under Clean Water Act (33 USCS ßß 1251 et seq.). United States v M.C.C. of Florida, Inc. (1988, CA11 Fla) 848 F2d 1133, 27 Envt Rep Cas 2271, 18 ELR 21080.

Clean Water Act (33 USCS ßß 1251 et seq.) permits blanket prohibition and other "stringent pollution restrictions" to be imposed even where discharge caused no discernible harm to environment; accordingly, Environmental Protection Agency adequately supported regulation prohibiting discharge of toxic-carrying diesel pills in relatively small volumes, despite claim by oil companies that they pose no environmental threat when discharged in relatively small volumes of mud typical of Alaskan off-shore drilling operations. American Petroleum Inst. v United States EPA (1988, CA5) 858 F2d 261, 28 Envt Rep Cas 1529, 19 ELR 20317, 102 OGR 443, reh den, en banc, clarified (1989, CA5) 864 F2d 1156, 102 OGR 453.

Victims of violations of Clean Water Act are public. United States v Snook (2004, CA7 Ill) 366 F3d 439 (criticized in United States v Atl. States Cast Iron Pipe Co. (2009, DC NJ) 627 F Supp 2d 180).

2. Constitutionality

Received
August 26, 2011
Commission on
State Mandates

Provisions of Water Pollution Control Act Amendments of 1972 are constitutional. United States v Ashland Oil & Transp. Co. (1974, CA6 Ky) 504 F2d 1317, 7 Envt Rep Cas 1114, 4 ELR 20784, 50 OGR 133.

Regulation of wetlands under Clean Water Act (33 USCS ßß 1251 et seq.) does not violate commerce clause of US Constitution; as applied to government's suit under Clean Water Act (33 USCS ßß 1251 et seq.) against owner of various alleged wetlands for dumping fill thereon, regulatory definition of wetlands as those areas that are inundated or saturated by surface or ground water at frequency and duration sufficient to support, and that under normal circumstances do support, prevalence of vegetation typically adapted to life in saturated soil conditions, is not unconstitutionally vague. United States v Tull (1985, CA4 Va) 769 F2d 182, 24 Envt Rep Cas 1495, 3 FR Serv 3d 1421, 15 ELR 21061, revd on other grounds, remanded (1987) 481 US 412, 107 S Ct 1831, 95 L Ed 2d 365, 25 Envt Rep Cas 1857, 7 FR Serv 3d 673, 17 ELR 20667 (criticized in Feltner v Columbia Pictures TV (1998) 523 US 340, 118 S Ct 1279, 140 L Ed 2d 438, 98 CDOS 2324, 98 Daily Journal DAR 3175, 26 Media L R 1513, 46 USPQ2d 1161, 1998 Colo J C A R 1542, 11 FLW Fed S 417, 163 ALR Fed 721) and (criticized in SEC v First Pac. Bancorp (1998, CA9 Cal) 142 F3d 1186, 98 CDOS 3143, 98 Daily Journal DAR 4343, CCH Fed Secur L Rep P 90197) and (criticized in State v Irving Oil Corp. (2008) 183 Vt 386, 2008 VT 42, 955 A2d 1098).

Federal Water Pollution Control Act's citizen's suit provision (33 USCS ß 1365) does not violate separation of powers doctrine, nor does authorization of civil penalty enforcement power in hands of private parties amount to unconstitutional delegation. Student Public Interest Research Group, Inc. v Monsanto Co. (1985, DC NJ) 600 F Supp 1474, 22 Envt Rep Cas 1132, 15 ELR 20294.

Landowner had not established partial regulatory taking under Fifth Amendment where landowner had presented no evidence that property's fair market value had been adversely affected, and because Clean Water Act was already effective at time landowner purchased land, landowner could not claim any adverse impact to his investment expectations. United States v Donovan (2006, DC Del) 466 F Supp 2d 590.

3. Purpose

Construing "discharge" in accordance with its ordinary or natural meaning--when applied to water, "flowing or issuing out"--plaintiff processing plant owner's operation of dam to produce hydroelectricity could result in any discharge into navigable waters, and thus, he was required to obtain state certification under ß 401 of Clean Water Act, 33 USCS ß 1341; Act did not stop at controlling "addition of pollutants," but dealt with "pollution" generally, 33 USCS ß 1251(b), which Congress defined under 33 USCS ß 1362(19) to mean man-made or man-induced alteration of chemical, physical, biological, and radiological integrity of water, and, as stated in 33 USCS ß 1251(b), policy was to recognize, preserve, and protect primary responsibilities and rights of states to prevent, reduce, and eliminate pollution. S. D. Warren Co. v Me. Bd. of Envtl. Prot. (2006) 547 US 370, 126 S Ct 1843, 164 L Ed 2d 625, 62 Envt Rep Cas 1257, 19 FLW Fed S 193, 17 ALR Fed 2d 807.

It is intent of Clean Water Act (33 USCS ßß 1251 et seq.) to cover as much as possible all waters of United States instead of just some, and to regulate such waters to fullest extent possible under commerce clause. Quivira Mining Co. v United States EPA (1985, CA10) 765 F2d 126, 22 Envt Rep Cas 2003, 15 ELR 20530, cert den (1986) 474 US 1055, 88 L Ed 2d 769, 106 S Ct 791, 23 Envt Rep Cas 1872 (criticized in FD&P Enters. v United States Army Corps of Eng'rs (2003, DC NJ) 239 F Supp 2d 509, 33 ELR 20140).

Term "navigable waters," in 33 USCS ß 1251 provision stating that it is national goal that discharge of pollutants into navigable waters be eliminated by 1985, means waters of United States, including territorial seas. Quivira Mining Co. v United States EPA (1985, CA10) 765 F2d 126, 22 Envt Rep Cas 2003, 15 ELR 20530, cert den (1986) 474 US 1055, 88 L Ed 2d 769, 106 S Ct 791, 23 Envt Rep Cas 1872 (criticized in FD&P Enters. v United States Army Corps of Eng'rs (2003, DC NJ) 239 F Supp 2d 509, 33 ELR 20140).

Protection of wetlands, as important wildlife refuge, is legitimate purpose for which Clean Water Act (33 USCS ßß 1251 et seq.) was intended, and justifies any incidental effect of permit requirement, under 33 USCS ß 1344, and of coincident refusal to apply 33 USCS ß 1251(g), on farmer's state-allocated water rights, since accommodations between Act's purpose and farmer's efforts to engage wetlands in upland farming on regular basis are best reached in individual permit process. United States v Akers (1986, CA9 Cal) 785 F2d 814, 24 Envt Rep Cas 1121, 16 ELR 20538, cert den (1986) 479 US 828, 93 L Ed 2d 56, 107 S Ct 107, 25 Envt Rep Cas 1856.

Purpose of Water Pollution Control Act, as indicated by legislative history, is to establish means whereby comprehensive programs for water pollution control may be developed and implemented by Environmental Protection Agency. Sierra Club v Lynn (1973, WD Tex) 364 F Supp 834, 5 Envt Rep Cas 1737, 5 Envt Rep Cas 1745, 4 ELR 20110, affd in

Received
August 26, 2011
Commission on
State Mandates

part and revd in part on other grounds (1974, CA5 Tex) 502 F2d 43, 7 Envt Rep Cas 1033, 4 ELR 20844, reh den (1974, CA5 Tex) 504 F2d 760 and cert den (1975) 421 US 994, 44 L Ed 2d 484, 95 S Ct 2001 and cert den (1975) 422 US 1049, 45 L Ed 2d 701, 95 S Ct 2668, reh den (1975) 423 US 884, 46 L Ed 2d 115, 96 S Ct 158.

Purpose of Federal Water Pollution Control Act (33 USCS ßß 1151 et seq.) and its 1972 Amendments (33 USCS ßß 1251 et seq.) was not to preempt but to supplement and amplify any preexisting remedies. Illinois ex rel. Scott v Milwaukee (1973, ND Ill) 366 F Supp 298, 5 Envt Rep Cas 2018, 4 ELR 20045, injunction gr (1973, ND Ill) 1973 US Dist LEXIS 15607.

Federal Water Pollution Control Act was designed to deal with all facts of recapturing and preserving biological integrity of nation's water by creating web of complex interrelated regulatory programs. United States v Holland (1974, MD Fla) 373 F Supp 665, 6 Envt Rep Cas 1388, 4 ELR 20710.

Federal Water Pollution Control Act was designed to exercise federal regulatory jurisdiction over activities which impair navigation; Act was enacted to prevent entry of pollutants into navigable waters and to this end pollution must be controlled at its source before pollution endangers coastal environment. P. F. Z. Properties, Inc. v Train (1975, DC Dist Col) 393 F Supp 1370, 7 Envt Rep Cas 1930.

Clean Water Act, as set forth in 33 USCS ß 1251(a), is comprehensive statute designed to restore and maintain chemical, physical, and biological integrity of Nation's waters. St. Andrews Park, Inc. v United States Dep't of the Army Corps of Eng'rs (2004, SD Fla) 314 F Supp 2d 1238, 17 FLW Fed D 526.

Mineral resources should be developed responsibly, keeping in mind those other values that are so important to people of State of Wyoming, such as preservation of Wyoming's unique natural heritage and lifestyle; purpose of National Environmental Policy Act of 1969 and Clean Water Act is to require agencies to take notice of these values as integral part of decision-making process. Wyo. Outdoor Council v United States Army Corps of Eng'rs (2005, DC Wyo) 351 F Supp 2d 1232, 59 Envt Rep Cas 2038, 166 OGR 407.

Motion of plant manager's and corporation to dismiss and for bill of particulars as to Count One of second superseding indictment that contained 19 substantive counts relating to criminal violations of Clean Water Act was denied, except to limited extent that Government had agreed to provide bill of particulars as to regulations, permit limits, or other requirements. United States v Hajduk (2005, DC Colo) 370 F Supp 2d 1103, 60 Envt Rep Cas 1534.

Purpose of Clean Water Act, 33 USCS ßß 1251 et seq., is to restore and maintain physical, biological and chemical integrity of Nation's waters, Clean Water Act ß 101(a), 33 USCS ß 1251(a); in pursuit of this goal, and subject to certain exceptions, Act prohibits discharge of any pollutant, Clean Water Act ß 301(a), 33 USCS ß 1311(a). API v Johnson (2008, DC Dist Col) 541 F Supp 2d 165, 67 Envt Rep Cas 1497, 38 ELR 20081.

4. Construction

Water pollution legislation is to be given generous rather than niggardly construction, notwithstanding penal provisions. United States v Hamel (1977, CA6 Mich) 551 F2d 107, 9 Envt Rep Cas 1932, 7 ELR 20253.

EPA has permissibly construed Clean Water Act, 33 USCS ßß 1251 et seq., in defining as "discharge from Concentrated Animal Feeding Operation (CAFO)" discharge of manure, litter or process wastewater to waters of U.S. from CAFO as result of application of that manure, litter or process wastewater by CAFO to land areas under its control pursuant to 40 C.F.R. ß 122.23(e); land application areas are integral and indeed indispensable part of CAFO operations; CAFOs depend on them to receive volumes of manure their animals generate. Waterkeeper Alliance, Inc. v United States EPA (2005, CA2) 399 F3d 486, 59 Envt Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) 2005 US App LEXIS 6533.

Federal Water Pollution Control Amendments of 1972 amplified previous federal statutory authority relating to water pollution; such amendments prohibit discharge of pollutant by any person unless permitted otherwise in Act and reach all waters of United States in geographical sense in order to control pollution at its source; such amendments thus extend federal authority over water pollution beyond mean high tide line; by recognizing federal authority to act when offensive matter is discharged from "any point source" government is authorized to prevent entry of pollutants into navigable waters; Federal Water Pollution Control Act was designed to exercise federal regulatory jurisdiction over activities which impair navigation; Act was enacted to prevent entry of pollutants into navigable waters and to this end pollution must be controlled at its source before pollution endangers coastal environment. P. F. Z. Properties, Inc. v Train (1975, DC Dist Col) 393 F Supp 1370, 7 Envt Rep Cas 1930.

Received
August 26, 2011
Commission on
State Mandates

Section 101(g) of Clean Water Act, 33 USCS ß 1251(g), does not prohibit conditioning water quality certification on maintenance of specified instream flows necessary to meet State's water quality standards promulgated under Act and necessary to protect designated uses, and to meet federal and state antidegradation policies, regardless of whether applicant has existing water rights. Public Util. Dist. No. 1 v Dep't of Ecology (2002) 146 Wash 2d 778, 51 P3d 744.

5. Legislative intent

Clean Water Act (33 USCS ßß 1251 et seq.) expresses congressional insistence to eliminate water pollution within short time-span through use of uniform effluent limitations imposed on industry-wide basis. Reynolds Metal Co. v United States EPA (1985, CA4) 760 F2d 549, 22 Envt Rep Cas 1794, 15 ELR 20736.

While Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) contains no mechanism for direct federal regulation of nonpoint source pollution, legislative history makes clear that omission was due not to Congress' concern for state autonomy, but simply to its recognition that control of nonpoint source pollution was so dependent upon site-specific factors that its uniform federal regulation was virtually impossible but structure and legislative history of act provide no support for contention that Congress intended Environmental Protection Agency to play no role in controlling nonpoint source pollution and nothing in language or legislative history indicates congressional intent specifically to preclude EPA from imposing conditions on construction grants that are designed to reduce amount of nonpoint source pollution generated, either directly or indirectly, by facilities grants fund. Shanty Town Assoc. Ltd. Partnership v Environmental Protection Agency (1988, CA4 Md) 843 F2d 782, 27 Envt Rep Cas 1540, 18 ELR 21227.

Environmental Protection Agency erred by denying environmental groups' petition to review National Pollution Discharge Elimination System permit issued under Clean Water Act, 33 USCS ß 1342, allowing mining company to discharge toxic levels of copper into already toxic desert creek; under 40 C.F.R. ß 122.4(i), no permit could issue because new discharge would contribute to violation of water quality policy standards listed in 33 USCS ß 1251(a)(3). Friends of Pinto Creek v United States EPA (2007, CA9) 504 F3d 1007, 65 Envt Rep Cas 1289, 37 ELR 20255, cert den (2009, US) 129 S Ct 896, 173 L Ed 2d 106, 68 Envt Rep Cas 1480.

Express intent of FWPCA was to streamline decision-making and insure prompt high-level judicial review; this policy indicates congressional determination to vest jurisdiction over discharge regulation in Courts of Appeal. Shell Oil Co. v Train (1976, ND Cal) 415 F Supp 70, affd (1978, CA9 Cal) 585 F2d 408, 12 Envt Rep Cas 1547, 9 ELR 20023.

Treating ßß 309 and 311 of Clean Water Act (CWA), 33 USCS ßß 1319 and 1321, as alternatives in the case of oil spills furthers purpose behind CWA to restore and maintain chemical, physical, and biological integrity of nation's waters. United States v Colonial Pipeline Co. (2002, ND Ga) 242 F Supp 2d 1365, 55 Envt Rep Cas 2015, 158 OGR 1048.

6. Relationship with other laws

Environmental Protection Agency has no authority under Federal Water Pollution Control Act, as amended in 1972 (33 USCS ßß 1251 et seq.), to regulate discharge into nation's waterways of nuclear waste materials subject to regulation by Atomic Energy Commission and its successors under Atomic Energy Act of 1954 (42 USCS ßß 2011 et seq.). Train v Colorado Public Interest Research Group, Inc. (1976) 426 US 1, 48 L Ed 2d 434, 96 S Ct 1938, 8 Envt Rep Cas 2057, 6 ELR 20549.

Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) does not abrogate doctrine of res judicata, and if state court enters final judgment on identical issue EPA cannot invoke Act to avoid any preclusive effect that judgment may have. United States v ITT Rayonier, Inc. (1980, CA9 Wash) 627 F2d 996, 16 Envt Rep Cas 1091, 10 ELR 20945.

Corps' decision to leave wetlands in tact obviously reflects weight given to environmental protection of wetlands and does not constitute taking subject to review under 28 USCS ß 1346 or 5 USCS ß 702. Allain-Lebreton Co. v Department of Army, etc. (1982, CA5 La) 670 F2d 43, 17 Envt Rep Cas 1169, 12 ELR 20605.

Legitimate sewage discharge can be proper exercise of government's police powers, but Clean Water Act (33 USCS ßß 1251 et seq.) imposes severe limitation on right to discharge sewage or other pollutants into nation's waterways, and under state constitutional provision that private property shall not be taken for public use without just compensation, pollution can amount to "taking." Stoddard v Western Carolina Regional Sewer Authority (1986, CA4 SC) 784 F2d 1200, 23 Envt Rep Cas 2105, 16 ELR 20503 (criticized in St. John's Organic Farm v Gem County Mosquito Abatement Dist. (2009, CA9 Idaho) 2009 US App LEXIS 17568).

Received
August 26, 2011
Commission on
State Mandates

Any incidental effect of permit requirement, under 33 USCS ß 1344, and of coincident refusal to apply 33 USCS ß 1251(g), on farmer's state-allocated water rights is justified, since protection of wetlands, as important wildlife refuge, is legitimate purpose for which Clean Water Act (33 USCS ßß 1251 et seq.) was intended, and accommodations are best reached in individual permit process. United States v Akers (1986, CA9 Cal) 785 F2d 814, 24 Envt Rep Cas 1121, 16 ELR 20538, cert den (1986) 479 US 828, 93 L Ed 2d 56, 107 S Ct 107, 25 Envt Rep Cas 1856.

There is no question but that Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) applies in Puerto Rico notwithstanding Puerto Rico Federal Relations Act (48 USCS ßß 7031 et seq.) and proceedings in the Commonwealth courts not involving identical issues do not constitute bar to raising federal claims before courts of United States. United States v Rivera Torres (1987, CA1 Puerto Rico) 826 F2d 151, 26 Envt Rep Cas 1374, 17 ELR 21285.

Company whose sewage treatment plant design was approved by EPA is not entitled to contribution from EPA for damages that might be awarded to plant owner that sued company as result of plant not meeting federal permit requirements since 28 USCS ß 2680(h) "misrepresentation" exception to government's waiver of sovereign immunity under Federal Tort Claims Act (28 USCS ßß 1346(b) and 2671 et seq.) bars contribution action against EPA. Garland v Zurn Industries, Inc. (1989, CA5 Tex) 870 F2d 320, 29 Envt Rep Cas 1753, 19 ELR 21297.

In action challenging fire-recovery timber sale in drainage area of national forest, environmental group has standing to sue under APA for violations of state water quality control plan pursuant to Clean Water Act. Marble Mountain Audubon Soc'y v Rice (1990, CA9 Cal) 914 F2d 179, 32 Envt Rep Cas 1249, 21 ELR 20023.

Distinction between jurisdiction of Resource Conservation and Reconstruction Act and Clean Water Act is defined by regulation stating that only actual discharges from holding pond into surface waters are governed by CWA, not contents of pond or discharges into it. United States v Dean (1992, CA6 Tenn) 969 F2d 187, 35 Envt Rep Cas 1255, 22 ELR 21296, reh, en banc, den (1992, CA6) 1992 US App LEXIS 20353 and cert den (1993) 507 US 1033, 123 L Ed 2d 475, 113 S Ct 1852 and (superseded by statute as stated in United States v Okoli (1994, CA5 Tex) 20 F3d 615).

Interagency Coordination Agreement (ICA) does not add new conflicting requirements that prospective permittees must satisfy; source of those conflicting requirements, to extent they exist, is in congressional decision in Clean Water Act, 33 USCS ßß 1251 et seq., to establish partnership between states and federal government; conflicting requirements are pervasive feature of regulatory landscape, not something that ICA created. Home Builders Ass'n v United States Army Corps of Eng'rs (2003, CA7 Ill) 335 F3d 607, 56 Envt Rep Cas 1812, 33 ELR 20236.

Because Second Circuit believes that terms of nutrient management plans constitute effluent limitations, Second Circuit holds that Concentrated Animal Feeding Operation Rule, codified at 40 C.F.R. pts. 9, 122, 123, 412--by failing to require that terms of nutrient management plans be included in National Pollutant Discharge Elimination System permits--violates Clean Water Act, 33 USCS ßß 1251 et seq., and is otherwise arbitrary and capricious in violation of Administrative Procedure Act. Waterkeeper Alliance, Inc. v United States EPA (2005, CA2) 399 F3d 486, 59 Envt Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) 2005 US App LEXIS 6533.

District court did not abuse its discretion when it determined that new trial under Fed. R. Crim. P. 33 based upon Nationwide Permit No. 3, 67 Fed. Reg. 2078 (Jan. 15, 2002) was not appropriate following defendant's criminal conviction for violating Clean Water Act (CWA), 33 USCS ßß 1251 et seq.; Permit was issued pursuant to Rivers and Harbors Act, 33 USCS ß 403, and did not apply to activities covered by CWA. United States v Moses (2007, CA9 Idaho) 496 F3d 984, 64 Envt Rep Cas 1993, 37 ELR 20206, cert den (2008, US) 128 S Ct 2963, 171 L Ed 2d 886 and (criticized in Peconic Baykeeper, Inc. v Suffolk County (2008, ED NY) 585 F Supp 2d 377, 68 Envt Rep Cas 2072).

Government's invocation of Clean Water Act limitations on discharge from plaintiff's gold placer mine may have such negative economic impact on value and investment that genuine issues of fact preclude summary judgment in plaintiff's suit for compensation for government taking. Rybachek v United States (1991) 23 Cl Ct 222, 33 Envt Rep Cas 1473.

Provisions of Federal Water Pollution Control Act Amendments of 1972 (33 USCS ßß 1251 to 1376) do not fall within limited exception of Puerto Rican Federal Relations Act (48 USCS ß 734) for locally inapplicable federal statutes, but apply to both navigable and nonnavigable waters of Puerto Rico. Puerto Rico v Alexander (1977, DC Dist Col) 438 F Supp 90, 10 Envt Rep Cas 1575, 7 ELR 20751.

Court will not rubberstamp agency determination that fails to consider cumulative impacts, fails to realistically assess impacts to ranchlands, and relies on unsupported, unmonitored mitigation measures; National Environmental Poli-

Received
August 26, 2011
Commission on
State Mandates

cy Act of 1969 and Clean Water Act require more. Wyo. Outdoor Council v United States Army Corps of Eng'rs (2005, DC Wyo) 351 F Supp 2d 1232, 59 Envt Rep Cas 2038, 166 OGR 407.

In issuing general permit authorizing discharge of dredge and fill materials associated with several activities related to oil and gas development, Army Corps of Engineers violated National Environmental Policy Act of 1969 by failing to consider permit's cumulative impacts; fact that cumulative impacts were not discussed in relation to any resource other than wetlands necessitated conclusion that Corps could not have found cumulative effects of permit to be minimal in order to comply with Clean Water Act. Wyo. Outdoor Council v United States Army Corps of Eng'rs (2005, DC Wyo) 351 F Supp 2d 1232, 59 Envt Rep Cas 2038, 166 OGR 407.

7.--Other environmental laws

Compliance with federal water quality standards developed under amended Federal Water Pollution Control Act (predecessor to 33 USCS ßß 1251 et seq.) would not immunize defendant from prosecution for discharges without permit under 33 USCS ß 407. United States v United States Steel Corp. (1973, CA7 Ind) 482 F2d 439, 3 ELR 20388, cert den (1973) 414 US 909, 38 L Ed 2d 147, 94 S Ct 229.

Federal environmental protection statutes did not enlarge jurisdiction of Army Corps of Engineers under Rivers and Harbors Act (33 USCS ß 401); developers did not need permit under Act to complete dredge and fill operation begun in 1951 where all land was substantially above mean high tide, but deposit of dredging material into navigable lagoon after its creation subjected developers to permit program administered under Federal Water Pollution Control Act Amendment of 1972 (33 USCS ß 1251). United States v Stoeco Homes, Inc. (1974, CA3 NJ) 498 F2d 597, 6 Envt Rep Cas 1757, 4 ELR 20390, cert den (1975) 420 US 927, 43 L Ed 2d 397, 95 S Ct 1124.

Remedial investigation feasibility study agreed to by operator and owner of landfill site, and as directed by EPA work plan, was remedial action or removal action and district court therefore properly dismissed suit, on ground of lack of subject matter jurisdiction, brought by operator against owner for violating Clean Water Act. Razore v Tulalip Tribes (1995, CA9 Wash) 66 F3d 236, 95 CDOS 7354, 95 Daily Journal DAR 12580, 41 Envt Rep Cas 1701, 32 FR Serv 3d 1451, 26 ELR 20063.

Federal district court's order vacating Clean Water Act (CWA), 33 USCS ßß 1251 et seq., permits issued by Army Corps of Engineers allowing limestone to be mined from wetlands that was home to endangered wood stork and provided aquifer for major metropolitan area was vacated because court failed to apply proper deferential standard of review under Administrative Procedure Act, 5 USCS ß 706(2), to Corps' decision; district court failed to confine its analysis to whether Corps had procedurally complied with National Environmental Policy Act, 42 USCS ß 4332(C), and erroneously engaged in substantive analysis of whether Corps should have granted permits under CWA. Sierra Club v Flowers (2008, CA11 Fla) 526 F3d 1353, 66 Envt Rep Cas 1904, 38 ELR 20113, 21 FLW Fed C 671.

Endangered Species Act's objective (to provide program and means to conserve endangered species and their ecosystems, 16 USCS ß 1531(b)), is surely intertwined with that of Clean Water Act (to restore and maintain chemical, physical, and biological integrity of nation's waters, 33 USCS ß 1251(a)). N. Cal. River Watch v Wilcox (2011, CA9 Cal) 633 F3d 766, 41 ELR 20084.

Predecessor to 33 USCS ß 1251 did not impliedly repeal 33 USCS ß 441. United States v Vulcan Materials Co. (1970, DC NJ) 320 F Supp 1378, 2 Envt Rep Cas 1145, 1 ELR 20086.

Federal Water Pollution Control Act amendments of 1972 did not repeal Refuse Act (33 USCS ßß 403, 407, and 409). United States v Consolidation Coal Co. (1973, ND W Va) 354 F Supp 173, 3 ELR 20425.

General demarcation line between jurisdiction of FWPCA (33 USCS ßß 1251 et seq.) and Marine Protection Act (33 USCS ßß 1401 et seq.), with exception of pipes or outfalls, is 3-mile limit of territorial seas. Pacific Legal Foundation v Quarles (1977, CD Cal) 440 F Supp 316, 10 Envt Rep Cas 1369, 7 ELR 20653, affd (1980, CA9 Cal) 614 F2d 225, 14 Envt Rep Cas 1111, 10 ELR 20271, cert den (1980) 449 US 825, 66 L Ed 2d 29, 101 S Ct 88, 14 Envt Rep Cas 2208.

Fish and Wildlife Service (FWS) was entitled to summary judgment in action under 16 USCS ß 1540(g)(1)(A), which was filed by builder associations challenging FWS' designation of Central California population of California tiger salamander as "threatened" under Endangered Species Act, 16 USCS ßß 1531 et seq.; FWS considered inadequacy of existing regulatory mechanisms as required by 16 USCS ß 1533(a)(1), and it rationally concluded that there was inadequate protection under Clean Water Act, 33 USCS ßß 1251 et seq., California Streambed Alteration Act, Cal. Fish &

Received
August 26, 2011
Commission on
State Mandates

Game Code ß 1600 et seq., California Environmental Quality Act, Cal. Pub. Res. Code ßß 21000 et seq., and California Porter-Cologne Water Quality Control Act, Cal. Water Code ßß 13000 et seq. Home Builders Ass'n v United States Fish & Wildlife Serv. (2007, ND Cal) 529 F Supp 2d 1110, affd (2009, CA9 Cal) 321 Fed Appx 704.

Meaning of "applicable water quality standards" for both Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) and River and Harbor Act of 1970 includes both state water quality criteria and plan for implementation and enforcement of such criteria. USEPA GCO 76-11.

8.--Federal common law of nuisance

No federal common law remedy is available to state to seek abatement of nuisance caused by interstate water pollution resulting from overflows of untreated sewage and discharges of inadequately treated sewage by municipality in neighboring state, Congress not having left appropriate federal standards to courts through application of nuisance concepts and maxims of equity jurisprudence, but rather having occupied field through establishment under Federal Water Pollution Control Act Amendments of 1972 (33 USCS ßß 1251 et seq.) of comprehensive regulatory program supervised by expert administrative agency. Milwaukee v Illinois (1981) 451 US 304, 68 L Ed 2d 114, 101 S Ct 1784, 15 Envt Rep Cas 1908, 11 ELR 20406.

There is no body of federal common law to which private citizen could resort in seeking injunctive relief against stream pollution by sewage treatment plant operating under permit issued in accordance with Federal Water Pollution Control Act and authorization of EPA where (1) controversy was strictly local, (2) there was no claim of indication of rights of another state, and (3) there was no allegation of any interstate effect. Committee for Consideration of Jones Falls Sewage System v Train (1976, CA4 Md) 539 F2d 1006, 9 Envt Rep Cas 1212, 6 ELR 20703 (criticized in Connecticut v Am. Elec. Power Co. (2009, CA2 NY) 582 F3d 309).

Maritime tort claims for damages resulting from water pollution, based on nuisance theory, have been pre-empted by enactment of Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) and Maritime Protection, Research, and Sanctuaries Act of 1972 (33 USCS ßß 1401 et seq.). Conner v Aerovox, Inc. (1984, CA1 Mass) 730 F2d 835, 20 Envt Rep Cas 1877, 1984 AMC 2507, 14 ELR 20370, cert den (1985) 470 US 1050, 84 L Ed 2d 812, 105 S Ct 1747, 22 Envt Rep Cas 1784.

Federal common law of nuisance in area of water pollution is entirely pre-empted by more comprehensive scope of Federal Water Pollution Control Act, 33 USCS ßß 1251 et seq. National Audubon Soc. v Department of Water (1988, CA9 Cal) 869 F2d 1196.

Federal common law nuisance claims concerning water pollution are preempted by Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) since Supreme Court has unequivocally so stated. National Audubon Soc. v Department of Water (1988, CA9 Cal) 869 F2d 1196.

In action brought by United States and State of Illinois to refrain steel corporation from discharging waste water into Lake Michigan, Public Law 92-500 was held as not abolishing federal common law of nuisance, but rather as manifesting intention to supplement and amplify pre-existing remedies. United States ex rel. Scott v United States Steel Corp. (1973, ND Ill) 356 F Supp 556, 5 Envt Rep Cas 1125, 3 ELR 20204.

Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) as amended in 1972 (33 USCS ßß 1251 et seq.) did not preempt state of Illinois from seeking abatement in Federal District Court of federal common law nuisance in interstate or navigable waters. Illinois ex rel. Scott v Milwaukee (1973, ND Ill) 366 F Supp 298, 5 Envt Rep Cas 2018, 4 ELR 20045, injunction gr (1973, ND Ill) 1973 US Dist LEXIS 15607.

State law claims against out-of-state dischargers are pre-empted by comprehensive federal statute (33 USCS ßß 1251 et seq.) which in turn pre-empts federal common law because uniformity in interstate regulation of pollution is concern of same magnitude whatever form federal response may take. Chicago Park Dist. v Sanitary Dist. of Hammond (1981, ND Ill) 530 F Supp 291, 18 Envt Rep Cas 1372, 13 ELR 20372.

9.--Civil rights laws

Congress has foreclosed 42 USCS ß 1983 remedy under 33 USCS ßß 1251 et seq. Love v New York State Dep't of Environmental Conservation (1981, SD NY) 529 F Supp 832, 17 Envt Rep Cas 2083, 12 ELR 20571.

Received
August 26, 2011
Commission on
State Mandates

Civil rights suit against operator of hazardous waste treatment and disposal facility is precluded by federal statutory scheme dealing with air and water pollution that provides for citizens' suits in such instances. Reeger v Mill Service, Inc. (1984, WD Pa) 593 F Supp 360, 21 Envt Rep Cas 2165, 14 ELR 20900.

Court has authority to exercise its discretion to adjudicate pendent state law claims in plaintiff's action alleging violation of state wetlands act, as pendent state claim to suit brought pursuant to Clean Water Act 33 USCS ßß 1251 et seq.). Norfolk v Harold (1987, ED Va) 662 F Supp 959.

Parties' joint motion to amend consent decree is granted, where original decree resolved power company's violations of Clean Water Act (33 USCS ßß 1251 et seq.) via, inter alia, provision of $ 7.5 million fund for acquisition and restoration of wetlands near nuclear generating station, but company's recent financial difficulties have raised doubts about completion of plan, because proposed amendment provides for immediate acquisition and expenditure of funds on crucial wetlands restoration projects throughout Southern California, in furtherance of Act's purpose to restore and maintain integrity of nation's waters. Earth Island Inst., Inc. v S. Cal. Edison (2001, SD Cal) 166 F Supp 2d 1304.

10. Effect on state and local law

No federal common law remedy is available to state to seek abatement of nuisance caused by interstate water pollution resulting from overflows of untreated sewage and discharges of inadequately treated sewage by municipality in neighboring state, Congress not having left appropriate federal standards to courts through application of nuisance concepts and maxims of equity jurisprudence, but rather having occupied field through establishment under Federal Water Pollution Control Act Amendments of 1972 (33 USCS ßß 1251 et seq.) of comprehensive regulatory program supervised by expert administrative agency. Milwaukee v Illinois (1981) 451 US 304, 68 L Ed 2d 114, 101 S Ct 1784, 15 Envt Rep Cas 1908, 11 ELR 20406.

It is not arbitrary or capricious for EPA to reject state water quality standards and to promulgate its own standards upon refusal of state to modify its standards; EPA need not consider economic factors when setting its criteria. Mississippi Com. on Natural Resources v Costle (1980, CA5 Miss) 625 F2d 1269, 15 Envt Rep Cas 1256, 10 ELR 20931.

Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) does not abrogate doctrine of res judicata, and if state court enters final judgment on identical issue EPA cannot invoke Act to avoid any preclusive effect that judgment may have. United States v ITT Rayonier, Inc. (1980, CA9 Wash) 627 F2d 996, 16 Envt Rep Cas 1091, 10 ELR 20945.

In enacting Clean Water Act (33 USCS ßß 1251 et seq.), Congress has clearly expressed its intent to allow states to take active role in abating water pollution; however, federal/state partnership in pollution regulation applies only to waters within states' jurisdiction. Chevron U.S.A., Inc. v Hammond (1984, CA9 Alaska) 726 F2d 483, 20 Envt Rep Cas 1505, 1984 AMC 1027, 14 ELR 20305, cert den (1985) 471 US 1140, 86 L Ed 2d 703, 105 S Ct 2686, 22 Envt Rep Cas 2071, 1985 AMC 2395.

Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) precludes application of state's common or statutory law to determine liability and afford remedy for discharges, in particular by municipality, within another state. Illinois v Milwaukee (1984, CA7 Ill) 731 F2d 403, 20 Envt Rep Cas 1801, 14 ELR 20359, cert den (1985) 469 US 1196, 83 L Ed 2d 981, 105 S Ct 979, 105 S Ct 980, 22 Envt Rep Cas 1071.

State township's prohibition of floating homes in ecologically fragile area is not preempted by federal ship licensing requirements in 46 USCS ß 12109 or Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.). Bass River Associates v Mayor, Township Comr., Planning Bd. (1984, CA3 NJ) 743 F2d 159, 1985 AMC 1896.

Nothing in Clean Water Act (33 USCS ßß 1251 et seq.) presages congressional intent to occupy entire field of water pollution to exclusion of state regulation. Stoddard v Western Carolina Regional Sewer Authority (1986, CA4 SC) 784 F2d 1200, 23 Envt Rep Cas 2105, 16 ELR 20503 (criticized in St. John's Organic Farm v Gem County Mosquito Abatement Dist. (2009, CA9 Idaho) 2009 US App LEXIS 17568).

When state's water quality standards were read in conjunction with guidance set forth in Fla. Stat. ß 403.021(11), waterbodies not meeting water quality standards solely because of natural conditions did not need to be placed on state's impaired waters list, thus, such argument by plaintiff environmental groups challenging defendant EPA's approval of state's impaired waterbodies list was rejected; phrase "restore and maintain," as used in 33 USCS ß 1251, indicated that Congress sought to return waterbodies to their natural conditions, not modify waterbodies' natural conditions. Sierra Club, Inc. v Leavitt (2007, CA11 Fla) 488 F3d 904, 64 Envt Rep Cas 1705, 67 FR Serv 3d 1332, 37 ELR 20138, 20 FLW Fed C 689.

Received
August 26, 2011
Commission on
State Mandates

Federal Water Pollution Control Act (33 USCS ßß 1151 et seq.) as amended in 1972 (33 USCS ßß 1251 et seq.) did not preempt state of Illinois from seeking abatement in Federal District Court of federal common law nuisance in interstate or navigable waters. Illinois ex rel. Scott v Milwaukee (1973, ND Ill) 366 F Supp 298, 5 Envt Rep Cas 2018, 4 ELR 20045, injunction gr (1973, ND Ill) 1973 US Dist LEXIS 15607.

State law claims against out-of-state dischargers are pre-empted by comprehensive federal statute (33 USCS ßß 1251 et seq.) which in turn pre-empts federal common law because uniformity in interstate regulation of pollution is concern of same magnitude whatever form federal response may take. Chicago Park Dist. v Sanitary Dist. of Hammond (1981, ND Ill) 530 F Supp 291, 18 Envt Rep Cas 1372, 13 ELR 20372.

Challenge to EPA's veto of water storage project must fail, where, inter alia, water entities argue that EPA violated 33 USCS ß 1251(g), prohibiting interference with state laws allocating quantities of water, because entities do not have standing to protect city's water rights, and EPA has done nothing to prevent city or any other water rights owners from using or transferring their rights. Alameda Water & Sanitation Dist. v Reilly (1996, DC Colo) 930 F Supp 486, 43 Envt Rep Cas 1471, 26 ELR 21526.

Taxpayers' challenge to property taxes imposed to fund comprehensive scheme of sewer improvements intended to bring defendant municipalities into compliance with Clean Water Act (33 USCS ßß 1251 et seq.) must fail, where taxes are pursuant to consent decree issued by federal District Court, because court may order local government unit with taxing authority to levy taxes adequate to satisfy municipality's debt obligations incurred in complying with federal law, even if taxes exceed state constitutional and statutory limitations. Bylinski v City of Allen Park (1998, ED Mich) 8 F Supp 2d 965, affd (1999, CA6 Mich) 169 F3d 1001, cert den (1999) 527 US 1037, 119 S Ct 2396, 144 L Ed 2d 796 and (criticized in Henson v Ciba-Geigy Corp. (2001, CA11 Fla) 261 F3d 1065, 14 FLW Fed C 1094) and (ovrld in part by Syngenta Crop Prot., Inc. v Henson (2002) 537 US 28, 123 S Ct 366, 154 L Ed 2d 368, 2002 CDOS 10936, 2002 Daily Journal DAR 12654, 16 FLW Fed S 4) and (Overruled as stated in City of Warren v City of Detroit (2007, CA6 Mich) 495 F3d 282, 2007 FED App 276P).

County's state-law nuisance and related pollution claims against city, relating to city's operation of dam, were not preempted by 33 USCS ß 1251(b), as basis for removal jurisdiction, in light of intrastate nature of dispute and Clean Water Act's savings clause. Portage County Bd. of Comm'rs v City of Akron (1998, ND Ohio) 12 F Supp 2d 693.

Under Clean Water Act, 33 USCS ßß 1251 et seq., all federal agencies must comply with state water quality standards; district court denied state's motion for preliminary injunction to stop Army Corps of Engineers from proceeding on project because of lack of possibility of success on merits. North Dakota v United States Army Corps of Eng'rs (2003, DC ND) 270 F Supp 2d 1115, injunction den (2003, DC ND) 2003 US Dist LEXIS 12072.

Lessor was entitled to summary judgment on his liquidated damages claim in action arising from early termination of lease; performance was not excused based on frustration of purpose because increased costs associated with dairy farm operator's compliance with Clean Water Act, 33 USCS ßß 1251 et seq., did not constitute substantial or severe frustration of purpose of lease. Further, event causing frustration was foreseeable to parties at time they entered lease because obligation to comply with environmental standards was stated and known obligation. Lindner v Meadow Gold Dairies, Inc. (2007, DC Hawaii) 515 F Supp 2d 1154.

Florida could not be allowed to create blanket variance from phosphorus criteria for discharge into Everglades, pursuant to Fla. Stat. ß 373.4592(4)(e)(2), through guise of compliance schedule set forth in administrative orders without following procedures required under Clean Water Act, 33 USCS ßß 1251 et seq. Miccosukee Tribe of Indians v United States (2010, SD Fla) 706 F Supp 2d 1296, 40 ELR 20122.

11.--More stringent standards

Since Administrator is required by FWPCA (33 USCS ßß 1251 et seq.) to include in permit more stringent state limitations, including those necessary to meet state water quality standards, and is given no authority to set aside or modify those limitations in permit proceeding, he has no authority to consider challenges to validity of state water quality standards in permanent proceeding, nor to consider whether limitations adopted by state were necessary to achieve its water quality standards. United States Steel Corp. v Train (1977, CA7 Ill) 556 F2d 822, 10 Envt Rep Cas 1001, 7 ELR 20419.

In the area of interstate water pollution Federal Water Pollution Control Act precludes application of one state's common or statutory law to determine liability and afford remedy for discharges, in particular by municipality, within

Received
August 26, 2011
Commission on
State Mandates

another state. Illinois v Milwaukee (1984, CA7 Ill) 731 F2d 403, 20 Envt Rep Cas 1801, 14 ELR 20359, cert den (1985) 469 US 1196, 83 L Ed 2d 981, 105 S Ct 979, 105 S Ct 980, 22 Envt Rep Cas 1071.

Provisions of 33 USCS ßß 1251(b), 1365(e), and 1370 show continuing intention of Congress not only to perpetuate rights of municipalities to adopt and enforce requirements to abate pollution more stringent than any which may be adopted under federal system but also to make certain that this activity by states and municipalities continues for public benefit; action by municipal corporation to abate pollution activities of manufacturing corporation, brought under authority of state statute and under common law, need not be stayed during pendency of proceedings under Federal Water Pollution Control Act Amendments of 1972, although objective of both local and federal jurisdictions is identical, but where method and manner of reaching objective are entirely different, in that federal agency hearings are concerned with permit expressly approving and validating continued pollution by corporation, while local proceedings involve termination of said pollution. Metropolitan Sanitary Dist. v United States Steel Corp. (1975, 1st Dist) 30 Ill App 3d 360, 332 NE2d 426, cert den (1976) 424 US 976, 47 L Ed 2d 746, 96 S Ct 1482.

12. Effect on existing remedies

Equitable relief against corporate defendants causing oil spills in Lake Champlain was not precluded by Federal Water Pollution, Prevention and Control Act. United States v Ira S. Bushey & Sons, Inc. (1973, DC Vt) 363 F Supp 110, 5 Envt Rep Cas 1710, 4 ELR 20071, affd without op (1973, CA2 Vt) 487 F2d 1393, cert den (1974) 417 US 976, 41 L Ed 2d 1146, 94 S Ct 3182.

1972 Amendments of Federal Water Pollution Control Act clearly shows that Congress in no way intended to destroy any remedies available to state prior to passage of 1972 Amendments; purpose of Federal Water Pollution Control Act (33 USCS ßß 1151 et seq.) and its 1972 Amendments (33 USCS ßß 1251 et seq.) was not to preempt but to supplement and amplify any preexisting remedies. Illinois ex rel. Scott v Milwaukee (1973, ND Ill) 366 F Supp 298, 5 Envt Rep Cas 2018, 4 ELR 20045, injunction gr (1973, ND Ill) 1973 US Dist LEXIS 15607.

Mandamus is not available when alternative adequate remedy exists, and property owners' attempt to invoke federal mandamus jurisdiction, under 28 USCS ß 1361, to compel Environmental Protection Agency, and Army Corps of Engineers to determine if land filling operation, performed without their approval, were proper, would fail where plaintiffs had alternative adequate remedy in action under "citizen suits" provision of Federal Water Pollution Control Act Amendments of 1972 (33 USCS ßß 1251 et seq.). Loveladies Property Owners Asso. v Raab (1975, DC NJ) 430 F Supp 276, 10 Envt Rep Cas 1242, affd (1976, CA3 NJ) 547 F2d 1162, cert den (1977) 432 US 906, 53 L Ed 2d 1077, 97 S Ct 2949, 10 Envt Rep Cas 1249.

Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) and regulations promulgated thereunder in no way entitle parties outside city limits who have had easement taken upon their property for sewer project to obtain connection and access to city sewer system. Application of Easement by City for Construction of Wastewater Treatment Plant, USEPA RCO (Region 10) December 3, 1974.

II.SCOPE OF CHAPTER 13. Persons subject to regulation

Federal dischargers of water pollutants are to be governed only by same general effluent limitations and other standards and compliance schedules as other polluters, which standards are embodied in permits issued by Environmental Protection Agency; in issuing permits to federal dischargers Agency is to treat them, under its program adopted pursuant to the National Pollutant Discharge Elimination System (33 USCS ß 1342), in same way state would treat nonfederal dischargers under its program. EPA v California (1976) 426 US 200, 96 S Ct 2022, 48 L Ed 2d 578, 8 Envt Rep Cas 2089, 6 ELR 20563 (superseded by statute as stated in United States v Pennsylvania Environmental Hearing Bd. (1978, CA3 Pa) 584 F2d 1273, 8 ELR 20689) and (superseded by statute as stated in United States v Puerto Rico (1983, CA1 Puerto Rico) 721 F2d 832, 20 Envt Rep Cas 1189, 14 ELR 20003) and (superseded by statute as stated in Parola v Weinberger (1988, CA9 Cal) 848 F2d 956, 27 Envt Rep Cas 2081, 34 CCF P 75501, 18 ELR 20882) and (superseded by statute as stated in United States v Air Pollution Control Bd. of Tennessee Dep't of Health & Environment (1990, MD Tenn) 31 Envt Rep Cas 1492) and (superseded by statute as stated in Ohio v United States Dep't of Energy (1990, CA6 Ohio) 904 F2d 1058, 31 Envt Rep Cas 1448, 20 ELR 20953) and (superseded by statute as stated in Sierra Club v Lujan (1991, CA10 Colo) 931 F2d 1421, 33 Envt Rep Cas 1014, 21 ELR 21195).

State thruway authority was not immune from suit in federal court under 11th Amendment for suit charging violation of Clean Water Act and discharge of pollutants into bay. Mancuso v New York State Thruway Auth. (1996, CA2 NY) 86 F3d 289, 42 Envt Rep Cas 1961, 26 ELR 21418, cert den (1996) 519 US 992, 136 L Ed 2d 375, 117 S Ct 481, 43 Envt Rep Cas 1992 and (criticized in Vogt v Bd. of Comm'rs (2002, CA5 La) 294 F3d 684, 157 OGR 741).

Received
August 26, 2011
Commission on
State Mandates

To infer that in enacting predecessor to 33 USCS ß 1251, Congress deprived states of their constitutional immunity from private suits arising from cleanup activities would frustrate Act's repeatedly articulated objective of encouraging state participation and cooperation in clean up of oil spills. Burgess v M/V Tamano (1974, DC Me) 382 F Supp 351.

Construction company that sought to construct and restore for use oil pipeline that traversed 149 miles was required to obtain permit under 33 USCS ßß 1251 et seq. from U.S. Army Corps of Engineers because project would involve release of sediment in or near various streams and wetlands that were part of navigable waters of United States. Stop the Pipeline v White (2002, SD Ohio) 233 F Supp 2d 957, 155 OGR 361.

Defendant, who was wastewater discharge under Clean Water Act (CWA), 33 USCS ßß 1251 et seq., and who, as electroplater/metal finisher, was significant industrial user was not "closely regulated industry" because CWA is general purpose environmental law applied to industrial companies exception to warrant requirement; therefore, publicly owned treatment works could not conduct warrantless administrative searches of defendant's manhole and sampling box under closely regulated industry exception to warrant requirement. United States v Hajduk (2005, DC Colo) 396 F Supp 2d 1216, 61 Envt Rep Cas 1750.

Fact that defendant may discharge through conveyances owned by another party does not remove defendant's actions from scope of FWPCA (33 USCS ßß 1251 et seq.); discharge of pollutants into city's nontreatment waste water system which in turn emptied into Mississippi River constituted discharge into "navigable waters" as described in "general definitions" section of FWPCA (33 USCS ß 1362(7)). United States v Velsicol Chemical Corp. (976, WD Tenn) 438 F Supp 945, 9 Envt Rep Cas 1722.

14.--Federal agencies

In action to enjoin Corps of Engineers from further dam construction on lower Snake River, and to compel Corps of Engineers to comply with certain federal laws, including, inter alia, predecessor to 33 USCS ßß 1251 et seq., as essence of plaintiffs' case on merits required determination of whether federal officials had exceeded their authority or had exercised that authority in void manner, such action fell within exceptions to sovereign immunity; however, if relief sought would work intolerable burden on governmental functions, outweighing any consideration of private harm, action must fail notwithstanding allegations falling within recognized exceptions to sovereign immunity. Association of Northwest Steelheaders, etc. v United States Army Corps of Engineers (1973, CA9 Wash) 485 F2d 67, 3 ELR 20807.

It was not abuse of discretion for Army Corps of Engineers to construe Clean Water Act, 33 USCS ßß 1251 et seq., and its regulations as not requiring Corps to consider any future deepening of ship channel as adverse environmental consequence of issuing dredge and fill permit to port authority. City of Shoreacres v Waterworth (2005, CA5 Tex) 420 F3d 440, 60 Envt Rep Cas 2068, 35 ELR 20162.

Attorney fees will not be granted for preparation of plaintiff's motion to hold Secretary of Army in contempt for failure to comply with Clean Water Act where motion for contempt was denied, defendant had remedied noncompliance prior to filing of plaintiff's motion, and where defendant had made substantial efforts to maintain compliance with decree. Public Interest Research Group v Stone (1994, DC NJ) 156 FRD 568.

15. Acts covered

Environmental Protection Agency has no authority under Federal Water Pollution Control Act, as amended in 1972 (33 USCS ßß 1251 et seq.), to regulate discharge into the nation's waterways of nuclear waste materials subject to regulation by Atomic Energy Commission and its successors under Atomic Energy Act of 1954 (42 USCS ßß 2011 et seq.). Train v Colorado Public Interest Research Group, Inc. (1976) 426 US 1, 48 L Ed 2d 434, 96 S Ct 1938, 8 Envt Rep Cas 2057, 6 ELR 20549.

Clean Water Act (33 USCS ßß 1251 et seq.), together with regulations promulgated under its authority, authorizes Army Corps of Engineers to require landowners to obtain permits from Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. United States v Riverside Bayview Homes, Inc. (1985) 474 US 121, 88 L Ed 2d 419, 106 S Ct 455, 23 Envt Rep Cas 1561, 16 ELR 20086, remanded (1986, CA6 Mich) 793 F2d 1294 and (criticized in American Mining Congress v United States Army Corps of Eng'rs (2000, DC Dist Col) 120 F Supp 2d 23, 51 Envt Rep Cas 1773).

Army Corps of Engineers acts within its authority in requiring plaintiffs, who seek nationwide permit for deposit of dredge material for construction of dam and reservoir, to proceed under individual permit procedure, where record supports finding that discharge may adversely modify critical habitat of whooping crane, and thus plaintiffs failed to meet

Received
August 26, 2011
Commission on
State Mandates

burden of showing that discharge would not have adverse impact. Riverside Irrigation Dist. v Andrews (1985, CA10 Colo) 758 F2d 508, 22 Envt Rep Cas 1773, 15 ELR 20333.

Clean Water Act (33 USCS ßß 1251 et seq.) permits blanket prohibition and other "stringent pollution restrictions" to be imposed even where discharge caused no discernible harm to environment; accordingly, Environmental Protection Agency adequately supported regulation prohibiting discharge of toxic-carrying diesel pills in relatively small volumes, despite claim by oil companies that they pose no environmental threat when discharged in relatively small volumes of mud typical of Alaskan off-shore drilling operations. American Petroleum Inst. v United States EPA (1988, CA5) 858 F2d 261, 28 Envt Rep Cas 1529, 19 ELR 20317, 102 OGR 443, reh den, en banc, clarified (1989, CA5) 864 F2d 1156, 102 OGR 453.

Government is not estopped from asserting claim against landowner for construction of sea wall and placement of fill because Army Corps of Engineers official misstated Corps' jurisdiction and Corps failed to follow deadlines established by its own regulations in processing landowner's permit application, since landowner could not have reasonably relied on misstatement, and timely processing was not congressionally mandated. United States v Boccanfuso (1989, CA2 Conn) 882 F2d 666, 30 Envt Rep Cas 1292, 19 ELR 21388.

Landowners failed to establish Clean Water Act violation as they did not show that water from wastewater treatment facility entered their property and failed to show that any water at facility contained pollutants found on their property. Bufford v Williams (2002, CA10 Okla) 42 Fed Appx 279, 55 Envt Rep Cas 1781.

Clean Water Act, 33 USCS ßß 1251 et seq., was intended to broadly regulate introduction of pollutants to streams and rivers, and exempting point source owners without clear exemption from Congress from requirement to obtain National Pollutant Discharge Elimination System permits for discharges occurring on their land would undermine primary objective of Act as those objectives are stated in 33 USCS ß 1251(a)(1), (3), and thus, point source owners can be liable for discharge of pollutants occurring on their land, whether or not they acted in some way to cause discharge. Sierra Club v El Paso Gold Mines (2005, CA10 Colo) 421 F3d 1133, 61 Envt Rep Cas 1274, 35 ELR 20175, reh gr, in part, reh den, in part, corrected (2005, CA10) 2005 US App LEXIS 22955 and cert den, motion gr (2006) 547 US 1065, 126 S Ct 1653, 164 L Ed 2d 411, 62 Envt Rep Cas 2088.

Sources of pollution in form of discharge of sand, dirt and dredged spoil on land which, although above mean high water line, was periodically inundated with waters of Papy's Bayou, were not beyond reach of Federal Water Pollution Control Act. United States v Holland (1974, MD Fla) 373 F Supp 665, 6 Envt Rep Cas 1388, 4 ELR 20710.

EPA was not required to prepare Environmental Impact Statement in connection with issuance of NPDES permit to Hawaiian Electric Co. which permit contemplated construction of new discharge facility, notwithstanding that discharge facility arguably fell within literal statutory definition of "source," since generating plants were existing source of pollution for which discharge facility was proposed method of control and method of control could not also be source. Mahelona v Hawaiian Electric Co. (1976, DC Hawaii) 418 F Supp 1328, 9 Envt Rep Cas 1625, 7 ELR 20031.

In action alleging violations by defendants of Clean Water Act (33 USCS ßß 1251 et seq.) on ground that county sanitary district failed to comply with sludge disposal reporting requirements and that federal, state and county defendants failed to enforce said reporting requirements, no violation occurred, where county sanitary district provided information regarding sludge disposal to state and stated during course of hearing that information regarding sludge disposal would be provided to state prior to any such disposal. Property Owners Asso. v Gorsuch (1983, DC Md) 601 F Supp 220.

Environmental group's Clean Water Act (CWA), 33 USCS ßß 1251 et seq., action was dismissed because silvicultural exemption applied to defendant's logging roads because timber harvesting operations were expressly defined to be nonpoint source activity under 40 CFR ß 122.27; therefore, 33 USCS ß 1342(p)(2)(B) which required National Pollutant Discharge Elimination System (NPDES) permit for discharges associated with industrial activity did not apply; also 33 USCS ß 1311 did not apply because there was no regulation of stormwater on forest roads. Northwest Envtl. Def. Ctr. v Brown (2007, DC Or) 476 F Supp 2d 1188, 65 Envt Rep Cas 1696.

Complaint filed by residents of island of Vieques, Puerto Rico, asserting failure to warn of safety risks associated with United States Navy's military operations on island was dismissed because court lacked subject matter jurisdiction since discretionary function exception under Federal Tort Claims Act (FTCA), 28 USCS ß 2680(a), applied to their claims; further, United States Congress has specifically intended to limit private remedies for Clean Water Act, 33 USCS ßß 1251-1357, violations to its statutory remedies, which purposefully excludes claims for compensatory damages as sought by residents. Sanchez v United States (2010, DC Puerto Rico) 707 F Supp 2d 216.

Received
August 26, 2011
Commission on
State Mandates

16.--Pollutants covered

Nuclear waste materials--source material, special nuclear material, and byproduct material--are not "pollutants" within meaning of Federal Water Pollution Control Act, as amended in 1972 (33 USCS ßß 1251 et seq.), and are not within definition of term "pollutant" in ß 502(6) of Act (33 USCS ß 1362(6)). Train v Colorado Public Interest Research Group, Inc. (1976) 426 US 1, 48 L Ed 2d 434, 96 S Ct 1938, 8 Envt Rep Cas 2057, 6 ELR 20549.

FWPCA (33 USCS ßß 1251 et seq.) prohibits only addition of any pollutant to navigable waters from point source; those constituents occurring naturally in waterways or occurring as result of other industrial discharges do not constitute addition of pollutants by plant through which they pass; effluent limitations which require industry to treat and reduce pollutants other than those added by plant process are beyond scope of EPA's authority. Appalachian Power Co. v Train (1976, CA4) 545 F2d 1351, 9 Envt Rep Cas 1033, 6 ELR 20732, mod (1976, CA4) 545 F2d 1351, 9 Envt Rep Cas 1274.

Defendant's conviction of knowingly discharging pollutant from point source into waters of United States, in violation of Clean Water Act (CWA), 33 USCS ßß 1251 et seq., was affirmed because creek's status as "water of United States" was simply jurisdictional fact and government did not need to establish defendant's knowledge of that fact; however, government provided sufficient evidence to show that not only did human sewage pollutants discharged by defendant flowed into creek, but he was well aware of this fact. United States v Cooper (2007, CA4 Va) 482 F3d 658, 64 Envt Rep Cas 1321, 37 ELR 20073.

Final rule promulgated by EPA under Clean Water Act, which revised certain nationwide limitations on water pollutant discharges from sources in cokemaking subcategory of iron and steel industry, was not arbitrary or capricious under 5 USCS ß 706 since final limitations were logical outgrowth of proposed rule. Am. Coke & Coal Chems. Inst. v EPA (2006, App DC) 371 US App DC 554, 452 F3d 930, 62 Envt Rep Cas 1717, 36 ELR 20137.

In action by environmental organization against salmon farm owner alleging violation of Clean Water Act, 33 USCS ßß 1251 et seq., regarding release of pollutants into water from its salmon farms, following grant of summary judgment for environmental organization and court's order that salmon farm owner not to introduce any new class of fish into its net pens due to violation of 33 USCS ß 1321(b)(7), environmental organization's motion for contempt was granted and salmon farm owner was enjoined from allowing its subsidiary aquaculture farm from stocking salmon smolt in its pens where court pierced corporate veil and found that salmon farm owner controlled aquaculture company and consciously used aquaculture company to evade its responsibilities to obey court's previous order. United States Pub. Interest Research Group v Atl. Salmon of Me., LLC (2003, DC Me) 261 F Supp 2d 17, 56 Envt Rep Cas 1840.

Under Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.), Toxic Substances Control Act (15 USCS ßß 2601 et seq.), Resource Conservation and Recovery Act (42 USCS ßß 6901 et seq.), Environmental Protection Agency may regulate all radioactive pollutants except "source," "by-product," and "special" nuclear materials, as defined by Atomic Energy Act of 1954, although activities producing nonionizing radiation do not appear to be subject to any Environmental Protection Agency administered information-gathering statute. USEPA GCO 78-1.

17. Waters covered

Congress had constitutional authority under its interstate commerce powers to prohibit discharge of pollutants into nonnavigable tributaries of navigable streams; Congress, in adopting Federal Water Pollution Control Act Amendments of 1972, intended to control both discharges of pollutants directly into navigable waters and discharges of pollutants into nonnavigable tributaries which flow into navigable rivers. United States v Ashland Oil & Transp. Co. (1974, CA6 Ky) 504 F2d 1317, 7 Envt Rep Cas 1114, 4 ELR 20784, 50 OGR 133.

Term "navigable waters," in 33 USCS ß 1251 provision stating that it is national goal that discharge of pollutants into navigable waters be eliminated by 1985, means waters of United States, including territorial seas. Quivira Mining Co. v United States EPA (1985, CA10) 765 F2d 126, 22 Envt Rep Cas 2003, 15 ELR 20530, cert den (1986) 474 US 1055, 88 L Ed 2d 769, 106 S Ct 791, 23 Envt Rep Cas 1872 (criticized in FD&P Enters. v United States Army Corps of Eng'rs (2003, DC NJ) 239 F Supp 2d 509, 33 ELR 20140).

District court properly denied defendant's motion under Fed. R. Civ. P. 12(b)(3)(B) to dismiss indictment for violating Clean Water Act (CWA), 33 USCS ßß 1251-1387; district court properly determined that affected creek was navigable water within meaning of CWA and that creek did not have to be navigable-in-fact. United States v Phillips (2004, CA9 Mont) 356 F3d 1086, 57 Envt Rep Cas 1929, amd, reh den, reh, en banc, den (2004, CA9 Mont) 367 F3d 846 and reprinted as amd (2004, CA9 Mont) 367 F3d 846, cert den (2004) 543 US 980, 125 S Ct 479, 160 L Ed 2d 358.

Received
August 26, 2011
Commission on
State Mandates

Appellate court affirmed district court's finding that discharge of turbid water from Shandaken Tunnel into creek qualified as "discharge of any pollutant" under 33 USCS ß 1311(a) which was defined as "any addition of any pollutant to navigable waters from any point source", 33 USCS ß 1362(12), that required City of New York to obtain National Pollutant Discharge Elimination System permit because at bottom, City's arguments for reconsideration of court's holding were simply embellishments of those made in previous case and meaning of word "addition" had not changed; neither those arguments nor any intervening developments led court to conclude that its earlier holding was reached in error or should otherwise be modified. Catskill Mts. Chapter of Trout Unlimited, Inc. v City of New York (2006, CA2 NY) 451 F3d 77, 62 Envt Rep Cas 1737, 36 ELR 20111, cert den (2007) 549 US 1252, 127 S Ct 1373, 167 L Ed 2d 160, 64 Envt Rep Cas 1672.

District court properly found that city violated 33 USCS ß 1311(a) by discharging sewage from its waste treatment plant into waters covered by CWA without first obtaining National Pollutant Discharge Elimination System permit; rock quarry pit filled with water was "water of U.S." under 33 USCS ß 1362(7) because it was part of larger wetland adjacent to navigable river and because it had significant nexus to river. N. Cal. River Watch v City of Healdsburg (2007, CA9 Cal) 496 F3d 993, 64 Envt Rep Cas 2097, cert den (2008, US) 128 S Ct 1225, 170 L Ed 2d 61, 67 Envt Rep Cas 1032.

In enacting Federal Water Pollution Control Act, Congress saw fit to define away old navigability restriction; Congress intended to reach activities such as pollution of non-navigable mosquito canals and mangrove wetland areas; polluting canals that empty into bayou arm of Tampa Bay is clearly activity Congress sought to regulate. United States v Holland (1974, MD Fla) 373 F Supp 665, 6 Envt Rep Cas 1388, 4 ELR 20710.

Federal Water Pollution Control Amendments of 1972, prohibiting discharge of pollutants by any person unless otherwise permitted, reach all waters of United States in geographical sense in order to control pollution at its source and extend federal authority over water pollution beyond mean high tide line; by recognizing federal authority to act when offensive matter is discharged from "any point source" government is authorized to prevent entry of pollutants into navigable waters. P. F. Z. Properties, Inc. v Train (1975, DC Dist Col) 393 F Supp 1370, 7 Envt Rep Cas 1930.

Congress did not intend Clean Water Act (33 USCS ßß 1251 et seq.) to extend federal regulatory and enforcement authority over groundwater contamination. Kelley on behalf of Michigan v United States (1985, WD Mich) 618 F Supp 1103, 23 Envt Rep Cas 1494, 16 ELR 20080.

Environmental group's allegations that refining company has and continues to discharge pollutants into soils and ground water beneath refinery, which then make their way to navigable creek through groundwater, state claim under Clean Water Act (33 USCS ßß 1251 et seq.), because Tenth Circuit has chosen to interpret terminology of Act broadly to give full effect to Congress's declared goal and policy "to restore and maintain chemical, physical, and biological integrity of Nation's waters." Sierra Club v Colorado Ref. Co. (1993, DC Colo) 838 F Supp 1428, 38 Envt Rep Cas 1171, 24 ELR 20749, summary judgment gr, motion den, dismd (1994, DC Colo) 852 F Supp 1476, 38 Envt Rep Cas 1700, 24 ELR 21464, app dismd (1994, CA10 Colo) 1994 US App LEXIS 15183 and (criticized in Friends of Santa Fe County v Lac Minerals (1995, DC NM) 892 F Supp 1333, 26 ELR 20135) and (criticized in Old Timer, Inc. v Blackhawk-Central City Sanitation Dist. (1999, DC Colo) 51 F Supp 2d 1109, 49 Envt Rep Cas 1165).

18.--Arroyos

Environmental Protection Agency Administrator's determination that certain gullies or "arroyos" are waters of United States, so as to render discharge into them of pollutants from uranium mining and milling facilities subject to EPA regulation, is supported by substantial evidence, including evidence that (1) during times of intense rainfall there can be surface connection between gullies and navigable-in-fact streams, (2) gullies flow for period after time of discharge of pollutants into waters, (3) flow continues regularly through underground aquifers into navigable-in-fact streams. Quivira Mining Co. v United States EPA (1985, CA10) 765 F2d 126, 22 Envt Rep Cas 2003, 15 ELR 20530, cert den (1986) 474 US 1055, 88 L Ed 2d 769, 106 S Ct 791, 23 Envt Rep Cas 1872 (criticized in FD&P Enters. v United States Army Corps of Eng'rs (2003, DC NJ) 239 F Supp 2d 509, 33 ELR 20140).

Desert washes were considered navigable waters under Clean Water Act, and therefore fell under jurisdiction of Army Corps of Engineers. Save Our Sonoran, Inc. v Flowers (2005, CA9 Ariz) 408 F3d 1113.

Legal definition of "navigable waters" or "waters of the United States" within scope of 33 USCS ßß 1251 et seq. includes any waterway within United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as river or stream, tributary to river or stream, lake, reservoir,

Received
August 26, 2011
Commission on
State Mandates

bay, gulf, sea or ocean either within or adjacent to United States. United States v Phelps Dodge Corp. (1975, DC Ariz) 391 F Supp 1181, 7 Envt Rep Cas 1823, 5 ELR 20308.

In suit by environmental group alleging that power plant violated terms of state discharge elimination system permit, pursuant to 11 USCS ß 524(a)(2), plant's bankruptcy barred any civil penalties from alleged permit violations arising prior to date of bankruptcy confirmation order. Riverkeeper, Inc. v Mirant Lovett, LLC (2009, SD NY) 675 F Supp 2d 337.

19.--Wetlands

Clean Water Act (33 USCS ßß 1251 et seq.), together with regulations promulgated under its authority, authorizes Army Corps of Engineers to require landowners to obtain permits from Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. United States v Riverside Bayview Homes, Inc. (1985) 474 US 121, 88 L Ed 2d 419, 106 S Ct 455, 23 Envt Rep Cas 1561, 16 ELR 20086, remanded (1986, CA6 Mich) 793 F2d 1294 and (criticized in American Mining Congress v United States Army Corps of Eng'rs (2000, DC Dist Col) 120 F Supp 2d 23, 51 Envt Rep Cas 1773).

Regulation of wetlands under Clean Water Act (33 USCS ßß 1251 et seq.) does not violate commerce clause of US Constitution; as applied to government's suit under Clean Water Act (33 USCS ßß 1251 et seq.) against owner of various alleged wetlands for dumping fill thereon, regulatory definition of wetlands as those areas that are inundated or saturated by surface or ground water at frequency and duration sufficient to support, and that under normal circumstances do support, prevalence of vegetation typically adapted to life in saturated soil conditions, is not unconstitutionally vague. United States v Tull (1985, CA4 Va) 769 F2d 182, 24 Envt Rep Cas 1495, 3 FR Serv 3d 1421, 15 ELR 21061, revd, remanded (1987) 481 US 412, 107 S Ct 1831, 95 L Ed 2d 365, 25 Envt Rep Cas 1857, 7 FR Serv 3d 673, 17 ELR 20667 (criticized in Feltner v Columbia Pictures TV (1998) 523 US 340, 118 S Ct 1279, 140 L Ed 2d 438, 98 CDOS 2324, 98 Daily Journal DAR 3175, 26 Media L R 1513, 46 USPQ2d 1161, 1998 Colo J C A R 1542, 11 FLW Fed S 417, 163 ALR Fed 721) and (criticized in SEC v First Pac. Bancorp (1998, CA9 Cal) 142 F3d 1186, 98 CDOS 3143, 98 Daily Journal DAR 4343, CCH Fed Secur L Rep P 90197) and (criticized in State v Irving Oil Corp. (2008) 183 Vt 386, 2008 VT 42, 955 A2d 1098).

Defendants, engaged in developing large shopping mall in Massachusetts, on site that contained more than 20 acres of federally protected wetlands, who were notified by Army Corps of Engineers, which administers relevant aspects of Clean Water Act, that they could not deposit dredged or fill material into wetlands without first obtaining permit from court, but, despite that, bulldozed more than 5 acres of wetlands clear of all vegetation and piled debris and deposited gravel onto wetlands, could not raise defense that their activities were protected by "head waters nationwide permits" because state of Massachusetts, where headlands were located, did not observe such permit. United States v Marathon Dev. Corp. (1989, CA1 Mass) 867 F2d 96, 29 Envt Rep Cas 1145, 19 ELR 20683.

Right "to use and maintain" levees on government easement presupposed occurrence of some damage and easement contract assumed that excavation was necessary to maintain levees without prior written permission. United States v Green Acres Enters. (1996, CA8 Mo) 86 F3d 130.

Army Corps of Engineers had jurisdiction over developer's adjacent wetlands under Clean Water Act (CWA), 33 USCS ßß 1251 et seq., because CWA did not require significant hydrological or ecological connection as necessary for Corps to have jurisdiction over adjacent wetlands to navigable waters. Furthermore, Corps' finding were not arbitrary or capricious such that court would be required to set them aside pursuant to 5 USCS ß 706 and were more than sufficient to establish significant nexus between wetlands on site and flood control channels. Baccarat Fremont Developers, LLC v United States Army Corps of Eng'rs (2005, CA9 Cal) 425 F3d 1150, 61 Envt Rep Cas 1225, 35 ELR 20212 (criticized in Rapanos v United States (2006) 547 US 715, 126 S Ct 2208, 165 L Ed 2d 159, 62 Envt Rep Cas 1481, 19 FLW Fed S 275) and cert den (2007) 549 US 1206, 127 S Ct 1258, 167 L Ed 2d 75, 64 Envt Rep Cas 1384.

Because mere adjacency provided basis for Clean Water Act coverage only when relevant waterbody was wetland, and no other reason for CWA coverage of pond was supported by evidence or was properly before appellate court, appellate court it reversed district court's summary judgment; appellees had to establish that it was unreasonable for Environmental Protection Agency to confine wetlands to CWA's reach to non-navigable waterbodies that were adjacent to protected waters. San Francisco Baykeeper v Cargill Salt Div. (2007, CA9 Cal) 481 F3d 700, 64 Envt Rep Cas 1109, 37 ELR 20061.

Received
August 26, 2011
Commission on
State Mandates

Army Corps of Engineers' assertion of jurisdiction respecting residential development in wetlands was within its authority and not ultra vires. Tabb Lakes, Ltd. v United States (1993, CA FC) 10 F3d 796, 38 Envt Rep Cas 1179, 24 ELR 20169.

Government is entitled to preliminary injunction enjoining defendants from engaging in unauthorized fill activities at beach site, where government is likely to succeed on merits of argument that site constitutes "waters of United States," since area retains all essential characteristics of "wetlands," in that it was inundated and/or saturated by water at frequency and duration sufficient to support vegetation that typically thrives in saturated soil conditions; fact that part of area may have become wetlands because of manmade connection between site and tidal waterways is not dispositive of Corps' jurisdiction. United States v Ciampitti (1984, DC NJ) 583 F Supp 483, 20 Envt Rep Cas 1926.

Clean Water Act (33 USCS ßß 1251 et seq.) jurisdiction exists over North Dakota sloughs as isolated wetlands, where U.S. questions propriety of county's work on drainage ditch bisecting sloughs, because sloughs have provided habitat to migratory birds and could be used by interstate travelers for recreation. United States v Sargent County Water Resource Dist. (1992, DC ND) 876 F Supp 1081, 40 Envt Rep Cas 1710, 25 ELR 20922.

In issuing general permit authorizing discharge of dredge and fill materials associated with several activities related to oil and gas development, Army Corps of Engineers acted arbitrarily and capriciously in finding, for purposes of Clean Water Act, that cumulative effects on aquatic environment were minimal without assessing cumulative impacts to any resource other than wetlands. Wyo. Outdoor Council v United States Army Corps of Eng'rs (2005, DC Wyo) 351 F Supp 2d 1232, 59 Envt Rep Cas 2038, 166 OGR 407.

In issuing general permit authorizing discharge of dredge and fill materials associated with several activities related to oil and gas development, Army Corps of Engineers did not act arbitrarily and capriciously in its consideration of impacts to water quality, its consideration of threatened and endangered species, its analysis of impacts to wetlands, or its conclusion that impacts of permit for purposes of Clean Water Act were both similar in nature and similar in impact. Wyo. Outdoor Council v United States Army Corps of Eng'rs (2005, DC Wyo) 351 F Supp 2d 1232, 59 Envt Rep Cas 2038, 166 OGR 407.

Because Clean Water Act was enacted well before property owners acquired certain acreage and prohibits discharge of pollutants into waters of U.S., pursuant to 33 USCS ßß 1251(a), 1311(a), and because property owners were sophisticated real estate developers with actual and constructive knowledge of ß 404 of Act, court found that they did not have reasonable investment-backed expectation in their ability to develop portion of acreage that was required to be maintained as wetlands in exchange for dredging and filling of other wetlands. Norman v United States (2004) 63 Fed Cl 231, 59 Envt Rep Cas 1921, 34 ELR 20157, affd (2005, CA FC) 429 F3d 1081, 61 Envt Rep Cas 1577, 35 ELR 20239, cert den (2006) 547 US 1147, 126 S Ct 2288, 164 L Ed 2d 813, 63 Envt Rep Cas 1224.

Unpublished Opinions

Unpublished: Environmental groups' action challenging validity of permit United States Army Corp of Engineers granted to partnership pursuant to ß 404 of Clean Water Act (CWA), 33 USCS ß 1344, to fill 7.69 acres of wetlands and alleging violations of CWA, 33 USCS ßß 1251-1387; Administrative Procedure Act, 5 USCS ßß 500-596; National Environmental Policy Act, 42 USCS ßß 4321-4375; Rivers and Harbors Act, 33 USCS ßß 401-467n; and implementing regulations, was prudentially moot under U.S. Const. art. III as court could no longer provide groups with any meaningful relief to their alleged injuries, which were harms to their recreational and aesthetic interests that would result from filling wetlands, because all but 0.12 acres of 7.69 acres of wetlands had been filled, and construction on top of former wetlands was substantially complete; while 0.12 acres of wetlands remain unfilled, remaining parcel had been split and were adjacent to and separated by major thoroughfare, so preserving parcels would not provide any meaningful relief to groups' alleged recreational and aesthetic injuries. Sierra Club v United States Army Corps of Eng'rs (2008, CA3 NJ) 277 Fed Appx 170, 66 Envt Rep Cas 2054.

Unpublished: In case arising under Clean Water Act in which regional condition issued by Savannah, Georgia regional office of U.S. Army Corps of Engineers (Corps) that prohibited use of nationwide permit (NWP) 18 in tidal waters had been rescinded, case brought by environmental group and island resident was moot; regional condition that had been eliminated was original basis for lawsuit, and even if environmental group and resident could establish that Corps' decision to allow development of wetlands at issue was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law based upon existence of tidal waters, Corps only had to reissue another certificate under current NWP 18 which was free of constraints of eliminated regional condition. Altamaha Riverkeeper v United States Army Corps of Eng'rs (2009, CA11 Ga) 2009 US App LEXIS 2433.

Received
August 26, 2011
Commission on
State Mandates

20. Interests protected

Denial of Clean Water Act permit to discharge fill on plaintiff's land was taking for which plaintiffs are entitled to compensation. Formanek v United States (1992) 26 Cl Ct 332, 35 Envt Rep Cas 1406, 22 ELR 20893.

Government's power extends to protection of wildlife and natural resources in navigable waters, as well as to protection of navigation; waters of Vacia Talega project are "waters of United States" within meaning and intent of Federal Water Pollution Control Act. P. F. Z. Properties, Inc. v Train (1975, DC Dist Col) 393 F Supp 1370, 7 Envt Rep Cas 1930.

Injunction forbidding city from constructing underground sewage retention basin on proposed site is denied, where association of impacted neighbors is concerned that proposed basin will emit unpleasant odors and reduce local property values, because association lacks standing since alleged decrease in local property values is not within zone of interest protected by either Clean Water Act (33 USCS ßß 1251 et seq.) or National Environmental Policy Act (42 USCS ßß 4321 et seq.). Association of Significantly Impacted Neighbors v Livonia (1991, ED Mich) 765 F Supp 389, 34 Envt Rep Cas 1398.

III.IMPLEMENTATION OF CHAPTER 21. Duty of Environmental Protection Agency to enforce chapter

Duties imposed by 33 USCS ß 1319(a)(3) on EPA Administrator are discretionary and are not mandatory; hence Environmental Protection Agency Administrator would be dismissed as defendant in citizen suit seeking, inter alia, writ of mandamus requiring him to enforce FWPCA [33 USCS ßß 1251 et seq.] as required by ß 1319(a)(3) since 33 USCS ß 1365(a)(2) grants jurisdiction only over citizen suits to force Administrator to perform mandatory duties. Sierra Club v Train (1977, CA5 Ala) 557 F2d 485, 10 Envt Rep Cas 1433, 7 ELR 20670.

In enacting Clean Water Act (33 USCS ßß 1251 et seq.), Congress gave Administrator of Environmental Protection Agency broad discretion to choose means by which he will carry out his responsibilities. Cerro Copper Products Co. v Ruckelshaus (1985, CA7) 766 F2d 1060, 22 Envt Rep Cas 2230.

District court properly granted government's motion to dismiss without prejudice action for injunctive relief, and condition that federal and state governments execute covenant not to sue for injunctive relief or civil penalties, with reservation allowing pursuit of later cost-recovery action, was not abuse of discretion, where government's decision to proceed, under Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) 42 USCS ß 9604, with immediate removal of polychlorinated biphenyles (PCB) from harbor contaminated by adjacent industrial complex and possibly sue later for removal and clean-up costs, under 42 USCS ß 9607, was justified, considering delay of years of anticipated litigation over injunctive relief, under Refuse Act, 33 USCS ß 407, Clean Water Act (33 USCS ßß 1251 et seq.), and CERCLA, 42 USCS ß 9606, balanced against government's overwhelming interest in protecting environment from further irreparable damage to water and marine life and in protecting citizens from potential harmful effects of PCBs. United States v Outboard Marine Corp. (1986, CA7 Ill) 789 F2d 497, 24 Envt Rep Cas 1273, 4 FR Serv 3d 1213, 16 ELR 20708, cert den (1986) 479 US 961, 93 L Ed 2d 403, 107 S Ct 457, 25 Envt Rep Cas 1856.

Federal Water Pollution Control Act does not grant Administrator of Environmental Protection Agency discretion to enforce Act at his option; Act must be construed as mandating appropriate action by Administrator, and civil action will lie against Administrator to compel him to act in proper case. Illinois ex rel. Scott v Hoffman (1977, SD Ill) 425 F Supp 71, 11 Envt Rep Cas 1049, 7 ELR 20287 (criticized in Amigos Bravos v EPA (2003, CA10 NM) 324 F3d 1166, 56 Envt Rep Cas 1270, 33 ELR 20166) and (criticized in Johnson County Citizen Comm. for Clean Air & Water v United States EPA (2005, MD Tenn) 2005 US Dist LEXIS 33190).

Action by state municipal corporation challenging validity of state water pollution control law as it relates to federal requirement to impose system of user charges as condition of federal grant funding under 33 USCS ßß 1251 et seq., in which plaintiff intends to enact user charge system as part of its contractual obligations under 33 USCS ß 1284, is dismissed as to Environmental Protection Agency, where question of whether corporation could legally enter into contract and whether contract is void ab initio is pending before state courts and resolution in that court could render federal constitutional issue moot, where only relief plaintiff requested against EPA is to enjoin EPA from withholding funds, both EPA and plaintiff agreed that EPA could properly withhold funds, and therefore no dispute between plaintiff and EPA existed upon which relief could be granted, and where unconstitutionality of state law is not directed against EPA, so that court lacks subject matter jurisdiction of claim in relation to EPA. Metropolitan St. Louis Sewer Dist. v Ruckelshaus (1984, ED Mo) 590 F Supp 385.

Received
August 26, 2011
Commission on
State Mandates

By naming silvicultural nonpoint sources through example, Environmental Protection Agency (EPA) acted within its authority under ß 304(f)(1) of Clean Water Act (33 USCS ß 1314(f)(1)), to issue guideline for identifying nature of nonpoint sources; however, since EPA determined sources were not subject to National Pollutant Discharge Elimination System program, circuit court review was not invoked. Envtl. Prot. Info. Ctr. v Pac. Lumber Co. (2003, ND Cal) 266 F Supp 2d 1101, 57 Envt Rep Cas 1188.

22. Actions by state or local governments to enforce chapter

Municipal sewage treatment authority which failed to receive funding under Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) does not have standing to bring action against state officials for violation of Act arising out of authority's failure to receive funding; authority also does not have standing to bring action under Administrative Procedure Act (5 USCS ßß 701 et seq.) against federal defendants arising out of authority's failure to receive funding under Act, in light of citizen suit provision under Water Pollution Control Act (33 USCS ß 1365). Allegheny County Sanitary Authority v United States Environmental Protection Agency (EPA) (1984, CA3 Pa) 732 F2d 1167, 20 Envt Rep Cas 2021, 38 FR Serv 2d 1575.

Because quality of discharged water and quantity of appropriated water are governed by different laws, Nev. Rev. Stat. ßß 445A.500, 534.050, 534.120, and subject to different permits, it is clear that state does not regulate dewatering under its Clean Water Act authority. Great Basin Mine Watch v Hankins (2006, CA9 Nev) 456 F3d 955, 36 ELR 20150.

40 CFR ß 123.30 did not say state program was unacceptable if not subject to same judicial review as that for federal permit challenges, and there was scant evidence of how fees would be assessed in public interest cases under Alaska Stat. ß 09.60.010(b), petitioner native community's challenge to respondent Environmental Protection Agency's approval of Alaska's National Pollutant Discharge Elimination System failed; it was not shown that state program would not encourage public participation in development, revision, and enforcement of any regulation as contemplated by 33 USCS ß 1251(e). Akiak Native Cmty. v United States EPA (2010, CA9) 625 F3d 1162.

Commonwealth of Puerto Rico has requisite standing, for purposes of declaratory judgment action asserting that Puerto Rican Federal Relations Act of 1950 (48 USCS ßß 731 to 916) limits powers of Federal Government under Federal Water Pollution Control Act Amendment of 1972 (33 USCS ßß 1251 to 1376) to regulate unnavigable waters of Puerto Rico, since injury sustained to Puerto Rico's sovereignty and having to gain approval from Federal Government for dredged or fill material to be discharged into its unnavigable waters is real and immediate. Puerto Rico v Alexander (1977, DC Dist Col) 438 F Supp 90, 10 Envt Rep Cas 1575, 7 ELR 20751.

State agency, West Virginia Department of Environmental Protection, that had become operator by default of former mine sites that were discharging pollutants without effective National Pollution Discharge Elimination System permit was enjoined from further discharges and required to apply for permit under Clean Water Act, 33 USCS ßß 1251 et seq. W. Va. Highlands Conservancy. Inc. v Huffman (2009, ND W Va) 588 F Supp 2d 678.

Although state supreme court rejected procedural claims of group of business organizations and Agency of Natural Resources, it still concluded that decision of Vermont Water Resources Board (Board) that existing stormwater discharges into five brooks located in particular county contributed to violations of Vermont Water Quality Standards and, thus, required federal discharge permits under Clean Water Act, 33 USCS ßß 1251 et seq.; Board erroneously encroached on Agency of Natural Resources' authority in assuming that discharges contributed to violations of water quality standards. In re Stormwater NPDES Petition (2006) 180 Vt 261, 2006 VT 91, 910 A2d 824.

23. Actions by private entities to enforce chapter

In action by environmentalist groups seeking injunction against particular development, plaintiffs failed to state claim for violation of Federal Water Pollution Control Act in that there was absence of evidence that development would pollute aquifer and degrade established standards of water quality or that Department of Housing and Urban Development's loan commitment contravened its duty to effectuate Federal Water Pollution Control Act. Sierra Club v Lynn (1974, CA5 Tex) 502 F2d 43, 7 Envt Rep Cas 1033, 4 ELR 20844, reh den (1974, CA5 Tex) 504 F2d 760 and cert den (1975) 421 US 994, 44 L Ed 2d 484, 95 S Ct 2001 and cert den (1975) 422 US 1049, 45 L Ed 2d 701, 95 S Ct 2668, reh den (1975) 423 US 884, 46 L Ed 2d 115, 96 S Ct 158.

There is no implied private right of action under Federal Water Pollution Control Act for damages against violator of FWPCA in favor of person injured by pollutant discharges. Evansville v Kentucky Liquid Recycling (1979, CA7

Received
August 26, 2011
Commission on
State Mandates

Ind) 604 F2d 1008, 13 Envt Rep Cas 1509, 9 ELR 20679, cert den (1980) 444 US 1025, 62 L Ed 2d 659, 100 S Ct 689, 13 Envt Rep Cas 2169.

Enforcement actions by state department of environmental conservation against railroad that culminated in consent orders did not preclude institution of citizen suits under section 505 of Federal Water Pollution Control Act Amendments of 1972. Friends of Earth v Conrail (1985, CA2 NY) 768 F2d 57, 22 Envt Rep Cas 2224, 15 ELR 20674.

Plaintiff properly brought citizen suit under 33 USCS ß 1365 against mining company for alleged violations of Federal Water Pollution Control Act because plaintiff fulfilled notice and filing requirements of 33 USCS ß 1319(g)(6)(B)(ii) before state instituted administrative enforcement proceedings under 33 USCS ß 1342 so that bar of ß 1319(g)(6)(A) was inapplicable based on purpose of Act under 33 USCS ß 1251(a) and clear meaning of ß 1319(g)(6)(B). Black Warrior Riverkeeper, Inc. v Cherokee Mining, LLC (2008, CA11 Ala) 548 F3d 986, 21 FLW Fed C 1253.

In citizen suit against local sewerage district under Clean Water Act, 33 USCS ßß 1251 et seq., district court did not abuse its discretion in denying motion to admit letter from Environmental Protection Agency (EPA) under Fed. R. Evid. 803(8), public records exception to hearsay rule, because letter was not sufficiently reliable or trustworthy to overcome rule against admission of hearsay evidence; district court had reasonable basis for excluding letter since it was apparently only repeating third party opinion and was not state opinion of EPA. Friends of Milwaukee's Rivers v Milwaukee Metro. Sewerage Dist. (2009, CA7 Wis) 556 F3d 603.

In citizen suit against local sewerage district under Clean Water Act, 33 USCS ßß 1251 et seq., court's dismissal of case on res judicata grounds based on settlement between State and district was affirmed because it was not clearly erroneous for district court to decline to give post-settlement evidence of sewer overflows decisive weight in its finding that State's settlement constituted diligent prosecution for purposes of res judicata. Friends of Milwaukee's Rivers v Milwaukee Metro. Sewerage Dist. (2009, CA7 Wis) 556 F3d 603.

State-level citizen suits are not commanded by Clean Water Act (33 USCS ßß 1251 et seq.), and administrator did not act improperly by failing to require state programs to afford them; EPA maintains that nothing in Clean Water Act or its legislative history indicates that Congress intended that states be required to provide identical rights to those Congress specified for citizens in Federal Court, and Court of Appeals will defer to agency's reading, since Congress has not directly addressed issue and agency's determination is based on permissible construction of statute. Natural Resources Defense Council, Inc. v U.S. EPA (1988, App DC) 859 F2d 156, 28 Envt Rep Cas 1401, 19 ELR 20016.

Plaintiffs comprised of two community groups had standing under 33 USCS ß 1365(a) to sue for alleged violations of water quality standards under Federal Water Pollution Control Act Amendments of 1972 (33 USCS ßß 1251 et seq.), where plaintiffs claimed to live within environments of natural object they sought to protect. Montgomery Environmental Coalition v Fri (1973, DC Dist Col) 366 F Supp 261, 6 Envt Rep Cas 1209, 4 ELR 20182.

Organization which had successfully brought suit to compel Administrator of Environmental Protection Agency to implement provisions of Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) by issuing regulations concerning state planning in area of water pollution would not be permitted to intervene of right under Rule 24(a)(2), Fed Rules of Civ Proc, in action brought by power utility company challenging regulations issued by Administrator; for purposes of adequacy of representation, once regulations were passed, assumption was that Administrator would ably defend regulations, and in absence of anything in record suggesting that Administrator could not ably defend regulations, that any interest of proposed intervenor would be adequately represented. Commonwealth Edison Co. v Train (1976, ND Ill) 71 FRD 391, 23 FR Serv 2d 1116.

33 USCS ßß 1251 et seq. do not create implied cause of action for commercial fishermen, seafood wholesalers, retailers, distributors and processors, restauranteurs, marine, boat tackle and bait shop owners or employees of such groups against defendant which violates such statutes. Pruitt v Allied Chemical Corp. (1981, ED Va) 523 F Supp 975, 16 Envt Rep Cas 2014, 12 ELR 20170.

Corporation owning land to be condemned for construction of water supply dam and reservoir on creek, and unincorporated conservation authority of local residents have no standing to challenge issuance of permit for construction, where plaintiffs failed to allege kind of direct harm sufficient to establish case or controversy necessary to invoke federal court jurisdiction, and alleged only generalized fear of loss of natural environment in creek area, which is shared in substantially equal measure by all members of public, and where all property acquisitions have been by voluntary purchases from affected landowners and corporation's land had not yet been condemned. Cane Creek Conservation Authority v Orange Water & Sewer Authority (1984, MD NC) 590 F Supp 1123, 21 Envt Rep Cas 1994.

Received
August 26, 2011
Commission on
State Mandates

Private right of action for state to enforce Clean Water Act (33 USCS ßß 1251 et seq.) would not be implied, where Congress expressly provided federal right of enforcement, under 33 USCS ß 1319(d), and private right of action for citizen enforcement, under 33 USCS ß 1365, but apparently chose not to create right of enforcement in states. California v Department of Navy (1986, ND Cal) 631 F Supp 584, 24 Envt Rep Cas 1177, 16 ELR 20618, affd (1988, CA9 Cal) 845 F2d 222, 27 Envt Rep Cas 1569, 18 ELR 20863.

District Court will exercise jurisdiction over citizen suit seeking declaratory judgment that company violated pollution permit and injunction against further violations because citizens commenced suit before state by filing in federal court one day before service of state complaint, and abstention is not appropriate when state action was much more limited than citizen's suit and inconsistent rulings are unlikely. Connecticut Fund for Environment, Inc. v Upjohn Co. (1987, DC Conn) 660 F Supp 1397, 26 Envt Rep Cas 1495, 17 ELR 21137.

Environmental organizations do not have standing to seek injunctive relief to have EPA and Army Corps of Engineers assert jurisdiction over "all" wetlands that meet scientific, regulatory definition of wetland without regard to their effect on interstate commerce, where plaintiffs have no such "personal stake" in outcome of "controversy" that would distinguish them from any other individual or class of individuals as to alleged harm that would be suffered. National Wildlife Federation v Laubscher (1987, SD Tex) 662 F Supp 548, 26 Envt Rep Cas 1071, 17 ELR 20892.

Environmental Protection Agency (EPA)'s decision not to amend regulation regarding lumber company's discharge of pollutants marked consummation of its decision making process, despite its generalized statement to continue studying problem and EPA's call for comments reopened underlying rule for review; as environmental organization filed its complaint after final agency action occurred, challenge to regulation was timely. Envtl. Prot. Info. Ctr. v Pac. Lumber Co. (2003, ND Cal) 266 F Supp 2d 1101, 57 Envt Rep Cas 1188.

Environmental organization's Clean Water Act (CWA), 33 USCS ßß 1251 et seq., suit was not moot because logging company's persistent representations that its operations did not require National Pollutant Discharge Elimination System permit suggested that there was likelihood that company would resume challenged activity, procurement of state general permit, without more, was not sufficient to establish that present action was moot, and if organization were to prevail imposition of civil penalties under 33 USCS ß 1319 could serve as powerful deterrent. Envtl. Prot. Info. Ctr. v Pac. Lumber Co. (2006, ND Cal) 430 F Supp 2d 996.

Court granted organizations' motion for summary judgment where: (1) EPA had yet to comply with Clean Water Act, 33 USCS ßß 1251 et seq., to extent that it had to prepare and publish antidegradation implementation policies for Puerto Rico; (2) Puerto Rico never adopted new antidegradation implementation methods consistent with P.R. Laws Ann. tit. 3, ßß 2122, 2126 and EPA regulations, and therefore any alleged approval by EPA was not valid; and (3) because EPA determined that Puerto Rico's antidegradation implementation policies were nonexistent, and therefore procedural steps fell under guidance of 33 USCS ß 1313(c)(4), which required published proposed regulations. CORALations v United States EPA (2007, DC Puerto Rico) 477 F Supp 2d 413.

In case in which two environmental groups challenged certain pollution limits--total maximum daily loads (TMDLs)--promulgated by Environmental Protection Agency (EPA) for waters of District of Columbia as inconsistent with Clean Water Act, 33 USCS ßß 1251 et seq., and EPA moved for partial dismissal and partial remand without vacatur, EPA's erroneous conclusion that it could express TMDLs in terms of annual or seasonal pollutant limits was unquestionably material deficiency in regulation; proper remedy was to vacate challenged rules, but stay vacatur in order to permit EPA opportunity to correct deficient TMDLs. Anacostia Riverkeeper, Inc. v Jackson (2010, DC Dist Col) 713 F Supp 2d 50, 40 ELR 20149.

24. Forum for enforcement proceedings

In light of delicate partnership between federal and state administrative agencies created by 33 USCS ßß 1251 et seq., court of appeals is unwilling to infer that Congress has implicitly consented to state court actions against EPA or Administrator. Aminoil U. S. A., Inc. v California State Water Resources Control Bd. (1982, CA9 Cal) 674 F2d 1227, 17 Envt Rep Cas 1702, 12 ELR 20594 (superseded by statute as stated in Beeman v Olson (1987, CA9 Cal) 828 F2d 620) and (superseded by statute as stated in Guidry v Durkin (1987, CA9 Cal) 834 F2d 1465, 1988 AMC 1979).

Court affirmed defendant's conviction for violating multiple provisions of Clean Water Act (CWA), 33 USCS ßß 1251-1387, and for conspiring to violate CWA after defendant, without permit, diverted water from creek to fill ponds on property that defendant was developing because district court did not err in refusing to dismiss indictment for lack of jurisdiction on ground that creek was not navigable water under CWA and in so instructing jury. United States v Phillips (2004, CA9 Mont) 367 F3d 846, cert den (2004, US) 160 L Ed 2d 358, 125 S Ct 479.

Received
August 26, 2011
Commission on
State Mandates

25. Remedies

Injunctive relief should not be automatically denied to individual lake owner making claim under 33 USCS ßß 1251 et seq., because at individual's insistence claim of defendant city's violation of Clean Water Act as well as claims for injunctive relief, costs, and attorney and expert witness fees were submitted to jury without objection by defendant, since relief under Clean Water Act is equitable in nature, and injunctive relief sought under lake owner's common-law nuisance claim also sounded in equity, power to grant or deny that relief clearly resided in trial judge. Jones v St. Clair (1986, CA8 Mo) 804 F2d 478, 25 Envt Rep Cas 1330, 17 ELR 20250.

Plaintiff can still pursue civil penalties against defendant even though defendant no longer owns and operates source of pollution; because of important deterrent function of civil penalties under Clean Water Act, defendant cannot escape liability arising out of past violations by selling polluting facility that continues to operate. San Francisco Baykeeper, Inc. v Tosco Corp. (2002, CA9 Cal) 309 F3d 1153, 2002 CDOS 10863, 2002 Daily Journal DAR 12587, 55 Envt Rep Cas 1385, 33 ELR 20098, cert dismd (2003) 539 US 924, 156 L Ed 2d 147, 123 S Ct 2296.

Following defendant's conviction for violating Clean Water Act, 33 USCS ßß 1251-1387, district court erred in concluding that government could not be victim entitled to restitution pursuant to USSG ß 5E1.1; site investigation costs necessary to determine extent of environmental damage and appropriate cleanup actions were recoverable. United States v Phillips (2004, CA9 Mont) 356 F3d 1086, 57 Envt Rep Cas 1929, amd, reh den, reh, en banc, den (2004, CA9 Mont) 367 F3d 846 and reprinted as amd (2004, CA9 Mont) 367 F3d 846, cert den (2004) 543 US 980, 125 S Ct 479, 160 L Ed 2d 358.

Following defendant's conviction for violating Clean Water Act, 33 USCS ßß 1251-1387, district court erred in failing to consider all reliable evidence of cleanup costs in its determination of whether defendant's actions caused "substantial expenditure" for cleanup pursuant to USSG ß 2Q1.3(b)(3); district court improperly excluded related expenses under Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USCS ßß 9601-9675. United States v Phillips (2004, CA9 Mont) 356 F3d 1086, 57 Envt Rep Cas 1929, amd, reh den, reh, en banc, den (2004, CA9 Mont) 367 F3d 846 and reprinted as amd (2004, CA9 Mont) 367 F3d 846, cert den (2004) 543 US 980, 125 S Ct 479, 160 L Ed 2d 358.

Following defendant's conviction for violating Clean Water Act, 33 USCS ßß 1251-1387, district court erred in concluding that USSG ß 3C1.1 required government to show more than fact that defendant attempted to influence testimony of witness. United States v Phillips (2004, CA9 Mont) 356 F3d 1086, 57 Envt Rep Cas 1929, amd, reh den, reh, en banc, den (2004, CA9 Mont) 367 F3d 846 and reprinted as amd (2004, CA9 Mont) 367 F3d 846, cert den (2004) 543 US 980, 125 S Ct 479, 160 L Ed 2d 358.

Following defendant's conviction for violating Clean Water Act, 33 USCS ßß 1251-1387, district court erred in conducting its USSG ß 5K2.0 heartland analysis; district court's analysis was flawed because it considered defendant's prior state prosecution and considered internal agency memoranda and legislative history. United States v Phillips (2004, CA9 Mont) 356 F3d 1086, 57 Envt Rep Cas 1929, amd, reh den, reh, en banc, den (2004, CA9 Mont) 367 F3d 846 and reprinted as amd (2004, CA9 Mont) 367 F3d 846, cert den (2004) 543 US 980, 125 S Ct 479, 160 L Ed 2d 358.

Monetary damages are not available under Clean Water Act (33 USCS ßß 1251 et seq.). Fairview Township v United States EPA (1984, MD Pa) 593 F Supp 1311, 22 Envt Rep Cas 1423, 15 ELR 20028, affd in part and remanded in part on other grounds (1985, CA3 Pa) 773 F2d 517, 23 Envt Rep Cas 1460, 15 ELR 20951.

Government is entitled to preliminary injunction mandating removal of fill from beach under 33 USCS ß 1251(a), where there is reasonable likelihood that filled pool is within tidal waters and thus within waters of U.S. land surrounding pool is likely "adjacent wetlands," because government is likely to succeed on merits; traditional test for preliminary injunction and purposes of Clean Water Act (USCS ßß 1251 et seq.) dictate issuance. United States v Malibu Beach, Inc. (1989, DC NJ) 711 F Supp 1301, 29 Envt Rep Cas 1920, 19 ELR 21247.

26. Impoundment of funds

Under 33 USCS ßß 1285 and 1287, Administrator could not allot to states less than entire amount authorized to be appropriated by 33 USCS ß 1287, but instead was obligated to allot full amounts authorized for appropriations. Train v New York (1975) 420 US 35, 43 L Ed 2d 1, 95 S Ct 839, 7 Envt Rep Cas 1497, 5 ELR 20162; Minnesota v United States Environmental Protection Agency (1975, CA8 Minn) 512 F2d 913.

Received
August 26, 2011
Commission on
State Mandates

United States Supreme Court will vacate Federal Court of Appeals' judgment which was based on premise that under 33 USCS ßß 1285 and 1287, Administrator of Environmental Protection Agency has discretion to allot to states less than full amounts authorized to be appropriated for certain fiscal years for federal grants to municipalities for construction of publicly owned waste treatment works, and case will be remanded for reconsideration, where subsequent to Court of Appeals' decision, Supreme Court, in another case, held that Administrator has no authority to allot less than full amounts authorized to be appropriated under Federal Water Pollution Control Act. Train v Campaign Clean Water, Inc. (1975) 420 US 136, 43 L Ed 2d 82, 95 S Ct 847, 5 ELR 20166.

27. Public participation

It is doubtful that 33 USCS ß 1251 public participation requirement suggests that EPA should hold some sort of public hearing before it obtains writ to sample untreated waste water. Mobil Oil Corp. v United States EPA (1983, CA7 Ill) 716 F2d 1187, 19 Envt Rep Cas 2043, 13 ELR 20891, cert den (1984) 466 US 980, 80 L Ed 2d 835, 104 S Ct 2363.

Environmental Appeals Board's determination that plaintiff who challenged EPA's issuance of National Pollution Discharge Elimination System permit under Clean Water Act (33 USCS ßß 1251 et seq.) failed to properly raise his concerns regarding EPA's compliance with Ocean Discharge Criteria (33 USCS ß 1343) during public comment period was not supported by evidence and lacked rational basis, where plaintiff submitted statements that included references to public laws that satisfied threshold requirement by alerting EPA to his concern that EPA had not adequately complied with Ocean Discharge Criteria mandates. Adams v United States EPA (1994, CA1) 38 F3d 43, 25 ELR 20396.

EPA failure to include groundwater-related requirements as part of New Source Performance Standards (NSPS) under 40 C.F.R. ßß 412.40-412.47 is properly supported and does not violate 33 USCS ß 1316, part of Clean Water Act, 33 USCS ßß 1251 et seq.; however, EPA has not adequately supported (1) its decision to allow Concentrated Animal Feeding Operations (CAFO) to comply with "total prohibition" requirement by designing, operating, and maintaining facility to contain runoff from 100-year, 24-hour rainfall event or (2) its decision to allow CAFOs to comply with "total prohibition" requirement through alternative performance standards; additionally, because EPA did not indicate, until adoption of final rule, that it was considering either 100-year, 24-hour rainfall event option or possibility of alternative performance standards, EPA's decision to adopt such provisions as part of NSPS for swine, poultry, and veal violates Act's public participation requirements; 33 USCS ß 1251(e) provides that public participation in development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by EPA Administrator or any State under Act shall be provided for, encouraged, and assisted by Administrator and States. Waterkeeper Alliance, Inc. v United States EPA (2005, CA2) 399 F3d 486, 59 Envt Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) 2005 US App LEXIS 6533.

In light of Second Circuit's holding that terms of nutrient management plans constitute effluent limitations that should have been included in National Pollutant Discharge Elimination System (NPDES) permits, Concentrated Animal Feeding Operation Rule (CAFO Rule), codified at 40 C.F.R. pts. 9, 122, 123, 412, deprives public of its right under 33 USCS ß 1251(e) to assist in development, revision, and enforcement of effluent limitation; more specifically and in contravention of 33 USCS ßß 1342(a), 1342(b)(3), CAFO Rule prevents public from calling for hearing about--and then meaningfully commenting on--NPDES permits before they issue; CAFO Rule also impermissibly compromises public's ability to bring citizen-suits under 33 USCS ß 1365(a), proven enforcement tool that Congress intended to be used to both spur and supplement government enforcement actions; under CAFO Rule, as written, citizens would be limited to enforcing mere requirement to develop nutrient management plan, but would be without means to enforce terms of nutrient management plans because they lack access to those terms. Waterkeeper Alliance, Inc. v United States EPA (2005, CA2) 399 F3d 486, 59 Envt Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) 2005 US App LEXIS 6533.

"Plans" and "programs" within meaning of Clean Water Act's public participation provisions (33 USCS ß 1251) do not include EPA investigatory activities of sort envisaged by modifications to agreement settling litigation. Environmental Defense Fund, Inc. v Costle (1980, App DC) 205 US App DC 101, 636 F2d 1229, 14 Envt Rep Cas 2161, 10 ELR 20803.

EPA regulations, as interpreted by agency, provide meaningful and adequate opportunity for public participation consistent with mandate of Clean Water Act, where agency indicated that one option called for state intervention rights similar to those accorded by federal rules, and asserted that second option, to extent it was based on state's agreement not to oppose permissive intervention, will not be available in states that do not provide some means of intervention. Natural Resources Defense Council, Inc. v U.S. EPA (1988, App DC) 859 F2d 156, 28 Envt Rep Cas 1401, 19 ELR 20016.

Received
August 26, 2011
Commission on
State Mandates

In suit by environmental group alleging that power plant violated terms of state discharge elimination system permit, where by its terms, consent order did not modify permit, even assuming that consent order had modified permit, it did not bar suit because any such modification was not product of public notice and participation requirements of under Clean Water Act, 33 USCS ß 1251(e). Riverkeeper, Inc. v Mirant Lovett, LLC (2009, SD NY) 675 F Supp 2d 337.

28. Miscellaneous

Environmental organization's allegations that lumber company used myriad of unpermitted culverts, drainage ditches, and other "point source"-like conduits to discharge stormwater and pollutants was sufficient to state claim under CWA, 33 USCS ßß 1251 et seq. Envtl. Prot. Info. Ctr. v Pac. Lumber Co. (2004, ND Cal) 301 F Supp 2d 1102, 58 Envt Rep Cas 1523 (criticized in Conservation Law Found. v Hannaford Bros. Co. (2004, DC Vt) 327 F Supp 2d 325).

U.S. Forest Service and Bureau of Land Management did not act arbitrarily or capriciously in allowing expansion of phosphate mine, because, inter alia, (1) they properly approved cover design without additional modeling under Clean Water Act, 33 USCS ßß 1251-1376, since they had abundant information on which to base reasoned scientific decision that cover would perform as modeled, and (2) no certification was required under 33 USCS ß 1341 since there was no direct hydrological connection between ground water and surface water. Greater Yellowstone Coalition v Larson (2009, DC Idaho) 641 F Supp 2d 1120.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 11

Received
August 26, 2011
Commission on
State Mandates

UNITED STATES CODE SERVICE
Copyright © 2011 Matthew Bender & Company,Inc.
a member of the LexisNexis Group (TM)
All rights reserved.

*** CURRENT THROUGH PL 112-28, APPROVED 8/12/2011 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
PERMITS AND LICENSES

Go to the United States Code Service Archive Directory

33 USCS ß 1342

ß 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS ßß 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS ß 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS ßß 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS ßß 1251 et seq.].

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [33 USCS ß 407], shall be deemed to be permits issued under this title [33 USCS ßß 1341 et seq.], and permits issued under this title [33 USCS ßß 1341 et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [33 USCS ß 407], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [33 USCS ßß 1251 et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [33 USCS ß 407], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [33 USCS ß 407], pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act [33 USCS ßß 1251 et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [33 USCS ß 1314(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS ßß 1251 et seq.]. No such permit shall issue if the Administrator objects to such issuance.

Received
August 26, 2011
Commission on
State Mandates

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS ß 1314(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [33 USCS ßß 1311, 1312, 1316, 1317, 1343];

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act [33 USCS ß 1318] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [33 USCS ß 1318];

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act [33 USCS ß 1317(b)] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 [33 USCS ß 1316] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 [33 USCS ß 1311] if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 [33 USCS ßß 1284(b), 1317, 1318].

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this sec-

Received
August 26, 2011
Commission on
State Mandates

tion as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act [33 USCS ß 1314(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act [33 USCS ß 1314(i)(2)].

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) of the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act [33 USCS ßß 1251 et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph [enacted Dec. 27, 1977], the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act [33 USCS ßß 1251 et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS ß 1314(i)(2)], the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories. The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants. Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works. In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act [33 USCS ß 1292]) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator de-

Received
August 26, 2011
Commission on
State Mandates

termines pursuant to section 309(a) of this Act [33 USCS ß 1319(a)] that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 USCS ß 1319].

(j) Public information. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [33 USCS ßß 1319, 1365], with sections 301, 302, 306, 307, and 403 [33 USCS ßß 1311, 1312, 1316, 1317, 1343], except any standard imposed under section 307 [33 USCS ß 1317] for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act [33 USCS ß 1311, 1316, or 1342], or (2) section 13 of the Act of March 3, 1899 [33 USCS ß 407], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 [33 USCS ß 407], the discharge by such source shall not be a violation of this Act [33 USCS ßß 1251 et seq.] if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement.

(1) Agricultural return flows. The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations. The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(m) Additional pretreatment of conventional pollutants not required. To the extent a treatment works (as defined in section 212 of this Act [33 USCS ß 1292]) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS ß 1314(a)(4)] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act [33 USCS ß 1317(b)(1)]. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act [33 USCS ßß 1317, 1319], affect State and local authority under sections 307(b)(4) and 510 of this Act [33 USCS ßß 1317(b)(4), 1370], relieve such treatment works of its obligations to meet requirements established under this Act [33 USCS ßß 1251 et seq.], or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program.

(1) State submission. The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

Received
August 26, 2011
Commission on
State Mandates

(2) Minimum coverage. A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval or major category partial permit programs. The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs. The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding.

(1) General prohibition. In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) [33 USCS ß 1314(b)] subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [33 USCS ß 1311(b)(1)(C) or 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) [33 USCS ß 1313(d)(4)].

(2) Exceptions. A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B) (i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) [33 USCS ß 1311(c), (g), (h), (i), (k), (n), or 1326(a)]; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification). Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act [33 USCS ßß 1251 et seq.] or for reasons otherwise unrelated to water quality.

(3) Limitations. In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 [33 USCS ß 1313] applicable to such waters.

Received
August 26, 2011
Commission on
State Mandates

(p) Municipal and industrial stormwater discharges.
(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.
(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:
(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].
(B) A discharge associated with industrial activity.
(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.
(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.
(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.
(3) Permit requirements.
(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [33 USCS ß 1311].
(B) Municipal discharge. Permits for discharges from municipal storm sewers--
(i) may be issued on a system- or jurisdiction-wide basis;
(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.
(4) Permit application requirements.
(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.
(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.
(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of--
(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;
(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and
(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.
Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).
(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

Received
August 26, 2011
Commission on
State Mandates

(q) Combined sewer overflows.
(1) Requirement for permits, orders, and decrees. Each permit, order, or decree issued pursuant to this Act [33 USCS ßß 1251 et seq.] after the date of enactment of this subsection [enacted Dec. 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").
(2) Water quality and designated use review guidance. Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.
(3) Report. Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels. No permit shall be required under this Act [33 USCS ßß 1251 et seq.] by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

HISTORY:
(June 30, 1948, ch 758, Title IV, ß 402, as added Oct. 18, 1972, P.L. 92-500, ß 2, 86 Stat. 880; Dec. 27, 1977, P.L. 95-217, ßß 33(c), 54(c)(1), 65, 66, 91 Stat. 1577, 1591, 1599, 1600; Feb. 4, 1987, P.L. 100-4, Title IV, ßß 401-403, 404(a), (c) [(d)], 405, 101 Stat. 65-69; Oct. 31, 1992, P.L. 102-580, Title III, ß 364, 106 Stat. 4862; Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, ß 2021(e)(2), 109 Stat. 727; Dec. 21, 2000, P.L. 106-554, ß 1(a)(4), 114 Stat. 2763; July 30, 2008, P.L. 110-288, ß 2, 122 Stat. 2650.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:
The bracketed reference "304(i)(2)" has been inserted in this section because Act Dec. 27, 1977, P.L. 95-217, ß 50, 91 Stat. 1588, redesignated former ß 304(h) of Act June 30, 1948, and any references thereto, as ß 304(i) of such Act June 30, 1948.
The amendment made by ß 1(a)(4) of Act Dec. 21, 2000, P.L. 106-554, is based on ß 112 of Title I of Division B of H.R. 5666 (114 Stat. 2763A-224), as introduced on Dec. 15, 2000, which was enacted into law by such ß 1(a)(4).

Amendments:

1977. Act Dec. 27, 1977, in subsec. (b)(8), inserted "the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to"; in subsec. (d), in para. (2), inserted "Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator." and added para. (4); in subsec. (h), substituted "or where the Administrator determines pursuant to section 309(a) of this Act that a State with an approved program has not commenced appropriate enforcement action with respect to such permit," for a comma; and added subsec. (l).

1987. Act Feb. 4, 1987, in subsec. (a)(1), inserted the subpara. designators "(A)" and "(B)"; in subsec. (c), in para. (1), substituted "as to those discharges" for "as to those navigable waters", and added para. (4); in subsec. (l), inserted

Received
August 26, 2011
Commission on
State Mandates

"Limitation on permit requirement." in the subsec. catchline, inserted "(1) agricultural return flows." before "The Administrator", and added para. (2); and added subsecs. (m)-(p).

1992. Act Oct. 31, 1992, in subsec. (p), in para. (1), substituted "October 1, 1994" for "October 1, 1992" and, in para. (6), substituted "October 1, 1993" for "October 1, 1992".

2000. Act Dec. 21, 2000 added subsec. (q).

2008. Act July 30, 2008, added subsec. (r).

Redesignation:

Section 404(d) of Act Feb. 4, 1987, P.L. 100-4, which amended this section, was redesignated ß 404(c) of such Act by Act Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, ß 2021(e)(2), 109 Stat. 727.

Transfer of functions:

Enforcement functions of the Administrator or other official of the Environmental Protection Agency under this section relating to compliance with national pollutant discharge elimination system permits with respect to pre-construction, construction, and initial operation of the transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System by Reorg. Plan No. 1 of 1979, ßß 102(a), 203(a), 44 Fed. Reg. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, which appears as 5 USCS ß 903 note. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by ß 3012(b) of Act Oct. 24, 1992, P.L. 102-486 (15 USCS ß 719e note). Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by 15 USCS ß 720d(f).

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see 6 USCS ßß 468(b), 551(d), 552(d), and 557, and the Department of Homeland Security Reorganization Plan of Nov. 25, 2002, as modified, which appears as 6 USCS ß 542 note.

Other provisions:

Allowable delay in modifying existing approved State permit programs to conform to 1977 amendment. Act Dec. 27, 1977, P.L. 95-217, ß 54(c)(2), 91 Stat. 1591, provided that Any State permit program approved under this section before Dec. 27, 1977, which required modification to conform to the amendment made to subsec. (b)(8) of this section, should not be required to be modified before the end of the one year period beginning on Dec. 27, 1977 unless in order to make the required modification a State must amend or enact a law in which case such modification should not be required for such State before the end of the two year period beginning Dec. 27, 1977.

Phosphate fertilizer effluent limitation. Act Feb. 4, 1987, P.L. 100-4, Title III, ß 306(c), 101 Stat. 36, provides:

"(1) Issuance of permit. As soon as possible after the date of the enactment of this Act, but not later than 180 days after such date of enactment, the Administrator shall issue permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 USCS ß 1342(a)(1)(B)] with respect to facilities--

"(A) which were under construction on or before April 8, 1974, and

"(B) for which the Administrator is proposing to revise the applicability of the effluent limitation established under section 301(b) of such Act [33 USCS ß 1311(b)] for phosphate subcategory of the fertilizer manufacturing point source category to exclude such facilities.

"(2) Limitations on statutory construction. Nothing in this section shall be construed--

Received
August 26, 2011
Commission on
State Mandates

"(A) to require the Administrator to permit the discharge of gypsum or gypsum waste into the navigable waters,
"(B) to affect the procedures and standards applicable to the Administrator in issuing permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 USCS ß 1342(a)(1)(B)], and
"(C) to affect the authority of any State to deny or condition certification under section 401 of such Act with respect to the issuance of permits under section 402(a)(1)(B) of such Act [33 USCS ß 1342(a)(1)(B)].".

Log transfer facilities. Act Feb. 4, 1987, P.L. 100-4, Title IV, ß 407, 101 Stat. 74, provides:
"(a) Agreement. The Administrator and Secretary of the Army shall enter into an agreement regarding coordination of permitting for log transfer facilities to designate a lead agency and to process permits required under sections 402 and 404 of the Federal Water Pollution Control Act [33 USCS ßß 1342, 1344], where both such sections apply, for discharges associated with the construction and operation of log transfer facilities. The Administrator and Secretary are authorized to act in accordance with the terms of such agreement to assure that, to the maximum extent practicable, duplication, needless paperwork and delay in the issuance of permits, and inequitable enforcement between and among facilities in different States, shall be eliminated.
"(b) Applications and permits before October 22, 1985. Where both of sections 402 and 404 of the Federal Water Pollution Control Act [33 USCS ßß 1342, 1344] apply, log transfer facilities which have received a permit under section 404 of such Act [33 USCS ß 1344] before October 22, 1985, shall not be required to submit a new application for a permit under section 402 of such Act [33 USCS ß 1342]. If the Administrator determines that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act [33 USCS ß 1344] satisfies the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 USCS ßß 1311, 1312, 1316, 1317, 1318, and 1343], a separate application for a permit under section 402 of such Act shall not thereafter be required. In any case where the Administrator demonstrates, after an opportunity for a hearing, that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act do not satisfy the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 USCS ßß 1311, 1312, 1316, 1317, 1318, and 1343], modifications to the existing permit under section 404 of such Act [33 USCS ß 1344] to incorporate such applicable requirements shall be issued by the Administrator as an alternative to issuance of a separate new permit under section 402 of such Act [33 USCS ß 1342].
"(c) Log transfer facility defined. For the purposes of this section, the term 'log transfer facility' means a facility which is constructed in whole or in part in waters of the United States and which is utilized for the purpose of transferring commercially harvested logs to or from a vessel or log raft, including the formation of a log raft.".

Stormwater permit requirements. Act Dec. 18, 1991, P.L. 102-240, Title I, Part A, ß 1068, 105 Stat. 2007 (effective on the date of enactment as provided by ß 1100 of such Act, which appears as 23 USCS ß 104 note), provides:
"(a) General rule. Notwithstanding the requirements of sections 402(p)(2) (B), (C), and (D) of the Federal Water Pollution Control Act [subsec. (p)(2)(B)-(D) of this section], permit application deadlines for stormwater discharges associated with industrial activities from facilities that are owned or operated by a municipality shall be established by the Administrator of the Environmental Protection Agency (hereinafter in this section referred to as the 'Administrator') pursuant to the requirements of this section.
"(b) Permit applications.
(1) Individual applications. The Administrator shall require individual permit applications for discharges described in subsection (a) on or before October 1, 1992; except that any municipality that has participated in a timely part I group application for an industrial activity discharging stormwater that is denied such participation in a group application or for which a group application is denied shall not be required to submit an individual application until the 180th day following the date on which the denial is made.
"(2) Group applications. With respect to group applications for permits for discharges described in subsection (a), the Administrator shall require--
"(A) part I applications on or before September 30, 1991, except that any municipality with a population of less than 250,000 shall not be required to submit a part I application before May 18, 1992; and
"(B) part II applications on or before October 1, 1992, except that any municipality with a population of less than 250,000 shall not be required to submit a part II application before May 17, 1993.
"(c) Municipalities with less than 100,000 population. The Administrator shall not require any municipality with a population of less than 100,000 to apply for or obtain a permit for any stormwater discharge associated with an industrial activity other than an airport, powerplant, or uncontrolled sanitary landfill owned or operated by such municipality before October 1, 1992, unless such permit is required by section 402(p)(2) (A) or (E) of the Federal Water Pollution Control Act [subsec. (p)(2)(A) or (E) of this section].
"(d) Uncontrolled sanitary landfill defined. For the purposes of this section, the term 'uncontrolled sanitary landfill' means a landfill or open dump, whether in operation or closed, that does not meet the requirements for run-on and run-off controls established pursuant to subtitle D of the Solid Waste Disposal Act [42 USCS ßß 6941 et seq.].

Received
August 26, 2011
Commission on
State Mandates

"(e) Limitation on statutory construction. Nothing in this section shall be construed to affect any application or permit requirement, including any deadline, to apply for or obtain a permit for stormwater discharges subject to section 402(p)(2) (A) or (E) of the Federal Water Pollution Control Act [subsec. (p)(2)(A) or (E) of this section].

"(f) Regulations. The Administrator shall issue final regulations with respect to general permits for stormwater discharges associated with industrial activity on or before February 1, 1992.".

Definitions; discharges incidental to normal operation of vessels. Act July 31, 2008, P.L. 110-299, ßß 1, 2, 122 Stat. 2995; July 30, 2010, P.L. 111-215, ß 1, 124 Stat. 2347, provides:

"Section 1. Definitions.

"In this Act:

"(1) Administrator. The term 'Administrator' means the Administrator of the Environmental Protection Agency.

"(2) Covered vessel. The term 'covered vessel' means a vessel that is--

"(A) less than 79 feet in length; or

"(B) a fishing vessel (as defined in section 2101 of title 46, United States Code [46 USCS ß 2101]), regardless of the length of the vessel.

"(3) Other terms. The terms 'contiguous zone', 'discharge', 'ocean', and 'State' have the meanings given the terms in section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362).

"Sec. 2. Discharges incidental to normal operation of vessels.

"(a) No permit requirement. Except as provided in subsection (b), during the period beginning on the date of enactment of this Act and ending on December 18, 2013, the Administrator, or a State in the case of a permit program approved under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), shall not require a permit under that section for a covered vessel for--

"(1) any discharge of effluent from properly functioning marine engines;

"(2) any discharge of laundry, shower, and galley sink wastes; or

"(3) any other discharge incidental to the normal operation of a covered vessel.

"(b) Exceptions. Subsection (a) shall not apply with respect to--

"(1) rubbish, trash, garbage, or other such materials discharged overboard;

"(2) other discharges when the vessel is operating in a capacity other than as a means of transportation, such as when--

"(A) used as an energy or mining facility;

"(B) used as a storage facility or a seafood processing facility;

"(C) secured to a storage facility or a seafood processing facility; or

"(D) secured to the bed of the ocean, the contiguous zone, or waters of the United States for the purpose of mineral or oil exploration or development;

"(3) any discharge of ballast water; or

"(4) any discharge in a case in which the Administrator or State, as appropriate, determines that the discharge--

"(A) contributes to a violation of a water quality standard; or

"(B) poses an unacceptable risk to human health or the environment.".

NOTES:

Code of Federal Regulations:

Environmental Protection Agency--OMB approvals under the Paperwork Reduction Act, 40 CFR 9.1 et seq.

Environmental Protection Agency--Consolidated rules of practice governing the administrative assessment of civil penalties and the revocation/termination or suspension of permits, 40 CFR 22.1 et seq.

Environmental Protection Agency--Secondary treatment regulation, 40 CFR 133.100 et seq.

Environmental Protection Agency--Concentrated animal feeding operations (CAFO) point source category, 40 CFR 412.1 et seq.

Environmental Protection Agency--The pulp, paper, and paperboard point source category, 40 CFR 430.00 et seq.

Environmental Protection Agency--The centralized waste treatment point source category, 40 CFR 437.1 et seq.

Environmental Protection Agency--Metal products and machinery point source category, 40 CFR 438.1 et seq.

Environmental Protection Agency--Pharmaceutical manufacturing point source category, 40 CFR 439.0 et seq.

Environmental Protection Agency--Transportation equipment cleaning point source category, 40 CFR 442.1 et seq.

Environmental Protection Agency--Waste combustors point source category, 40 CFR 444.10 et seq.

Environmental Protection Agency--Landfills point source category, 40 CFR 445.1 et seq.

Environmental Protection Agency--Construction and development point source category, 40 CFR 450.1 et seq.

Received
August 26, 2011
Commission on
State Mandates

Environmental Protection Agency--Concentrated aquatic animal production point source category, 40 CFR 451.1 et seq.

Related Statutes & Rules:

Sentencing Guidelines for the United States Courts, 18 USCS Appx ßß 2Q1.2, 2Q1.3 .
Declaration of policy that states manage grant and permit programs, 33 USCS ß 1251.
Effluent limitations, 33 USCS ß 1311.
Information and guidelines, 33 USCS ß 1314.
Toxic and pretreatment effluent standards, 33 USCS ß 1317.
Oil and hazardous substance liability, 33 USCS ß 1321.
Administrative procedure and judicial review, 33 USCS ß 1369.
This section is referred to in 23 USCS ß 328; 33 USCS ßß 1251, 1283, 1284, 1285, 1288, 1301, 1311, 1314, 1317, 1318, 1319, 1321, 1322, 1323, 1328, 1341, 1343, 1344, 1345, 1365, 1369, 1371, 1373, 2104, 2803; 42 USCS ßß 6903, 6924, 6925, 6939e, 9601.

Research Guide:

Federal Procedure:

4 Administrative Law (Matthew Bender), ch 33, Administrative Adjudications ß 33.01.
5 Administrative Law (Matthew Bender), ch 48, Ripeness and Finality ß 48.03.
6 Administrative Law (Matthew Bender), ch 51, Judicial Review of Questions of Law and Facts ß 51.01.
11 Fed Proc L Ed, Environmental Protection ß 32:55.
11A Fed Proc L Ed, Environmental Protection ßß 32:784, 788, 803, 811, 814-816, 818, 822, 828, 833, 834, 870, 874, 923, 961.

Am Jur:

61B Am Jur 2d, Pollution Control ßß 12, 59.
61C Am Jur 2d, Pollution Control ßß 709, 727, 728, 736, 740, 742, 744, 752, 759, 765-71, 773-775, 780, 782, 792, 808, 812, 814, 853, 865.

Forms:

2 Bender's Federal Practice Forms, Form 8(IV):3, Federal Rules of Civil Procedure.
9 Fed Procedural Forms L Ed, Environmental Protection (Rev ed) ßß 29:40, 41.
14 Fed Procedural Forms L Ed, Railroads (Rev ed) ß 56:84.
18C Am Jur Pl & Pr Forms (Rev ed), Nuisances ß 99.
19C Am Jur Pl & Pr Forms (Rev ed), Pollution Control ßß 90-93.
24B Am Jur Pl & Pr Forms (2011), Waters, ßß 131, 189.

Annotations:

Validity, construction, and application of Clean Water Act (CWA) (Federal Water Pollution Control Act) (33 U.S.C.S. ß 1251 et seq.)--Supreme Court cases. 168 L Ed 2d 813.
Construction and Application of Clean Water Act's Total Maximum Daily Loads (TMDLs) Requirement for Waters Failing to Achieve Water Quality Standards Under 33 U.S.C.A. ß 1313(d) [33 USCS ß 1313(d)]. 53 ALR Fed 2d 1.

Received
August 26, 2011
Commission on
State Mandates

Jurisdiction of Federal Court in Action Under National Environmental Policy Act (NEPA), 42 U.S.C.A. ßß 4321 to 4347 [42 USCS ßß 4321-4347], as Determined by Whether Federal Defendants Have Undertaken "Major Federal Action". 53 ALR Fed 2d 489.

What constitutes "issuing or denying" permit for discharge of pollutants within meaning of ß 509(b)(1)(F) of the Federal Water Pollution Control Act (33 USCS ß 1369(b)(1)(F)) which authorizes judicial review of such action by Administrator of Environmental Protection Agency. 67 ALR Fed 365.

Texts:

Cohen's Handbook of Federal Indian Law (Matthew Bender), ch 10, Environmental Regulation in Indian Country ß 10.03.

1 Energy Law & Transactions (Matthew Bender), ch 3, Federal Regulation of Energy Transactions ß 3.05.

2 Energy Law & Transactions (Matthew Bender), ch 53, Hydroelectric Power ßß 53.04, 53.05.

3 Energy Law & Transactions (Matthew Bender), ch 55, Coal ß 55.13.

3 Energy Law & Transactions (Matthew Bender), ch 70, Cogeneration and Independent Power Production ß 70.08.

5 Energy Law & Transactions (Matthew Bender), ch 120, Energy and the Environment ß 120.05.

1 Environmental Law Practice Guide (Matthew Bender), ch 1, Environmental Impact Statements ß 1.04.

1 Environmental Law Practice Guide (Matthew Bender), ch 5A, Environmental Due Diligence in Corporate Transactions ß 5A.03.

2 Environmental Law Practice Guide (Matthew Bender), ch 9A, Government Financing ß 9A.02.

2 Environmental Law Practice Guide (Matthew Bender), ch 11A, Practice Before the EPA ß 11A.03.

2 Environmental Law Practice Guide (Matthew Bender), ch 11B, Environmental Litigation ß 11B.11.

2A Environmental Law Practice Guide (Matthew Bender), ch 12, Civil Enforcement ßß 12.02, 12.03.

2A Environmental Law Practice Guide (Matthew Bender), ch 12, Civil Enforcement ß 12.03.

2A Environmental Law Practice Guide (Matthew Bender), ch 12A, Citizen Suits ßß 12A.16, 12A.17.

2A Environmental Law Practice Guide (Matthew Bender), ch 12C, Criminal Enforcement ß 12C.03.

2A Environmental Law Practice Guide (Matthew Bender), ch 15A, Indian Country Environmental Law ß 15A.05.

3 Environmental Law Practice Guide (Matthew Bender), ch 17, Clean Air Act ß 17.09.

4 Environmental Law Practice Guide (Matthew Bender), ch 18, Water Pollution ßß 18.02, 18.03, 18.05, 18.11, 18.13, 18.20, 18.23.

4 Environmental Law Practice Guide (Matthew Bender), ch 18B, Environmental Trading Programs ß 18B.02.

5 Environmental Law Practice Guide (Matthew Bender), ch 33, Toxic Torts ß 33.01.

5 Environmental Law Practice Guide (Matthew Bender), ch 34A, Agricultural Environmental Law ß 34A.02.

5A Environmental Law Practice Guide (Matthew Bender), ch 36B, PCBs ß 36B.03.

6 Environmental Law Practice Guide (Matthew Bender), ch 41, Federal-State Relationships ßß 41.01, 41.02.

6 Environmental Law Practice Guide (Matthew Bender), ch 46, California ßß 46.21, 46.23.

6 Environmental Law Practice Guide (Matthew Bender), ch 47, Colorado ß 47.01.

6 Environmental Law Practice Guide (Matthew Bender), ch 54, Idaho ß 54.25.

7 Environmental Law Practice Guide (Matthew Bender), ch 71, New Hampshire ß 71.25.

7 Environmental Law Practice Guide (Matthew Bender), ch 73, New Mexico ß 73.05.

7 Environmental Law Practice Guide (Matthew Bender), ch 74, New York ß 74.26.

7 Environmental Law Practice Guide (Matthew Bender), ch 79, Oregon ß 79.27.

8 Environmental Law Practice Guide (Matthew Bender), ch 80, Pennsylvania ß 80.28.

8 Environmental Law Practice Guide (Matthew Bender), ch 81, Puerto Rico ß 81.01.

8 Environmental Law Practice Guide (Matthew Bender), ch 83, South Carolina ß 83.05.

8 Environmental Law Practice Guide (Matthew Bender), ch 86, Texas ß 86.24.

5 Frumer & Friedman, Products Liability (Matthew Bender), ch 55, Toxic Torts ß 55.04.

1 Treatise on Environmental Law (Matthew Bender), ch 2, Air Pollution ß 2.03.

2 Treatise on Environmental Law (Matthew Bender), ch 3, Water Pollution ßß 3.03-3.05.

3 Treatise on Environmental Law (Matthew Bender), ch 4, Solid Waste ß 4.03.

3 Treatise on Environmental Law (Matthew Bender), ch 4A, Disposal of Hazardous Waste--The "Superfund Law" ß 4A.02.

3 Treatise on Environmental Law (Matthew Bender), ch 4C, Emergency Planning ß 4C.04.

4 Treatise on Environmental Law (Matthew Bender), ch 7, Fertilizer and Feedlot Pollution ß 7.02.

Received
August 26, 2011
Commission on
State Mandates

5 Treatise on Environmental Law (Matthew Bender), ch 11, Regulation of Energy Generation and Transmission ßß 11.02, 11.03.
5 Treatise on Environmental Law (Matthew Bender), ch 12, Public Lands and Conservation ßß 12.03-12.05.

Law Review Articles:
Johnston; Davis. In this Issue: Permits, Best Management Practices, and Construction Sites: Don't Muddy the Water, or Else! 61 Ala Law 330, September 2000.
Henner. Rapanos and Warren -- A Tale of Two Cases: The Supreme Court Bats. 12 Alb L Envtl Outlook 52, 2007.
Water Law And Policy Conference: Defenders of Wildlife v. United States Environmental Protection Agency: The Future of National Pollutant Discharge Elimination System (NPDES) Permitting in Arizona. 49 Ariz L Rev 503, Summer 2007.
Water Law And Policy Conference: Defenders of Wildlife v. United States Environmental Protection Agency: The Future of National Pollutant Discharge Elimination System (NPDES) Permitting in Arizona, Arizona Department of Environmental Quality. 49 Ariz L Rev 503, Summer 2007.
Cole. Environmental Criminal Liability: What Federal Officials Know (or should Know) can Hurt Them. 54 AF L Rev 1, 2004.
Craig; Miller. Ocean Discharge Criteria and Marine Protected Areas: Ocean Water Quality Protection Under the Clean Water Act. 29 BC Envtl Aff L Rev 1, 2001.
Murchison. Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future. 32 BC Envtl Aff L Rev 527, 2005.
Drelich. Restoring the Cornerstone of the Clean Water Act. 34 Colum J Envtl L 267, 2009.
Mandiberg; Faure. A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe. 34 Colum J Envtl L 447, 2009.
Porter. Good Alliances make Good Neighbors: The Case for Tribal-State-Federal Watershed Partnerships. 16 Cornell J L & Pub Pol'y 495, Summer 2007.
Blumm. The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective. 8 Ecology L Quarterly 409, 1980.
Craig. Idaho Sporting Congress v. Thomas and Sovereign Immunity: Federal Facility Nonpoint Sources, the APA, and the Meaning of "in the Same Manner and to the Same Extent as any Nongovernmental Entity". 30 Envtl L 527, Summer 2000.
Centner. Courts and the EPA Interpret NPDES General Permit Requirements for CAFOS. 38 Envtl L 1215, Fall 2008.
Davison. Defining "Addition" of a Pollutant into Navigable Waters from a Point Source Under the Clean Water Act: The Questions Answered -- and Those not Answered -- by South Florida Water Management District v. Miccosukee Tribe of Indians. 16 Fordham Envtl Law Rev 1, Fall 2004.
Adler. Integrated Approaches to Water Pollution: Lessons from the Clean Air Act. 23 Harv Envtl L Rev 203, 1999.
Markell. The Role Of Deterrence-Based Enforcement In A "Reinvented" State/Federal Relationship: The Divide Between Theory And Reality. 24 Harv Envtl L Rev 1, 2000.
Steinzor. Devolution and the Public Health. 24 Harv Envtl L Rev 351, 2000.
Cassuto. The Law of Words: Standing, Environment, and Other Contested Terms. 28 Harv Envtl L Rev 79, 2004.
Miller. Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions. 28 Harv Envtl L Rev 401, 2004.
Miller. Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two: Statutory Preclusions on EPA Enforcement. 29 Harv Envtl L Rev 1, 2005.
Gaba. Generally Illegal: NPDES General Permits Under the Clean Water Act. 31 Harv Envtl L Rev 409, 2007.
Hall. Political Externalities, Federalism, And A Proposal For An Interstate Environmental Impact Assessment Policy. 32 Harv Envtl L Rev 49, 2008.
Babcock. Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save our Public Lands? 14 Hastings W.-NW J Env L & Pol'y 449, Winter 2008.
Hersh. The Clean Water Act's Antidegradation Policy and Its Role in Watershed Protection in Washington State. 15 Hastings W-NW J Env L & Pol'y 217, Summer 2009.
Zellmer. Preemption by Stealth. 45 Hous L Rev 1659, Winter 2009.

Received
August 26, 2011
Commission on
State Mandates

Bogert. Even Heroes have the Right to Bleed: The Endangered Species Act and Categorical Statutory Commands after National Association of Home Builders v. Defenders of Wildlife. 44 Idaho L Rev 543, 2008.
Mank. Implementing Rapanos--Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers? 40 Ind L Rev 291, 2007.
Owley. Tribal Sovereignty over Water Quality. 20 J Land Use & Envtl Law 61, Fall 2004.
Adler. Reckoning with Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation. 14 Mo Envtl L & Pol'y Rev 1, Fall 2006.
Adler. Reckoning with Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation. 14 Mo Envtl L & Pol'y Rev 1, Fall 2006.
Centner. Enforcing Environmental Regulations: Concentrated Animal Feeding Operations. 69 Mo L Rev 697, Summer 2004.
Rizzardi. Regulating Watershed Restoration: Why the Perfect Permit Is the Enemy of the Good Project. 27 Nova L Rev 51, Fall 2002.
Brautigam. Control Of Aquatic Nuisance Species Introductions Via Ballast Water In The United States: Is The Exemption Of Ballast Water Discharges From Clean Water Act Regulation A Valid Exercise Of Authority By The Environmental Protection Agency? 6 Ocean & Coastal LJ 33, 2001.
Murphy. Slowing the Onslaught and Forecasting Hope for Change: Litigation Efforts Concerning the Environmental Impacts of Coalbed Methane Development in the Powder River Basin. 24 Pace Envtl L Rev 399, Summer 2007.
Davison. General Permits Under Section 404 of the Clean Water Act. 26 Pace Envtl L Rev 35, Winter 2009.
Ruggiero. Toward a Law of the Land: The Clean Water Act as a Federal Mandate for the Implementation of an Ecosystem Approach to Land Management. 20 Pub Land & Resources L Rev 31, 1999.
Minan. Municipal Separate Storm Sewer System (MS4) Regulation Under the Federal Clean Water Act: The Role of Water Quality Standards? 42 San Diego L Rev 1215, Fall 2005.
Walston. Judicial Deference To Agency Interpretations: The Ups And Downs Of The Chevron Doctrine. 15 Southeastern Envtl LJ 405, Spring 2007.
Murphy; Goldman-Carter; Sibbing. Mitigation Regulation Article: New Mitigation Rule Promises More Of The Same: Why The New Corps And Epa Mitigation Rule Will Fail To Protect Our Aquatic Resources Adequately. 38 Stetson L Rev 311, Winter 2009.
Dam-Induced Pollution is not Within the Ambit of NPDES Permit Program. 7 Suffolk Transnat'l LJ 513, 1983.
Brull. An Evaluation of Nonpoint Source Pollution Regulation in the Chesapeake Bay. 13 U Balt J Envtl L 221, Spring 2006.
Craig. Climate Change, Regulatory Fragmentation, and Water Triage. 79 U Colo L Rev 825, Summer 2008.
Squillace. From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulation. 40 U Mich JL Reform 799, Summer 2007.
Latham. The Rehnquist Court and the Pollution Control Cases: Anti-Environmental and Pro-Business? 10 U Pa J Const L 133, December 2007.
Centner. Issue in Environmental Law: Establishing a Rational Basis for Regulating Animal Feeding Operations: A View of the Evidence. 27 Vt L Rev 115, Fall 2002.
Beck. Water And Coal Mining In Appalachia: Applying The Surface Mining Control And Reclamation Act Of 1977 And The Clean Water Act. 106 W Va L Rev 629, Spring 2004.
Cowell. Law at the Air/Water Interface: Is There a Gap Between the Regulation of Toxic Pollutants Under the Clean Air Act and Clean Water Act? 8 Wis Envtl LJ 51, Spring 2002.
Mandleco. Surviving a State's Challenge to the EPA's Grant of "Treatment as State" Status Under the Clean Water Act: One Tribe's Story: State of Wisconsin v. EPA and Sokaogon Chippewa Community. 8 Wis Envtl LJ 197, Spring 2002.
Buccino; Jones. Controlling Water Pollution from Coalbed Methane Drilling: An Analysis of Discharge Permit Requirements. 4 Wyo L Rev 559, 2004.

Interpretive Notes and Decisions:

I.IN GENERAL 1. Generally 2. Relationship with other laws, generally 3.--Administrative Procedure Act (5 USCS ßß 551 et seq.) 4.--Refuse Act (33 USCS ß 407) 5.--Relationship with other water pollution control provisions (33 USCS ßß 1251 et seq.) 6.----Definitions 7.----Guidelines 8.----Permit requirement 9.----Remedies 10. Practice and procedure

II.PERMITS

Received
August 26, 2011
Commission on
State Mandates

A.In General 11. Activities requiring permit 12.--Disposal in wells 13.--Dredge and filling 14. Permit issuance 15.--Public participation 16. Factors considered in issuance 17.--Guidelines under 33 USCS ß 1314 18. Tests used to determine compliance 19. Conditions included in permit 20.--Sewer hookup moratorium 21.--Removal of waste material 22.--Qualified personnel 23.--Discharge of pollutants 24.--Hook up to regional sewer facility 25.--Monitoring requirement 26.--Joint and several liability 27. Discretion of Administrator

B.Federal Permits 28. Generally 29. Amendment of permit 30. Exemptions 31.--Emergency discharge 32. Extension of deadline 33. Violations 34. Evidence of noncompliance

C.State Permits

1.In General 35. Generally 36. Jurisdiction to issue permit 37.--Jurisdiction over federal agencies 38. Amendment of permit

2.Supervision by EPA 39. Permit contents and criteria 40. Enforcement of permit 41. Suspension of issuance of federal permits 42.--Acts continuing to require federal permit 43. Revocation of state permit program

D.Review of Permits Issued 44. Review by EPA 45. Judicial review, generally 46.--EPA action or regulations 47. Review by federal court of state agency action 48.--Where EPA is involved

III.PERMIT AS CONSTITUTING COMPLIANCE WITH OTHER ANTIPOLLUTION REQUIREMENTS 49. Compliance with water quality standards 50.--State standards 51. Compliance with Refuse Act (33 USCS ß 407)

I.IN GENERAL 1. Generally

EPA under 33 USCS ß 1342, and not Secretary of Army under ß 1344, has authority over placement of fill material or water treatment ponds in small streams in state for disposal of waste associated with surface coal mining operations. West Virginia Coal Ass'n v Reilly (1991, CA4 W Va) 33 Envt Rep Cas 1353, 22 ELR 20092.

EPA's June 12, 2006, storm water discharge rule, codified at 40 CFR ß 122.26, represents complete departure from its previous interpretation of what constitutes "contamination" under Clean Water Act (CWA), 33 USCS ß 1342(l)(2); as such, Ninth Circuit concludes that EPA's inconsistent and conflicting position regarding discharge of sediment-laden storm water from oil and gas construction sites causes its interpretation of amended 33 USCS ß 1342(l)(2), as reflected in storm water discharge rule, 40 CFR ß 122.26, to be arbitrary and capricious one. NRDC v United States EPA (2008, CA9) 526 F3d 591, 66 Envt Rep Cas 1948, 38 ELR 20126.

Language of Federal Water Pollution Control Act makes it evident that federal program is not intended to pre-empt authority of state to issue permits for discharges into waters within a state, but rather to induce co-operation of states in establishment of program to be administered by states within certain federal guidelines with regard to uniform national standards. State v Republic Steel Corp. (1973) 38 Ohio Misc 43, 67 Ohio Ops 2d 232, 311 NE2d 911.

2. Relationship with other laws, generally

Environmental Protection Agency has no authority under Federal Water Pollution Control Act Amendments of 1972 (33 USCS ßß 1251 et seq.) to regulate discharge into nation's waterways of nuclear waste materials subject to regulation by Atomic Energy Commission and its successors under Atomic Energy Act of 1954 (42 USCS ßß 2011 et seq.). Train v Colorado Public Interest Research Group, Inc. (1976) 426 US 1, 48 L Ed 2d 434, 96 S Ct 1938, 8 Envt Rep Cas 2057, 6 ELR 20549.

There was no body of federal common law to which private citizen could resort in seeking injunctive relief against stream pollution by sewage treatment plant operating under permit issued in accordance with FWPCA and authorization of EPA where (1) controversy was strictly local, (2) there was no claim of vindication of rights of another state and (3) there was no allegation of any interstate effect. Committee for Consideration of Jones Falls Sewage System v Train (1976, CA4 Md) 539 F2d 1006, 9 Envt Rep Cas 1212, 6 ELR 20703 (criticized in Connecticut v Am. Elec. Power Co. (2009, CA2 NY) 582 F3d 309).

United States government's action against cranberry farmers, alleging that they had discharged pollutants into federally-regulated waters without permit in violation of ß 301 and ß 502 of Clean Water Act, 33 USCS ßß 1311 and 1342, was remanded so that parties had opportunity to develop their positions in district court with awareness of jurisdictional standards applied by U.S. Supreme Court in Rapanos v. United States, 547 U.S., 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006). United States v Johnson (2006, CA1 Mass) 467 F3d 56, 63 Envt Rep Cas 1289, 36 ELR 20218, cert den (2007,

Received
August 26, 2011
Commission on
State Mandates

US) 128 S Ct 375, 169 L Ed 2d 260, 66 Envt Rep Cas 1032 and (criticized in United States v Robison (2007, CA11 Ala) 505 F3d 1208, 65 Envt Rep Cas 1385, 21 FLW Fed C 96).

Issuance of NPDES permit by state pursuant to program structured under FWPCA does not constitute major federal action requiring preparation of EIS. Chesapeake Bay Foundation, Inc. v Virginia State Water Control Bd. (1978, ED Va) 453 F Supp 122, 11 Envt Rep Cas 1897, 8 ELR 20664.

Wastewaters discharged into company's holding ponds are regulated under 42 USCS ß 6903(27) rather than under 33 USCS ß 1342, because wastewaters are "solid waste" under ß 6903(27); exclusion for point source discharges under ß 6903(27) is for those wastes actually discharged, as opposed to held in pond, and thus exclusion does not apply. United States v Allegan Metal Finishing Co. (1988, WD Mich) 696 F Supp 275, 28 Envt Rep Cas 1581, 19 ELR 20148, app dismd without op (1989, CA6 Mich) 867 F2d 611.

Loan made to defendant sewer authority did not fall within either exception to broad exemption for federal capitalization loans from requirements of National Environmental Protection Act (NEPA); money for sewer pipeline project did not come through 33 USCS ß 1281 because program was no longer in existence, and issuance of National Pollutant Discharge Elimination System permit had been delegated to state under 33 USCS ß 1342, and state's decision did not fall within exception under 33 USCS ß 1371(c). Citizens Alert Regarding the Env't v United States EPA (2003, DC Dist Col) 259 F Supp 2d 9, claim dismissed, in part, affd, in part (2004, App DC) 102 Fed Appx 167, motion to strike den (2004, App DC) 2004 US App LEXIS 13228.

Not all of provisions of Clean Water Act (CWA), 33 USCS ßß 1251 et seq., dropped out or were suspended upon approval of state permit program under CWA; claim that Secretary of West Virginia Department of Environmental Protection was discharging pollutants without permit retained its federal character notwithstanding state regulation of permit program; as such, Ex parte Young exception to Eleventh Amendment was applicable, and Secretary was in violation of CWA. W. Va. Highlands Conservancy, Inc. v Huffman (2009, SD W Va) 651 F Supp 2d 512.

Environmental Protection Agency's retention of veto power pursuant to 33 USCS ß 1342 over state-issued National Pollutant Discharge Elimination System permits does not constitute federal action requiring preparation of impact statement by EPA. USEPA GCO 76-18.

State issued National Pollutant Discharge Elimination System permits under 33 USCS ß 1342 are not federal permits but state permits, thus they do not subject applicant to consistency requirements of 16 USCS ß 1456. USEPA GCO 76-20.

Because Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) applies to discharges from fixed platforms and from vessels or other floating craft while engaged in drilling and attached to ocean floor, and because there is strong Congressional intent expressed in FWPCA and Marine Protection Research and Sanctuaries Act of 1972 (33 USCS ßß 1420, 1444 et seq.) that one or other but not both laws apply to same activity, only Federal Water Pollution Control Act should be relied upon to regulate discharges from these activities. USEPA GCO 76-21.

In case of disagreement between Administrator of EPA and Secretary of Army, Administrator has ultimate authority to determine whether discharge of solid waste in waters of United States requires NPDES permit or ß 404 permit. USEPA GCO 79-1.

In case brought by landowner seeking compensation for taking, landowner's failure to comply with county's development plan foreclosed his takings claim; landowner failed to establish sufficient nexus between federal Clean Water Act (33 USCS ßß 1251-1387), Coastal Zone Management Act (16 USCS ßß 1451-1464), and county's plan such that court should exclude evidence of county plan in determining pre-taking value of land. City Nat'l Bank v United States (1995) 33 Fed Cl 759.

3.--Administrative Procedure Act (5 USCS ßß 551 et seq.)

Setting of effluent limitations in permits issued under 33 USCS ß 1342 is clearly "adjudicatory" in nature and requires special protections of 5 USCS ßß 554, 556 and 557 notwithstanding that ß 1342(a)(1) requires only "opportunity for public hearing" and fails to specify that permit limitations must be "determined on the record"; NPDES permits issued to oil company for certain onshore facilities would be required to provide that upsets beyond control of permit holder are not violations of permit standards since BPCTCA standards written into permits were written on basis of 97.5 or 99 percent "confidence interval" and to require companies to meet standards 100 percent of time would exceed requirements of Act. Marathon Oil Co. v EPA (1977, CA9) 564 F2d 1253, 12 Envt Rep Cas 1098.

Received
August 26, 2011
Commission on
State Mandates

Proceedings for issuance of permit under 33 USCS ß 1342 are subject to 5 USCS ß 554 notwithstanding that words "on the record" are not used in conjunction with requirement for public hearing. Seacoast Anti-Pollution League v Costle (1978, CA1) 572 F2d 872, 11 Envt Rep Cas 1358, 8 ELR 20207, cert den (1978) 439 US 824, 58 L Ed 2d 117, 99 S Ct 94, 12 Envt Rep Cas 1081.

Administrator's exercise of veto power under 33 USCS ß 1342(d) is subject to judicial review under Administrative Procedure Act; Administrator's exercise of veto power conferred by 33 USCS ß 1342(d) is contingent on antecedent formulation of guideline regulations under 33 USCS ß 1314(b) in conformity with rulemaking provisions of Administrative Procedure Act. Washington v United States EPA (1978, CA9 Wash) 573 F2d 583, 11 Envt Rep Cas 1339, 8 ELR 20314.

Environmental Protection Agency's decision to grant permit to discharge pollutants is subject to procedural requirements of 5 USCS ßß 556 and 557. Gallagher & Ascher Co. v Simon (1982, CA7 Ill) 687 F2d 1067, 66 ALR Fed 264.

Because decision to approve application for industrial discharge under 33 USCS ß 1342 is essentially factual determination, EPA need not provide notice and comment under 5 USCS ß 553. Natural Resources Defense Council, Inc. v United States EPA (1992, CA9) 966 F2d 1292, 92 CDOS 4703, 92 Daily Journal DAR 7542, 22 ELR 20950, 34 Envt Rep Cas 2017.

EPA regulation implementing NPDES which explicitly applies 5 USCS ß 558(c), allowing expired permit to continue when application for renewal has not been finally determined by agency, is upheld, despite claim that regulation implicitly extends Clean Water Act's deadline for best available technology, and fact that term of permit may not exceed 5 years under Act, since EPA's lack of independent statutory power to extend permit is overbalanced by ß 558(c) and expired permit is continued, not by affirmative agency action, but by operation of law. Natural Resources Defense Council, Inc. v U.S. EPA (1988, App DC) 859 F2d 156, 28 Envt Rep Cas 1401, 19 ELR 20016.

33 USCS ß 1342 provisions for revocation of approval for National Pollutant Discharge Elimination System of state requires public hearing which can be typified as "adjudication" as term is defined in Administrative Procedure Act, and because this adjudication must be made on basis of hearing which is directly reviewable in Court of Appeals, 33 USCS ß 1342 hearings must comply with formal adjudicatory procedures of 5 USCS ßß 554, 556, 557. USEPA GCO 78-7.

4.--Refuse Act (33 USCS ß 407)

Fact that practical implementation of 1970 water quality limitations necessitated formal administrative permit program is not sufficient reason to say that previous absence of such program rendered general prohibition of Refuse Act of 1899 nugatory. United States v United States Steel Corp. (1973, CA7 Ind) 482 F2d 439, 3 ELR 20388, cert den (1973) 414 US 909, 38 L Ed 2d 147, 94 S Ct 229.

Because difference between standards applied to defendants in Refuse Acts suits brought before enactment of Federal Water Pollution Control Act amendments which applied to other polluters was result of savings clause (note to 33 USCS ß 1251), fact that Federal Water Pollution Control Act amendments standards were not applied in establishing effluent limitations did not result in defendants' being denied equal protection of the laws. United States v Rohm & Haas Co. (1974, CA5 Tex) 500 F2d 167, 6 Envt Rep Cas 2016, 4 ELR 20738, cert den (1975) 420 US 962, 43 L Ed 2d 439, 95 S Ct 1352, 7 Envt Rep Cas 1656.

5.--Relationship with other water pollution control provisions (33 USCS ßß 1251 et seq.)

Failure to comply with order issued under state law, pursuant to 33 USCS ß 1342(b), relating to discharge of sewage effluent, cannot be based on failure to obtain federal funds, under 33 USCS ßß 1281 et seq., since subchapters II and III of Clean Water Act (33 USCS ßß 1251 et seq.), which comprehensively regulate grants for construction of treatment works and enforcement of orders for their construction, are not mutually dependent. Mumford Cove Asso. v Groton (1986, CA2 Conn) 786 F2d 530, 24 Envt Rep Cas 1116, 4 FR Serv 3d 510, 16 ELR 20532.

Deep well injection, although not endangering navigable waters nor drinking waters, is subject to Resource Conservation and Recovery Act not because dictionary requires court to distinguish between discharge and disposal, but because failure to make distinction would create senseless regulatory gap. Inland Steel Co. v EPA (1990, CA7) 901 F2d 1419, 31 Envt Rep Cas 1527, 20 ELR 20889, reh den, en banc (1990, CA7) 1990 US App LEXIS 9693.

Received
August 26, 2011
Commission on
State Mandates

Petition challenging ruling of EPA filed by Associations that represented certain oil and gas businesses was not ripe for review because EPA ruling was not final, ruling could inappropriately interfere with administrative action, EPA indicated that it intended to examine further issues presented by 33 USCS ß 1342(l)(2), and associations would not have suffered significant hardship if court declined to supersede administrative process. Tex. Indep. Producers & Royalty Owners Ass'n v United States EPA (2005, CA5 Tex) 413 F3d 479, 60 Envt Rep Cas 1756, 35 ELR 20117, 161 OGR 995.

Plaintiff properly brought citizen suit under 33 USCS ß 1365 against mining company for alleged violations of Federal Water Pollution Control Act because plaintiff fulfilled notice and filing requirements of 33 USCS ß 1319(g)(6)(B)(ii) before state instituted administrative enforcement proceedings under 33 USCS ß 1342 so that bar of ß 1319(g)(6)(A) was inapplicable based on purpose of Act under 33 USCS ß 1251(a) and clear meaning of ß 1319(g)(6)(B). Black Warrior Riverkeeper, Inc. v Cherokee Mining, LLC (2008, CA11 Ala) 548 F3d 986, 21 FLW Fed C 1253.

Interrelationship of 33 USCS ßß 1311, 1314, and 1342, establishes that Administrator of Environmental Protection Agency had primary duty to publish 33 USCS ß 1314(b)(1)(A) guidelines by December 31, 1974. Natural Resources Defense Council v Train (1974, App DC) 166 US App DC 312, 510 F2d 692, 7 Envt Rep Cas 1209, 5 ELR 20046.

Various sections of Federal Water Pollution Control Act Amendments of 1972 supported contention of Deputy Administrator of Environmental Protection Agency that 33 USCS ß 1311 effluent limitations were intended to be promulgated as regulations apart from proceedings under 33 USCS ß 1342. E. I. Du Pont de Nemours & Co. v Train (1974, WD Va) 383 F Supp 1244, 7 Envt Rep Cas 1065, 4 ELR 20855, affd (1975, CA4 Va) 528 F2d 1136, 8 Envt Rep Cas 1506, 6 ELR 20117, affd (1977) 430 US 112, 51 L Ed 2d 204, 97 S Ct 965, 9 Envt Rep Cas 1753, 7 ELR 20191.

Even if defendant's proposed injection disposal would constitute "discharge of a pollutant" within meaning of 33 USCS ß 1311(a), defendant would not be in violation of any applicable provision within meaning of 33 USCS ß 1319(a)(3) where effluent limitations under 33 USCS ß 1312 which might be applicable to defendant's organic chemical waste have not as yet been established nor has defendant's application for permit under 33 USCS ß 1342 been acted upon. United States v GAF Corp. (1975, SD Tex) 389 F Supp 1379, 7 Envt Rep Cas 1581, 5 ELR 20581, 51 OGR 99 (criticized in Sierra Club, Lone Star Chapter v Cedar Point Oil Co. (1996, CA5 Tex) 73 F3d 546, 41 Envt Rep Cas 1897, 34 FR Serv 3d 874, 26 ELR 20522).

Conditions and limitations contained in NPDES permits issued prior to taking of action implementing sections listed in 33 USCS ß 1342 may be enforced pursuant to 33 USCS ß 1319, notwithstanding language that civil actions may be brought against violators of "permit condition or limitation implementing any of (the listed) sections." United States v Cutter Laboratories, Inc. (1976, ED Tenn) 413 F Supp 1295, 9 Envt Rep Cas 1209, 6 ELR 20742.

Reasonable interpretation of FWPCA requires that 33 USCS ßß 1311 and 1343 apply concurrently to all ocean pollution within jurisdiction of Act; i.e., to obtain NPDES permit, ocean polluter must meet both technological requirements of ß 1311 and ocean degradation criteria of ß 1343. Pacific Legal Foundation v Quarles (1977, CD Cal) 440 F Supp 316, 10 Envt Rep Cas 1369, 7 ELR 20653, affd (1980, CA9 Cal) 614 F2d 225, 14 Envt Rep Cas 1111, 10 ELR 20271, cert den (1980) 449 US 825, 66 L Ed 2d 29, 101 S Ct 88, 14 Envt Rep Cas 2208.

By virtue of 33 USCS ß 1311(a), making unlawful any discharge not authorized by, inter alia, 33 USCS ß 1342, which provides that compliance with permit issued pursuant to such section shall be deemed compliance for purposes of EPA enforcement and civil penalties and citizen suit provisions of Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.), violation of national pollutant discharge elimination system permit is, without more, violation of Act. Chesapeake Bay Foundation v Bethlehem Steel Corp. (1985, DC Md) 608 F Supp 440, 22 Envt Rep Cas 1894, 15 ELR 20785.

Environmental Protection Agency's (EPA) approval of state procedures for prevention of degradation of state's water was arbitrary and capricious as to various aspects of state's procedures where there was not sufficient evidence in record explaining how tier 2 review, which was location-specific and required public participation, could be done at time general permit under ßß 402 or 404 of Clean Water Act, 33 USCS ß 1342, 1344, was issued, rather than at time new individual discharges were proposed. Ohio Valley Envtl. Coalition v Horinko (2003, SD W Va) 279 F Supp 2d 732, 57 Envt Rep Cas 1639 (criticized in Ky. Waterways Alliance v Johnson (2006, WD Ky) 426 F Supp 2d 612).

Environmental organization was not entitled to summary judgment on issue of liability on its claim that lumber companies violated 33 USCS ß 1342(p) part of Clean Water Act (CWA), 33 USCS ßß 1251 et seq., based on allegations that they failed to obtain permits for discharges of storm water; failure to apply for permit and discharging without per-

Received
August 26, 2011
Commission on
State Mandates

mit did not give rise to cause of action under 33 USCS ß 1342(p); liability under CWA for discharges was appropriately brought under 33 USCS ß 1311. Envtl. Prot. Info. Ctr. v Pac. Lumber Co. (2007, ND Cal) 469 F Supp 2d 803, 64 Envt Rep Cas 1880, 37 ELR 20012.

EPA could issue National Pollutant Discharge Elimination System permits pursuant to 33 USCS ß 1342 prior to promulgation of guidelines pursuant to 33 USCS ß 1314. In re Marathon Oil Co. (1974) USEPA NPDES Permit Op No. 1.

Under 33 USCS ßß 1318, 1342, EPA can impose NPDES permit requirements to conduct studies to determine type of technology necessary to reflect best available technology economically achievable for facility, even in absence of promulgated guidelines pertaining to specific point source category in question. In re FMC Corp. (1976) USEPA NPDES Permit Op No. 39.

6.----Definitions

Term "requirement," as used in 33 USCS ß 1323, providing, in part, that federal agencies, in the discharge of pollutants, shall comply with federal and state "requirements," refers principally to "condition," as this term is used in parenthetical expression in 33 USCS ß 1365(f)(6), defining phrase "effluent standard or limitations under this Act" as meaning permit or condition of certification under 33 USCS ß 1342 (including requirement applicable by reason of ß 1323 of this Act); authority of EPA to require permits for discharge of water pollutants rests alone on 33 USCS ß 1342 and does not rest on 33 USCS ß 1311(a), which simply makes it "unlawful" for any person not to have required permit; fact that federal agencies, departments, and instrumentalities are not "persons" within meaning of ß 1311(a) as this term is defined in 33 USCS ß 1362(5) does not mean either that federal dischargers are not required to secure permits, or that their obligation to secure permit derives from different provision of FWPCA; federal discharger without permit is no less out of compliance with ß 1342 than nonfederal discharger, however federal discharge is not "unlawful;" 33 USCS ß 1319, which provides for federal enforcement of FWPCA, mirrors this differing treatment, in ß 1311(a), of federal and nonfederal sources. EPA v California (1976) 426 US 200, 96 S Ct 2022, 48 L Ed 2d 578, 8 Envt Rep Cas 2089, 6 ELR 20563 (superseded by statute as stated in United States v Pennsylvania Environmental Hearing Bd. (1978, CA3 Pa) 584 F2d 1273, 8 ELR 20689) and (superseded by statute as stated in United States v Puerto Rico (1983, CA1 Puerto Rico) 721 F2d 832, 20 Envt Rep Cas 1189, 14 ELR 20003) and (superseded by statute as stated in Parola v Weinberger (1988, CA9 Cal) 848 F2d 956, 27 Envt Rep Cas 2081, 34 CCF P 75501, 18 ELR 20882) and (superseded by statute as stated in United States v Air Pollution Control Bd. of Tennessee Dep't of Health & Environment (1990, MD Tenn) 31 Envt Rep Cas 1492) and (superseded by statute as stated in Ohio v United States Dep't of Energy (1990, CA6 Ohio) 904 F2d 1058, 31 Envt Rep Cas 1448, 20 ELR 20953) and (superseded by statute as stated in Sierra Club v Lujan (1991, CA10 Colo) 931 F2d 1421, 33 Envt Rep Cas 1014, 21 ELR 21195).

In dispute regarding whether pump station, which emptied water from canal into water conservation area, required discharge permit, Court determined that definition of " 'discharge of pollutant'" contained in 33 USCS ß 1362(12) includes within its reach point sources that do not themselves generate pollutants. S. Fla. Water Mgmt. Dist. v Miccosukee Tribe of Indians (2004) 541 US 95, 124 S Ct 1537, 158 L Ed 2d 264, 58 Envt Rep Cas 1001, 34 ELR 20021, 17 FLW Fed S 195, reh den (2004) 541 US 1057, 124 S Ct 2198, 158 L Ed 2d 758 and appeal after remand, dismd (2009, CA11 Fla) 559 F3d 1191, 21 FLW Fed C 1563.

7.----Guidelines

Permit-issuing authority is to follow guidelines promulgated under 33 USCS ß 1314(b) and is not to refer to independent regulations promulgated under 33 USCS ß 1311; Court of Appeal's holding that EPA lacks power to promulgate effluent limitations by regulation under 33 USCS ß 1311 is not inconsistent with other provisions of Act and does not render them meaningless. CPC International, Inc. v Train (1975, CA8) 515 F2d 1032, 7 Envt Rep Cas 1887, 5 ELR 20392.

Pursuant to 33 USCS ß 1311(b)(2)(F), which requires EPA to promulgate BAT-based effluent limitation guidelines for nonconventional pollutants no later than July 1, 1987, EPA can impose BAT limitation on nonconventional pollutants on case-by-case basis, under 33 USCS ß 1342(a)(1), until guidelines are promulgated. American Petroleum Institute v Environmental Protection Agency (1986, CA5) 787 F2d 965, 24 Envt Rep Cas 1233, 16 ELR 20610, 89 OGR 8.

8.----Permit requirement

Discharge of pollutants by individuals who had never obtained or applied for permit was unlawful under 33 USCS ß 1311(a) even though no effluent standards were applicable to them. United States v Frezzo Bros. (1979, CA3 Pa) 602

Received
August 26, 2011
Commission on
State Mandates

F2d 1123, 13 Envt Rep Cas 1403, 9 ELR 20556, 53 ALR Fed 469, cert den (1980) 444 US 1074, 62 L Ed 2d 756, 100 S Ct 1020, 14 Envt Rep Cas 1033.

Exemption from permit requirement for construction of fish ponds, under 33 USCS ß 1342, where ponds produce less than 100,000 pounds of fish per year, does not exempt pond from permit requirement, under 33 USCS ß 1344, where pond lies in wetlands area. Conant v United States (1986, CA11 Fla) 786 F2d 1008, 24 Envt Rep Cas 1343, 16 ELR 20453 (criticized in FD&P Enters. v United States Army Corps of Eng'rs (2003, DC NJ) 239 F Supp 2d 509, 33 ELR 20140).

Environmental Protection Agency erred by denying environmental groups' petition to review National Pollution Discharge Elimination System permit issued under Clean Water Act, 33 USCS ß 1342, allowing mining company to discharge toxic levels of copper into already toxic creek; under 40 C.F.R. ß 122.4(i), no permit could issue because new discharge would contribute to violation of water quality standards set forth in 33 USCS ß 1251(a)(3). Friends of Pinto Creek v United States EPA (2007, CA9) 504 F3d 1007, 65 Envt Rep Cas 1289, 37 ELR 20255, cert den (2009, US) 129 S Ct 896, 173 L Ed 2d 106, 68 Envt Rep Cas 1480.

Violation of permit application regulations was not within purview of 33 USCS ß 1319(g)(1)(A) (unless there was "discharge of any pollutant," there was no violation of Clean Water Act, and point sources were, accordingly, neither statutorily obligated to comply with Environmental Protection Agency regulations for point source discharges, nor were they statutorily obligated to seek or obtain National Pollution Discharge Elimination System permit), court vacated order assessing civil penalty primarily on petitioner company's complete failure to apply for its storm water permit prior to starting construction, and remanded to agency for redetermination of amount of penalty. Serv. Oil v United States EPA (2009, CA8) 590 F3d 545.

Where logging company's runoff system utilized kind of conduits and channels embraced by ß 502(14) of Clean Water Act (CWA), 33 USCS ß 1362(14) pollution sources are definitively "point sources;" Environmental Protection Agency may not alter this categorization and 40 C.F.R. ß 122.27 does not--and cannot--absolve silvicultural businesses of CWA's "point source" requirements and neither does ß 402(p) of Clean Water Act, 33 USCS ß 1342(p). Envtl. Prot. Info. Ctr. v Pac. Lumber Co. (2004, ND Cal) 301 F Supp 2d 1102, 58 Envt Rep Cas 1523 (criticized in Conservation Law Found. v Hannaford Bros. Co. (2004, DC Vt) 327 F Supp 2d 325).

Environmental organization's Clean Water Act (CWA), 33 USCS ßß 1251 et seq., suit was not moot because logging company's persistent representations that its operations did not require National Pollutant Discharge Elimination System permit suggested that there was likelihood that company would resume challenged activity, procurement of state general permit, without more, was not sufficient to establish that present action was moot, and if organization were to prevail imposition of civil penalties under 33 USCS ß 1319 could serve as powerful deterrent. Envtl. Prot. Info. Ctr. v Pac. Lumber Co. (2006, ND Cal) 430 F Supp 2d 996.

9.----Remedies

Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) does not require District Court to enjoin immediately all discharges that do not comply with Act's permit requirements, but rather allows District Court to order relief considered necessary to secure prompt compliance with Act, such relief including, but not being limited to, order of immediate cessation. Weinberger v Romero-Barcelo (1982) 456 US 305, 72 L Ed 2d 91, 102 S Ct 1798, 17 Envt Rep Cas 1217, 12 ELR 20538.

No federal cause of action in favor of persons seeking to challenge state agency's decisions regarding NPDES permit applications is implied under Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.). Chesapeake Bay Foundation, Inc. v Virginia State Water Control Bd. (1980, ED Va) 495 F Supp 1229, 17 Envt Rep Cas 1622, 11 ELR 20058.

10. Practice and procedure

Where labor organization alleged that defendants violated Clean Water Act by discharging polluted water without permit, organization established statutory standing, original complaint was filed before violation was allegedly rectified by receipt of permit. Bldg. & Constr. Trades Council of Buffalo v Downtown Dev., Inc. (2006, CA2 NY) 448 F3d 138, 62 Envt Rep Cas 1385.

Where labor organization alleged that defendants violated Clean Water Act by discharging polluted water without permit, it could not be determined that claims were mooted by receipt of permit, because it was unclear whether permit

Received
August 26, 2011
Commission on
State Mandates

allegedly obtained covered areas where alleged violations had been occurring, and claim for civil penalties remained. Bldg. & Constr. Trades Council of Buffalo v Downtown Dev., Inc. (2006, CA2 NY) 448 F3d 138, 62 Envt Rep Cas 1385.

EPA's duty under 33 USCS ß 1342(d)(4), 40 CFR ßß 123.24, 123.44(h)(2), and Fla. Admin. Code Ann. R. 62-620.510 was discretionary, and thus, district court lacked jurisdiction under citizen-suit provision of Clean Water Act, 33 USCS ß 1365(a)(2), to compel EPA to take over permitting process from State of Florida with regard to mill's request for permit to discharge water into estuary. Sierra Club v United States EPA (2007, DC Dist Col) 475 F Supp 2d 29, 37 ELR 20055.

Plaintiffs' property received large quantity of sediment and cleanup caused economic loss, these injuries were traceable to defendant adjoining landowner, who had released storm water onto plaintiffs' property, and injuries were fairly redressable, so plaintiffs had standing under Clean Water Act (CWA) to pursue citizen suit as to state instream water quality standard violation claims adopted under CWA. New Manchester Resort & Golf, LLC v Douglasville Dev., LLC (2010, ND Ga) 734 F Supp 2d 1326.

II.PERMITS

A.In General 11. Activities requiring permit

Construing "discharge" in accordance with its ordinary or natural meaning--when applied to water, "flowing or issuing out"--plaintiff processing plant owner's operation of dam to produce hydroelectricity could result in discharge into navigable waters, and thus, he was required to obtain state certification under ß 401 of Clean Water Act, 33 USCS ß 1341; Court noted that understanding that something had to be added in order to implicate ß 402 of Clean Water Act, 33 USCS ß 1342, did not explain what sufficed for "discharge" under 33 USCS ß 1341. S. D. Warren Co. v Me. Bd. of Envtl. Prot. (2006) 547 US 370, 126 S Ct 1843, 164 L Ed 2d 625, 62 Envt Rep Cas 1257, 19 FLW Fed S 193, 17 ALR Fed 2d 807.

EPA Administrator, as incident to his power under 33 USCS ß 1342(a) to issue permits authorizing discharge of pollutants into surface waters, does not have authority to place conditions in such permits that control disposal of waste into deep wells. Exxon Corp. v Train (1977, CA5) 554 F2d 1310, 10 Envt Rep Cas 1289, 7 ELR 20594.

Concentrated Animal Feeding Operation Rule (CAFO Rule), codified at 40 C.F.R. pts. 9, 122, 123, 412, violates statutory scheme under 33 USCS ßß 1311(a), (e), 1342(a)(1), (b), 1362(12), part of Clean Water Act, 33 USCS ßß 1251 et seq.; it imposes obligations on all Concentrated Animal Feeding Operations (CAFO) regardless of whether or not they have, in fact, added any pollutants to navigable waters, that is, discharged any pollutants; after all, 40 C.F.R. ß 122.23(d), (f) demands that every CAFO owner or operator either apply for permit--and comply with effluent limitations contained in permit--or affirmatively demonstrate that no permit is needed because there is "no potential to discharge"; Act gives EPA jurisdiction to regulate and control only actual discharges--not potential discharges, and certainly not point sources themselves. Waterkeeper Alliance, Inc. v United States EPA (2005, CA2) 399 F3d 486, 59 Envt Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) 2005 US App LEXIS 6533.

If defendant landowner's mine shaft, which was admittedly point source, was "discharging" pollutants, it was liable in citizen's suit filed by plaintiff environmental groups for violating 33 USCS ßß 1311(a), 1342, part of Clean Water Act, 33 USCS ßß 1251 et seq., whether or not landowner had caused discharge, but due to fact issues on whether shaft's pollutants were discharged into creek, summary judgment had been improper. Sierra Club v El Paso Gold Mines (2005, CA10 Colo) 421 F3d 1133, 61 Envt Rep Cas 1274, 35 ELR 20175, reh gr, in part, reh den, in part, corrected (2005, CA10) 2005 US App LEXIS 22955 and cert den, motion gr (2006) 547 US 1065, 126 S Ct 1653, 164 L Ed 2d 411, 62 Envt Rep Cas 2088.

Appellate court affirmed district court's finding that discharge of turbid water from Shandaken Tunnel into creek qualified as "discharge of any pollutant" under 33 USCS ß 1311(a) which was defined as "any addition of any pollutant to navigable waters from any point source", 33 USCS ß 1362(12), that required City of New York to obtain National Pollutant Discharge Elimination System permit because at bottom, City's arguments for reconsideration of court's holding were simply embellishments of those made in previous case and meaning of word "addition" had not changed; neither those arguments nor any intervening developments led court to conclude that its earlier holding was reached in error or should otherwise be modified. Catskill Mts. Chapter of Trout Unlimited, Inc. v City of New York (2006, CA2 NY) 451 F3d 77, 62 Envt Rep Cas 1737, 36 ELR 20111, cert den (2007) 549 US 1252, 127 S Ct 1373, 167 L Ed 2d 160, 64 Envt Rep Cas 1672.

Received
August 26, 2011
Commission on
State Mandates

40 CFR ß 122.1(b)(2)'s exclusion of septic systems did not diminish ß 122.1(b)(1)'s applicability and septic systems could be point sources that discharged pollutants under ß 122.1(b)(1); thus, indictment against defendants, corporate developer, its two principals, and engineer, stated offense and convictions for violations of Clean Water Act under 33 USCS ßß 1319(c)(2)(A), 1342, 1344, 1362(7), (14), were affirmed. United States v Lucas (2008, CA5 Miss) 516 F3d 316, 66 Envt Rep Cas 1778, 38 ELR 20041, reh, en banc, den (2008, CA5) 2008 US App LEXIS 11529 and cert den (2008, US) 129 S Ct 116, 172 L Ed 2d 36, 67 Envt Rep Cas 1768.

EPA acted ultra vires in promulgating 40 CFR ß 122.3(a) with regard to exempting certain marine activities from Clean Water Act's discharge permit requirements, and EPA's denial of plaintiffs' petition requesting repeal of ß 122.3(a) was not in accordance with law; Congress expressed plain intent to require permits in any situation of pollution from point sources and EPA failed to satisfy its burden of proof with regard to its argument that Congress acquiesced to EPA's interpretation of CWA. Northwest Envtl. Advocates v EPA (2008, CA9 Cal) 537 F3d 1006, 67 Envt Rep Cas 1748, 2008 AMC 2459, 38 ELR 20183.

Logging companies were subject to permitting requirements for discharge of stormwater runoff from logging roads since discharges associated with industrial activity were not exempted from permitting process under 33 USCS ß 1342(p)(2)(B), logging operations were within broad definition of industrial activity, and runoff was from immediate access roads primarily dedicated to industrial activity of logging. Northwest Envtl. Def. Ctr. v Brown (2010, CA9 Or) 617 F3d 1176, 40 ELR 20221.

Hauler of waste is in violation of 33 USCS ßß 1311(a) and 1342 by permitting discharge of pollutants from his lagoon into nearby stream without permit, despite hauler's assertion that overflow was not from "point source," where (1) overflow from discernible, confined and discrete conveyance constituted "point source" and (2) even though hauler did not intend for discharge to occur, Clean Water Act is strict liability statute. Fishel v Westinghouse Electric Corp. (1986, MD Pa) 640 F Supp 442, 24 Envt Rep Cas 1632, 16 ELR 20634.

National Pollutant Discharge Elimination System (NPDES) program does not apply to groundwater, but that question will be sent to Ninth Circuit for immediate appeal, even though some provisions of Clean Water Act (33 USCS ßß 1251 et seq.) refer to groundwater and some courts have held that discharges of pollutants through hydrologically connected groundwater are subject to permit requirement, because ß 1342, which establishes NPDES permitting system, makes no reference to groundwater, and surface water/groundwater distinction has been in place in Oregon for more than 2 decades. Umatilla Waterquality Protective Ass'n v Smith Frozen Foods (1997, DC Or) 962 F Supp 1312, 44 Envt Rep Cas 1385, 27 ELR 21411 (criticized in Aiello v Town of Brookhaven (2001, ED NY) 136 F Supp 2d 81, 52 Envt Rep Cas 2111) and (criticized in Idaho Rural Council v Bosma (2001, DC Idaho) 143 F Supp 2d 1169, 53 Envt Rep Cas 1145) and (criticized in Coldani v Hamm (2007, ED Cal) 66 Envt Rep Cas 1069).

No permits were required for new landowners' realignment and use of access roads for farming purposes, where interpreting agricultural activity to include road construction and maintenance is consistent with other provisions of Clean Water Act (33 USCS ßß 1251 et seq.), because court finds that Congress intended to extend exception for road construction to farm access roads. Na Mamo O 'Aha'ino v Galiher (1998, DC Hawaii) 28 F Supp 2d 1258, 47 Envt Rep Cas 1972, request den, reconsideration den (1999, DC Hawaii) 60 F Supp 2d 1058.

National Pollutant Discharge Elimination System permit is required for county's stormwater discharge, even though county argues that it is excepted from requirement pursuant to 33 USCS ß 1342(p)(1)(D), where EPA and DOE have independently determined that county is subject to permit requirement, and county has now applied for permit, because any argument that county still has with necessity for permit should be taken up with agencies. Waste Action Project v Clark County (1999, WD Wash) 45 F Supp 2d 1049, 49 Envt Rep Cas 1071, 29 ELR 21332.

In action by environmental organization and its members against city, mayor, and city officials for violations of 33 USCS ßß 1311, 1342 and Ohio Rev. Code Ann. ß 6111 et seq., motions to dismiss filed by city, mayor, and city officials under Fed. R. Civ. P. 12(b)(1) were granted because: (1) notice letter by organization and members regarding alleged violations of first city permit failed to strictly comply with requirements of 33 USCS ß 1365(b) and 40 C.F.R. ß 135.3(a) in that notice letter failed to indicate dates or specific locations of alleged improper discharges and failed to specify manner in which permit was alleged to have been violated; (2) notice letter by organization and members regarding alleged violations of second city permit was insufficient under 33 USCS ß 1365(b) and 40 C.F.R. ß 135.3(a) because it provided no indication of which of multiple paragraphs of permit were alleged to have been violated, or activity alleged to constitute violation; and (3) neither of notice letters provided sufficient information for recipients to determine full name, address, and telephone number of persons giving notice. Sierra Club v City of Columbus (2003,

Received
August 26, 2011
Commission on
State Mandates

SD Ohio) 282 F Supp 2d 756, 57 Envt Rep Cas 1238 (criticized in Carney v Gordon County (2006, ND Ga) 63 Envt Rep Cas 1907).

Environmental organization's allegations that lumber company used myriad of unpermitted culverts, drainage ditches, and other "point source"-like conduits to discharge stormwater and pollutants was sufficient to state claim under CWA, 33 USCS ßß 1251 et seq. Envtl. Prot. Info. Ctr. v Pac. Lumber Co. (2004, ND Cal) 301 F Supp 2d 1102, 58 Envt Rep Cas 1523 (criticized in Conservation Law Found. v Hannaford Bros. Co. (2004, DC Vt) 327 F Supp 2d 325).

Where existing regulations did not require storm drain owners to obtain National Pollution Discharge Elimination System (NPDES) permit, owners did not violate Clean Water Act (CWA), 33 USCS ßß 1251-1387, by discharging pollutants through storm drain system without permit; CWA ß 402 (33 USCS ß 1342) could not be interpreted to require NPDES permits for all stormwater discharges notwithstanding regulations or individual determinations issued (or not issued) by Environmental Protection Agency (EPA) or authorized state agencies, and CWA did not provide court with authority, independent of EPA and state agency, to designate stormwater discharges as requiring NPDES permits. Conservation Law Found. v Hannaford Bros. Co. (2004, DC Vt) 327 F Supp 2d 325, affd (2005, CA2 Vt) 139 Fed Appx 338.

While plaintiffs offered evidence showing that surface water connection did at times exist in support of their claim of alleged violations of 33 USCS ß 1342, by operation of gun club's outdoor rifle and handgun range, they offered no evidence demonstrating continuous connection between club's wetland and cove or river such that there existed no clear demarcation between waters and wetlands therefore, club was entitled to summary judgment. Simsbury-Avon Pres. Soc'y, LLC v Metacon Gun Club, Inc. (2007, DC Conn) 472 F Supp 2d 219, 64 Envt Rep Cas 2081, 37 ELR 20038, affd (2009, CA2 Conn) 575 F3d 199, 69 Envt Rep Cas 1187.

State agency, West Virginia Department of Environmental Protection, that had become operator by default of former mine sites that were discharging pollutants without effective National Pollution Discharge Elimination System permit was enjoined from further discharges and required to apply for permit under Clean Water Act, 33 USCS ßß 1251 et seq. W. Va. Highlands Conservancy. Inc. v Huffman (2009, ND W Va) 588 F Supp 2d 678.

EPA cannot require discharger through National Pollutant Discharge Elimination System permit to remove deposits of sludge or silt in navigable water where deposits were result of discharges occurring prior to 1970, either prior to issuance of permit or subsequent to issuance of permit. In re Bristol County Water Co. (1976) USEPA NPDES Permit Op No. 40.

Since industrial users of privately owned treatment works are subject to National Pollutant Discharge Elimination System permit requirements of 33 USCS ß 1342 and may be made parties to joint permit together with privately owned works, permit conditions and requirements contained in such permit may therefore apply directly to industrial users as well as to treatment works so long as such conditions are rationally related to assured compliance with effluent limitations which apply to pollutants which are ultimately discharged into navigable waters. In re Friendswood Development Co. (1976) USEPA NPDES Permit Op No. 43.

Effluent limitation regulations promulgated for particular point source category under 33 USCS ßß 1311, 1314 can only be applied in National Pollutant Discharge Elimination System permit to that portion of effluent being discharged into navigable waters; such discharge can be subjected to controls in NPDES permit. In re Borden, Inc. (1977) USEPA NPDES Permit Op No. 56.

Illinois Pollution Control Board rule stating that discharge of any pollutant subject to federal or state regulation is unlawful unless discharge is specifically authorized in permit was consistent with FWPCA notwithstanding petitioner's argument that FWPCA does not require permit so long as discharge complies with applicable effluent limitations and no aquaculture or dredging or fill disposal project is involved. Peabody Coal Co. v Illinois Pollution Control Bd. (1976, 5th Dist) 36 Ill App 3d 5, 344 NE2d 279.

Application for variance from state pollution control regulation pertaining to mercury discharges to public sewer systems was properly treated as one not requiring NPDES permit since NPDES permit is not required for industrial discharges to publicly owned sewage treatment plants, even though such permit may be required for discharges by the publicly owned treatment plant itself and even though discharges by industrial user may be subject to Federal pre-treatment standards. Monsanto Co. v Illinois Pollution Control Bd. (1976, 5th Dist) 39 Ill App 3d 333, 350 NE2d 289, revd on other grounds (1977) 67 Ill 2d 276, 10 Ill Dec 231, 367 NE2d 684, 8 ELR 20016.

Received
August 26, 2011
Commission on
State Mandates

To discharge heated water and waste into Atlantic Ocean from Seabrook facility (New Hampshire) public service company would need both permit from Water Supply and Pollution Control Commission, and finding from Site Evaluation Committee that discharge would not adversely affect water quality. Society for Protection of N.H. Forests v Site Evaluation Comm. (1975) 115 NH 163, 337 A2d 778.

12.--Disposal in wells

33 USCS ß 1342(a)(3) and (b) authorizes EPA to regulate disposal of pollutants into deep wells, at least when regulation is undertaken in conjunction with limitations on permittee's discharges into surface waters. United States Steel Corp. v Train (1977, CA7 Ill) 556 F2d 822, 10 Envt Rep Cas 1001, 7 ELR 20419.

Disposal of pollutants into wells is subject to regulation through conditions in National Pollutant Discharge Elimination System permit. In re E. I. duPont de Nemours & Co. (1975) USEPA NPDES Permit Op No. 6; In re Jones & Laughlin Steel Corp. (1975) USEPA NPDES Permit Op No. 8; In re Bethlehem Steel Corp. (1975) USEPA NPDES Permit Op No. 18.

13.--Dredge and filling

Decisions upholding Army Corps of Engineers Clean Water Act (CWA) jurisdiction over dredging and filling wetlands with hydrological connections with adjacent navigable waters were vacated, as phrase "waters of U.S." in CWA included only relatively permanent, standing or continuously flowing bodies of water forming geographic features; cases were remanded for further proceedings to determine whether ditches or man-made drains near each wetland were "waters" in ordinary sense of containing relatively permanent flow, and whether wetlands in question were adjacent to these waters in sense of possessing continuous surface connection that created boundary-drawing problem addressed in Riverside Bayview. Rapanos v United States (2006) 547 US 715, 126 S Ct 2208, 165 L Ed 2d 159, 62 Envt Rep Cas 1481, 19 FLW Fed S 275 (criticized in Northwest Bypass Group v United States Army Corps of Eng'rs (2007, DC NH) 470 F Supp 2d 30, 65 Envt Rep Cas 1070, 37 ELR 20013) and on remand, remanded (2007, CA6) 217 Fed Appx 431, 2007 FED App 116N.

Slurry (gold mining waste) that company wished to discharge into lake was defined by regulation (40 CFR ß 232.2) as "fill material," and thus, company properly obtained discharge permit from U.S. Army Corps of Engineers (Corps) under ß 404 of Clean Water Act (CWA) (33 USCS ß 1344), rather than from EPA under ß 402 of CWA (33 USCS ß 1342); as Corps had authority to issue such permit, EPA was not allowed regulate as well. Coeur Alaska, Inc. v Southeast Alaska Conservation Council (2009, US) 129 S Ct 2458, 174 L Ed 2d 193, 68 Envt Rep Cas 1513, 21 FLW Fed S 973, on remand, remanded (2009, CA9 Alaska) 580 F3d 873.

Dredged spoil is not regulated under NPDES whether NPDES permit program is administered by EPA pursuant to 33 USCS ß 1342(a) or by state pursuant to ß 1342(b); state-administered NPDES permit programs, as well as EPA-administered NPDES programs are limited by exceptions delineated in ß 1342(a)(1). Minnesota by Spannaus v Hoffman (1976, CA8 Minn) 543 F2d 1198, 9 Envt Rep Cas 1353, 7 ELR 20066, cert den and app dismd (1977) 430 US 977, 52 L Ed 2d 373, 97 S Ct 1672, 9 Envt Rep Cas 2073.

Secretary of Army and Corps of Engineers were not exempt from permit issuance requirements of Federal Water Pollution Control Amendments because (1) 33 USCS ß 1371(a) could not be read so broadly as to exempt Secretary and Corps from permit issuance requirements for all Corps projects affecting navigation and (2) requirement of obtaining permit under 33 USCS ß 1344 for discharge of dredge materials in navigable waters, after notice and opportunity for public hearings, cannot be said to "affect or impair" authority of Secretary of Army to maintain navigation. Save Our Sound Fisheries Asso. v Callaway (1974, DC RI) 387 F Supp 292, 7 Envt Rep Cas 1445, 4 ELR 20437.

Army Corps of Engineers' refusal to issue plaintiff permit for dredging and filling of land was not "taking" where, although plaintiff complied with state law requiring riparian land owners seeking to reclaim land lost through erosion to apply for coastal use permit, plaintiff did not pursue renewal when permit expired despite Corps's notice that permit had expired; by not renewing permit, plaintiff extinguished its compensable interest. Plantation Landing Resort v United States (1993) 30 Fed Cl 63, 24 ELR 20185, affd without op (1994, CA FC) 39 F3d 1197, reported in full (1994, CA FC) 1994 US App LEXIS 28475 and reh den (1994, CA FC) 1994 US App LEXIS 32670 and cert den (1995) 514 US 1095, 131 L Ed 2d 744, 115 S Ct 1822.

14. Permit issuance

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 12

Received
August 26, 2011
Commission on
State Mandates

UNITED STATES CODE SERVICE
Copyright © 2011 Matthew Bender & Company,Inc.
a member of the LexisNexis Group (TM)
All rights reserved.

*** CURRENT THROUGH PL 112-28, APPROVED 8/12/2011 ***

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL
GENERAL PROVISIONS

Go to the United States Code Service Archive Directory

33 USCS ß 1370

ß 1370. State authority

Except as expressly provided in this Act [33 USCS ßß 1251 et seq.], nothing in this Act [33 USCS ßß 1251 et seq.] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act [33 USCS ßß 1251 et seq.], such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act [33 USCS ßß 1251 et seq.]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

HISTORY:
(June 30, 1948, ch. 758, Title V, ß 510, as added, Oct. 18, 1972, P.L. 92-500, ß 2, 86 Stat. 893.)

NOTES:

Code of Federal Regulations:
Environmental Protection Agency--Construction and development point source category, 40 CFR 450.1 et seq.

Related Statutes & Rules:
Declaration of policy that states retain primary responsibilities and rights, 33 USCS ß 1251.
Congressional consent to interstate pollution control agreements, 33 USCS ß 1253.
This section is referred to in 33 USCS ßß 1311, 1342.

Research Guide:

Received
August 26, 2011
Commission on
State Mandates

Federal Procedure:
11A Fed Proc L Ed, Environmental Protection ß 32:756.

Am Jur:
61C Am Jur 2d, Pollution Control ß 676.

Annotations:
Validity, construction, and application of Clean Water Act (CWA) (Federal Water Pollution Control Act) (33 U.S.C.S. ß 1251 et seq.)--Supreme Court cases. 168 L Ed 2d 813.

Texts:
2 Energy Law & Transactions (Matthew Bender), ch 53, Hydroelectric Power ß 53.05.
2A Environmental Law Practice Guide (Matthew Bender), ch 15A, Indian Country Environmental Law ß 15A.05.
4 Environmental Law Practice Guide (Matthew Bender), ch 18, Water Pollution ßß 18.03, 18.11.
2 Treatise on Environmental Law (Matthew Bender), ch 3, Water Pollution ßß 3.03, 3.04.

Law Review Articles:
Murchison. Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future. 32 BC Envtl Aff L Rev 527, 2005.
Whalin. The Polluter's Court: Expanding Polluter Rights While Limiting Pollutee Rights. 12 Fordham Envtl Law J 329, Spring 2001.
Adler. Integrated Approaches to Water Pollution: Lessons from the Clean Air Act. 23 Harv Envtl L Rev 203, 1999.
Miller. Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two: Statutory Preclusions on EPA Enforcement. 29 Harv Envtl L Rev 1, 2005.
Zellmer. Preemption by Stealth. 45 Hous L Rev 1659, Winter 2009.
Tarlock. Oil Pollution on Lake Superior: The Uses of State Regulation. 61 Minn L Rev 63, November 1976.
Minan. Municipal Separate Storm Sewer System (MS4) Regulation Under the Federal Clean Water Act: The Role of Water Quality Standards? 42 San Diego L Rev 1215, Fall 2005.
Babcock. Administering the Clean Water Act: Do Regulators Have "Bigger Fish To Fry" When It Comes To Addressing the Practice of Chumming on the Chesapeake Bay? 21 Tul Envtl LJ 1, Winter 2007.
Ingelson; Gray. The Regulation Of Produced Water From Coalbed Methane Development Under The Clean Water Act: Northern Plains Resource Council V. Fidelity Exploration & Development Company. 8 U Denv Water L Rev 200, 2004.
Janisch. Scope of Federal Jurisdiction under Section 404 of the Clean Water Act: Rethinking "Navigable Waters" after Rapanos v. United States. 11 U. Denv Water L Rev 91, Fall 2007.
Adler. Watersheds and the Integration of U.S. Water Law and Policy: Bridging the Great Divides. 25 Wm & Mary Envtl L & Pol'y Rev 1, Fall 2000.

Interpretive Notes and Decisions:
1. Generally 2. Applicability of state law to Federal agencies 3. Validity of state regulations and standards 4.--Stricter regulations or standards 5.--Effect of Federal permit 6. Actions to enforce state law 7.--Stay of action pending Federal action

1. Generally

Received
August 26, 2011
Commission on
State Mandates

1972 Amendments of Federal Water Pollution Control Act clearly shows that Congress in no way intended to destroy any remedies available to state prior to passage of 1972 Amendments. Illinois ex rel. Scott v Milwaukee (1973, ND Ill) 366 F Supp 298, 5 Envt Rep Cas 2018, 4 ELR 20045, injunction gr (1973, ND Ill) 1973 US Dist LEXIS 15607.

2. Applicability of state law to Federal agencies

In conducting dredging operations in navigable waters, Corps of Engineers is required neither to obtain state NPDES permit nor to conform to state's water quality standards and effluent limitations. Minnesota by Spannaus v Hoffman (1976, CA8 Minn) 543 F2d 1198, 9 Envt Rep Cas 1353, 7 ELR 20066, cert den and app dismd (1977) 430 US 977, 52 L Ed 2d 373, 97 S Ct 1672, 9 Envt Rep Cas 2073.

3. Validity of state regulations and standards

Construing "discharge" in accordance with its ordinary or natural meaning--when applied to water, "flowing or issuing out"--plaintiff processing plant owner's operation of dam to produce hydroelectricity could result in any discharge into navigable waters, and thus, he was required to obtain state certification under ß 401 of Clean Water Act, 33 USCS ß 1341; Court noted that concerns of state--that dams caused long stretches of natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms--were changes in river that fell within state's legitimate legislative business. S. D. Warren Co. v Me. Bd. of Envtl. Prot. (2006) 547 US 370, 126 S Ct 1843, 164 L Ed 2d 625, 62 Envt Rep Cas 1257, 19 FLW Fed S 193, 17 ALR Fed 2d 807.

Objective of ordinance of city of Chicago banning use of detergents was prevention and elimination of nuisance algae and was environmental objective toward which local legislation may properly be aimed; although there is federal intervention in this general area such intervention did not prevent local attempt to deal with one of country's most immediate and difficult problems. Procter & Gamble Co. v Chicago (1975, CA7 Ill) 509 F2d 69, 7 Envt Rep Cas 1328, 5 ELR 20146, cert den (1975) 421 US 978, 44 L Ed 2d 470, 95 S Ct 1980.

Although Mont. Code Ann. ß 75-5-401(1)(b) permitted methane gas extraction company to discharge unaltered groundwater without compliance with water quality permit requirements, existence of pollutants in groundwater precluded exemption from requirements since 33 USCS ß 1370 prohibited Montana from adopting standard less stringent than federal requirements for permit to discharge such pollutants. Northern Plains Res. Council v Fid. Exploration & Dev. Co. (2003, CA9 Mont) 325 F3d 1155, 2003 CDOS 3072, 2003 Daily Journal DAR 3930, 56 Envt Rep Cas 1289, 33 ELR 20171, cert den (2003) 540 US 967, 157 L Ed 2d 312, 124 S Ct 434, 57 Envt Rep Cas 2120.

Since Clean Water Act never mentions "Outstanding National Resource Water" (ONRW), EPA cannot demand any particular state ONRW designations or designate ONRW's through federal promulgation process; states have complete discretion with respect to ONRW but, if ONRW has been adopted by state, EPA may issue water quality standards to protect it. USEPA GCO August 15, 1979.

Provisions of 33 USCS ßß 1251, 1365, and 1370 show continuing intention of Congress not only to perpetuate rights of municipalities to adopt and enforce requirements to abate pollution more stringent than any which may be adopted under federal system, but also to make certain that this activity by states and municipalities continues for public benefit. Metropolitan Sanitary Dist. v United States Steel Corp. (1975, 1st Dist) 30 Ill App 3d 360, 332 NE2d 426, cert den (1976) 424 US 976, 47 L Ed 2d 746, 96 S Ct 1482.

4.--Stricter regulations or standards

Challenge to state limitations included in NPDES permit on ground that they are impossible to achieve with present technology would be rejected since it is clear from 33 USCS ßß 1311 and 1370 that states are free to force technology; if states wish to achieve better water quality, they may, even at cost of economic and social dislocations caused by plant closings; since Administrator is required by FWPCA [33 USCS ßß 1251 et seq.] to include in permit any more stringent state limitations, including those necessary to meet state water quality standards, and is given no authority to set aside or modify those limitations in permit proceeding, he has no authority to consider challenges to validity of state water quality standards and permit proceeding, nor to consider whether limitations adopted by state were necessary to achieve its water quality standards. United States Steel Corp. v Train (1977, CA7 Ill) 556 F2d 822, 10 Envt Rep Cas 1001, 7 ELR 20419.

State's denial of upset defense in issuing permit is example of imposing standards more stringent than correlative federal standards and thus denial of upset defense in permit issued by state does not violate Federal Water Pollution

Received
August 26, 2011
Commission on
State Mandates

Control Act. Sierra Club v Union Oil Co. (1987, CA9 Cal) 813 F2d 1480, 25 Envt Rep Cas 1801, 17 ELR 20547, vacated, remanded (1988) 485 US 931, 99 L Ed 2d 264, 108 S Ct 1102, 27 Envt Rep Cas 1280.

Pursuant to 33 USCS ß 1370, Clean Water Act allows states to impose more stringent water quality controls than are required under its terms. Islander E. Pipeline Co., LLC v Conn. Dep't of Envtl. Prot. (2006, CA2) 482 F3d 79, 166 OGR 72.

Corporation's "bypass" defense to 33 USCS ß 1365 complaint alleging violations of its National Pollutant Discharge Elimination System permit issued under 33 USCS ß 1342 fails, where corporation is held to stricter state standard governing bypass allowance under 33 USCS ß 1370, because, under terms of corporation's permit, bypassing facilities necessary to maintain compliance with permit was only allowed when precipitation exceeded 5.1 inches in 24 hours and rainfall on 4 dates claimed by defendant for bypasses was not even close to that level. Chesapeake Bay Foundation, Inc. v Bethlehem Steel Corp. (1987, DC Md) 652 F Supp 620, 25 Envt Rep Cas 1684, 17 ELR 20623.

5.--Effect of Federal permit

Secretary of Interior's approval of more stringent state regulation of catastrophic storm effluent limitations than exist under federal law is permitted by 33 USCS ß 1370. Pennsylvania Coal Mining Assoc. v Watt (1983, MD Pa) 562 F Supp 741, 19 Envt Rep Cas 1316, 13 ELR 20773.

Action to enjoin municipality from discharging sanitary sewage and other waste into waters of Smokes Creek which had not been given "effective secondary treatment" as provided for in state environmental statute, was not barred because municipality had national pollutant discharge elimination system permit to discharge sewage into Smokes Creek; permit itself provided that nothing therein should be construed to preclude institution of any legal action nor relieve permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation under authority preserved "by ß 510 of the Act." Biggane v Lackawanna (1974) 80 Misc 2d 816, 365 NYS2d 107.

6. Actions to enforce state law

Language of 33 USCS ß 1370, preserving authority of state with respect to waters (including boundary waters) of such state, arguably limits effect of clause to discharges flowing directly into states own waters from within state, so that savings clause does not preclude pre-emption of law of state affected by pollution. International Paper Co. v Ouellette (1987) 479 US 481, 93 L Ed 2d 883, 107 S Ct 805, 25 Envt Rep Cas 1457, 17 ELR 20327.

Federal Water Pollution Control Act (33 USCS ßß 1151 et seq.) as amended in 1972 (33 USCS ßß 1251 et seq.) did not preempt state of Illinois from seeking abatement in Federal District Court of federal common law nuisance in interstate or navigable waters. Illinois ex rel. Scott v Milwaukee (1973, ND Ill) 366 F Supp 298, 5 Envt Rep Cas 2018, 4 ELR 20045, injunction gr (1973, ND Ill) 1973 US Dist LEXIS 15607.

Savings clause and state authority provision of Federal Water Pollution Control Act (33 USCS ßß 1251 et seq.) authorizes application of Vermont common law to remedy injury caused by discharges of pollutants emanating from paper mill in New York. Ouellette v International Paper Co. (1985, DC Vt) 602 F Supp 264, 22 Envt Rep Cas 1682, 15 ELR 20377, affd (1985, CA2) 776 F2d 55, 23 Envt Rep Cas 1703, 16 ELR 20012, affd in part and revd in part on other grounds, remanded (1987) 479 US 481, 93 L Ed 2d 883, 107 S Ct 805, 25 Envt Rep Cas 1457, 17 ELR 20327.

7.--Stay of action pending Federal action

Action by municipal corporation to abate pollution activities of manufacturing corporation, brought under authority of state statute and under common law, need not be stayed during pendency of proceedings under Federal Water Pollution Control Act Amendments of 1972, although objective of both local and federal jurisdictions is identical, but where method and manner of reaching objective are entirely different, in that federal agency hearings are concerned with permit expressly approving and validating continued pollution by corporation, while local proceedings involve termination of said pollution. Metropolitan Sanitary Dist. v United States Steel Corp. (1975, 1st Dist) 30 Ill App 3d 360, 332 NE2d 426, cert den (1976) 424 US 976, 47 L Ed 2d 746, 96 S Ct 1482.

Stay of state proceedings seeking permanent injunction to prevent corporation from discharging waste products into Lake Michigan pending adjudicatory hearing before EPA with respect to corporation's NPDES permit would be denied since granting of such stay would thwart clear intent of Congress to allow states or their political subdivisions the primary responsibility for enforcing their own more stringent pollution standards by common law nuisance actions and equally clear intent of state legislature to confer that responsibility on Attorney General. People ex rel. Scott v United States Steel Corp. (1976, 1st Dist) 40 Ill App 3d 607, 352 NE2d 225, 6 ELR 20765.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 13

Received
August 26, 2011
Commission on
State Mandates

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
Copyright (c) 2011, by Matthew Bender & Company, a member
of the LexisNexis Group. All rights reserved.

*** THIS SECTION IS CURRENT THROUGH THE AUGUST 18, 2011 ***
*** ISSUE OF THE FEDERAL REGISTER ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
SUBPART A -- DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS

Go to the CFR Archive Directory

40 CFR 122.2

ß 122.2 Definitions.

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Animal feeding operation is defined at ß 122.23.

Applicable standards and limitations means all State, interstate, and federal standards and limitations to which a "discharge," a "sewage sludge use or disposal practice," or a related activity is subject under the CWA, including "effluent limitations," water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," pretreatment standards, and "standards for sewage sludge use or disposal" under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in "approved States," including any approved modifications or revisions.

Approved program or approved State means a State or interstate program which has been approved or authorized by EPA under part 123.

Aquaculture project is defined at ß 122.25.

Average monthly discharge limitation means the highest allowable average of "daily discharges" over a calendar month, calculated as the sum of all "daily discharges" measured during a calendar month divided by the number of "daily discharges" measured during that month.

Received
August 26, 2011
Commission on
State Mandates

Average weekly discharge limitation means the highest allowable average of "daily discharges" over a calendar week, calculated as the sum of all "daily discharges" measured during a calendar week divided by the number of "daily discharges" measured during that week.

Best management practices ("BMPs") means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

BMPs means "best management practices."

Bypass is defined at ß 122.41(m).

Class I sludge management facility means any POTW identified under 40 CFR 403.8(a) as being required to have an approved pretreatment program (including such POTWs located in a State that has elected to assume local program responsibilities pursuant to 40 CFR 403.10(e)) and any other treatment works treating domestic sewage classified as a Class I sludge management facility by the Regional Administrator, or, in the case of approved State programs, the Regional Administrator in conjunction with the State Director, because of the potential for its sludge use or disposal practices to adversely affect public health and the environment.

Concentrated animal feeding operation is defined at ß 122.23.

Concentrated aquatic animal feeding operation is defined at ß 122.24.

Contiguous zone means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

Continuous discharge means a "discharge" which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

CWA means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Public Law 92-500, as amended by Public Law 95-217, Public Law 95-576, Public Law 96-483 and Public Law 97-117, 33 U.S.C. 1251 et seq.

CWA and regulations means the Clean Water Act (CWA) and applicable regulations promulgated thereunder. In the case of an approved State program, it includes State program requirements.

Daily discharge means the "discharge of a pollutant" measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the "daily discharge" is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the "daily discharge" is calculated as the average measurement of the pollutant over the day.

Direct discharge means the "discharge of a pollutant."

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no "approved State program," and there is an EPA administered program, "Director" means the Regional Administrator. When there is an approved State program, "Director" normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State program. (For example, when EPA has issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval, see ß 123.1.) In such cases, the term "Director" means the Regional Administrator and not the State Director.

Discharge when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

Received
August 26, 2011
Commission on
State Mandates

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

Discharge Monitoring Report ("DMR") means the EPA uniform national form, including any subsequent additions, revisions, or modifications for the reporting of self-monitoring results by permittees. DMRs must be used by "approved States" as well as by EPA. EPA will supply DMRs to any approved State upon request. The EPA national forms may be modified to substitute the State Agency name, address, logo, and other similar information, as appropriate, in place of EPA's.

DMR means "Discharge Monitoring Report."

Draft permit means a document prepared under ß 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a "permit." A notice of intent to terminate a permit, and a notice of intent to deny a permit, as discussed in ß 124.5, are types of "draft permits." A denial of a request for modification, revocation and reissuance, or termination, as discussed in ß 124.5, is not a "draft permit." A "proposed permit" is not a "draft permit."

Effluent limitation means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.

Effluent limitations guidelines means a regulation published by the Administrator under section 304(b) of CWA to adopt or revise "effluent limitations."

Environmental Protection Agency ("EPA") means the United States Environmental Protection Agency.

EPA means the United States "Environmental Protection Agency."

Facility or activity means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

Federal Indian reservation means all land within the limits of any Indian *67981 reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

General permit means an NPDES "permit" issued under ß 122.28 authorizing a category of discharges under the CWA within a geographical area.

Hazardous substance means any substance designated under 40 CFR part 116 pursuant to section 311 of CWA.

Indian country means:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

(2) All dependent Indian communities with the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

Indirect discharger means a nondomestic discharger introducing "pollutants" to a "publicly owned treatment works."

Individual control strategy is defined at 40 CFR 123.46(c).

Received
August 26, 2011
Commission on
State Mandates

Interstate agency means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the CWA and regulations.

Major facility means any NPDES "facility or activity" classified as such by the Regional Administrator, or, in the case of "approved State programs," the Regional Administrator in conjunction with the State Director.

Maximum daily discharge limitation means the highest allowable "daily discharge."

Municipal separate storm sewer system is defined at ß 122.26 (b)(4) and (b)(7).

Municipality means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved managment agency under section 208 of CWA.

National Pollutant Discharge Elimination System (NPDES) means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of CWA. The term includes an "approved program."

New discharger means any building, structure, facility, or installation:

(a) From which there is or may be a "discharge of pollutants;"

(b) That did not commence the "discharge of pollutants" at a particular "site" prior to August 13, 1979;

(c) Which is not a "new source;" and

(d) Which has never received a finally effective NDPES permit for discharges at that "site."

This definition includes an "indirect discharger" which commences discharging into "waters of the United States" after August 13, 1979. It also includes any existing mobile point source (other than an offshore or coastal oil and gas exploratory drilling rig or a coastal oil and gas developmental drilling rig) such as a seafood processing rig, seafood processing vessel, or aggregate plant, that begins discharging at a "site" for which it does not have a permit; and any offshore or coastal mobile oil and gas exploratory drilling rig or coastal mobile oil and gas developmental drilling rig that commences the discharge of pollutants after August 13, 1979, at a "site" under EPA's permitting jurisdiction for which it is not covered by an individual or general permit and which is located in an area determined by the Regional Administrator in the issuance of a final permit to be an area or biological concern. In determining whether an area is an area of biological concern, the Regional Administrator shall consider the factors specified in 40 CFR 125.122(a) (1) through (10).

An offshore or coastal mobile exploratory drilling rig or coastal mobile developmental drilling rig will be considered a "new discharger" only for the duration of its discharge in an area of biological concern.

New source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:

(a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or

(b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

NPDES means "National Pollutant Discharge Elimination System."

Owner or operator means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

Permit means an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part and parts 123 and 124. "Permit" includes an NPDES "general permit" (ß 122.28). Permit does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Person means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

Received
August 26, 2011
Commission on
State Mandates

Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See ß 122.3).

Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

(a) Sewage from vessels; or

(b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

NOTE: Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976).

POTW is defined at ß 403.3 of this chapter.

Primary industry category means any industry category listed in the NRDC settlement agreement (Natural Resources Defense Council et al. v. Train, 8 E.R.C. 2120 (D.D.C. 1976), modified 12 E.R.C. 1833 (D.D.C. 1979)); also listed in appendix A of part 122.

Privately owned treatment works means any device or system which is (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a "POTW."

Process wastewater means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

Proposed permit means a State NPDES "permit" prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State. A "proposed permit" is not a "draft permit."

Publicly owned treatment works is defined at 40 CFR 403.3.

Recommencing discharger means a source which recommences discharge after terminating operations.

Regional Administrator means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

Schedule of compliance means a schedule of remedial measures included in a "permit", including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations.

Secondary industry category means any industry category which is not a "primary industry category."

Secretary means the Secretary of the Army, acting through the Chief of Engineers.

Septage means the liquid and solid material pumped from a septic tank, cesspool, or similar domestic sewage treatment system, or a holding tank when the system is cleaned or maintained.

Sewage from vessels means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under section 312 of CWA, except that with respect to commercial vessels on the Great Lakes this term includes graywater. For the purposes of this definition, "graywater" means galley, bath, and shower water.

Sewage Sludge means any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage. Sewage sludge includes, but is not limited to, solids removed during primary, secondary, or advanced waste water treatment, scum, septage, portable toilet pumpings, type III marine sanitation device pumpings

Received
August 26, 2011
Commission on
State Mandates

(33 CFR part 159), and sewage sludge products. Sewage sludge does not include grit or screenings, or ash generated during the incineration of sewage sludge.

Sewage sludge use or disposal practice means the collection, storage, treatment, transportation, processing, monitoring, use, or disposal of sewage sludge.

Silvicultural point source is defined at ß 122.27.

Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

Sludge-only facility means any "treatment works treating domestic sewage" whose methods of sewage sludge use or disposal are subject to regulations promulgated pursuant to section 405(d) of the CWA and is required to obtain a permit under ß 122.1(b)(2).

Standards for sewage sludge use or disposal means the regulations promulgated pursuant to section 405(d) of the CWA which govern minimum requirements for sludge quality, management practices, and monitoring and 6reporting applicable to sewage sludge or the use or disposal of sewage sludge by any person.

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe as defined in these regulations which meets the requirements of ß 123.31 of this chapter.

State Director means the chief administrative officer of any State or interstate agency operating an "approved program," or the delegated representative of the State Director. If responsibility is divided among two or more State or interstate agencies, "State Director" means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

State/EPA Agreement means an agreement between the Regional Administrator and the State which coordinates EPA and State activities, responsibilities and programs including those under the CWA programs.

Storm water is defined at ß 122.26(b)(13).

Storm water discharge associated with industrial activity is defined at ß 122.26(b)(14).

Total dissolved solids means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR part 136.

Toxic pollutant means any pollutant listed as toxic under section 307(a)(1) or, in the case of "sludge use or disposal practices," any pollutant identified in regulations implementing section 405(d) of the CWA.

Treatment works treating domestic sewage means a POTW or any other sewage sludge or waste water treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, "domestic sewage" includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works. In States where there is no approved State sludge management program under section 405(f) of the CWA, the Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal in 40 CFR part 503 as a "treatment works treating domestic sewage," where he or she finds that there is a potential for adverse effects on public health and the environment from poor sludge quality or poor sludge handling, use or disposal practices, or where he or she finds that such designation is necessary to ensure that such person is in compliance with 40 CFR part 503.

TWTDS means "treatment works treating domestic sewage."

Upset is defined at ß 122.41(n).

Variance means any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125, or in the applicable "effluent limitations guidelines" which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

Waters of the United States or waters of the U.S. means:

Received
August 26, 2011
Commission on
State Mandates

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Whole effluent toxicity means the aggregate toxic effect of an effluent measured directly by a toxicity test.

NOTE: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in ß 122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision continues that suspension. n1

n1 EDITORIAL NOTE: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.

HISTORY: [48 FR 14153, Apr. 1, 1983, as amended at 48 FR 39619, Sept. 1, 1983; 50 FR 6940, 6941, Feb. 19, 1985; 54 FR 254, Jan. 4, 1989; 54 FR 18781, May 2, 1989; 54 FR 23895, June 2, 1989; 58 FR 45037, Aug. 25, 1993 as corrected at 58 FR 48424, Sept. 15, 1993; 58 FR 67980, Dec. 22, 1993; 64 FR 41434, 42462, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 65 FR 30886, 30905, May 15, 2000]

AUTHORITY: (Clean Water Act (33 U.S.C. 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300f et seq.), Clean Air Act (42 U.S.C. 7401 et seq.), Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.))

NOTES: [EFFECTIVE DATE NOTE: 64 FR 41434, 42462, Aug. 4, 1999, added the definitions for "Indian Country" and "TWTDS," effective Dec. 2, 1999; 65 FR 30886, 30905, May 15, 2000, amended this section, effective June 14, 2000.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

Received
August 26, 2011
Commission on
State Mandates

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
United States v Hagberg (2000, CA9 Mont) 207 F3d 569, 2000 CDOS 2274, 2000 Daily Journal DAR 3083, 50 Envt Rep Cas 1380, 30 ELR 20436
Friends of Pinto Creek v United States EPA (2007, CA9) 504 F3d 1007, 65 Envt Rep Cas 1289
N. Cal. River Watch v City of Healdsburg (2004, ND Cal) 2004 US Dist LEXIS 1008, affd (2006, CA9 Cal) 457 F3d 1023, 62 Envt Rep Cas 2089, 36 ELR 20163 (criticized in United States v Johnson (2006, CA1 Mass) 467 F3d 56, 63 Envt Rep Cas 1289, 36 ELR 20218) and (criticized in United States v Cundiff (2007, WD Ky) 480 F Supp 2d 940) and (criticized in United States v Fabian (2007, ND Ind) 2007 US Dist LEXIS 24254) and op withdrawn, reh den, reh, en banc, den (2007, CA9 Cal) 2007 US App LEXIS 18612 and substituted op (2007, CA9 Cal) 2007 US App LEXIS 18615

4338 words

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 14

Received
August 26, 2011
Commission on
State Mandates

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
Copyright (c) 2011, by Matthew Bender & Company, a member
of the LexisNexis Group. All rights reserved.

*** THIS SECTION IS CURRENT THROUGH THE AUGUST 18, 2011 ***
*** ISSUE OF THE FEDERAL REGISTER ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

Go to the CFR Archive Directory

40 CFR 122.26

ß 122.26 Storm water discharges (applicable to State NPDES programs, see ß 123.25).

(a) Permit requirement. (1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

(i) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii) A discharge associated with industrial activity (see ß 122.26(a)(4));

(iii) A discharge from a large municipal separate storm sewer system;

(iv) A discharge from a medium municipal separate storm sewer system;

(v) A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at ß 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:

(A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2.

(B) The size of the discharge;

(C) The quantity and nature of the pollutants discharged to waters of the United States; and

(D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

Received
August 26, 2011
Commission on
State Mandates

(i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

Note to paragraph (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) Large and medium municipal separate storm sewer systems. (i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C) A regional authority may be responsible for submitting a permit application under the following guidelines:

(1) The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(2) The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(3) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4) (i), (ii), and (iii) or (b)(7) (i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.

Received
August 26, 2011
Commission on
State Mandates

(vi) Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

(4) Discharges through large and medium municipal separate storm sewer systems. In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

(5) Other municipal separate storm sewers. The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(6) Non-municipal separate storm sewers. For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(7) Combined sewer systems. Conveyances that discharge storm water runoff combined with municipal sewageare point sources that must obtain NPDES permits in accordance with the procedures of ß 122.21 and are not subject to the provisions of this section.

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. See 40 CFR part 35, subpart I, appendix A(b)H.2.j.

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to ß 122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with ßß 122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

Received
August 26, 2011
Commission on
State Mandates

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see ß 124.52(c) of this chapter).

(b) Definitions. (1) Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(2) Illicit discharge means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(3) Incorporated place means the District of Columbia, or a city, town, township, or village that is incorporated under the laws of the State in which it is located.

(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

(ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b)(4)(i), (ii), (iii) of this section.

(5) Major municipal separate storm sewer outfall (or "major outfall") means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

(6) Major outfall means a major municipal separate storm sewer outfall.

(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or

(ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the

Received
August 26, 2011
Commission on
State Mandates

interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a regiondefined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7)(i), (ii), (iii) of this section.

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(10) Overburden means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(11) Runoff coefficient means the fraction of total rainfall that will appear at a conveyance as runoff.

(12) Significant materials includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

(13) Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the

Received
August 26, 2011
Commission on
State Mandates

past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 31l, 32 (except 323), 33, 344l, 373;

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(1) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

Received
August 26, 2011
Commission on
State Mandates

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25;

(15) Storm water discharge associated with small construction activity means the discharge of storm water from:

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where:

(A) The value of the rainfall erosivity factor ("R" in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning With the Revised Universal Soil Loss Equation (RUSLE), pages 21-64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C 552(a) and 1 CFR part 51. Copies may be obtained from EPA's Water Resource Center, Mail Code RC4100, 1200 Pennsylvania Ave., NW., Washington, DC 20460. A copy is also available for inspection at the U.S. EPA Water Docket, 1200 Pennsylvania Ave., NW., Washington, DC 20460, or the Office of the Federal Register, 800 N. Capitol Street N.W. Suite 700, Washington, DC. An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

(B) Storm water controls are not needed based on a "total maximum daily load" (TMDL) approved or established by EPA that addresses the pollutant(s) of concern or, for non-impaired waters that do not require TMDLs, an equivalent analysis that determines allocations for small construction sites for the pollutant(s) of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purpose of this paragraph, the pollutant(s) of concern include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation) and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator must certify to the Director that the construction activity will take place, and storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

(ii) Any other construction activity designated by the Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

EXHIBIT 1 TO ß 122.26(b)(15).--SUMMARY OF COVERAGE
OF "STORM WATER DISCHARGES ASSICIATED WITH SMALL
CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Automatic Designation: Required Nationwide Coverage	. Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres. . Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see ß 122.26(b)(15)(i).)
Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator.	. Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see ß 122.26(b)(15)(ii).)

Received
August 26, 2011
Commission on
State Mandates

EXHIBIT 1 TO ß 122.26(b)(15).--SUMMARY OF COVERAGE OF "STORM WATER DISCHARGES ASSICIATED WITH SMALL CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Potential Waiver: Waiver from Requirements as Determined by the NPDES Permitting Authority.	Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (see ß 122.26(b)(15)(i).)

(16) Small municipal separate storm sewer system means all separate storm sewers that are:

(i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

(ii) Not defined as "large" or "medium" municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7) of this section, or designated under paragraph (a)(1)(v) of this section.

(iii) This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

(17) Small MS4 means a small municipal separate storm sewer system.

(18) Municipal separate storm sewer system means all separate storm sewers that are defined as "large" or "medium" or "small" municipal separate storm sewer systems pursuant to paragraphs (b)(4), (b)(7), and (b)(16) of this section, or designated under paragraph (a)(1)(v) of this section.

(19) MS4 means a municipal separate storm sewer system.

(20) Uncontrolled sanitary landfill means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runon or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

(c) Application requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity -- (1) Individual application. Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit, or any discharge of storm water which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of ß 122.21 as modified and supplemented by the provisions of this paragraph.

(i) Except as provided in ß 122.26(c)(1)(ii)-(iv), the operator of a storm water discharge associated with industrial activity subject to this section shall provide:

(A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

Received
August 26, 2011
Commission on
State Mandates

(B) An estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility) and a narrative description of the following: Significant materials that in the three years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and non-structural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

(C) A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

(D) Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

(E) Quantitative data based on samples collected during storm events and collected in accordance with ß 122.21 of this part from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(1) Any pollutant limited in an effluent guideline to which the facility is subject;

(2) Any pollutant listed in the facility's NPDES permit for its process wastewater (if the facility is operating under an existing NPDES permit);

(3) Oil and grease, pH, BOD5, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(4) Any information on the discharge required under ß 122.21(g)(7) (vi) and (vii);

(5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

(6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

(F) Operators of a discharge which is composed entirely of storm water are exempt from the requirements of ß 122.21 (g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and

(G) Operators of new sources or new discharges (as defined in ß 122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the NPDES permit for the discharge. Operators of a new source or new discharge which is composed entirely of storm water are exempt from the requirements of ß 122.21 (k)(3)(ii), (k)(3)(iii), and (k)(5).

(ii) An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of ß 122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

(A) The location (including a map) and the nature of the construction activity;

(B) The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

Received
August 26, 2011
Commission on
State Mandates

(C) Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;

(D) Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;

(E) An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(F) The name of the receiving water.

(iii) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.

(iv) The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

(v) Applicants shall provide such other information the Director may reasonably require under ß 122.21(g)(13) of this part to determine whether to issue a permit and may require any facility subject to paragraph (c)(1)(ii) of this section to comply with paragraph (c)(1)(i) of this section.

(2) [Reserved]

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

(1) Part 1. Part 1 of the application shall consist of;

(i) General information. The applicants' name, address, telephone number of contact person, ownership status and status as a State or local government entity.

(ii) Legal authority. A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (d)(2)(i) of this section, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

(iii) Source identification. (A) A description of the historic use of ordinances, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system.

(B) A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

(1) The location of known municipal storm sewer system outfalls discharging to waters of the United States;

Received
August 26, 2011
Commission on
State Mandates

(2) A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

(3) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

(4) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;

(5) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and

(6) The identification of publicly owned parks, recreational areas, and other open lands.

(iv) Discharge characterization. (A) Monthly mean rain and snow fall estimates (or summary of weather bureau data) and the monthly average number of storm events.

(B) Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.

(C) A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments, lakes and estuaries, where pollutants from the system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts shall include a description of whether the water bodies receiving such discharges havebeen:

(1) Assessed and reported in section 305(b) reports submitted by the State, the basis for the assessment (evaluated or monitored), a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;

(2) Listed under section 304(l)(1)(A)(i), section 304(l)(1)(A)(ii), or section 304(l)(1)(B) of the CWA that is not expected to meet water quality standards or water quality goals;

(3) Listed in State Nonpoint Source Assessments required by section 319(a) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution (or contributing to a violation of water quality standards);

(4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

(5) Areas of concern of the Great Lakes identified by the International Joint Commission;

(6) Designated estuaries under the National Estuary Program under section 320 of the CWA;

(7) Recognized by the applicant as highly valued or sensitive waters;

(8) Defined by the State or U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and

(9) Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

(D) Field screening. Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents

Received
August 26, 2011
Commission on
State Mandates

(or surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

(1) A grid system consisting of perpendicular north-south and east-west lines spaced 1/4 mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;

(2) All cells that contain a segment of the storm sewer system shall be identified; one field screening point shall be selected in each cell; major outfalls may be used as field screening points;

(3) Field screening points should be located downstream of any sources of suspected illegal or illicit activity;

(4) Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;

(5) Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;

(6) For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created, and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment of the sewer system shall be subject to field screening (unless access to the separate storm sewer system is impossible); and

(7) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced 1/4 mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

(E) Characterization plan. Information and a proposed program to meet the requirements of paragraph (d)(2)(iii) of this section. Such description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (d)(2)(iii)(A) of this section, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for such sampling should reflect water quality concerns (see paragraph (d)(1)(iv)(C) of this section) to the extent practicable.

(v) Management programs. (A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but arenot limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

(B) A description of the existing program to identify illicit connections to the municipal storm sewer system. The description should include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

(vi) Fiscal resources. (A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, in-

Received
August 26, 2011
Commission on
State Mandates

cluding an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.

(2) Part 2. Part 2 of the application shall consist of:

(i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) Source identification. The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(1) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) Characterization data. When "quantitative data" for a pollutant are required under paragraph (d)(2)(iii)(A)(3) of this section, the applicant must collect a sample of effluent in accordance with ß 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(1) For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the requirements at ß 122.21(g)(7) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(2) A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(3) For samples collected and described under paragraphs (d)(2)(iii) (A)(1) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)

Total dissolved solids (TDS)

COD

BOD[5]

Oil and grease

Received
August 26, 2011
Commission on
State Mandates

Fecal coliform

Fecal streptococcus

pH

Total Kjeldahl nitrogen

Nitrate plus nitrite

Dissolved phosphorus

Total ammonia plus organic nitrogen

Total phosphorus

(4) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under ß 122.21(c)(7)) for BOD[sub]5, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C) A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(1) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

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

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

Received
August 26, 2011
Commission on
State Mandates

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

(5) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(5) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

(C) A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

Received
August 26, 2011
Commission on
State Mandates

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: Any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under ß 122.21(g)(7) (vi) and (vii).

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(1) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(2) A description of requirements for nonstructural and structural best management practices;

(3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

(4) A description of appropriate educational and training measures for construction site operators.

(v) Assessment of controls. Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

(vi) Fiscal analysis. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2)(iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements. The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

(e) Application deadlines. Any operator of a point source required to obtain a permit under this section that does not have an effective NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines:

(1) Storm water discharges associated with industrial activity. (i) Except as provided in paragraph (e)(1)(ii) of this section, for any storm water discharge associated with industrial activity identified in paragraphs (b)(14)(i) through (xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or that is not authorized by a storm water general permit, a permit application made pursuant to paragraph (c) of this section must be submitted to the Director by October 1, 1992;

(ii) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, other than an airport, powerplant, or uncontrolled sanitary landfill, the permit application must be submitted to the Director by March 10, 2003.

(2) For any group application submitted in accordance with paragraph (c)(2) of this section:

Received
August 26, 2011
Commission on
State Mandates

(i) Part 1. (A) Except as provided in paragraph (e)(2)(i)(B) of this section, part 1 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by September 30, 1991;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 18, 1992.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(ii) Based on information in the part 1 application, the Director will approve or deny the members in the group application within 60 days after receiving part 1 of the group application.

(iii) Part 2. (A) Except as provided in paragraph (e)(2)(iii)(B) of this section, part 2 of the application shall be submittted to the Director, Office of Wastewater Enforcement and Compliance by October 1, 1992;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 17, 1993.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(iv) Rejected facilities. (A) Except as provided in paragraph (e)(2)(iv)(B) of this section, facilities that are rejected as members of the group shall submit an individual application (or obtain coverage under an applicable general permit) no later than 12 months after the date of receipt of the notice of rejection or October 1, 1992, whichever comes first.

(B) Facilities that are owned or operated by a municipality and that are rejected as members of part 1 group application shall submit an individual application no later than 180 days after the date of receipt of the notice of rejection or October 1, 1992, whichever is later.

(v) A facility listed under paragraph (b)(14) (i)-(xi) of this section may add on to a group application submitted in accordance with paragraph (e)(2)(i) of this section at the discretion of the Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18, 1992; the addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than 10%, unless there are over 100 facilities in the group that are submitting quantitative data; approval to become part of group application must be obtained from the group or the trade association representing the individual facilities.

(3) For any discharge from a large municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by November 18, 1991;

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application;

(iii) Part 2 of the application shall be submitted to the Director by November 16, 1992.

(4) For any discharge from a medium municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by May 18, 1992.

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application.

(iii) Part 2 of the application shall be submitted to the Director by May 17, 1993.

(5) A permit application shall be submitted to the Director within 180 days of notice, unless permission for a later date is granted by the Director (see ß 124.52(c) of this chapter), for:

(i) A storm water discharge that the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (see paragraphs (a)(1)(v) and (b)(15)(ii) of this section);

Received
August 26, 2011
Commission on
State Mandates

(ii) A storm water discharge subject to paragraph (c)(1)(v) of this section.

(6) Facilities with existing NPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. Facilities with permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992 shall submit a new application in accordance with the requirements of 40 CFR 122.21 and 40 CFR 122.26(c) (Form 1, Form 2F, and other applicable Forms) 180 days before the expiration of such permits.

(7) The Director shall issue or deny permits for discharges composed entirely of storm water under this section in accordance with the following schedule:

(i)(A) Except as provided in paragraph (e)(7)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than October 1, 1993, or, for new sources or existing sources which fail to submit a complete permit application by October 1, 1992, one year after receipt of a complete permit application;

(B) For any municipality with a population of less than 250,000 which submits a timely Part I group application under paragraph (e)(2)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than May 17, 1994, or, for any such municipality which fails to submit a complete Part II group permit application by May 17, 1993, one year after receipt of a complete permit application;

(ii) The Director shall issue or deny permits for large municipal separate storm sewer systems no later than November 16, 1993, or, for new sources or existing sources which fail to submit a complete permit application by November 16, 1992, one year after receipt of a complete permit application;

(iii) The Director shall issue or deny permits for medium municipal separate storm sewer systems no later than May 17, 1994, or, for new sources or existing sources which fail to submit a complete permit application by May 17, 1993, one year after receipt of a complete permit application.

(8) For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see ß 122.21(c)(1). Discharges from these sources require permit authorization by March 10, 2003, unless designated for coverage before then.

(9) For any discharge from a regulated small MS4, the permit application made under ß 122.33 must be submitted to the Director by:

(i) March 10, 2003 if designated under ß 122.32(a)(1) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under ß 123.35(d)(3) (see ß 122.33(c)(1)); or

(ii) Within 180 days of notice, unless the NPDES permitting authority grants a later date, if designated under ß 122.32(a)(2) (see ß 122.33(c)(2)).

(f) Petitions. (1) Any operator of a municipal separate storm sewer system may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.

(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.

Received
August 26, 2011
Commission on
State Mandates

(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

(g) Conditional exclusion for "no exposure" of industrial activities and materials to storm water. Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to rain, snow, snowmelt and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section. "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

(1) Qualification. To qualify for this exclusion, the operator of the discharge must:

(i) Provide a storm resistant shelter to protect industrial materials and activities from exposure to rain, snow, snow melt, and runoff;

(ii) Complete and sign (according to ß 122.22) a certification that there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in paragraph (g)(2) of this section;

(iii) Submit the signed certification to the NPDES permitting authority once every five years;

(iv) Allow the Director to inspect the facility to determine compliance with the "no exposure" conditions;

(v) Allow the Director to make any "no exposure" inspection reports available to the public upon request; and

(vi) For facilities that discharge through an MS4, upon request, submit a copy of the certification of "no exposure" to the MS4 operator, as well as allow inspection and public reporting by the MS4 operator.

(2) Industrial materials and activities not requiring storm resistant shelter. To qualify for this exclusion, storm resistant shelter is not required for:

(i) Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak ("Sealed" means banded or otherwise secured and without operational taps or valves);

(ii) Adequately maintained vehicles used in material handling; and

(iii) Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

(3) Limitations. (i) Storm water discharges from construction activities identified in paragraphs (b)(14)(x) and (b)(15) are not eligible for this conditional exclusion.

(ii) This conditional exclusion from the requirement for an NPDES permit is available on a facility-wide basis only, not for individual outfalls. If a facility has some discharges of storm water that would otherwise be "no exposure" discharges, individual permit requirements should be adjusted accordingly.

(iii) If circumstances change and industrial materials or activities become exposed to rain, snow, snow melt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for un-permitted discharge. Any conditionally exempt discharger who anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances.

(iv) Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.

(4) Certification. The no exposure certification must require the submission of the following information, at a minimum, to aid the NPDES permitting authority in determining if the facility qualifies for the no exposure exclusion:

(i) The legal name, address and phone number of the discharger (see ß 122.21(b));

Received
August 26, 2011
Commission on
State Mandates

(ii) The facility name and address, the county name and the latitude and longitude where the facility is located;

(iii) The certification must indicate that none of the following materials or activities are, or will be in the foreseeable future, exposed to precipitation:

(A) Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed to storm water;

(B) Materials or residuals on the ground or in storm water inlets from spills/leaks;

(C) Materials or products from past industrial activity;

(D) Material handling equipment (except adequately maintained vehicles);

(E) Materials or products during loading/unloading or transporting activities;

(F) Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);

(G) Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;

(H) Materials or products handled/stored on roads or railways owned or maintained by the discharger;

(I) Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);

(J) Application or disposal of process wastewater (unless otherwise permitted); and

(K) Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

(iv) All "no exposure" certifications must include the following certification statement, and be signed in accordance with the signatory requirements of ß 122.22: "I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of "no exposure" and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

HISTORY: [55 FR 48063, Nov. 16, 1990, as amended at 56 FR 12100, Mar. 21, 1991; 56 FR 56554, Nov. 5, 1991; 57 FR 11412, Apr. 2, 1992; 57 FR 60447, Dec. 18, 1992; 60 FR 40235, Aug. 7, 1995; 64 FR 68722, 68838, Dec. 8, 1999; 65 FR 30886, 30907, May 15, 2000; 68 FR 11325, 11329, Mar. 10, 2003; 70 FR 11560, 11563, Mar. 9, 2005; 71 FR 33628, 33639, June 12,2006]

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq.

NOTES: [EFFECTIVE DATE NOTE: 71 FR 33628, 33639, June 12, 2006, revised paragraphs (a)(2) and (e)(8), effective June 12, 2006.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

Received
August 26, 2011
Commission on
State Mandates

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
American Mining Congress v United States EPA (1992, CA9) 965 F2d 759, 92 CDOS 4465, 92 Daily Journal DAR 7079, 35 Envt Rep Cas 1032, 22 ELR 21135, 121 OGR 375
Envtl. Def. Ctr., Inc. v EPA (2003, CA9 Cal) 344 F3d 832, 57 Envt Rep Cas 1039, 33 ELR 20269, cert den (2004) 541 US 1085, 124 S Ct 2811, 159 L Ed 2d 246, 59 Envt Rep Cas 1160

14690 words

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 15

Received
August 26, 2011
Commission on
State Mandates

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
Copyright (c) 2011, by Matthew Bender & Company, a member
of the LexisNexis Group. All rights reserved.

*** THIS SECTION IS CURRENT THROUGH THE AUGUST 18, 2011 ***
*** ISSUE OF THE FEDERAL REGISTER ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
SUBPART C -- PERMIT CONDITIONS

Go to the CFR Archive Directory

40 CFR 122.42

ß 122.42 Additional conditions applicable to specified categories of NPDES permits (applicable to State NPDES programs, see ß 123.25).

The following conditions, in addition to those set forth in ß 122.41, apply to all NPDES permits within the categories specified below:

(a) Existing manufacturing, commercial, mining, and silvicultural dischargers. In addition to the reporting requirements under ß 122.41(1), all existing manufacturing, commercial, mining, and silvicultural dischargers must notify the Director as soon as they know or have reason to believe:

(1) That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

(i) One hundred micrograms per liter (100 X mg/l);

(ii) Two hundred micrograms per liter (200 X mg/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 X mg/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;

(iii) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with ß 122.21(g)(7); or

(iv) The level established by the Director in accordance with ß 122.44(f).

(2) That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

(i) Five hundred micrograms per liter (500 X mg/l);

(ii) One milligram per liter (1 mg/l) for antimony;

Received
August 26, 2011
Commission on
State Mandates

(iii) Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with ß 122.21(g)(7).

(iv) The level established by the Director in accordance with ß 122.44(f).

(b) Publicly owned treatment works. All POTWs must provide adequate notice to the Director of the following:

(1) Any new introduction of pollutants into the POTW from an indirect discharger which would be subject to section 301 or 306 of CWA if it were directly discharging those pollutants; and

(2) Any substantial change in the volume or character of pollutants being introduced into that POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.

(3) For purposes of this paragraph, adequate notice shall include information on (i) the quality and quantity of effluent introduced into the POTW, and (ii) any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

(c) Municipal separate storm sewer systems. The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under ß 122.26(a)(1)(v) of this part must submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include:

(1) The status of implementing the components of the storm water management program that are established as permit conditions;

(2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with ß 122.26(d)(2)(iii) of this part; and

(3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under ß 122.26(d)(2)(iv) and (d)(2)(v) of this part;

(4) A summary of data, including monitoring data, that is accumulated throughout the reporting year;

(5) Annual expenditures and budget for year following each annual report;

(6) A summary describing the number and nature of enforcement actions, inspections, and public education programs;

(7) Identification of water quality improvements or degradation;

(d) Storm water discharges. The initial permits for discharges composed entirely of storm water issued pursuant to ß 122.26(e)(7) of this part shall require compliance with the conditions of the permit as expeditiously as practicable, but in no event later than three years after the date of issuance of the permit.

(e) Concentrated animal feeding operations (CAFOs). Any permit issued to a CAFO must include the requirements in paragraphs (e)(1) through (e)(6) of this section.

(1) Requirement to implement a nutrient management plan. Any permit issued to a CAFO must include a requirement to implement a nutrient management plan that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412. The nutrient management plan must, to the extent applicable:

(i) Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;

(ii) Ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;

(iii) Ensure that clean water is diverted, as appropriate, from the production area;

(iv) Prevent direct contact of confined animals with waters of the United States;

Received
August 26, 2011
Commission on
State Mandates

(v) Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;

(vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;

(vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;

(viii) Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and

(ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i)through (e)(1)(viii) of this section.

(2) Recordkeeping requirements.

(i) The permittee must create, maintain for five years, and make available to the Director, upon request, the following records:

(A) All applicable records identified pursuant paragraph (e)(1)(ix) of this section;

(B) In addition, all CAFOs subject to 40 CFR part 412 must comply with record keeping requirements as specified in ß 412.37(b) and (c) and ß 412.47(b) and (c).

(ii) A copy of the CAFO's site-specific nutrient management plan must be maintained on site and made available to the Director upon request.

(3) Requirements relating to transfer of manure or process wastewater to other persons. Prior to transferring manure, litter or process wastewater to other persons, Large CAFOs must provide the recipient of the manure, litter or process wastewater with the most current nutrient analysis. The analysis provided must be consistent with the requirements of 40 CFR part 412. Large CAFOs must retain for five years records of the date, recipient name and address, and approximate amount of manure, litter or process wastewater transferred to another person.

(4) Annual reporting requirements for CAFOs. The permittee must submit an annual report to the Director. The annual report must include:

(i) The number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);

(ii) Estimated amount of total manure, litter and process wastewater generated by the CAFO in the previous 12 months (tons/gallons);

(iii) Estimated amount of total manure, litter and process wastewater transferred to other person by the CAFO in the previous 12 months (tons/gallons);

(iv) Total number of acres for land application covered by the nutrient management plan developed in accordance with paragraph (e)(1) of this section;

(v) Total number of acres under control of the CAFO that were used for land application of manure, litter and process wastewater in the previous 12 months;

(vi) Summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume; and

(vii) A statement indicating whether the current version of the CAFO's nutrient management plan was developed or approved by a certified nutrient management planner; and

(viii) The actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, the results of calculations conducted in accordance with paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section, and the amount of manure, litter, and process wastewater applied to each field during the previous 12 months; and, for any CAFO that implements a nutrient management plan that addresses rates of applica-

Received
August 26, 2011
Commission on
State Mandates

tion in accordance with paragraph (e)(5)(ii) of this section, the results of any soil testing for nitrogen and phosphorus taken during the preceding 12 months, the data used in calculations conducted in accordance with paragraph (e)(5)(ii)(D) of this section, and the amount of any supplemental fertilizer applied during the previous 12 months.

(5) Terms of the nutrient management plan. Any permit issued to a CAFO must require compliance with the terms of the CAFO's site-specific nutrient management plan. The terms of the nutrient management plan are the information, protocols, best management practices, and other conditions in the nutrient management plan determined by the Director to be necessary to meet the requirements of paragraph (e)(1) of this section. The terms of the nutrient management plan, with respect to protocols for land application of manure, litter, or process wastewater required by paragraph (e)(1)(viii) of this section and, as applicable, 40 CFR 412.4(c), must include the fields available for land application; field-specific rates of application properly developed, as specified in paragraphs (e)(5)(i) through (ii) of this section, to ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and any timing limitations identified in the nutrient management plan concerning land application on the fields available for land application. The terms must address rates of application using one of the following two approaches, unless the Director specifies that only one of these approaches may be used:

(i) Linear approach. An approach that expresses rates of application as pounds of nitrogen and phosphorus, according to the following specifications:

(A) The terms include maximum application rates from manure, litter, and process wastewater for each year of permit coverage, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, per year, for each field to be used for land application, and certain factors necessary to determine such rates. At a minimum, the factors that are terms must include: The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses of a field such as pasture or fallow fields; the realistic yield goal for each crop or use identified for each field; the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field; credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; and accounting for all other additions of plant available nitrogen and phosphorus to the field. In addition, the terms include the form and source of manure, litter, and process wastewater to be land-applied; the timing and method of land application; and the methodology by which the nutrient management plan accounts for the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(B) Large CAFOs that use this approach must calculate the maximum amount of manure, litter, and process wastewater to be land applied at least once each year using the results of the most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application; or

(ii) Narrative rate approach. An approach that expresses rates of application as a narrative rate of application that results in the amount, in tons or gallons, of manure, litter, and process wastewater to be land applied, according to the following specifications:

(A) The terms include maximum amounts of nitrogen and phosphorus derived from all sources of nutrients, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, for each field, and certain factors necessary to determine such amounts. At a minimum, the factors that are terms must include: the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses such as pasture or fallow fields (including alternative crops identified in accordance with paragraph (e)(5)(ii)(B) of this section); the realistic yield goal for each crop or use identified for each field; and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field. In addition, the terms include the methodology by which the nutrient management plan accounts for the following factors when calculating the amounts of manure, litter, and process wastewater to be land applied: Results of soil tests conducted in accordance with protocols identified in the nutrient management plan, as required by paragraph (e)(1)(vii) of this section; credits for all nitrogen in the field that will be plant available; the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; the form and source of manure, litter, and process wastewater; the timing and method of land application; and volatilization of nitrogen and mineralization of organic nitrogen.

(B) The terms of the nutrient management plan include alternative crops identified in the CAFO's nutrient management plan that are not in the planned crop rotation. Where a CAFO includes alternative crops in its nutrient management plan, the crops must be listed by field, in addition to the crops identified in the planned crop rotation for that

Received
August 26, 2011
Commission on
State Mandates

field, and the nutrient management plan must include realistic crop yield goals and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop. Maximum amounts of nitrogen and phosphorus from all sources of nutrients and the amounts of manure, litter, and process wastewater to be applied must be determined in accordance with the methodology described in paragraph (e)(5)(ii)(A) of this section.

(C) For CAFOs using this approach, the following projections must be included in the nutrient management plan submitted to the Director, but are not terms of the nutrient management plan: The CAFO's planned crop rotations for each field for the period of permit coverage; the projected amount of manure, litter, or process wastewater to be applied; projected credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; and the predicted form, source, and method of application of manure, litter, and process wastewater for each crop. Timing of application for each field, insofar as it concerns the calculation of rates of application, is not a term of the nutrient management plan.

(D) CAFOs that use this approach must calculate maximum amounts of manure, litter, and process wastewater to be land applied at least once each year using the methodology required in paragraph (e)(5)(ii)(A) of this section before land applying manure, litter, and process wastewater and must rely on the following data:

(1) A field-specific determination of soil levels of nitrogen and phosphorus, including, for nitrogen, a concurrent determination of nitrogen that will be plant available consistent with the methodology required by paragraph (e)(5)(ii)(A) of this section, and for phosphorus, the results of the most recent soil test conducted in accordance with soil testing requirements approved by the Director; and

(2) The results of most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application, in order to determine the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(6) Changes to a nutrient management plan. Any permit issued to a CAFO must require the following procedures to apply when a CAFO owner or operator makes changes to the CAFO's nutrient management plan previously submitted to the Director:

(i) The CAFO owner or operator must provide the Director with the most current version of the CAFO's nutrient management plan and identify changes from the previous version, except that the results of calculations made in accordance with the requirements of paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section are not subject to the requirements of paragraph (e)(6) of this section.

(ii) The Director must review the revised nutrient management plan to ensure that it meets the requirements of this section and applicable effluent limitations and standards, including those specified in 40 CFR part 412, and must determine whether the changes to the nutrient management plan necessitate revision to the terms of the nutrient management plan incorporated into the permit issued to the CAFO. If revision to the terms of the nutrient management plan is not necessary, the Director must notify the CAFO owner or operator and upon such notification the CAFO may implement the revised nutrient management plan. If revision to the terms of the nutrient management plan is necessary, the Director must determine whether such changes are substantial changes as described in paragraph (e)(6)(iii) of this section.

(A) If the Director determines that the changes to the terms of the nutrient management plan are not substantial, the Director must make the revised nutrient management plan publicly available and include it in the permit record, revise the terms of the nutrient management plan incorporated into the permit, and notify the owner or operator and inform the public of any changes to the terms of the nutrient management plan that are incorporated into the permit.

(B) If the Director determines that the changes to the terms of the nutrient management plan are substantial, the Director must notify the public and make the proposed changes and the information submitted by the CAFO owner or operator available for public review and comment. The process for public comments, hearing requests, and the hearing process if a hearing is held must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the CAFO's permit, an appropriate period of time for the public to comment and request a hearing on the proposed changes that differs from the time period specified in 40 CFR 124.10. The Director must respond to all significant comments received during the comment period as provided in 40 CFR 124.17, and require the CAFO owner or operator to further revise the nutrient management plan if necessary, in order to approve the revision to the terms of the nutrient management plan incorporated into the CAFO's permit. Once the Director incorporates the revised terms of the nutrient management plan into the permit, the Director must notify the owner or operator and inform the public of the final decision concerning revisions to the terms and conditions of the permit.

Received
August 26, 2011
Commission on
State Mandates

(iii) Substantial changes to the terms of a nutrient management plan incorporated as terms and conditions of a permit include, but are not limited to:

(A) Addition of new land application areas not previously included in the CAFO's nutrient management plan. Except that if the land application area that is being added to the nutrient management plan is covered by terms of a nutrient management plan incorporated into an existing NPDES permit in accordance with the requirements of paragraph (e)(5) of this section, and the CAFO owner or operator applies manure, litter, or process wastewater on the newly added land application area in accordance with the existing field-specific permit terms applicable to the newly added land application area, such addition of new land would be a change to the new CAFO owner or operator's nutrient management plan but not a substantial change for purposes of this section;

(B) Any changes to the field-specific maximum annual rates for land application, as set forth in paragraphs (e)(5)(i) of this section, and to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop, as set forth in paragraph (e)(5)(ii) of this section;

(C) Addition of any crop or other uses not included in the terms of the CAFO's nutrient management plan and corresponding field-specific rates of application expressed in accordance with paragraph (e)(5) of this section; and

(D) Changes to site-specific components of the CAFO's nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S.

(iv) For EPA-issued permits only. Upon incorporation of the revised terms of the nutrient management plan into the permit, 40 CFR 124.19 specifies procedures for appeal of the permit decision. In addition to the procedures specified at 40 CFR 124.19, a person must have submitted comments or participated in the public hearing in order to appeal the permit decision.

HISTORY: [48 FR 14153, Apr. 1, 1983, as amended at 49 FR 38049, Sept. 26, 1984; 50 FR 4514, Jan. 31, 1985; 55 FR 48073, Nov. 16, 1990; 57 FR 60448, Dec. 18, 1992; 68 FR 7176, 7268, Feb. 12, 2003; 71 FR 6978, 6984, Feb. 10, 2006; 72 FR 40245, 40250, July 24, 2007; 73 FR 70418, 70483, Nov. 20, 2008]

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq.

NOTES: [EFFECTIVE DATE NOTE: 72 FR 40245, 40250, July 24, 2007, amended paragraph (e)(1), effective July 24, 2007; 73 FR 70418, 70483, Nov. 20, 2008, amended paragraph (e), effective Dec. 22, 2008.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
Waterkeeper Alliance, Inc. v United States EPA (2005, CA2) 2005 US App LEXIS 6533
Waterkeeper Alliance, Inc. v United States EPA (2005, CA2) 399 F3d 486, 59 Envt Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) 2005 US App LEXIS 6533

3785 words

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 16

Received
August 26, 2011
Commission on
State Mandates

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
Copyright (c) 2011, by Matthew Bender & Company, a member
of the LexisNexis Group. All rights reserved.

*** THIS SECTION IS CURRENT THROUGH THE AUGUST 18, 2011 ***
*** ISSUE OF THE FEDERAL REGISTER ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
SUBPART C -- PERMIT CONDITIONS

Go to the CFR Archive Directory

40 CFR 122.44

ß 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see ß 123.25).

In addition to the conditions established under ß 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(a)(1) Technology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CWA, or new source performance standards promulgated under section 306 of CWA, on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or a combination of the three, in accordance with ß 125.3 of this chapter. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of ß 122.29(d) (protection period).

(2) Monitoring waivers for certain guideline-listed pollutants.

(i) The Director may authorize a discharger subject to technology-based effluent limitations guidelines and standards in an NPDES permit to forego sampling of a pollutant found at 40 CFR Subchapter N of this chapter if the discharger has demonstrated through sampling and other technical factors that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(ii) This waiver is good only for the term of the permit and is not available during the term of the first permit issued to a discharger.

(iii) Any request for this waiver must be submitted when applying for a reissued permit or modification of a reissued permit. The request must demonstrate through sampling or other technical information, including information generated during an earlier permit term that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

(iv) Any grant of the monitoring waiver must be included in the permit as an express permit condition and the reasons supporting the grant must be documented in the permit's fact sheet or statement of basis.

Received
August 26, 2011
Commission on
State Mandates

(v) This provision does not supersede certification processes and requirements already established in existing effluent limitations guidelines and standards.

(b)(1) Other effluent limitations and standards under sections 301, 302, 303, 307, 318 and 405 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. See also ß 122.41(a).

(2) Standards for sewage sludge use or disposal under section 405(d) of the CWA unless those standards have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator. When there are no applicable standards for sewage sludge use or disposal, the permit may include requirements developed on a case-by-case basis to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge. If any applicable standard for sewage sludge use or disposal is promulgated under section 405(d) of the CWA and that standard is more stringent than any limitation on the pollutant or practice in the permit, the Director may initiate proceedings under these regulations to modify or revoke and reissue the permit to conform to the standard for sewage sludge use or disposal.

(3) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I, J, and N of this chapter.

(c) Reopener clause: For any permit issued to a treatment works treating domestic sewage (including "sludge-only facilities"), the Director shall include a reopener clause to incorporate any applicable standard for sewage sludge use or disposal promulgated under section 405(d) of the CWA. The Director may promptly modify or revoke and reissue any permit containing the reopener clause required by this paragraph if the standard for sewage sludge use or disposal is more stringent than any requirements for sludge use or disposal in the permit, or controls a pollutant or practice not limited in the permit.

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an instream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

(iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that adischarge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity

Received
August 26, 2011
Commission on
State Mandates

are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(1) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(2) The fact sheet required by ß 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(3) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(4) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of CWA;

(3) Conform to the conditions to a State certification under section 401 of the CWA that meets the requirements of ß 124.53 when EPA is the permitting authority. If a State certification is stayed by a court of competent jurisdiction or an appropriate State board or agency, EPA shall notify the State that the Agency will deem certification waived unless a finally effective State certification is received within sixty days from the date of the notice. If the State does not forward a finally effective certification within the sixty day period, EPA shall include conditions in the permit that may be necessary to meet EPA's obligation under section 301(b)(1)(C) of the CWA;

(4) Conform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA;

(6) Ensure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of CWA;

(7) Incorporate section 403(c) criteria under part 125, subpart M, for ocean discharges;

Received
August 26, 2011
Commission on
State Mandates

(8) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under 40 CFR part 125, subpart D;

(9) Incorporate any other appropriate requirements, conditions, or limitations (other than effluent limitations) into a new source permit to the extent allowed by the National Environmental Policy Act, 42 U.S.C. 4321 et seq. and section 511 of the CWA, when EPA is the permit issuing authority. (See ß 122.29(c)).

(e) Technology-based controls for toxic pollutants. Limitations established under paragraphs (a), (b), or (d) of this section, to control pollutants meeting the criteria listed in paragraph (e)(1) of this section. Limitations will be established in accordance with paragraph (e)(2) of this section. An explanation of the development of these limitations shall be included in the fact sheet under ß 124.56(b)(1)(i).

(1) Limitations must control all toxic pollutants which the Director determines (based on information reported in a permit application under ß 122.21(g)(7) or in a notification under ß 122.42(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under ß 125.3(c) of this chapter; or

(2) The requirement that the limitations control the pollutants meeting the criteria of paragraph (e)(1) of this section will be satisfied by:

(i) Limitations on those pollutants; or

(ii) Limitations on other pollutants which, in the judgment of the Director, will provide treatment of the pollutants under paragraph (e)(1) of this section to the levels required by ß 125.3(c).

(f) Notification level. A "notification level" which exceeds the notification level of ß 122.42(a)(1)(i), (ii) or (iii), upon a petition from the permittee or onthe Director's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under ß 125.3(c)

(g) Twenty-four hour reporting. Pollutants for which the permittee must report violations of maximum daily discharge limitations under ß 122.41(1)(6)(ii)(C) (24-hour reporting) shall be listed in the permit. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(h) Durations for permits, as set forth in ß 122.46.

(i) Monitoring requirements. In addition to ß 122.48, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate including pollutants in internal waste streams under ß 122.45(i); pollutants in intake water for net limitations under ß 122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under ß 122.45(e); pollutants subject to notification requirements under ß 122.42(a); and pollutants in sewage sludge or other monitoring as specified in 40 CFR part 503; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.

(iv) According to test procedures approved under 40 CFR Part 136 for the analyses of pollutants or another method is required under 40 CFR subchapters N or O. In the case of pollutants for which there are no approved methods under 40 CFR Part 136 or otherwise required under 40 CFR subchapters N or O, monitoring must be conducted according to a test procedure specified in the permit for such pollutants.

(2) Except as provided in paragraphs (i)(4) and (i)(5) of this section, requirements to report monitoring results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year. For sewage sludge use or disposal practices, requirements to monitor and report results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the sewage sludge use or disposal practice; minimally this shall be as specified in 40 CFR part 503 (where applicable), but in no case less than once a year.

Received
August 26, 2011
Commission on
State Mandates

(3) Requirements to report monitoring results for storm water discharges associated with industrial activity which are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(4) Requirements to report monitoring results for storm water discharges associated with industrial activity (other than those addressed in paragraph (i)(3) of this section) shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. At a minimum, a permit for such a discharge must require:

(i) The discharger to conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity and evaluate whether measures to reduce pollutant loadings identified in a storm water pollution prevention plan are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed;

(ii) The discharger to maintain for a period of three years a record summarizing the results of the inspection and a certification that the facility is in compliance with the plan and the permit, and identifying any incidents of non-compliance;

(iii) Such report and certification be signed in accordance with ß 122.22; and

(iv) Permits for storm water discharges associated with industrial activity from inactive mining operations may, where annual inspections are impracticable, require certification once every three years by a Registered Professional Engineer that the facility is in compliance with the permit, or alternative requirements.

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under ß 122.41(l) (1), (4), (5), and (6) at least annually.

(j) Pretreatment program for POTWs. Requirements for POTWs to:

(1) Identify, in terms of character and volume of pollutants, any Significant Industrial Users discharging into the POTW subject to Pretreatment Standards under section 307(b) of CWA and 40 CFR part 403.

(2)(i) Submit a local program when required by and in accordance with 40 CFR part 403 to assure compliance with pretreatment standards to the extent applicable under section 307(b). The local program shall be incorporated into the permit as described in 40 CFR part 403. The program must require all indirect dischargers to the POTW to comply with the reporting requirements of 40 CFR part 403.

(ii) Provide a written technical evaluation of the need to revise local limits under 40 CFR 403.5(c)(1), following permit issuance or reissuance.

(3) For POTWs which are "sludge-only facilities," a requirement to develop a pretreatment program under 40 CFR part 403 when the Director determines that a pretreatment program is necessary to assure compliance with Section 405(d) of the CWA.

(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

(2) Authorized under section 402(p) of the CWA for the control of storm water discharges;

(3) Numeric effluent limitations are infeasible; or

(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

NOTE TO PARAGRAPH (k)(4): Additional technical information on BMPs and the elements of BMPs is contained in the following documents: Guidance Manual for Developing Best Management Practices (BMPs), October 1993, EPA No. 833/B-93-004, NTIS No. PB 94-178324, ERIC No. W498); Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices, September 1992, EPA No. 832/R-92-005, NTIS No. PB 92-235951, ERIC No. N482); Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA No. 833/R-92-001, NTIS No. PB 93-223550; ERIC No. W139; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices, September 1992; EPA 832/R-92-006, NTIS No. PB 92-235969, ERIC No.

Received
August 26, 2011
Commission on
State Mandates

N477; Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices: Summary Guidance, EPA 833/R-92-002, NTIS No. PB 94-133782; ERIC No. W492. Copies of those documents (or directionson how to obtain them) can be obtained by contacting either the Office of Water Resource Center (using the EPA document number as a reference) at (202) 260-7786; or the Educational Resources Information Center (ERIC) (using the ERIC number as a reference) at (800) 276-0462. Updates of these documents or additional BMP documents may also be available. A list of EPA BMP guidance documents is available on the OWM Home Page at http://www.epa.gov/owm. In addition, States may have BMP guidance documents.

These EPA guidance documents are listed here only for informational purposes; they are not binding and EPA does not intend that these guidance documents have any mandatory, regulatory effect by virtue of their listing in this note.

(l) Reissued permits. (1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under ß 122.62.)

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions -- A permit with respect to which paragraph (l)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if --

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) Limitations. In no event may a permit with respect to which paragraph (l)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

(m) Privately owned treatment works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this part. Alternatively, the Director may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The Director's decision to issue a permit with no conditions applicable to any user, to impose conditions on one or more users, to issue separate permits, or to require separate applications, and the basis for that decision, shall be stated in the fact sheet for the draft permit for the treatment works.

Received
August 26, 2011
Commission on
State Mandates

(n) Grants. Any conditions imposed in grants made by the Administrator to POTWs under sections 201 and 204 of CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.

(o) Sewage sludge. Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established, in accordance with any applicable regulations.

(p) Coast Guard. When a permit is issued to a facility that may operate at certain times as a means of transportation over water, a condition that the discharge shall comply with any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, that establish specifications for safe transportation, handling, carriage, and storage of pollutants.

(q) Navigation. Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with ß 124.59 of this chapter.

(r) Great Lakes. When a permit is issued to a facility that discharges into the Great Lakes System (as defined in 40 CFR 132.2), conditions promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132.

(s) Qualifying State, Tribal, or local programs. (1) For storm water discharges associated with small construction activity identified in ß 122.26(b)(15), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. Where a qualifying State, Tribal, or local program does not include one or more of the elements in this paragraph (s)(1), then the Director must include those elements as conditions in the permit. A qualifying State, Tribal, or local erosion and sediment control program is one that includes:

(i) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(ii) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(iii) Requirements for construction site operators to develop and implement a storm water pollution prevention plan. (A storm water pollution prevention plan includes site descriptions, descriptions of appropriate control measures, copies of approved State, Tribal or local requirements, maintenance procedures, inspection procedures, and identification of non-storm water discharges); and

(iv) Requirements to submit a site plan for review that incorporates consideration of potential water quality impacts.

(2) For storm water discharges from construction activity identified in ß 122.26(b)(14)(x), the Director may include permit conditions that incorporate qualifying State, Tribal, or local erosion and sediment control program requirements by reference. A qualifying State, Tribal or local erosion and sediment control program is one that includes the elements listed in paragraph (s)(1) of this section and any additional requirements necessary to achieve the applicable technology-based standards of "best available technology" and "best conventional technology" based on the best professional judgment of the permit writer.

HISTORY: [48 FR 14153, Apr. 1, 1983, as amended at 49 FR 31842, Aug. 8, 1984; 49 FR 38049, Sept. 26, 1984; 50 FR 6940, Feb. 19, 1985; 50 FR 7912, Feb. 27, 1985; 54 FR 256, Jan. 4, 1989; 54 FR 18783, May 2, 1989; 54 FR 23895, June 2, 1989; 57 FR 11413, Apr. 2, 1992; 57 FR 33049, July 24, 1992; 60 FR 15386, Mar. 23, 1995; 64 FR 42434, 42469, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 64 FR 68722, 68847, Dec. 8, 1999; 65 FR 30886, 30908, May 15, 2000; 65 FR 43586, 43661, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001; 66 FR 65256, 65337, Dec. 18, 2001; 69 FR 41576, 41682, July 9, 2004; 70 FR 60134, 60191, Oct. 14, 2005; 71 FR 35006, 35040, June 16, 2006; 72 FR 11200, 11212, Mar. 12, 2007]

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq.

NOTES: [EFFECTIVE DATE NOTE: 71 FR 35006, 35040, June 16, 2006, revised paragraph (b)(3), effective July 17, 2006; 72 FR 11200, 11212, Mar. 12, 2007, revised paragraph (i)(1)(iv), effective Apr. 11, 2007.]

Received
August 26, 2011
Commission on
State Mandates

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
Communities for a Better Environment v State Water Resources Control Bd. (2003, 1st Dist) 109 Cal App 4th 1089, 1 Cal Rptr 3d 76, 2003 CDOS 5149, 2003 Daily Journal DAR 6533, reh den (2003, Cal App 1st Dist) 2003 Cal App LEXIS 1082
Divers' Environmental Conservation Organization v State Water Resources Control Bd. (2006, 4th Dist) 145 Cal App 4th 246, 51 Cal Rptr 3d 497, 2006 CDOS 10951, 36 ELR 20237, reh den (2006, Cal App 4th Dist) 2006 Cal App LEXIS 2102

4849 words

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 17

Received
August 26, 2011
Commission on
State Mandates

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
Copyright (c) 2011, by Matthew Bender & Company, a member
of the LexisNexis Group. All rights reserved.

*** THIS SECTION IS CURRENT THROUGH THE AUGUST 18, 2011 ***
*** ISSUE OF THE FEDERAL REGISTER ***

TITLE 40 -- PROTECTION OF ENVIRONMENT
CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D -- WATER PROGRAMS
PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
SUBPART C -- PERMIT CONDITIONS

Go to the CFR Archive Directory

40 CFR 122.48

ß 122.48 Requirements for recording and reporting of monitoring results (applicable to State programs, see ß 123.25).

All permits shall specify:

(a) Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);

(b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;

(c) Applicable reporting requirements based upon the impact of the regulated activity and as specified in ß 122.44. Reporting shall be no less frequent than specified in the above regulation.

HISTORY: [48 FR 14153, Apr. 1, 1983; 50 FR 6940, Feb. 19, 1985]

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq.

NOTES: NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 18

Received
August 26, 2011
Commission on
State Mandates

ENVIRONMENTAL PROTECTION AGENCY

AGENCY: Environmental Protection Agency (EPA).

40 CFR Parts 122, 123, and 124

National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges

[FRL-3834-7]

RIN 2040-AA79

55 FR 47990

November 16, 1990

ACTION: Final rule. [PART I OF II]

SUMMARY: Today's final rule begins to implement section 402(p) of the Clean Water Act (CWA) (added by section 405 of the Water Quality Act of 1987 (WQA)), which requires the Environmental Protection Agency (EPA) to establish regulations setting forth National Pollutant Discharge Elimination System (NPDES) permit application requirements for: storm water discharges associated with industrial activity; discharges from a municipal separate storm sewer system serving a population of 250,000 or more; and discharges from municipal separate storm sewer systems serving a population of 100,000 or more, but less than 250,000.

Today's rule also clarifies the requirements of section 401 of the WQA, which amended CWA section 402(1)(2) to provide that NPDES permits shall not be required for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of such operations. This rule sets forth NPDES permit application requirements addressing storm water discharges associated with industrial activity and storm water discharges from large and medium municipal separate storm sewer systems.

DATES: This final rule becomes effective December 17, 1990. In accordance with 40 CFR 23.2, this rule shall be considered final for purposes of judicial review on November 30, 1990, at 1 p.m. eastern daylight time. The public record is located at EPA Headquarters, EPA Public Information Reference Unit, room 2402, 401 M Street SW., Washington DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For further information on the rule contact: Thomas J. Seaton, Kevin Weiss, or Michael Mitchell Office of Water Enforcement and Permits (EN-336), United States Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475-9518.

TEXT: SUPPLEMENTARY INFORMATION:

Received
August 26, 2011
Commission on
State Mandates

I. Background and Water Quality Concerns

II. Water Quality Act of 1987

III. Remand of 1984 Regulations

IV. Codification Rule and Case-by-Case Designations

V. Consent Decree of October 20, 1989

VI. Today's Final Rule and Response to Comments

A. Overview

B. Definition of Storm Water

C. Responsibility for Storm Water Discharges Associated with Industrial Activity into Municipal Separate Storm Sewers

D. Preliminary Permitting Strategy for Storm Water Discharges Associated with Industrial Activity

1. Tier 1 -- Baseline Permitting

2. Tier 2 -- Watershed Permitting

3. Tier 3 -- Industry Specific Permitting

4. Tier 4 -- Facility Specific Permitting

5. Relationship of Strategy to Permit Application Requirements

a. Individual Permit Application Requirements

b. Group Application

c. Case-by-Case Requirements

E. Storm Water Discharge Sampling

F. Storm Water Discharges Associated with Industrial Activity

1. Permit Applicability

a. Storm Water Discharges Associated with Industrial Activity to Waters of the United States

b. Storm Water Discharges Through Municipal Separate Storm Sewers

c. Storm Water Discharges Through Non-Municipal Storm Sewers

2. Scope of "Associated with Industrial Activity"

3. Individual Application Requirements

4. Group Applications

a. Facilities Covered

b. Scope of Group Application

c. Group Application Requirements

5. Group Application: Applicability in NPDES States

6. Group Application: Procedural Concerns

Received
August 26, 2011
Commission on
State Mandates

7. Permit Applicability and Applications for Oil, Gas and Mining Operations

a. Gas and Oil Operations

b. Use of Reportable Quantities to Determine if a Storm Water Discharge from an Oil or Gas Operation is Contaminated

c. Mining Operations

8. Application Requirements for Construction Activities

a. Permit application requirements

b. Administrative burdens

G. Municipal Separate Storm Sewer Systems

1. Municipal Separate Storm Sewers

2. Effective Prohibition on Non-Storm Water Discharges

3. Site-Specific Storm Water Quality Management Programs for Municipal Systems

4. Large and Medium Municipal Storm Sewer Systems

a. Overview of proposed options and comments

b. Definition of large and medium municipal separate storm sewer system

c. Response to comments

H. Permit Application Requirements for Large and Medium Municipal Systems

1. Implementing the Permit Program

2. Structure of Permit Application

a. Part 1 Application

b. Part 2 Application

3. Major Outfalls

4. Field Screening Program

5. Source Identification

6. Characterization of Discharges

a. Screening Analysis for Illicit Discharges

b. Representative Data

c. Loading and Concentration Estimates

7. Storm Water Quality Management Plans

a. Measures to Reduce Pollutants in Runoff from Commercial and Residential Areas

b. Measures for Illicit Discharges and Improper Disposal

c. Measures to Reduce Pollutants in Storm Water Discharges Associated with Industrial Activity Through Municipal Systems

d. Measures to Reduce Pollutants in Runoff from Construction Sites Through Municipal Systems

8. Assessment of Controls

I. Annual Reports

J. Application Deadlines

Received
August 26, 2011
Commission on
State Mandates

VII. Economic Impact

VIII. Paperwork Reduction Act

IX. Regulatory Flexibility Act

SUPPLEMENTARY INFORMATION:

I. Background and Water Quality Concerns

The 1972 amendments to the Federal Water Pollution Control Act (referred to as the Clean Water Act or CWA), prohibit the discharge of any pollutant to navigable waters from a point source unless the discharge is authorized by an NPDES permit. Efforts to improve water quality under the NPDES program traditionally and primarily focused on reducing pollutants in discharges of industrial process wastewater and municipal sewage. This program emphasis developed for a number of reasons. At the onset of the program in 1972, many sources of industrial process wastewater and municipal sewage were not adequately controlled and represented pressing environmental problems. In addition, sewage outfalls and industrial process discharges were easily identified as responsible for poor, often drastically degraded, water quality conditions. However, as pollution control measures were initially developed for these discharges, it became evident that more diffuse sources (occurring over a wide area) of water pollution, such as agricultural and urban runoff were also major causes of water quality problems. Some diffuse sources of water pollution, such as agricultural storm water discharges and irrigation return flows, are statutorily exempted from the NPDES program.

Since enactment of the 1972 amendments to the CWA, considering the rise of economic activity and population, significant progress in controlling water pollution has been made, particularly with regard to industrial process wastewater and municipal sewage. Expenditures by EPA, the States, and local governments to construct and upgrade sewage treatment facilities have substantially increased the population served by higher levels of treatment. Backlogs of expired permits for industrial process wastewater discharges have been reduced. Continued improvements are expected for these discharges as the NPDES program continues to place increasing emphasis on water quality-based pollution controls, especially for toxic pollutants.

Although assessments of water quality are difficult to perform and verify, several national assessments of water quality are available. For the purpose of these assessments, urban runoff was considered to be a diffuse source or non-point source pollution. From a legal standpoint, however, most urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program. The "National Water Quality Inventory, 1988 Report to Congress" provides a general assessment of water quality based on biennial reports submitted by the States under section 305(b) of the CWA. In preparing the section 305(b) Reports, the States were asked to indicate the fraction of the States' waters that were assessed, as well as the fraction of the States' waters that were fully supporting, partly supporting, or not supporting designated uses. The Report indicates that of the rivers, lakes, and estuaries that were assessed by States (approximately one-fifth of stream miles, one-third of lake acres and one-half of estuarine waters), roughly 70% to 75% are supporting the uses for which they are designated. For waters with use impairments, States were asked to determine impacts due to diffuse sources (agricultural and urban runoff and other sources), municipal sewage, industrial process wastewaters, combined sewer overflows, and natural and other sources, then combine impacts to arrive at estimates of the relative percentage of State waters affected by each source. In this manner, the relative importance of the various sources of pollution that are causing use impairments was assessed and weighted national averages were calculated. Based on 37 States that provided information on sources of pollution, industrial process wastewaters were cited as the cause of nonsupport for 7.5% of rivers and streams, 10% of lakes, and 6% of estuaries. Municipal sewage was the cause of nonsupport for 13% of rivers and streams, 5% lakes, 48% estuaries, 41% of the Great Lake shoreline, and 11% of coastal waters. The Assessment concluded that pollution from diffuse sources, such as runoff from agricultural, urban areas, construction sites, land disposal and resource extraction, is cited by the States as the leading cause of water quality impairment. These sources appear to be increasingly important contributors of use impairment as discharges of industrial process wastewaters and municipal sewage plants come under increased control and as intensified data collection efforts provide additional information. Some examples of diffuse sources cited as causing use impairment are: for rivers and streams, 9% from sepa-

Received
August 26, 2011
Commission on
State Mandates

rate storm sewers, 6% from construction and 13% from resource extraction; for lakes, 28% from separate storm sewers and 26% from land disposal; for the Great Lakes shoreline, 10% from separate storm sewers, 34% from resource extraction, and 82% from land disposal; for estuaries, 28% from separate storm sewers and 27% from land disposal; and for coastal areas, 20% from separate storm sewers and 29% from land disposal.

The States conducted a more comprehensive study of diffuse pollution sources under the sponsorship of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and EPA. The study resulted in the report "America's Clean Water -- The States' Nonpoint Source Assessment, 1985" which indicated that 38 States reported urban runoff as a major cause of beneficial use impairment. In addition, 2l States reported construction site runoff as a major cause of use impairment.

To provide a better understanding of the nature of urban runoff from commercial and residential areas, from 1978 through 1983, EPA provided funding and guidance to the Nationwide Urban Runoff Program (NURP). The NURP included 28 projects across the Nation, conducted separately at the local level but centrally reviewed, coordinated, and guided.

One focus of the NURP was to characterize the water quality of discharges from separate storm sewers which drain residential, commercial, and light industrial (industrial parks) sites. The majority of samples collected in the study were analyzed for eight conventional pollutants and three metals. Data collected under the NURP indicated that on an annual loading basis, suspended solids in discharges from separate storm sewers draining runoff from residential, commercial and light industrial areas are around an order of magnitude greater than solids in discharges from municipal secondary sewage treatment plants. In addition, the study indicated that annual loadings of chemical oxygen demand (COD) are comparable in magnitude to effluent from secondary sewage treatment plants. When analyzing annual loadings associated with urban runoff, it is important to recognize that discharges of urban runoff are highly intermittent, and that the short-term loadings associated with individual events will be high and may have shockloading effects on receiving water, such as low dissolved oxygen levels. NURP data also showed that fecal coliform counts in urban runoff are typically in the tens to hundreds of thousands per 100 ml of runoff during warm weather conditions, although the study suggested that fecal coliform may not be the most appropriate indicator organism for identifying potential health risks in storm water runoff. Although NURP did not evaluate oil and grease, other studies have demonstrated that urban runoff is an extremely important source of oil pollution to receiving waters, with hydrocarbon levels in urban runoff typically being reported at a range of 2 to 15 mg/l. These hydrocarbons tend to accumulate in bottom sediments where they may persist for long periods of time and exert adverse impacts on benthic organisms.

A portion of the NURP study involved monitoring 120 priority pollutants in storm water discharges from lands used for residential, commercial and light industrial activities. Seventy-seven priority pollutants were detected in samples of storm water discharges from residential, commercial and light industrial lands taken during the NURP study, including 14 inorganic and 63 organic pollutants. Table A-1 shows the priority pollutants which were detected in at least ten percent of the discharge samples which were sampled for priority pollutants.

Table A-1. -- Priority Pollutants Detected in at Least 10% of NURP Samples
[In percent]

	Frequency of detection
Metals and inorganics:	
Antimony	13
Arsenic	52
Beryllium	12
Cadmium	48
Chromium	58
Copper	91
Cyanides	23
Lead	94
Nickel	43
Selenium	11
Zinc	94
Pesticides:	

Received
August 26, 2011
Commission on
State Mandates

Table A-1. -- Priority Pollutants Detected in at Least 10% of NURP Samples
[In percent]

	Frequency of detection
Alpha-hexachlorocyclohexane	20
Alpha-endosulfan	19
Chlordane	17
Lindane	15
Halogenated aliphatics:	
Methane, dichloro-	11
Phenols and cresols:	
Phenol	14
Phenol, pentachloro-	19
Phenol, 4-nitro	10
Phthalate esters:	
Phthalate, bis(2-ethylhexyl)	22
Polycyclic aromatic hydrocarbons:	
Chrysene	10
Fluoranthene	16
Phenanthrene	12
Pyrene	15

The NURP data also showed a significant number of these samples exceeded various EPA freshwater water quality criteria.

The NURP study provides insight on what can be considered background levels of pollutants for urban runoff, as the study focused primarily on monitoring runoff from residential, commercial and light industrial areas. However, NURP concluded that the quality of urban runoff can be adversely impacted by several sources of pollutants that were not directly evaluated in the study and are generally not reflected in the NURP data, including illicit connections, construction site runoff, industrial site runoff and illegal dumping.

Other studies have shown that many storm sewers contain illicit discharges of non-storm water and that large amounts of wastes, particularly used oils, are improperly disposed in storm sewers. Removal of these discharges present opportunities for dramatic improvements in the quality of storm water discharges. Storm water discharges from industrial facilities may contain toxics and conventional pollutants when material management practices allow exposure to storm water, in addition to wastes from illicit connections and improperly disposed wastes.

In some municipalities, illicit connections of sanitary, commercial and industrial discharges to storm sewer systems have had a significant impact on the water quality of receiving waters. Although the NURP study did not emphasize the identification of illicit connections to storm sewers (other than to assure that monitoring sites used in the study were free from sanitary sewage contamination), the study concluded that illicit connections can result in high bacterial counts and dangers to public health. The study also noted that removing such discharges presented opportunities for dramatic improvements in the quality of urban storm water discharges.

Studies have shown that illicit connections to storm sewers can create severe, wide-spread contamination problems. For example, the Huron River Pollution Abatement Program inspected 660 businesses, homes and other buildings located in Washtenaw County, Michigan and identified 14% of the buildings as having improper storm drain connections. Illicit discharges were detected at a higher rate of 60% for automobile related businesses, including service stations, automobile dealerships, car washes, body shops and light industrial facilities. While some of the problems discovered in this study were the result of improper plumbing or illegal connections, a majority were approved connections at the time they were built.

Intensive construction activities may result in severe localized impacts on water quality because of high unit loads of pollutants, primarily sediments. Construction sites can also generate other pollutants such as phosphorus and nitrogen from fertilizer, pesticides, petroleum products, construction chemicals and solid wastes. These materials can be toxic to aquatic organisms and degrade water for drinking and water-contact recreation. Sediment loadings rates from construction sites are typically 10 to 20 times that of agricultural lands, with runoff rates as high as 100 times that of agricultural

Received
August 26, 2011
Commission on
State Mandates

lands, and typically 1,000 to 2,000 times that of forest lands. Even a small amount of construction may have a significant negative impact on water quality in localized areas. Over a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades.

II. Water Quality Act of 1987

The WQA contains three provisions which specifically address storm water discharges. The central WQA provision governing storm water discharges is section 405, which adds section 402(p) to the CWA. Section 402(p)(1) provides that EPA or NPDES States cannot require a permit for certain storm water discharges until October 1, 1992, except: for storm water discharges listed under section 402(p)(2). Section 402(p)(2) lists five types of storm water discharges which are required to obtain a permit prior to October 1, 1992:

(A) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(B) A discharge associated with industrial activity;

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more;

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more, but less than 250,000; or

(E) A discharge for which the Administrator or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

Section 402(p)(4)(A) requires EPA to promulgate final regulations governing storm water permit application requirements for storm water discharges associated with industrial activity and discharges from large municipal separate storm sewer systems (systems serving a population of 250,000 or more), "no later than two years" after the date of enactment (*i.e.,* no later than February 4, 1989). Section 402(p)(4)(B) also requires EPA to promulgate final regulations governing storm water permit application requirements for discharges from medium municipal separate storm sewer systems (systems serving a population of 100,000 or more but less than 250,000) "no later than four years" after enactment (*i.e.,* no later than February 4, 1991).

In addition, section 402(p)(4) provides that permit applications for storm water discharges associated with industrial activity and discharges from large municipal separate storm sewer systems "shall be filed no later than three years" after the date of enactment of the WQA (*i.e.,* no later than February 4, 1990). Permit applications for discharges from medium municipal systems must be filed "no later than five years" after enactment (*i.e.,* no later than February 4, 1992).

The WQA clarified and amended the requirements for permits for storm water discharges in the new CWA section 402(p)(3). The Act clarified that permits for discharges associated with industrial activity must meet all of the applicable provisions of section 402 and section 301 including technology and water quality based standards. However, the new Act makes significant changes to the permit standards for discharges from municipal storm sewers. Section 402(p)(3)(B) provides that permits for such discharges:

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

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

(iii) Shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

These changes are discussed in more detail later in today's rule.

The EPA, in consultation with the States, is required to conduct two studies on storm water discharges that are in the class of discharges for which EPA and NPDES States cannot require permits prior to October 1, 1992. The first study will identify those storm water discharges or classes of storm water discharges for which permits are not required prior to October 1, 1992, and determine, to the maximum extent practicable, the nature and extent of pollutants in such discharges. The second study is for the purpose of establishing procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality. Based on the two studies the EPA, in consultation with State and local officials, is required to issue regulations no later than October 1, 1992, which designate additional storm

Received
August 26, 2011
Commission on
State Mandates

water discharges to be regulated to protect water quality and establish a comprehensive program to regulate such designated sources. This program must, at a minimum, (A) Establish priorities, (B) establish requirements for State storm water management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

Section 401 of the WQA amends section 402(1)(2) of the CWA to provide that the EPA shall not require a permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities if the storm water discharge is not contaminated by contact with, or does not come into contact with, any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of such operations.

Section 503 of the WQA amends section 502(14) of the CWA to exclude agricultural storm water discharges from the definition of point source.

III. Remand of 1984 Regulations

On December 4, 1987, the United States Court of Appeals for the District of Columbia Circuit vacated 40 CFR 122.26, (as promulgated on September 26, 1984, 49 FR 37998, September 26, 1984), and remanded the regulations to EPA for further rulemaking (*NRDC* v. *EPA,* No. 80-1607). EPA had requested the remand because of significant changes made by the storm water provisions of the WQA. The effect of the decision was to invalidate the storm water discharge regulations then found at ß 122.26.

Storm water discharges which had been issued an NPDES permit prior to February 4, 1987, were not affected by the Court remand or the February 12, 1988, rule implementing the court order (53 FR 4157). (*See* section 402(p)(2)(A) of the CWA.) Similarly, the remand did not affect the authority of EPA or an NPDES State to require a permit for any storm water discharge (except an agricultural storm water discharge) designated under section 402(p)(2)(E) of the CWA. The notice of the remand clarified that such designated discharges meet the regulatory definition of point source found at 40 CFR 122.2 and that EPA or an NPDES State can rely on the statutory authority and require the filing of an application (Form 1 and Form 2C) for an NPDES permit with respect to such discharges on a case-by-case basis.

IV. Codification Rule and Case-by-Case Designations

Codification Rule

On January 4, 1989, (54 FR 255), EPA published a final rule which codified numerous provisions of the WQA into EPA regulations. The codification rule included several provisions dealing with storm water discharges. The codification rule promulgated the language found at section 402(p) (1) and (2) of the amended Clean Water Act at 40 CFR 122.26(a)(1). In addition, the codification rule promulgated the language of Section 503 of the WQA which exempted agricultural storm water discharges from the definition of point source at 40 CFR 122.2, and section 401 of the WQA addressing uncontaminated storm water discharges from mining or oil and gas operations at 40 CFR 122.26(a)(2).

EPA also codified the statutory authority of section 402(p)(2)(E) of the CWA for the Administrator or the State Director, as the case may be, to designate storm water discharges for a permit on a case-by-case basis at 40 CFR 122.26(a)(1)(v).

Case by Case Designations

Section 402(p)(2)(E) of the CWA authorizes case-by-case designations of storm water discharges for immediate permitting if the Administrator or the State Director determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

In determining that a storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States for the purpose of a designation under section 402(p)(2)(E), the legislative history for the provision provides that "EPA or the State should use any available water quality or sampling data to determine whether the latter two criteria (contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States) are met, and should require additional sampling as necessary to determine whether or not these criteria are met." Conference Report, *Cong. Rec.* S16443 (daily ed. October 16, 1986).

Received
August 26, 2011
Commission on
State Mandates

In accordance with this legislative history, today's rule promulgates permit application requirements for certain storm water discharges, including discharges designated on a case-by-case basis. EPA will consider a number of factors when determining whether a storm water discharge is a significant contributor of pollution to the waters of the United States. These factors include: the location of the discharge with respect to waters of the United States; the size of the discharge; the quantity and nature of the pollutants reaching waters of the United States; and any other relevant factors. Today's rule incorporates these factors at 40 CFR 122.26(a)(1)(v).

Under today's rule, case-by-case designations are made under regulatory procedures found at 40 CFR 124.52. The procedures at 40 CFR 124.52 require that whenever the Director decides that an individual permit is required, the Director shall notify the discharger in writing that the discharge requires a permit and the reasons for the decision. In addition, an application form is sent with the notice. Section 124.52 provides a 60 day period from the date of notice for submitting a permit application. Although this 60 day period may be appropriate for many designated storm water discharges, site specific factors may dictate that the Director provide additional time for submitting a permit application. For example, due to the complexities associated with designation of a municipal separate storm sewer system for a system- or jurisdiction-wide permit, the Director may provide the applicant with additional time to submit relevant information or may require that information be submitted in several phases.

V. Consent Decree of October 20, 1989

On April 20, 1989, EPA was served notice of intent to sue by Kathy Williams *et al,* because of the Agency's failure to promulgate final storm regulations on February 4, 1989, pursuant to Section 402(p)(4) of the CWA. A suit was filed by the same party on July 20, 1989, alleging the same cause of action, to wit: the Agency's failure to promulgate regulations under section 402(p)(4) of the CWA. On October 20, 1989, EPA entered into a consent decree with Kathy Williams *et al,* wherein the Federal District Court, District of Oregon, Southern Division, decreed that the Agency promulgate final regulations for storm water discharges identified in sections 402(p)(2) (B) and (C) of the CWA no later than July 20, 1990. *Kathy Williams et al.,* v. *William K. Reilly, Administrator, et al.,* No. 89-6265-E (D-Ore.) In July 1990, the consent degree was amended to provide for a promulgation date of October 31. Today's rule is promulgated in compliance with the terms of the consent decree as amended.

VI. Today's Final Rule and Response to Comments

A. Overview

Section 405 of the WQA alters the regulatory approach to control pollutants in storm water discharges by adopting a phased and tiered approach. The new provision phases in permit application requirements, permit issuance deadlines and compliance with permit conditions for different categories of storm water discharges. The approach is tiered in that storm water discharges associated with industrial activity must comply with sections 301 and 402 of the CWA (requiring control of the discharge of pollutants that utilize the Best Available Technology (BAT) and the Best Conventional Pollutant Control Technology (BCT) and where necessary, water quality-based controls), but permits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls, and must include a requirement to effectively prohibit non-storm water discharges into the storm sewers. Furthermore, EPA in consultation with State and local officials must develop a comprehensive program to designate and regulate other storm water discharges to protect water quality.

This final regulation establishes requirements for the storm water permit application process. It also sets forth the required components of municipal storm water quality management plans, as well as a preliminary permitting strategy for industrial activities. In implementing these regulations, EPA and the States will strive to achieve environmental results in a cost effective manner by placing high priority on pollution prevention activities, and by targeting activities based on reducing risk from particularly harmful pollutants and/or from discharges to high value waters. EPA and the States will also work with applicants to avoid cross media transfers of storm water contaminants, especially through injection to shallow wells in the Class V Underground Injection Control Program.

In addition, EPA recognizes that problems associated with storm water, combined sewer overflows (CSOs) and infiltration and inflow (I&I) are all inter-related even though they are treated somewhat differently under the law. EPA believes that it is important to begin linking these programs and activities and, because of the potential cost to local

Received
August 26, 2011
Commission on
State Mandates

governments, to investigate the use of innovative, non-traditional approaches to reducing or preventing contamination of storm water.

The application process for developing municipal storm water management plans provides an ideal opportunity between steps 1 and 2 for considering the full range of nontraditional, preventive approaches, including municipalities, public awareness/education programs, use of vegetation and/or land conservancy practices, alternative paving materials, creative ways to eliminate I&I and illegal hook-ups, and potentials for water reuse. EPA has already announced its plans to present an award for the best creative, cost effective approaches to storm water and CSOs beginning in 1991.

This rulemaking establishes permit application requirements for classes of storm water discharges that were specifically identified in section 402(p)(2). These priority storm water discharges include storm water discharges associated with industrial activity and discharges from a municipal separate storm sewer serving a population of 100,000 or more.

This rulemaking was developed after careful consideration of 450 sets of comments, comprising over 3200 pages, that were received from a variety of industries, trade associations, municipalities, State and Federal Agencies, environmental groups, and private citizens. These comments were received during a 90-day comment period which extended from December 7, 1988, to March 7, 1989. EPA received several requests for an extension of the comment period from 30-days up to 90-days. Many arguments were advanced for an extension including: the extent and complexity of the proposal, the existence of other concurrent EPA proposals, and the need for technical evaluations of the proposal. EPA considered these comments as they were received, but declined to extend the comment period beyond 90 days. The standard comment period on proposals normally range from 30 to 60 days. In light of the statutory deadline of February 4, 1989, additional time for the comment period beyond what was already a substantially lengthened comment period would have been inappropriate. The number and extent of the comments received on this proposal indicated that interested parties had substantially adequate time to review and comment on the regulation. Furthermore, the public was invited to attend six public meetings in Washington DC, Chicago, Dallas, Oakland, Jacksonville, and Boston to present questions and comments. EPA is convinced that substantial and adequate public participation was sought and received by the Agency.

Numerous commenters have also requested that the rule be reproposed due to the extent of the proposal and the number of options and issues upon which the Agency requested comments. EPA has decided against a reproposal. The December 7, 1988, notice of proposed rulemaking was extremely detailed and thoroughly identified major issues in such a manner as to allow the public clear opportunities to comment. The comments that were received were extensive, and many provided valuable information and ideas that have been incorporated into the regulation. Accordingly, the Agency is confident it has produced a workable and rational approach to the initial regulation of storm water discharges and a regulation that reflects the experience and knowledge of the public as provided in the comments, and which was developed in accordance with the procedural requirements of the Administrative Procedures Act (APA). EPA believes that while the number of issues raised by the proposal was extensive, the number of detailed comments indicates that the public was able to understand the issues in order to comment adequately. Thus, a reproposal is unnecessary.

B. Definition of Storm Water

The December 7, 1988, notice requested comment on defining storm water as storm water runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration (other than infiltration contaminated by seepage from sanitary sewers or by other discharges) and drainage related to storm events or snow melt. This definition is consistent with the regulatory definition of "storm sewer" at 40 CFR 35.2005(b)(47) which is used in the context of grants for construction of treatment works. This definition aids in distinguishing separate storm water sewers from sanitary sewers, combined sewers, process discharge outfalls and non-storm water, non-process discharge outfalls.

The definition of "storm water" has an important bearing on the NPDES permitting scheme under the CWA. The following discusses the interrelationship of NPDES permitting requirements for storm water discharges addressed by this rule and NPDES permitting requirements for other non-storm water discharges which may be discharged via the storm sewer as a storm water discharge. Today's rule addresses permit application requirements for storm water discharges associated with industrial activity and for discharges from municipal separate storm sewer systems serving a population of 100,000 or more. Storm water discharges associated with industrial activity are to be covered by permits which contain technology-based controls based on BAT/BCT considerations or water quality-based controls, if necessary. A permit for storm water discharges from an industrial facility may also cover other non-storm water discharges from the facility. Today's rule establishes individual (Form 1 and Form 2F) and group application requirements for storm water discharges associated with industrial activity. In addition, EPA or authorized NPDES States with authorized

Received
August 26, 2011
Commission on
State Mandates

general permit programs may issue general permits which establish alternative application or notification requirements for storm water discharges covered by the general permit(s). Where a storm water discharge associated with industrial activity is mixed with a non-storm water discharge, both discharges must be covered by an NPDES permit (this can be in the same permit or with multiple permits). Permit application requirements for these "combination" discharges are discussed later in today's notice.

Today's rule also addresses permit application requirements for discharges from municipal separate storm sewer systems serving a population of 100,000 or more. Under today's rule, appropriate municipal owners or operators of these systems must obtain NPDES permits for discharges from these systems. These permits are to establish controls to the maximum extent practicable (MEP), effectively prohibit non-storm water discharges to the municipal separate storm sewer system and, where necessary, contain applicable water quality-based controls. Where non-storm water discharges or storm water discharges associated with industrial activity discharge through a municipal separate storm sewer system (including systems serving a population of 100,000 or more as well as other systems), which ultimately discharges to a waters of the United States, such discharges through a municipal storm sewer need to be covered by an NPDES permit that is independent of the permit issued for discharges from the municipal separate storm sewer system. Today's rule defines the term "illicit discharge" to describe any discharge through a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the CWA. Section 402(p)(3)(B) of the CWA requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer. As discussed in more detail below, today's rule begins to implement the "effective prohibition" by requiring municipal operators of municipal separate storm sewer systems serving a population of 100,000 or more to submit a description of a program to detect and control certain non-storm water discharges to their municipal system. Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit (other than the permit for the discharge from the municipal separate storm sewer). For reasons discussed in more detail below, in general, municipalities will not be held responsible for prohibiting some specific components of discharges or flows listed below through their municipal separate storm sewer system, even though such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed. However, operators of such non-storm water discharges need to obtain NPDES permits for these discharges under the present framework of the CWA (rather than the municipal operator of the municipal separate storm sewer system). (Note that section 516 of the Water Quality Act of 1987 requires EPA to conduct a study of de minimis discharges of pollutants to waters of the United States and to determine the most effective and appropriate methods of regulating any such discharges.)

EPA received numerous comments on the proposed regulatory definition of storm water, many of which proposed exclusions or additions to the definition. Several commenters suggested that the definition should include or not include detention and retention reservoir releases, water line flushing, fire hydrant flushing, runoff from fire fighting, swimming pool drainage and discharge, landscape irrigation, diverted stream flows, uncontaminated pumped ground water, rising ground waters, discharges from potable water sources, uncontaminated waters from cooling towers, foundation drains, non-contact cooling water (such as HVAC or heating, ventilation and air conditioning condensation water that POTWs require to be discharged to separate storm sewers rather than sanitary sewers), irrigation water, springs, roof drains, water from crawl space pumps, footing drains, lawn watering, individual car washing, flows from riparian habitats and wetlands. Most of these comments were made with regard to the concern that these were commonly occurring discharges which did not pose significant environmental problems. It was also noted that, unless these flows are classified as storm water, permits would be required for these discharges.

In response to the comments which requested EPA to define the term "storm water" broadly to include a number of classes of discharges which are not in any way related to precipitation events, EPA believes that this rulemaking is not an appropriate forum for addressing the appropriate regulation under the NPDES program of such non-storm water discharges, even though some classes of non-storm water discharges may typically contain only minimal amounts of pollutants. Congress did not intend that the term storm water be used to describe any discharge that has a de minimis amount of pollutants, nor did it intend for section 402(p) to be used to provide a moratorium from permitting other non-storm water discharges. Consequently, the final definition of storm water has not been expanded from what was proposed. However, as discussed in more detail later in today's notice, municipal operators of municipal separate storm sewer systems will generally not be held responsible for "effectively prohibiting" limited classes of these discharges through their municipal separate storm sewer systems.

Received
August 26, 2011
Commission on
State Mandates

The proposed rule included infiltration in the definition of storm water. In this context one commenter suggested that the term infiltration be defined. Infiltration is defined at 40 CFR 35.2005(b)(20) as water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections or manholes. Infiltration does not include, and is distinguished from, inflow. Another commenter urged that ground water infiltration not be classified as storm water because the chemical characteristics and contaminants of ground water will differ from surface storm water because of a longer contact period with materials in the soil and because ground water quality will not reflect current practices at the site. In today's rule, the definition of storm water excludes infiltration since pollutants in these flows will depend on a large number of factors, including interactions with soil and past land use practices at a given site. Further infiltration flows can be contaminated by sources that are not related to precipitation events, such as seepage from sanitary sewers. Accordingly the final regulatory language does not include infiltration in the definition of storm water. Such flows may be subject to appropriate permit conditions in industrial permits. As discussed in more detail below, municipal management programs must address infiltration where identified as a source of pollutants to waters of the United States.

One commenter questioned the status of discharges from detention and retention basins used to collect storm water. This regulation covers discharges of storm water associated with industrial activity and discharges from municipal separate storm sewer systems serving a population of 100,000 or more into waters of the United States. Therefore, discharges from basins that are part of a conveyance system for a storm water discharge associated with industrial activity or part of a municipal separate storm sewer system serving a population of 100,000 or more are covered by this regulation. Flows which are channeled into basins and which do not discharge into waters of the United States are not addressed by today's rule.

Several commenters requested that the term illicit connection be replaced with a term that does not connote illegal discharges or activity, because many discharges of non-storm water to municipal separate storm sewer systems occurred prior to the establishment of the NPDES program and in accordance with local or State requirements at the time of the connection. EPA disagrees that there should be a change in this terminology. The fact that these connections were at one time legal does not confer such status now. The CWA prohibits the point source discharge of non-storm water not subject to an NPDES permit through municipal separate storm sewers to waters of the United States. Thus, classifying such discharges as illicit properly identifies such discharges as being illegal.

A commenter wanted clarification of the terms "other discharges" and "drainage" that are used in the definition of "storm water." As noted above, today's rule clarifies that infiltration is not considered storm water. Thus the portion of the definition of storm water that refers to "other discharges" has also been removed. However, the term drainage has been retained. "Drainage" does not take on any meaning other than the flow of runoff into a conveyance, as the word is commonly understood.

One commenter stated that irrigation flows combined with storm water discharges should be excluded from consideration in the storm water program. The Agency would note that irrigation return flows are excluded from regulation under the NPDES program. Section 402(l)(1) states that the Administrator or the State shall not require permits for discharges composed entirely of return flows from irrigated agriculture. The legislative history of the 1977 Clean Water Act, which enacted this language, states that the word "entirely" was intended to limit the exception to only those flows which do not contain additional discharges from activities unrelated to crop production. Congressional Record Vol. 123 (1977), pg. 4360, Senate Report No. 95-370. Accordingly, a storm water discharge component, from an industrial facility for example, included in such "joint" discharges may be regulated pursuant to an NPDES permit either at the point at which the storm water flow enters or joins the irrigation flow, or where the combined flow enters waters of the United States or a municipal separate storm sewer.

Some commenters expressed concern about including street wash waters as storm water. One commenter argued including street wash waters in the definition of storm water should not be construed to eliminate the need for management practices relating to construction activities where sediment may simply wash into storm drains. EPA agrees with these points and the concerns that storm sewers may receive material that pose environmental problems if street wash waters are included in the definition. Accordingly, such discharges are no longer in the definition as proposed, and must be addressed by municipal management programs as part of the prohibition on non-storm water discharges through municipal separate storm sewer systems.

Several commenters requested that the terms discharge and point source, in the context of permits for storm water discharge, be clarified. Several commenters stated that the EPA should clarify that storm water discharge does not include "sheet flow" off of an industrial facility. EPA interprets this as request for clarification on the status of the terms

Received
August 26, 2011
Commission on
State Mandates

"point source" and "discharge" under these regulations. In response, this rulemaking only covers storm water discharges from point sources. A point source is defined at 40 CFR 122.2 as "any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff." EPA agrees with one commenter that this definition is adequate for defining what discharges of storm water are covered by this rulemaking. EPA notes that this definition would encompass municipal separate storm sewers. In view of this comprehensive definition of point source, EPA need clarify in this rulemaking only that a storm water discharge subject to NPDES regulation does not include storm water that enters the waters of the United States via means other than a "point source." As further discussed below, storm water from an industrial facility which enters and is subsequently discharged through a municipal separate storm sewer is a "discharge associated with industrial activity" which must be covered by an individual or general permit pursuant to today's rule.

EPA would also note that individual facilities have the burden of determining whether a permit application should be submitted to address a point source discharge. Those unsure of the classification of storm water flow from a facility, should file permit applications addressing the flow, or prior to submitting the application consult permitting authorities for clarification.

One commenter stated that "point source" for this rulemaking should be defined, for the purposes of achieving better water quality, as those areas where "discharges leave the municipal [separate storm sewer] system." EPA notes in response that "point source" as currently defined will address such discharges, while keeping the definition of discharge and point source within the framework of the NPDES program, and without adding potentially confusing and ambiguous additional definitions to the regulation. If this comment is asserting that the term point source should not include discharges from sources through the municipal system, EPA disagrees. As discussed in detail below, discharges through municipal separate storm sewer systems which are not connected to an operable treatment works are discharges subject to NPDES permit requirements at (40 CFR 122.3(c)), and may properly be deemed point sources.

One industry argued that the definition of "point source" should be modified for storm water discharges so as to exclude discharges from land that is not artificially graded and which has a propensity to form channels where precipitation runs off. EPA intends to embrace the broadest possible definition of point source consistent with the legislative intent of the CWA and court interpretations to include any identifiable conveyance from which pollutants might enter the waters of the United States. In most court cases interpreting the term "point source", the term has been interpreted broadly. For example, the holding in *Sierra Club* v. *Abston Construction Co., Inc.,* 620 F.2d 41 (5th Cir. 1980) indicates that changing the surface of land or establishing grading patterns on land will result in a point source where the runoff from the site is ultimately discharged to waters of the United States:

Simple erosion over the material surface, resulting in the discharge of water and other materials into navigable waters, does not constitute a point source discharge, absent some effort to *change the surface,* to *direct* the water flow or otherwise impede its progress * * * Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the (discharger) at least initially collected or channeled the water and other materials. A point source of pollution may also be present where (dischargers) design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the (dischargers) have done nothing beyond the mere collection of rock and other materials * * * Nothing in the Act relieves (dischargers) from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a * * * drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act." 620 F.2d at 45 (emphasis added).

Under this approach, point source discharges of storm water result from structures which increase the imperviousness of the ground which acts to collect runoff, with runoff being conveyed along the resulting drainage or grading patterns.

The entire thrust of today's regulation is to control pollutants that enter receiving water from storm water conveyances. It is these conveyances that will carry the largest volume of water and higher levels of pollutants. The storm water permit application process and permit conditions will address circumstances and discharges peculiar to individual facilities.

Received
August 26, 2011
Commission on
State Mandates

One industry commented that the definition of waters of the State under some State NPDES programs included municipal storm sewer systems. The commenter was concerned that certain industrial facilities discharging through municipal storm sewers in these states would be required to obtain an NPDES permit, despite EPA's proposal not to require permits from such facilities generally. In response, EPA notes that section 510 of the CWA, approved States are able to have stricter requirements in their NPDES program. In approved NPDES States, the definition of waters of the State controls with regard to what constitutes a discharge to a water body. However, EPA believes that this will have little impact, since, as discussed below, all industrial dischargers, including those discharging through municipal separate storm sewer systems, will be subject to general or individual NPDES permits, regardless of any additional State requirements.

One municipality commented that neither the term "point source" nor "discharge" should be used in conjunction with industrial releases into urban storm water systems because that gives the impression that such systems are navigable waters. EPA disagrees that any confusion should result from the use of these terms in this context. In this rulemaking, EPA always addresses such discharges as "discharges through municipal separate storm sewer systems" as opposed to "discharges to waters of the United States." Nonetheless, such industrial discharges through municipal storm sewer systems are subject to the requirements of today's rule, as discussed elsewhere.

One commenter desired clarification with regard to what constituted an outfall, and if an outfall could be a pipe that connected two storm water conveyances. This rulemaking defines outfall as a point of discharge into the waters of the United States, and not a conveyance which connects to Sections of municipal separate storm sewer. In response to another comment, this rulemaking only addresses discharges to waters of United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body. *See, e.q., Exxon Coro.* v. *Train,* 554 F.2d 1310, 1312 n.1 (5th Cir. 1977); *McClellan Ecological Seepage Situation* v. *Weinberger,* 707 F.Supp. 1182, 1195-96 (E.D. Cal. 1988)).

In the WQA and other places, the term "storm water" is presented as a single word. Numerous comments were received by EPA as to the appropriate spelling. Many of these comments recommended that two words for storm water is appropriate. EPA has decided to use an approach consistent with the Government Printing Office's approved form where storm water appears as two words.

C. Responsibility for Storm Water Discharges Associated With Industrial Activity Through Municipal Separate Storm Sewers

The December 7, 1988, notice of proposed rulemaking requested comments on the appropriate permitting scheme for storm water discharges associated with industrial activity through municipal separate storm sewers. EPA proposed a permitting scheme that would define the requirement to obtain coverage under an NPDES permit for a storm water discharge associated with industrial activity through a municipal separate storm sewer in terms of the classification of the municipal separate storm sewer. EPA proposed holding municipal operators of large or medium municipal separate storm sewer systems primarily responsible for applying for and obtaining an NPDES permit covering system discharges as well as storm water discharges (including storm water discharges associated with industrial activity) through the system. Under the proposed approach, operators of storm water discharges associated with industrial activity which discharge through a large or medium municipal separate storm sewer system would generally not be required to obtain permit coverage for their discharge (unless designated as a significant contributor of pollution pursuant to section 402(p)(2)(E)) provided the municipality was notified of: The name, location and type of facility and a certification that the discharge has been tested (if feasible) for non-storm water (including the results of any testing). The notification procedure also required the operator of the storm water discharge associated with industrial activity to determine that: The discharge is composed entirely of storm water; the discharge does not contain hazardous substances in excess of reporting quantities; and the facility is in compliance with applicable provisions of the NPDES permit issued to the municipality for storm water.

In the proposal, EPA also requested comments on whether a decision on regulatory requirements for storm water discharges associated with industrial activity through other municipal separate storm sewer systems (generally those serving a population of less than 100,000) should be postponed until completion of two studies of storm water discharges required under section 402(p)(5) of the CWA.

EPA favored these approaches because they appeared to reduce the potential administrative burden associated with preparing and processing the thousands of permit applications associated with the rulemaking and provide EPA additional flexibility in developing permitting requirements for storm water discharges associated with industrial activity.

Received
August 26, 2011
Commission on
State Mandates

EPA also expressed its belief, based upon an analysis of ordinances controlling construction site runoff in place in certain cities, that municipalities generally possessed legal authority sufficient to control contributions of industrial storm water pollutants to their separate storm sewers to the degree necessary to implement the proposed rule. EPA commented that municipal controls on industrial sources implemented to comply with an NPDES permit issued to the municipality would likely result in a level of storm water pollution control very similar to that put directly on the industrial source through its own NPDES permit. This was to be accomplished by requiring municipal permitees, to the maximum extent practicable, to require industrial facilities in the municipality to develop and implement storm water controls based on a consideration of the same or similar factors as those used to make BAT/BCT determinations. (*See* 40 CFR 125.3 (d)(2) and (d)(3)).

The great majority of commenters on the December 7, 1988, notice addressed this aspect of the proposal. Based on consideration of the comments received on the notice, EPA has decided that it is appropriate to revise the approach in its proposed rule to require direct permit coverage for all storm water discharges associated with industrial activity, including those that discharge through municipal separate storm sewers. In response to this decision, EPA has continued to analyze the appropriate manner to respond to the large number of storm water discharges subject to this rulemaking. The development of EPA's policy regarding permitting these discharges is discussed in more detail in the section VI.D of today's preamble.

EPA notes that the status of discharges associated with industrial activity which pass through a municipal separate storm sewer system under section 402(p) raises difficult legal and policy questions. EPA believes that treating these discharges under permits separate from those issued to the municipality will most fully address both the legal and policy concerns raised in public comment.

Certain commenters supported EPA's proposal. Some commenters claimed that EPA lacked any authority to permit industrial discharges which were not discharged immediately to waters of the U.S. Other commenters agreed with EPA's statements in the proposal that its approach would result in a more manageable administrative burden for EPA and the NPDES states. However, numerous comments also were received which provided various arguments in support of revising the proposed approach. These comments addressed several areas including the definition of discharge under the CWA, the requirements and associated statutory time frames of section 402(p), as well as the resource and enforcement constraints of municipalities. EPA is persuaded by these comments and has modified its approach accordingly. The key comments on this issue are discussed below.

EPA disagrees with commenters who suggested that EPA lacks authority to permit separately industrial discharges through municipal sewers. The CWA prohibits the discharge of a pollutant except pursuant to an NPDES permit. Section 502(12)(A) of the CWA defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." n1 There is no qualification in the statutory language regarding the source of the pollutants being discharged. Thus, pollutants from a remote location which are discharged through a point source conveyance controlled by a different entity (such as a municipal storm sewer) are nonetheless discharges for which a permit is required.

n 1 Indeed, the DC Circuit has held, in the storm water context, that EPA may not exempt any point source discharges of pollutants from the requirement to obtain an NPDES permit. *NRDC* v. *Costle,* 569 F.2d 1369, 1377 (DC Cir. 1977).

EPA's regulatory definition of the term "discharge" reflects this broad construction. EPA defines the term to include

> additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; *discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which does not lead to a treatment works;* and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.

40 CFR ß 122.2 (1989) (emphasis added). The only exception to this general rule is the one contemplated by section 307(b) of the CWA, *i.e.,* the introduction of pollutants into publicly-owned treatment works. EPA treats these as "indirect discharges," subject not to NPDES requirements, but to pretreatment standards under section 307(b).

In light of its construction of the term discharge, EPA has consistently maintained that a person who sends pollutants from a remote location through a point source into a water of the U.S. may be held liable for the unpermitted discharge of that pollutant. Thus, EPA asserts the authority to require a permit either from the operator of the point source

Received
August 26, 2011
Commission on
State Mandates

conveyance, (such as a municipal storm sewer or a privately-owned treatment works), or from any person causing pollutants to be present in that conveyance and discharged through the point source, or both. *See Decision of the General Counsel (of EPA) No. 43* ("In re Friendswood Development Co.") (June 11, 1976) (operator of privately owned treatment work and dischargers to it are both subject to NPDES permit requirements). *See also,* 40 CFR 122.3(g), 122.44(m) (NPDES permit writer has discretion to permit contributors to a privately owned treatment works as direct dischargers). In other words, where pollutants are added by one person to a conveyance owned/operated by another person, and that conveyance discharges those pollutants through a point source, EPA may permit either person or both to ensure that the discharge is properly controlled. Pollutants from industrial sites discharged through a storm sewer to a point source are appropriately treated in this fashion.

Furthermore, EPA believes that storm water from an industrial plant which is discharged through a municipal storm sewer is a "discharge associated with industrial activity." Today's rule, as in the proposal, defines discharges associated with industrial activity solely in terms of the origin of the storm water runoff. There is no distinction for how the storm water reaches the waters of the U.S. In other words, pollutants in storm water from an industrial plant which are discharged are "associated with industrial activity," regardless of whether the industrial facility operates the conveyance discharging the storm water (or whether the storm water is ultimately discharged through a municipal storm sewer). Indeed, there is no distinction in the "industrial" nature of these two types of discharges. The pollutants of concern in an industrial storm water discharge are present when the storm water leaves the facility, either through an industrial or municipal storm water conveyance. EPA has no data to suggest that the pollutants in industrial storm water entering a municipal storm sewer are any different than those in storm water discharged immediately to a water of the U.S. Thus, industrial storm water in a municipal sewer is properly classified as "associated with industrial activity." Although EPA proposed not to cover these discharges by separate permit, the Agency believes that it is clearly not precluded from doing so.

Many comments also supported the proposed approach, noting that holding municipalities primarily responsible for obtaining a permit which covers industrial storm water discharges through municipal systems would reduce the administrative burden associated with preparing and processing thousands of permit applications -- permit applications that would be submitted if each industrial discharger through a large or medium municipal separate storm sewer system had to apply individually (or as part of a group application).

EPA appreciates these concerns. Yet EPA also recognizes that there are also significant problems with putting the burden of controlling these sources on the municipalities (except for designated discharges) which must be balanced with the concerns about the permit application burden on industries. The industrial permitting strategy discussed in section VI.D below attempts to achieve this balance.

EPA also does not believe that the administrative burden will be nearly as significant as originally thought, for several reasons. First, as discussed in section VI.F.2 below and in response to significant public comment, EPA has significantly narrowed the scope of the definition of "associated with industrial activity" to focus in on those facilities which are most commonly considered "industrial" and thought to have the potential for the highest levels of pollutants in their storm water discharges. EPA believes this is a more appropriate way to ensure a manageable scope for the industrial storm water program in light of the statutory language of section 402(p), since it does not attempt to arbitrarily distinguish industrial facilities on the basis of the ownership of the conveyance through which a facility discharges its storm water. Second, EPA's industrial permitting strategy discussed in section VI.D is designed around aggressive use of general permits to cover the vast majority of industrial sources. These general permits will require industrial facilities to develop storm water control plans and practices similar to those that would have been required by the municipality. Yet, general permits will eliminate the need for thousands of individual or group permit applications, greatly reducing the burden on both industry EPA/States. Finally, even under the proposal, EPA believes that a large number of industrial dischargers would have been appropriate for designation for individual permitting under section 402(p)(2)(E), with the attendant individual application requirements. Today's approach will actually decrease the overall burden on these facilities; rather than filing an individual permit application upon designation, these facilities will generally be covered by a general permit.

By contrast, several commenters asserted that not only does EPA have the authority to cover these discharges by separate permit, it is required to by the language of section 402(p). As discussed above, storm water from an industrial plant which passes through a municipal storm sewer to a point source and is discharged to waters of the U.S. is a "discharge associated with industrial activity." Therefore, it is subject to the appropriate requirements of section 402(p). The operator of the discharge (or the industrial facility where the storm water originates) must apply for a permit within three years of the 1987 amendments (*i.e.,* Feb. 4, 1990); n2 EPA must issue a permit by one year later (Feb. 4, 1991);

Received
August 26, 2011
Commission on
State Mandates

and the permit must require compliance within three years of permit issuance. That permit must ensure that the discharge is in compliance with all appropriate provisions of sections 301 and 402. Commenters asserted that EPA's proposal would violate these two requirements of the law. First, the statute requires all industrial storm water discharges to obtain a permit in the first round of permitting (*i.e.,* February 4, 1990). However, Congress established a different framework to address discharges from small municipal separate storm sewer systems. Section 402(p) requires EPA to complete two studies of storm water discharges, and based on those studies, promulgate additional regulations, including requirements for state storm water management programs by October 1, 1992. EPA is prohibited from issuing permits for storm water discharges from small municipal systems until October 1, 1992 unless the discharge is designated under section 402(p)(2)(E). Thus, industrial storm water discharges from these systems would not be covered by a permit until later than contemplated by statute. Second, permits for municipal storm sewer systems require controls on storm water discharges "to the maximum extent practicable," as opposed to the BAT/BCT requirements of section 301(b)(2). Yet, all industrial storm water discharges must comply with section 301(b)(2). Thus, covering industrial storm water under a municipal storm water permit will not ensure the legally-required level of control of industrial storm water discharges.

n 2 It should be noted that EPA did not promulgate the required storm water regulations by February, 1989, as contemplated by section 402(p)(4)(A). As discussed below, today's rule generally requires industrial storm water discharges to file a permit application in one year.

In addition to comments on the requirements of section 402(p), EPA received several comments questioning whether EPA's proposal to cover industrial pollutants in municipal separate storm sewers solely in the permit issued to the municipality would ensure adequate control of these pollutants due to both inadequate resources and enforcement. Some municipalities stated that the burdens of this responsibility would be too great with regard to source identification and general administration of the program. These commenters claimed they lacked the necessary technical and regulatory expertise to regulate such sources. Commenters also noted that additional resources to control these sources would be difficult to obtain given the restrictions on local taxation in many states and the fact that EPA will not be providing funding to local governments to implement their storm water programs.

Municipalities also expressed concerns regarding enforcement of EPA's proposed approach. Some municipalities remarked that they did not have appropriate legal authority to address these discharges. Several commenters also stated that requiring municipalities to be responsible for addressing storm water discharges associated with industrial activity through their municipal system would result in unequal treatment of industries nationwide because of different municipal requirements and enforcement procedures. Several municipal entities expressed concern with regard to their responsibility and liability for pollutants discharged to their municipal storm sewer system, and further asserted that it was unfair to require municipalities to bear the full cost of controlling such pollutants. Other municipalities suggested that overall municipal storm water control would be impaired, since municipalities would spend a disproportionate amount of resources trying to control industrial discharges through their sewers, rather than addressing other storm water problems. In a related vein, certain commenters suggested that, where industrial storm water was a significant problem in a municipal sewer, EPA's proposed approach would hamper enforcement at the federal/state level, since all enforcement measures could be directed only at the municipality, rather than at the most direct source of that problem.

In response to all of these concerns, EPA has decided to require storm water discharges associated with industrial activity which discharge through municipal separate storm sewers to obtain separate individual or general NPDES permits. EPA believes that this change will adequately address all of the key concerns raised by commenters.

The Agency was particularly influenced by concerns that many municipalities lacked the authority under state law to address industrial storm water practices. EPA had assumed that since several cities regulate construction site activities, that they could regulate other industrial operations in a similar manner. Several commenters suggested otherwise. In light of these concerns, EPA agrees with certain commenters that municipal controls on industrial facilities, in lieu of federal control, might not comply with section 402(p)(3)(A) for those facilities. n3 This calls into question whether EPA's proposed approach would have reasonably implemented Congressional intent to address industrial storm water early and stringently in the permitting process.

n 3 EPA notes that the legal issue raised by commenters regarding whether industrial storm water would be controlled to BAT if covered by a municipal permit at the MEP level is primarily a theoretical issue. As explained above, the proposal assumed that cities would establish controls on industry very similar to those estab-

Received
August 26, 2011
Commission on
State Mandates

lished in an NPDES permit using best professional judgment. EPA's key concern, rather, is whether cities can, in fact, establish such controls. Thus, today's final rule should not appreciably change the requirements to be imposed on industrial sources, only how those requirements are enforced.

EPA also agrees with those commenters who argued that municipal controls on industrial storm water sources were not directly analogous to the pretreatment program under section 307(b), as EPA suggested in the preamble to the proposal. The authority of cities to control the type and volume of industrial pollutants into a POTW is generally unquestioned under the laws of most states, since sewage and industrial waste treatment is a service provided by the municipality. Thus, EPA has greater confidence that cities can and will adopt effective pretreatment programs. By contrast, many cities are limited in the types of controls they can impose on flows into storm sewers; cities are more often limited to regulations on quantity of industrial flows to prevent flooding the system. So too, the pretreatment program allows for federal enforcement of local pretreatment requirements. Enforcement against direct dischargers (including dischargers through municipal storm sewers) is possible only when the municipal requirements are contained in an NPDES permit.

Although today's rule will require industrial discharges through municipal storm sewers to be covered by separate permit, EPA still believes that municipal operators of large and medium municipal systems have an important role in source identification and the development of pollutant controls for industries that discharge storm water through municipal separate storm sewer systems is appropriate. Under the CWA, large and medium municipalities are responsible for reducing pollutants in discharges from municipal separate storm sewers to the maximum extent practicable. Because storm water from industrial facilities may be a major contributor of pollutants to municipal separate storm sewer systems, municipalities are obligated to develop controls for storm water discharges associated with industrial activity through their system in their storm water management program. (*See* section VI.H.7. of today's preamble.) The CWA provides that permits for municipal separate storm sewers shall require municipalities to reduce pollutants to the maximum extent practicable. Permits issued to municipalities for discharges from municipal separate storm sewers will reflect terms, specified controls, and programs that achieve that goal. As with all NPDES permits, responsibility and liability is determined by the discharger's compliance with the terms of the permit. A municipality's responsibility for industrial storm water discharged through their system is governed by the terms of the permit issued. If an industrial source discharges storm water through a municipal separate storm sewer in violation of requirements incorporated into a permit for the industrial facility's discharge, that industrial operator of the discharge may be subject to an enforcement action instituted by the Director of the NPDES program.

Today's rule also requires operators of storm water discharges associated with industrial activity through large and medium municipal systems to provide municipal entities of the name, location, and type of facility that is discharging to the municipal system. This information will provide municipalities with a base of information from which management plans can be devised and implemented. This requirement is in addition to any requirements contained in the industrial facility's permit. As in the proposal, the notification process will assist cities in development of their industrial control programs.

EPA intends for the NPDES program, through requirements in permits for storm water discharges associated with industrial activity, to work in concert with municipalities in the industrial component of their storm water management program efforts. EPA believes that permitting of municipal storm sewer systems and the industrial discharges through them will act in a complementary manner to fully control the pollutants in those sewer systems. This will fully implement the intent of Congress to control industrial as well as large and medium municipal storm water discharges as expeditiously and effectively as possible. This approach will also address the concerns of municipalities that they lack sufficient authority and resources to control all industrial contributions to their storm sewers and will be liable for discharges outside of their control.

The permit application requirements for large and medium municipal separate storm sewer systems, discussed in more detail later in today's preamble, address the responsibilities of the municipal operators of these systems to identify and control pollutants in storm water discharges associated with industrial activity. Permit applications for large and medium municipal separate storm sewer systems are to identify the location of facilities which discharge storm water associated with industrial activity to the municipal system (*see* section VI.H.7. of the preamble). In addition, municipal applicants will provide a description of a proposed management program to reduce, to the maximum extent practicable, pollutants from storm water discharges associated with industrial activity which discharge to the municipal system (*see* section VI.H.7.c of this preamble). EPA notes that each municipal program will be tailored to the conditions in that city. Differences in regional weather patterns, hydrology, water quality standards, and storm sewer systems themselves dictate that storm water management practices will vary to some degree in each municipality. Accordingly, similar industrial storm water discharges may be treated differently in terms of the requirements imposed by the municipality,

Received
August 26, 2011
Commission on
State Mandates

depending on the municipal program. Nonetheless, any individual or general permit issued to the industrial facility must comply with section 402(p)(3)(A) of the CWA.

EPA intends to provide assistance and guidance to municipalities and permitting authorities for developing storm water management programs that achieve permit requirements. EPA intends to issue a guidance document addressing municipal permit applications in the near term.

Controls developed in management plans for municipal system permits may take a variety of forms. Where necessary, municipal permittees can pursue local remedies to develop measures to reduce pollutants or halt storm water discharges with high levels of pollutants through municipal storm sewer systems. Some local entities have already implemented ordinances or laws that are designed to reduce the discharge of pollutants to municipal separate storm sewers, while other municipalities have developed a variety of techniques to control pollutants in storm water. Alternatively, where appropriate, municipal permittees may develop end-of-pipe controls to control pollutants in these discharges such as regional wet detention ponds or diverting flow to publicly owned treatment works. Finally, municipal applicants may bring individual storm water discharges, which cannot be adequately controlled by the municipal permittees or general permit coverage, to the attention of the permitting authority. Then, at the Director's discretion, appropriate additional controls can be required in the permit for the facility generating the targeted storm water discharge.

One commenter suggested that municipal operators of municipal separate storm sewers should have control over all storm water discharges from a facility that discharges both through the municipal system and to waters of the United States. In response, under this regulatory and statutory scheme, industries that discharge storm water directly into the waters of the United States, through municipal separate storm sewer systems, or both are required to obtain permit coverage for their discharges. However, municipalities are not precluded from exercising control over such facilities through their own municipal authorities.

It is important to note that EPA has established effluent guideline limitations for storm water discharges for nine subcategories of industrial dischargers (Cement Manufacturing (40 CFR part 411), Feedlots (40 CFR part 412), Fertilizer Manufacturing (40 CFR part 418), Petroleum Refining (40 CFR part 419), Phosphate Manufacturing (40 CFR part 422), Steam Electric (40 CFR part 423), Coal Mining (40 CFR part 434), Ore Mining and Dressing (40 CFR part 440) and Asphalt (40 CFR part 441)). Most of the existing facilities in these subcategories already have individual permits for their storm water discharges. Under today's rule, facilities with existing NPDES permits for storm water discharges through a municipal storm sewer will be required to maintain these permits and apply for an individual permit, under ß 122.26(c), when existing permits expire. EPA received numerous comments supporting this decision because requiring facilities that have existing permits to comply with today's requirements immediately would be inefficient and not serve improved water quality.

Sections 402(p) (1) and (2) of the CWA provide that discharges from municipal separate storm sewer systems serving a population of less than 100,000 are not required to obtain a permit prior to October 1, 1992, unless designated on a case-by-case basis under section 402(p)(2)(E). However, as discussed above, storm water discharges associated with industrial activity through such municipal systems are not excluded. Thus, under today's rule, all storm water discharges associated with industrial activity that discharge through municipal separate storm sewer systems are required to obtain NPDES permit coverage, including those which discharge through systems serving populations less than 100,000. EPA believes requiring permits will address the legal concerns raised by commenters regarding these sources. In addition, it will allow for control of these significant sources of pollution while EPA continues to study under section 402(p)(6) whether to require the development of municipal storm water management plans in these municipalities. If these municipalities do ultimately obtain NPDES permits for their municipal separate storm sewer systems, early permitting of the industrial contributions may aid those cities in their storm water management efforts.

In the December 7, 1988, proposal, EPA recognized that storm water discharges associated with industrial activity from Federal facilities through municipal separate storm sewer systems may pose unique legal and administrative situations. EPA received numerous comments on this issue, with most of these comments coming from cities and counties. The comments reflected a general concern with respect to a municipality's ability to control Federal storm water discharges through municipal separate storm sewer systems. Most municipalities stated that they do not have the legal authority to adequately enforce against problem storm water discharges from Federal facilities and that these facilities should be required to obtain separate storm water permits. Some commenters stated that they have no Constitutional authority to regulate Federal facilities or establish regulation for such facilities. Some commenters indicated that Federal facilities could not be inspected, monitored, or subjected to enforcement for national security and other jurisdictional reasons. Some commenters argued that without clearly stated legal authority for the municipality, such dischargers

Received
August 26, 2011
Commission on
State Mandates

should be required to obtain permits. One municipality pointed out that Federal facilities within city limits are exempted from their Erosion and Sediment Control Act and that permits for these facilities should be required.

Under today's rule, Federal facilities which discharge storm water associated with industrial activity through municipal separate storm sewer systems will be required to obtain NPDES permit coverage under Federal or State law. EPA believes this will cure the legal authority problems at the local level raised by the commenters. EPA notes that this requirement is consistent with section 313(a) of the CWA.

D. Preliminary Permitting Strategy for Storm Water Discharges Associated With Industrial Activity

Many of the comments received on the December 7, 1988, proposal focused on the difficulties that EPA Regions and authorized NPDES States, with their finite resources, will have in implementing an effective permitting program for the large number of storm water discharges associated with industrial activity. Many commenters noted that problems with implementing permit programs are caused not only by the large number of industrial facilities subject to the program, but by the difficulties associated with identifying appropriate technologies for controlling storm water at various sites and the differences in the nature and extent of storm water discharges from different types of industrial facilities.

EPA recognizes these concerns; and based on a consideration of comments from authorized NPDES States, municipalities, industrial facilities and environmental groups on the permitting framework and permit application requirements for storm water discharges associated with industrial activity, EPA is in the process of developing a preliminary strategy for permitting storm water discharges associated with industrial activity. In developing this strategy, EPA recognizes that the CWA provides flexibility in the manner in which NPDES permits are issued. n4 EPA intends to use this flexibility in designing a workable and reasonable permitting system. In accordance with these considerations, EPA intends to publish in the near future a discussion of its preliminary permitting strategy for implementing the NPDES storm water program.

n 4 The courts in *NRDC* v. *Train*, 396 F.Supp. 1393 (D.D.C. 1975) *aff'd, NRDC* v. *Costle*, 568 F.2d 1369 (DC Cir. 1977), have acknowledged the administrative burden placed on the Agency by requiring individual permits for a large number of storm water discharges. These courts have recognized EPA's discretion to use certain administrative devices, such as area permits or general permits to help manage its workload. In addition, the courts have recognized flexibility in the type of permit conditions that are established, including requirements for best management practices.

The preliminary strategy is intended to establish a framework for developing permitting priorities, and includes a four tier set of priorities for issuing permits to be implemented over time:

-- *Tier I -- baseline permitting:* One or more general permits will be developed to initially cover the majority of storm water discharges associated with industrial activity;

-- *Tier II -- watershed permitting:* Facilities within watersheds shown to be adversely impacted by storm water discharges associated with industrial activity will be targeted for permitting.

-- *Tier III -- industry specific permitting:* Specific industry categories will be targeted for individual or industry-specific permits; and

-- *Tier IV -- facility specific permitting:* A variety of factors will be used to target specific facilities for individual permits.

Tier I -- Baseline Permitting

EPA intends to issue general permits that initially cover the majority of storm water discharges associated with industrial activity in States without authorized NPDES programs. These permits will also serve as models for States with authorized NPDES programs.

The consolidation of many sources under one permit will greatly reduce the otherwise overwhelming administrative burden associated with permitting storm water discharges associated with industrial activity. This approach has a number of additional advantages, including:

-- Requirements will be established for discharges covered by the permit;

Received
August 26, 2011
Commission on
State Mandates

-- Facilities whose discharges are covered by the permit will have an opportunity for substantial compliance with the CWA;

-- The public, including municipal operators of municipal separate storm sewers which may receive storm water discharges associated with industrial activity, will have access under section 308(b) of the CWA to monitoring data and certain other information developed by the permittee;

-- EPA will have the opportunity to begin to collect and review data on storm water discharges from priority industries, thereby supporting the development of subsequent permitting activities;

-- Applicable requirements of municipal storm water management programs established in permits for discharges from municipal separate storm sewer systems will be enforceable directly against non-complying industrial facilities that generate the discharges;

-- The public will be given an opportunity to comment on permitting activities;

-- The baseline permits will provide a basis for bringing selected enforcement actions by eliminating many issues which might otherwise arise in an enforcement proceeding; and

-- Finally, the baseline permits will provide a focus for public comment on the development of subsequent phases of the permitting strategy for storm water discharges, including the development of priorities for State storm water management programs developed under section 402(p)(6) of the CWA.

Initially, the coverage of the baseline permits will be broad, but the coverage is intended to shrink as other permits are issued for storm water discharges associated with industrial activities pursuant to Tier II through IV activities.

2. Tier II -- Watershed Permitting

Facilities within watersheds shown to be adversely impacted by storm water discharges associated with industrial activity will be targeted for individual and general permitting. This process can be initiated by identifying receiving waters (or segments of receiving waters) where storm water discharges associated with industrial activity have been identified as a source of use impairment or are suspected to be contributing to use impairment.

3. Tier III -- Industry Specific Permitting

Specific industry categories will be targeted for individual or industry-specific general permits. These permits will allow permitting authorities to focus attention and resources on industry categories of particular concern and/or industry categories where tailored requirements are appropriate. EPA will work with the States to coordinate the development of model permits for selected classes of industrial storm water discharges. EPA is also working to identify priority industrial categories in the two reports to Congress required under section 402(p)(5) of the CWA. In addition, group applications that are received can be used to develop model permits for the appropriate industries.

4. Tier IV -- Facility Specific Permitting

Individual permits will be appropriate for some storm water discharges in addition to those identified under Tier II and III activities. Individual permits should be issued where warranted by: the pollution potential of the discharge; the need for individual control mechanisms; and in cases where reduced administrative burdens exist. For example, individual NPDES permits for facilities with process discharges should be expanded during the normal process of permit reissuance to cover storm water discharges from the facility.

5. Relationship of Strategy to Permit Applications Requirements

The preliminary long-term permitting strategy described above identifies several permit schemes that EPA anticipates will be used in addressing storm water discharges associated with industrial activity. One issue that arises with this strategy is determining the appropriate information needed to develop and issue permits for these discharges. The NPDES regulatory scheme provides three major options for obtaining permit coverage for storm water discharges associated with industrial activity: (1) Individual permit applications; (2) group applications; and (3) case-by-case requirements developed for general permit coverage.

a. *Individual permit application requirements.* Today's notice establishes requirements for individual permit applications for storm water discharges associated with industrial activity. These application requirements are applicable for all storm water discharges associated with industrial activity, except where the operator of the discharge is participating in a group application or a general permit is issued to cover the discharge and the general permit provides alternative

Received
August 26, 2011
Commission on
State Mandates

means to obtain permit coverage. Information in individual applications is intended to be used in developing the site-specific conditions generally associated with individual permits.

Individual permit applications are expected to play an important role in all tiers of the Strategy, even where general permits are used. Although general permits may provide for notification requirements that operate in lieu of the requirement to submit individual permit applications, the individual permit applications may be needed under several circumstances. Examples include: where a general permit requires the submission of a permit application as the notice of intent to be covered by the permit; where the owner or operator authorized by a general permit requests to be excluded from the coverage of the general permit by applying for a permit (*see* 40 CFR 122.28(b)(2)(iii) for EPA issued general permits); and where the Director requires an owner or operator authorized by a general permit to apply for an individual permit (*see* 40 CFR 122.28(b)(2)(ii) for EPA issued general permits).

b. *Group applications.* Today's rule also promulgates requirements for group applications for storm water discharges associated with industrial activity. These applications provide participants of groups with sufficiently similar storm water discharges an alternative mechanism for applying for permit coverage.

The group application requirements are primarily intended to provide information for developing industry specific general permits. (Group applications can also be used to issue individual permits in authorized NPDES States without general permit authority or where otherwise appropriate). As such, group application requirements correlate well with the Tier III permitting activities identified in the long-term permitting Strategy.

c. *Case-by-case requirements.* 40 CFR 122.21(a) excludes persons covered by general permits from requirements to submit individual permit applications. Further, the general permit regulations at 40 CFR 122.28 do not address the issue of how a potential permittee is to apply to be covered under a general permit. Rather, conditions for notification of intent (NOI) to be covered by the general permit are established in the permits on a case-by-case basis, and operate in lieu of permit application requirements. Requirements for submitting NOIs to be covered by a general permit can range from full applications (this would be Form 1 and Form 2F for most discharges composed entirely of storm water discharges associated with industrial activity), to no notice. EPA recommends that the NOI requirements established in a general permit for storm water discharges associated with industrial activity be commensurate with the needs of the permit writer in establishing the permit and the permit program. The baseline general permit described in Tier I is intended to support the development of controls for storm water discharges associated with industrial activity that can be supported by the limited resources of the permitting Agency. In this regard, the burdens of receiving and reviewing NOI's from the large number of facilities covered by the permit should also be considered when developing NOI requirements. In addition, NOI requirements should be developed in conjunction with permit conditions establishing reporting requirements during the term of the permit.

NOI requirements in general permits can establish a mechanism which can be used to establish a clear accounting of the number of permittees covered by the general permit, the nature of operations at the facility generating the discharge, their identity and location. The NOI can be used as an initial screening tool to determine discharges where individual permits are appropriate. Also, the NOI can be used to identify classes of discharges appropriate for more specific general permits, as well as provide information needed to notify such dischargers of the issuance of a more specific general permit. In addition, the NOI can provide for the identification of the permittee to provide a basis for enforcement and compliance monitoring strategies. EPA will further address this issue in the context of specific general permits it plans to issue in the near future.

Today's rule requires that individual permit applications for storm water discharges associated with industrial activity be submitted within one year from the date of publication of this notice. EPA is considering issuing general permits for the majority of storm water discharges associated with industrial activity in those States and territories that do not have authorized State NPDES programs (MA, ME, NH, FL, LA, TX, OK, NM, SD, AZ, AK, ID, District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands) before that date to enable industrial dischargers of storm water to ascertain whether they are eligible for coverage under a general permit (and subject to any alternative notification requirements established by the general permit in lieu of the individual permit application requirements of today's rule) or whether they must submit an individual permit application (or participate in a group application) before the regulatory deadlines for submitting these applications passes. Storm water application deadlines are discussed in further detail below.

E. Storm Water Discharge Sampling

Received
August 26, 2011
Commission on
State Mandates

Storm water discharges are intermittent by their nature, and pollutant concentrations in storm water discharges will be highly variable. Not only will variability arise between given events, but the flow and pollutant concentrations of such discharges will vary with time during an event. This variability raises two technical problems: how best to characterize the discharge associated with a single storm event; and how best to characterize the variability between discharges of different events that may be caused by seasonal changes and changes in material management practices, for example.

Prior to today's rulemaking, 40 CFR 122.21(g)(7) required that applicants for NPDES permits submit quantitative data based on one grab sample taken every hour of the discharge for the first four hours of discharge. EPA has modified this requirement such that, instead of collecting and analyzing four grab samples individually, applicants for permits addressing storm water discharges associated with industrial activity will provide data as indicators of two sets of conditions: data collected during the first 30 minutes of discharge and flow-weighted average storm event concentrations. Large and medium municipalities will provide data on flow-weighted average storm event concentrations only.

Data describing pollutants in a grab sample taken during the first few minutes of the discharge can often be used as a screen for non-storm water discharges to separate storm sewers because such pollutants may be flushed out of the system during the initial portion of the discharge. In addition, data from the first few minutes of a discharge are useful because much of the traditional structural technology used to control storm water discharges, including detention and retention devices, may only provide controls for the first portion of the discharge, with relatively little or no control for the remainder of the discharge. Data from the first portion of the discharge will give an indication of the potential usefulness of these techniques to reduce pollutants in storm water discharges. Also, such discharges may be primarily responsible for pollutant shocks to the ecosystem in receiving waters.

Studies such as NURP have shown that flow-weighted average concentrations of storm water discharges are useful for estimating pollutant loads and for evaluating certain concentration-based water quality impacts. The use of flow-weighted composite samples are also consistent with comments raised by various industry representatives during previous Agency rulemakings that continuous monitoring of discharges from storm events is necessary to adequately characterize such discharges.

EPA requested comment on the feasibility of the proposed modification of sampling procedures at ß 122.21(g)(7) and the ability to characterize pollutants in storm water discharges with an average concentration from the first portion of the discharge compared to collecting and separately analyzing four grab samples. It was proposed that an event composite sample be collected, as well as a grab sample collected during the first 20 minutes of runoff. Comments were solicited as to whether or not this sampling method would provide better definition of the storm load for runoff characterization than would the requirement to collect and separately analyze four grab samples.

Many commenters questioned the ability to obtain a 20 minute sample in the absence of automatic samplers. Some believed that pollutants measured by such a sample can be accounted for in the event composite sample. Others argued that this is an unwarranted sampling effort if municipal storm water management plans are to be geared to achieving annual pollutant load reductions. Many commenters advised that problems accessing sampling stations and mobilizing sampling crews, particularly after working hours, made sampling during the first 20 minutes impractical. These comments were made particularly with respect to municipalities, where the geographical areas could encompass several hundred square miles. Several alternatives were suggested including: the collection of a sample in the first hour, and representative grab sampling in the next three hours, one per hour; or perform time proportioned sampling for up to four hours.

Because of the logistical problems associated with collecting samples during the first few minutes of discharge from municipal systems, EPA will only require such sampling from industrial facilities. Municipal systems will be spread out over many square miles with sampling locations potentially several miles from public works departments or other responsible government agencies. Reaching such locations in order to obtain samples during the first few minutes of a storm event may prove impossible. For essentially the same reasons, the requirement has been modified to encompass the first 30 minutes of the discharge, instead of 20 minutes, for industrial discharges. The rule also clarifies that the sample should be taken during the first 30 minutes or as soon thereafter as practicable. Where appropriate, characterization of this portion of the discharge from selected outfalls or sampling points may be a condition to permits issued to municipalities. With regard to protocols for the collection of sample aliquots for flow-weighted composite samples, ß 122.21(g)(7) provides that municipal applicants may collect flow-weighted composite samples using different protocols with respect to the time duration between the collection of sample aliquots, subject to the approval of the Director or Regional Administrator. In other words, the period may be extended from 15 minutes to 20 or 25 minutes between sample aliquots, or decreased from 15 to 10 or 5 minutes.

Received
August 26, 2011
Commission on
State Mandates

Other comments raised issues that apply both to the impact of runoff characterization and the first discharge representation. These primarily pertained to regions that have well defined wet and dry seasons. Comments questioned whether or not it is fair to assume that the initial storm or two of a wet season, which will have very high pollutant concentrations, are actually representative of the runoff concentrations for the area.

In response, EPA believes that it is important to represent the first part of the discharge either separately or as a part of the event composite samples. This loading is made up primarily of the mass of unattached fine particulates and readily soluble surface load that accumulates between storms. This load washes off of the basin's directly connected paved surfaces when the runoff velocities reach the level required for entrainment of the particulate load into the surface flow. It should be noted that for very fine particulates and solubles, this can occur very soon after the storm begins and much sooner than the peak flow. The first few minutes of discharge represents a shock load to the receiving water, in terms of concentration of pollutants, because for many constituents the highest concentrations of the event will occur during this initial period. Due to the need to properly quantify this load, it is not necessary to represent the first discharge from the upper reaches of the outfall's tributary area. In runoff characterization basins, the assumption is that the land use in the basin is homogeneous, or nearly so, and that the first discharge from the lower reaches for all intents and purposes is representative of the entire basin. If a sample is taken during the first 30 minutes of the runoff, it will be composed primarily of first discharge. If the sample is taken at the outfall an hour into the event, it may contain discharge from the remote portions of the basin. It will not be representative of the discharge because it will also contain later washoff from the lower reaches of the basin, resulting in a low estimation of the first discharge load of most constituents. Conversely, larger suspended particulates that normally are not present in first discharge due to inadequate velocities will appear in this later sampling scenario because of the influence of higher runoff rates in the lower basin. Many commonly used management practices are designed based on their ability to treat a volume of water defined by the first discharge phenomenon. It is important to characterize the first discharge load because most management practices effectively treat only, or primarily, this load.

It should be noted that first discharge runoff is sometimes contaminated by non-storm water related pollutants. In many urban catchments, contaminants that result from illicit connections and illegal dumping may be stored in the system until "flushed" during the initial storm period. This does not negate the need for information on the characteristic first discharge load, but does indicate that the first phase field screen results for illicit connections should be used to help define those outfalls where this problem might exist.

Several methods can be used to develop an event average concentration. Either automatic or manual sampling techniques can be used that sample the entire hydrograph, or at least the first four hours of it, that will result in several discrete samples and associated flow rates that represent the various flow regimes of an event. These procedures have the potential for providing either an event average concentration, an event mean concentration, or discrete definition of the washoff process. Automatic sampling procedures are also available that collect a single composite sample, either on a time-proportioned or flow proportioned basis.

When discrete samples are collected, an event average composite sample can be produced by the manual composite of the discrete samples in equal volumes. Laboratory analysis of time proportioned composite samples will directly yield the event average concentration. Mathematical averaging of discrete sample analysis results will yield an event average concentration.

When discrete samples are collected, a flow-weighted composite sample can be produced based on the discharge record. This is done by manually flow proportioning the volumes of the individual samples. Laboratory analysis of flow weighted composite samples will directly yield an event mean concentration. Mathematical integration of the change in concentrations and mass flux of the discharge for discrete sample data can produce an event mean concentration. This procedure was used during the NURP program.

EPA wishes to emphasize that the reason for sampling the type of storm event identified in ß 122.21(g)(7) is to provide information that represents local conditions that will be used to create sound storm water management plans. Based on the method to be used to generate system-wide estimates of pollutant loads, either method, discrete or event average concentrations, may be preferable to the other. If simulation models will be used to generate loading estimates, analysis of discrete samples will be more valuable so that calibration of water quality and hydrology may be performed. On the other hand, simple estimation methods based on event average or event mean concentrations may not justify the additional cost of discrete sample analysis.

EPA believes that the first discharge loading should be represented in the permit application from industrial facilities and, if appropriate, permitting authorities may require the same in the discharge characterization component of

Received
August 26, 2011
Commission on
State Mandates

permits issued to municipalities. The first discharge load should also be represented as part of an event composite sample. This requirement will assist industries in the development of effective storm water management plans.

EPA requested comments on the appropriateness of the proposed rules and of proposed amendments to the rules regarding discharge sampling. Comments were received which addressed the appropriateness of imposing uniform national guidelines. Several commenters are concerned that uniform national guidelines may not be appropriate due to the geographic variations in meteorology, topography, and pollutant sources. While some assert that a uniform guideline will provide consistency of the sample results, others prefer a program based on regional or State guidelines that more specifically address their situation.

Several commenters, addressing industrial permit application requirements, preferred that the owner/operator be allowed to set an individual sampling protocol with approval of the permit writer. Some commenters were concerned that one event may not be sufficient to characterize runoff from a basin as this may result in gross over-estimation or under-estimation of the pollutant loads. Others indicated confusion with regard to sampling procedures, lab analysis procedures, and the purpose of the program.

In response, today's regulations establish certain minimum requirements. Municipalities and industries may vary from these requirements to the extent that their implementation is at least as stringent as outlined in today's rule. EPA views today's rule as a means to provide assurance as to the quality of the data collected; and to this end, it is important that the minimum level of sampling required be well defined.

In response to EPA's proposal that the first discharge be included in "representative" storm sampling, several commenters made their concerns known about the possible equipment necessary to meet this requirement. Several commenters are concerned that in order to get a first discharge sample, automatic sampling equipment will be required. Concerns related to the need for this equipment surfaced in the comments frequently; most advised that the equipment is expensive and that the demand on sampling equipment will be too large for suppliers and manufacturers to meet. Although equipment can be leased, some commenters maintained that not enough rental equipment is available to make this a viable option in many instances.

EPA is not promoting or requiring the use of automated equipment to satisfy the sampling requirements. A community may find that in the long run it would be more convenient to have such equipment since sampling is required not only during preparation of the application, but also may be required during the term of the permit to assure that the program goals are being met. Discharge measurement is necessary in order for the sample data to have any meaning. If unattended automatic sampling is to be performed, then unattended flow measurement will be required too.

EPA realizes that equipment availability is a legitimate concern. However, there is no practical recommendation that can be made relative to the availability of equipment. If automatic sampling equipment is not available, manual sampling is an appropriate alternative.

F. Storm Water Discharges Associated With Industrial Activity

1. Permit Applicability

a. *Storm water discharges associated with industrial activity to waters of the United States.* Under today's rule dischargers of storm water associated with industrial activity are required to apply for an NPDES permit. Permits are to be applied for in one of three ways depending on the type of facility: Through the individual permit application process; through the group application process; or through a notice of intent to be covered by general permit.

Storm water discharges associated with the industrial activities identified under ß 122.26(b)(14) of today's rule may avail themselves of general permits that EPA intends to propose and promulgate in the near future. The general permit will be available to be promulgated in each non-NPDES State, following State certification, and as a model for use by NPDES States with general permit authority. It is envisioned that these general permits will provide baseline storm water management practices. For certain categories of industries, specific management practices will be prescribed in addition to the baseline management practices. As information on specific types of industrial activities is developed, other, more industry-specific general permits will be developed.

Today's rule requires facilities with existing NPDES permits for storm water discharges to apply for individual permits under the individual permit application requirements found at 122.26(c) 180 days before their current permit expires. Facilities not eligible for coverage under a general permit are required to file an individual or group permit ap-

Received
August 26, 2011
Commission on
State Mandates

plication in accordance with today's rule. The general permits to be proposed and promulgated will indicate what facilities are eligible for coverage by the general permit.

b. *Storm water discharges through municipal storm sewers.* As discussed above, many operators of storm water discharges associated with industrial activity are not required to apply for an individual permit or participate in a group application under ß 122.26(c) of today's rule if covered by a general permit. Under the December 7, 1988, proposal, dischargers through large and medium municipal separate storm sewer systems were not required, as a general rule, to apply for an individual permit or as a group applicant. Today's rule is a departure from that proposal. Today's rule requires all dischargers through municipal separate storm sewer systems to apply for an individual permit, apply as part of a group application, or seek coverage under a promulgated general permit for storm water discharges associated with industrial activity.

Municipal operators of large and medium municipal separate storm sewer systems are responsible for obtaining system-wide or area permits for their system's discharges. These permits are expected to require that controls be placed on storm water discharges associated with industrial activity which discharge through the municipal system. It is anticipated that general or individual permits covering industrial storm water dischargers to these municipal separate storm sewer systems will require industries to comply with the terms of the permit issued to the municipality, as well other terms specific to the permittee.

c. *Storm water discharges through non-municipal storm sewers.* Under today's rulemaking all operators of storm water discharges associated with industrial activity that discharge into a privately or Federally owned storm water conveyance (a storm water conveyance that is not a municipal separate storm sewer) will be required to be covered by an NPDES permit (*e.g.* an individual permit, general permit, or as a co-permittee to a permit issued to the operator of the portion of the system that directly discharges to waters of the United States). This is a departure from the "either/or" approach that EPA requested comments on in the December 7, 1988, notice. The "either/or" approach would have allowed either the system discharges to be covered by a permit issued to the owner/operator of the system segment that discharged to waters of the United States, or by an individual permit issued to each contributor to the non-municipal conveyance.

EPA requested comments on the advantages and disadvantages of retaining the "either/or" approach for non-municipal storm sewers. An abundance of comment was received by EPA on this particular part of the program. A number of industrial commenters and a smaller number of municipalities favored retaining the "either/or" approach as proposed, while most municipal entities, one industry, and one trade association favored requiring permits for each discharger.

Two commenters stated that private owners of conveyances may not have the legal authority to implement controls on discharges through their system and would not want to be held responsible for such controls. EPA agrees that this is a potential problem. Therefore, today's rule will require permit coverage for each storm water discharge associated with industrial activity.

One commenter supported the concept of requiring all the facilities that discharge to a non-municipal conveyance to be co-permittees. EPA agrees that this type of permitting scheme, along with other permit schemes such as area or general permits, is appropriate for discharges from non-municipal sewers, as long as each storm water discharge through the system is associated with industrial activity and thus currently subject to NPDES permit coverage.

One State agency commented that in the interest of uniformity, all industries that discharge to non-municipal conveyances should be required to conform to the application requirements. One industry stated that the rules must provide a way for the last discharger before the waters of the U.S. to require permits for facilities discharging into the upper portions of the system. EPA agrees with these comments. Today's rule provides that each discharger may be covered under individual permits, as co-permittees to a single permit, or by general permit rather than holding the last discharger to the waters of the United States solely responsible.

In response to one commenter, the term "non-municipal" has been clarified to explain that the term refers to non-publicly owned or Federally-owned storm sewer systems.

Some commenters supporting the approach as proposed, noted that industrial storm water dischargers into such systems can take advantage of the group application process. EPA agrees that in appropriate circumstances, such as when industrial facilities discharging storm water to the same system are sufficiently similar, group applications can be used for discharges to non-municipal conveyances. However, EPA believes that it would be inappropriate to approve group applications for those facilities whose only similarity is that they discharge storm water into the same private convey-

Received
August 26, 2011
Commission on
State Mandates

ance system. The efficacy of the group application procedures is predicated on the similarity of operations and other factors. The fact that several industries discharge storm water to the same non-municipal sewer system alone may not make these discharges sufficiently similar for group application approval.

One commenter suggested that EPA has not established any deadlines for submission of permit applications for storm water discharges associated with industrial activity through non-municipal separate storm sewer systems. EPA wants to clarify that industrial storm water dischargers into privately owned or Federally owned storm water conveyances are required to apply for permits in the same time frame as individual or group applicants (or as otherwise provided for in a general permit).

One commenter stated that the operator of the conveyance that accepts discharges into its system has control and police power over those that discharge into the system by virtue of the ability to restrict discharges into the system. This commenter stated that these facilities should be the entity required to obtain the permit in all cases. Assuming that this statement is true in all respects, the larger problem is that one's theoretical ability to restrict discharges is not necessarily tied to the reality of enforcing those restrictions or even detecting problem discharges when they exist. In a similar vein one commenter urged that a private operator will not be in any worse a position than a municipal entity to determine who is the source of pollution up-stream. EPA agrees that from a hydrological standpoint this may be true. However, from the standpoint of detection resources, police powers, enforcement remedies, and other facets of municipal power that may be brought to bear upon problem dischargers, private systems are in a far more precarious position with respect to controlling discharges from other private sources.

In light of the comments received, EPA has decided that the either/or approach as proposed is inappropriate. Operators of non-municipal systems will generally be in a poorer position to gain knowledge of pollutants in storm water discharges and to impose controls on storm water discharges from other facilities than will municipal system operators. In addition, best management practices and other site-specific controls are often most appropriate for reducing pollutants in storm water discharges associated with industrial activity and can often only be effectively addressed in a regulatory scheme that holds each industrial facility operator directly responsible. The either/or approach as proposed is not conducive to establishing these types of practices unless each discharger is discharging under a permit. Also, some non-municipal operators of storm water conveyances, which receive storm water runoff from industrial facilities, may not be generating storm water discharges associated with industrial activity themselves and, therefore, they would otherwise not need to obtain a permit prior to October 1, 1992, unless specifically designated under section 402(p)(2)(E). Accordingly, EPA disagrees with comments that dischargers to non-municipal conveyances should have the flexibility to be covered by their permit or covered by the permit issued to the operator of the outfall to waters to the United States.

2. Scope of "Associated with Industrial Activity"

The September 26, 1984, final regulation divided those discharges that met the regulatory definition of storm water point source into two groups. The term Group I storm water discharges was defined in an attempt to identify those storm water discharges which had a higher potential to contribute significantly to environmental impacts. Group I included those discharges that contained storm water drained from an industrial plant or plant associated areas. Other storm water discharges (such as those from parking lots and administrative buildings) located on lands used for industrial activity were classified as Group II discharges. The regulations defined the term "plant associated areas" by listing several examples of areas that would be associated with industrial activities. However, the resulting definition led to confusion among the regulated community regarding the distinctions between the Group I and Group II classifications.

In amending the CWA in 1987, Congress did not explicitly adopt EPA's regulatory classification of Group I and Group II discharges. Rather, Congress required EPA to address "storm water discharges associated with industrial activity" in the first round of storm water permitting. In light of the adoption of the term "associated with industrial activity" in the CWA, and the ongoing confusion surrounding the previous regulatory definition, EPA has eliminated the regulatory terms "Group I storm water discharge" and "Group II storm water discharge" pursuant to the December 7, 1987, Court remand and has not revived it. In addition, today's notice promulgates a definition of the term "storm water discharge associated with industrial activity"at ß 122.26(b)(14) and clarified the scope of the term.

In describing the scope of the term "associated with industrial activity", several members of Congress explained in the legislative history that the term applied if a discharge was "directly related to manufacturing, processing or raw materials storage areas at an industrial plant." (Vol. 132 Cong. Rec. H10932, HI0936 (daily ed. October 15, 1986); Vol. 133 Cong. Rec. H176 (daily ed. January 8, 1987)). Several commenters cited this language in arguing for a more expansive or less expansive definition of "associated with industrial activity." EPA believes that the legislative history supports the decision to exclude from the definition of industrial activity, at ß 122.26(b)(14) of today's rule, those facili-

Received
August 26, 2011
Commission on
State Mandates

ties that are generally classified under the Office of Management and Budget Standard Industrial Classifications (SIC) as wholesale, retail, service, or commercial activities.

Two commenters recommended that all commercial enterprises should be required to obtain a permit under this regulation. Another commenter recommended that all the facilities listed in the December 7, 1988, proposal, including those listed in paragraphs (xi) through (xvi) on page 49432 of the December 7, 1988, proposal, should be included. EPA disagrees since the intent of Congress was to establish a phased and tiered approach to storm water permits, and that only those facilities having discharges associated with industrial activity should be included initially. The studies to be conducted pursuant to section 402(p)(5) will examine sources of pollutants associated with commercial, retail, and other light business activity. If appropriate, additional regulations addressing these sources can be developed under section 402(p)(6) of the CWA. As further discussed below, EPA believes that the facilities identified in paragraphs (xi) through (xvi) are more properly characterized as commercial or retail facilities, rather than indutrial facilities.

Today's rule clarifies the regulatory definition of "associated with industrial activity" by adopting the language used in the legislative history and supplementing it with a description of various types of areas that are directly related to an industrial process (*e.g.,* industrial plant yards, immediate access roads and rail lines, drainage ponds, material handling sites, sites used for the application or disposal of process waters, sites used for the storage and maintenance of material handling equipment, and known sites that are presently or have been used in the past for residual treatment, storage or disposal). The agency has also incorporated some of the suggestions offered by the public in comments.

Three commenters suggested that the permit application should focus only on storm water with the potential to come into contact with industrial-related pollutant sources, rather than focusing on how plant areas are utilized. These commenters suggested that facilities that are wholly enclosed or have their operations entirely protected from the elements should not be subject to permit requirements under today's rule. EPA agrees that these comments have merit with regard to certain types of facilities. Today's rule defines the term "storm water discharge associated with industrial activity" to include storm water discharges from facilities identified in today's rule at 40 CFR 122.21(b)(I4)(xi) (facilities classified as Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, 4221-25) only if:

areas where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery at these facilities are exposed to storm water. Such areas include: material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at 40 CFR 401); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment; storage or disposal; shipping and receiving areas; manufacturing buildings; material storage areas for raw materials, and intermediate and finished products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water.

The critical distinction between the facilities identified at 40 CFR 122.26(b)(14)(xi) and the facilities identified at 40 CFR 122.26(b)(14)(i)-(x) is that the former are not classified as having "storm water discharges associated with industrial activity" unless certain materials or activities are exposed to storm water. Storm water discharges from the latter set of facilities are considered to be "associated with industrial activity" regardless of the actual exposure of these same materials or activities to storm water.

EPA believes this distinction is appropriate because, when considered as a class, most of the activity at the facilities in ß 122.26(b)(14)(xi) is undertaken in buildings; emissions from stacks will be minimal or non-existent; the use of unhoused manufacturing and heavy industrial equipment will be minimal; outside material storage, disposal or handling generally will not be a part of the manufacturing process; and generating significant dust or particulates would be atypical. As such, these industries are more akin or comparable to businesses, such as retail, commercial, or service industries, which Congress did not contemplate regulating before October 1, 1992, and storm water discharges from these facilities are not "associated with industrial activity." Thus, these industries will be required to obtain a permit under today's rule only when the manufacturing processes undertaken at such facilities would result in storm water contact with industrial materials associated with the facility.

Industrial categories in ß 122.26(b)(14)(xi) all tend to engage in production activities in the manner described in the paragraph above. Facilities under SIC 20 process foods including meats, dairy food, fruit, and flour. Facilities classified under SIC 21 make cigarettes, cigars, chewing tobacco and related products. Under SIC 22, facilities produce yarn, etc., and/or dye and finish fabrics. Facilities under SIC 23 are in the business of producing clothing by cutting and sewing purchased woven or knitted textile products. Facilities under SIC 2434 and 25 are establishments engaged in furniture

Received
August 26, 2011
Commission on
State Mandates

making. SIC 265 and 267 address facilities that manufacture paper board products. Facilities under SIC 27 perform services such as bookbinding, plate making, and printing. Facilities under SIC 283 manufacture pharmaceuticals and facilities under 285 manufacture paints, varnishes, lacquers, enamels, and allied products. Under SIC 30 establishments manufacture products from plastics and rubber. Those facilities under SIC 31 (except 311), 323, 34 (except 3441), 35, 36, and 37 (except 373) manufacture industrial and commercial metal products, machinery, equipment, computers, electrical equipment, and transportation equipment, and glass products made of purchased glass. Facilities under SIC 38 manufacture scientific and electrical instruments and optical equipment. Those under SIC 39 manufacture a variety of items such as jewelry, silverware, musical instruments, dolls, toys, and athletic goods. SIC 4221-25 are warehousing and storage activities.

In contrast, the facilities identified by SIC 24 (except and 2434), 26 (except 265 and 267), 28 (except 283 and 285), 29, 311, 32 (except 323), 33, 3441, 373 when taken as a group, are expected to have one or many of the following activities, processes occurring on-site: storing raw materials, intermediate products, final products, by-products, waste products, or chemicals outside; smelting; refining; producing significant emissions from stacks or air exhaust systems; loading or unloading chemical or hazardous substances; the use of unhoused manufacturing and heavy industrial equipment; and generating significant dust or particulates. Accordingly, these are classes of facilities which can be viewed as generating storm water discharges associated with industrial activity requiring a permit. Establishments identified under SIC 24 (except 2434) are engaged in operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials. SIC 26 facilities are paper mills. Under SIC 28, facilities produce basic chemical products by predominantly chemical processes. SIC 29 describes facilities that are engaged in the petroleum industry. Under SIC 311, facilities are engaged in tanning, currying, and finishing hides and skins. Such processes use chemicals such as sulfuric acid and sodium dichromate, and detergents, and a variety of raw and intermediate materials. SIC 32 manufacture glass, clay, stone and concrete products form raw materials in the form quarried and mined stone, clay, and sand. SIC 33 identifies facilities that smelt, refine ferrous and nonferrous metals from ore, pig or scrap, and manufacturing related products. SIC 3441 identifies facilities manufacturing fabricated structural metal. Facilities under SIC 373 engage in ship building and repairing. The permit application requirements for storm water discharges from facilities in these categories are unchanged from the proposal.

Today's rule clarifies that the requirement to apply for a permit applies to storm water discharges from plant areas that are no longer used for industrial activities (if significant materials remain and are exposed to storm water) as well as areas that are currently being used for industrial activities. EPA would also clarify that all discharges from these areas including those that discharge through municipal separate storm sewers are addressed by this rulemaking.

One commenter questioned the use of the word "or" instead of the word "and" to describe storm water "which is located at an industrial plant 'or' directly related to manufacturing, processing, or raw material storage areas at an industrial plant." The comment expressed the concern that discharges from areas not located at an industrial plant would be subject to permitting by this language and questioned whether this was EPA's intent. EPA agrees that this is a potential source of confusion and has modified this language to reflect the conjunctive instead of the alternative. This change has been made to provide consistency in the rule whereby some areas at industrial plants, such as administrative parking lots which do not have storm water discharges commingled with discharges from manufacturing areas, are not included under this rulemaking.

Two commenters wanted clarification of the term "or process water," in the definition of discharge associated with industrial activity at ß 122.26(b)(14). This rulemaking replaces this term with the term "process waste water" which is defined at 40 CFR part 401.

One commenter took issue with the decision to include drainage ponds, refuse sites, sites for residual treatment, storage, or disposal, as areas associated with industrial activity, because it was the commenter's view that such areas are unconnected with industrial activity. EPA disagrees with this comment. If refuse and other sites are used in conjunction with manufacturing or the by-products of manufacturing they are clearly associated with industrial activity. As noted above, Congress intended to include discharges directly related to manufacturing and processing at industrial plants. EPA is convinced that wastes, refuse, and residuals are the direct result or consequence of manufacturing and processing and, when located or stored at the plant that produces them, are directly related to manufacturing and processing at that plant. Storm water drainage from such areas, especially those areas exposed to the elements (*e.g.* rainfall) has a high potential for containing pollutants from materials that were used in the manufacturing process at that facility. One commenter supported the inclusion of these areas since many toxins degrade very slowly and the mere passage of time will not eliminate their effects. EPA agrees and finalizes this part of the definition as proposed. One commenter requested clarification of the term "residual" as used in this context. Residual can generally be defined to include material

Received
August 26, 2011
Commission on
State Mandates

that is remaining subsequent to completion of an industrial process. One commenter noted that the current owner of a facility may not know what areas or sites at a facility were used in this manner in the past. EPA has clarified the definition of discharge associated with industrial activity to include areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. The Agency believes that the current owner will be in a position to establish these facts.

One commenter suggested including material shipping and receiving areas, waste storage and processing areas, manufacturing buildings, storage areas for raw materials, supplies, intermediates, and finished products, and material handling facilities as additional areas "associated with industrial activity." EPA agrees that this would add clarification to the definition, and has incorporated these areas into the definition at ß 122.26(b)(14).

One commenter stated that the language "point source located at an industrial plant" would include outfalls located at the facility that are not owned or operated by the facility, but which are municipal storm sewers on easements granted to a municipality for the conveyance of storm water. EPA agrees that if the industry does not operate the point source then that facility is not required to obtain a permit for that discharge. A point source is a conveyance that discharges pollutants into the waters of the United States. If a facility does not operate that point source, then it would be the responsibility of the municipality to cover it under a permit issued to them. However, if contaminated storm water associated with industrial activity were introduced into that conveyance by that facility, the facility would be subject to permit application requirements as is all industrial storm water discharged through municipal sewers.

EPA disagrees with several comments that road drainage or railroad drainage within a facility should not be covered by the definition. Access roads and rail lines (even those not used for loading and unloading) are areas that are likely to accumulate extraneous material from raw materials, intermediate products and finished products that are used or transported within, or to and from, the facility. These areas will also be repositories for pollutants such as oil and grease from machinery or vehicles using these areas. As such they are related to the industrial activity at facilities. However, the language describing these areas of industrial activity has been clarified to include those access roads and rail lines that are "used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility." For the same reasons haul roads (roads dedicated to transportation of industrial products at facilities) and similar extensions are required to be addressed in permit applications. Two industries stated that haul roads and similar extensions should be covered by permits by rule. EPA is not considering the use of a permit by rule mechanism under this regulation, however this issue will be addressed in the section 402(p)(5) reports to Congress and in general permits to be proposed and promulgated in the near future. EPA would note however that facilities with similar operations and storm water concerns that desire to limit administrative burdens associated with permit applications and obtaining permits may want to avail themselves of the group application and/or general permits.

In response to comments, EPA would also like to clarify that it intends the language "immediate access roads" (including haul roads) to refer to roads which are exclusively or primarily dedicated for use by the industrial facility. EPA does not expect facilities to submit permit applications for discharges from public access roads such as state, county, or federal roads such as highways or BLM roads which happen to be used by the facility. Also, some access roads are used to transport bulk samples of raw materials or products (such as prospecting samples from potential mines) in small-scale prior to industrial production. EPA does not intend to require permit applications for access roads to operations which are not yet industrial activities.

EPA does agree with comments made by several industries that undeveloped areas, or areas that do not encompass those described above, should generally not be addressed in the permit application, or a storm water permit, as long as the storm water discharge from these areas is segregated from the storm water discharge associated with the industrial activity at the facility.

Numerous commenters stated that maintenance facilities, if covered, should not be included in the definition. EPA disagrees with this comment. Maintenance facilities will invariably have points of access and egress, and frequently will have outside areas where parts are stored or disposed of. Such areas are locations where oil, grease, solvents and other materials associated with maintenance activities will accumulate. In response to one commenter, such areas are only regulated in the context of those facilities enumerated in the definition at ß 122.26(b)(14), and not similar areas of retail or commercial facilities.

Another commenter requested that "storage areas" be more clearly defined. EPA disagrees that this term needs further clarification in the context of this section of the rule. However, in response to one comment, tank farms at industrial facilities are included. Tank farms are in existence to store products and materials created or used by the facility. Accordingly they are directly related to manufacturing processes.

Received
August 26, 2011
Commission on
State Mandates

Regarding storage areas, one commenter stated that the regulations should emphasize that only facilities that are not totally enclosed are required to submit permit applications. EPA does not agree with this interpretation since use of the generic term storage area indicates no exceptions for certain physical characteristics. Thus discharges from enclosed storage areas are also covered by today's rule (except as discussed above). EPA also disagrees with one comment asserting that small outside storage areas of finished products at industrial facilities should be excluded under the definition of associated with industrial activity. EPA believes that such areas are areas associated with industrial activity which Congress intended to be regulated under the CWA. As noted above, the legislative history refers to storage areas, without reference to whether they are covered or uncovered, or of a certain size.

The same language, in the legislative history cited above, was careful to state that the term "associated with industrial activity" does not include storm water "discharges associated with parking lots and administrative and employee buildings." To accommodate legislative intent, segregated storm water discharges from these areas will not be required to obtain a permit prior to October 1, 1992. Many commenters stated that this was an appropriate method in which to limit the scope of "associated with industrial activity." However, if a storm water discharge from a parking lot at an industrial facility is mixed with a storm water discharge "associated with industrial activity," the combined discharge is subject to permit application requirements for storm water discharges associated with industrial activity. EPA disagrees with some commenters who urged that office buildings and administrative parking lots should be covered if they are located at the plant site. EPA agrees with one commenter that inclusion of storm water discharge from these areas would be overstepping Congressional intent unless such are commingled with storm water discharges from the plant site. Several commenters requested that language be incorporated into the rule which establishes that storm water discharges from parking lots and administrative areas not be included in the definition of associated with industrial activity. EPA agrees and has retained language used in the proposal which addresses this distinction.

Storm water discharges from parking lots and administrative buildings along with other discharges from industrial lands that do not meet the regulatory definition of "associated with industrial activity" and that are segregated from such discharges may be required to obtain an NPDES permit prior to October 1, 1992, under certain conditions. For example, large parking facilities, due to their impervious nature may generate large amounts of runoff which may contain significant amounts of oil and grease and heavy metals which may have adverse impacts on receiving waters. The Administrator or NPDES State has the authority under section 402(p)(2)(E) of the amended CWA to require a permit prior to October 1, 1992, by designating storm water discharges such as those from parking lots that are significant contributors of pollutants or contribute to a water quality standard violation. EPA will address storm water discharges from lands used for industrial activity which do not meet the regulatory definition of "associated with industrial activity" in the section 402(p)(5) study to determine the appropriate manner to regulate such discharges.

Several commenters requested clarification that the definition does not include sheet flow or discharged storm water from upstream adjacent facilities that enters the land or comingles with discharge from a facility submitting a permit application. EPA wishes to clarify that operators of facilities are generally responsible for its discharge in its entirety regardless of the initial source of discharge. However, where an upstream source can be identified and permitted, the liability of a downstream facility for other storm water entering that facility may be minimized. Facilities in such circumstances may be required to develop management practices or other run-on/run-off controls, which segregates or otherwise prevents outside runoff from comingling with its storm water discharge. Some commenters expressed concern about other pollutants which may arrive on a facility's premises from rainfall. This comment was made in reference to runoff with a high or low pH. If an applicant has reason to believe that pollutants in its storm water discharge are from such sources, then that needs to be addressed in the permit application and brought to the attention of the permitting authority, which can draft appropriate permit conditions to reflect these circumstances.

EPA requested comments on clarifying the types of facilities that involve industrial activities and generate storm water. EPA preferred basing the clarification, in part, on the use of Standard Industrial Classification (SIC) codes, which have been suggested in comments to prior storm water rulemakings because they are commonly used and accepted and would provide definitions of facilities involved in industrial activity. Several commenters supported the use by EPA of Standard Industrial Classifications for the same reasons identified by EPA as a generally used and understood form of classification. It was also noted that using such a classification would allow targeting for special notification and educational mailings. Three municipalities and three State authorities commented that SICs were appropriate and endorsed their use as a sound basis for determining which industries are covered.

One municipality questioned how SIC classifications will be assigned to particular industries. SICs have descriptions of the type of industrial activity that is engaged in by facilities. Industries will need to assess for themselves whether they are covered by a listed SIC and submit an application accordingly. Another commenter questioned if Fed-

Received
August 26, 2011
Commission on
State Mandates

eral facilities that do not have an SIC code identification are required to file a permit application. Federal facilities will be required to submit a permit application if they are engaged in an industrial activity that is described under ß 122.26(b)(14). The definition of industrial activity incorporates language that requires Federal facilities to submit permit applications in such circumstances. The language has been further clarified to include State and municipal facilities.

EPA requested comments on the scope of the definition (types of facilities addressed) as well as the clarity of regulation. EPA identified the following types of facilities in the proposed regulation as those facilities that would be required to obtain permits for storm water discharges associated with industrial activity:

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are also identified under category (xi) of this paragraph). One commenter (a municipality) agreed with EPA that these industries should be addressed in this rulemaking. No other comments were received on this category. EPA agrees with this comment since these facilities are those that Congress has required EPA to examine and regulate under the CWA with respect to process water discharges. The industries in these categories have generally been identified by EPA as the most significant dischargers of process wastewaters in the country. As such, these facilities are likely to have storm water discharges associated with industrial activity for which permit applications should be required.

One commenter stated that because oil and gas producers are subject to effluent guidelines, EPA is disregarding the intent of Congress to exclude facilities pursuant to section 402(1). EPA disagrees with this comment. EPA is not prohibited from requiring permit applications from industries with storm water discharge associated with industrial activity. EPA is prohibited only from requiring a permit for oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water that is not contaminated by contact with or has not come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations such discharges. In keeping with this requirement, EPA is requiring permit applications from oil and gas exploration, production, processing, or treatment operations, or transmission facilities that fall into a class of dischargers as described in ß 122.26(c)(iii).

(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283 and 285), 29, 311, 32 (except 323), 33, 3411, 373 and *(xi). Facilities classified as Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, 4221-25.* One large municipality and one industry agreed with EPA that facilities covered by these SICs should be covered by this rulemaking. Many commenters, however, took exception to including all or some of these industries. However as noted elsewhere these facilities are appropriate for permit applications.

One commenter stated that within certain SICs industries, such as textile manufacturers use few chemicals and that there is little chance of pollutants in their storm water discharge. EPA agrees that some industries in this category are less likely than others to have storm water discharges that pose significant risks to receiving water quality. However, there are many other activities that are undertaken at these facilities that may result in polluted storm water. Further, the CWA is clear in its mandate to require permit applications for discharges associated with industrial activity. Excluding any of the facilities under these categories, except where the facility manufacturing plant more closely resembles a commercial or retail outlet would be contrary to Congressional intent.

One State questioned the inclusion of facilities identified in SIC codes 20-39 because of their temporary and transient nature or ownership. Agency disagrees that simply because a facility may transfer ownership that storm water quality concerns should be ignored. If constant ownership was a condition precedent to applying for and obtaining a permit, few if any facilities would be subject to this rulemaking.

One State estimated that the proposed definition would lead to permits for 18,000 facilities in its State. Consequently this commenter recommended that the facilities under SIC 20-39 should be limited to those facilities that have to report under section 313 of title III, Superfund Amendments and Reauthorization Act. However, as noted by another commenter, limiting permit requirements to these facilities would be contrary to Congressional intent. While use of chemicals at a facility may be a source of pollution in storm water discharges, other every day activities at an industrial site and associated pollutants such as oil and grease, also contribute to the discharge of pollutants that are to be addressed by the CWA and these regulations. While the number of permit applications may number in the thousands, EPA intends for group applications and general permits to be employed to reduce the administrative burdens as greatly as possible.

Received
August 26, 2011
Commission on
State Mandates

Two commenters felt the permit applications should be limited to all entities under SIC 20-39. EPA disagrees that all the industrial activities that need to be addressed fall within these SICs. Discharges from facilities under paragraphs (i) through (xi) such as POTWs, transportation facilities, and hazardous waste facilities, are of an industrial nature and clearly were intended to be addressed before October 1, 1992.

Two commenters stated that SIC 241 should be excluded in that logging is a transitory operation which may occur on a site for only 2-3 weeks once in a 20-30 year period. It was perceived that delays in obtaining permits for such operations could create problems in harvest schedule and mill demand. This commenter stated that runoff from such operations should be controlled by BMPs in effect for such industries and that such a permit would not be practical and would be cost prohibitive.

EPA agrees with the commenter that this provision needs clarification. The existing regulations at 40 CFR 122.27 currently define the scope of the NPDES program with regard to silvicultural activities. 40 CFR 122.27(b)(1) defines the term "silvicultural point source" to mean any discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. Section 122.27(b)(1) also excludes certain sources. The definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under NPDES. EPA does not intend to change the scope of 40 CFR 122.27 in this rulemaking. Accordingly, the definition of "storm water discharge associated with industrial activity" does not include sources that may be included under SIC 24, but which are excluded under 40 CFR 122.27. Further, EPA intends to examine the scope of the NPDES silvicultural regulations at 40 CFR 122.27 as it relates to storm water discharges in the course of two studies of storm water discharges required under section 402(p)(5) of the CWA.

In response to one comment, EPA intends that the list of applicable SICs will define and identify what industrial facilities are required to apply. Facilities that warehouse finished products under the same code at a different facility from the site of manufacturing are not required to file a permit application, unless otherwise covered by this rulemaking.

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(l) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990 and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations. Several commenters urged that Congress intended to require permits or permit applications only for the manufacturing sector of the oil and gas industry (or those activities that designated in SIC 20 through 39). EPA disagrees with this argument. The fact that Congress used the language cited above and not the appropriate the SIC definition explicitly does not indicate that a broader definition or less exclusive definition was contemplated. According to these comments, all storm water discharges from oil and gas exploration and production facilities would be exempt from regulation. However, EPA is convinced that a facility that is engaged in finding and extracting crude oil and natural gas from subsurface formations, separating the oil and gas from formation water, and preparing that crude oil for transportation to a refinery for manufacturing and processing into refined products, will have discharges directly relating to the processing or raw material storage at an industrial plant and are therefore discharges associated with industrial activity.

For further clarification EPA is intending to focus only on those facilities that are in SIC 10-14. Furthermore, in response to several comments, this rulemaking will require permit applications for storm water discharges from currently inactive petroleum related facilities within SIC codes 10-14, if discharges from such facilities meet the requirements as described in section VI.F.7.a. and ß 122.26(c)(1)(iii). Inactive facilities will have storm water associated with industrial activity irrespective of whether the activity is ongoing. Congress drew no distinction between active and inactive facilities in the statute or in the legislative history.

(iv) Hazardous waste treatment, storage, or disposal facilities that are operating under interim status or a permit under Subtitle C of the Resource, Conservation and Recovery Act. One commenter believed that all RCRA and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) facilities should be specifically identified using SIC codes for further clarification. EPA considers this to be unnecessarily redundant, since the RCRA/CERCLA identification is sufficient.

Received
August 26, 2011
Commission on
State Mandates

Several industries asserted that storm water discharge from landfills, dumps, and land application sites, properly closed or otherwise subject to corrective or remedial actions under RCRA, should not be included in the definition. One commenter noted that the runoff from these areas is like runoff from undeveloped areas. One commenter also concluded that landfills, dumps, and land application sites should also be excluded if they are properly maintained under RCRA.

One commenter also rejected the idea of requiring permits from all active and inactive landfills and open dumps that have received any industrial wastes, and subtitle C facilities. This commenter felt that these facilities were already adequately covered under RCRA.

Two industry commenters felt that it would be redundant to have hazardous waste facilities regulated by RCRA and the NPDES storm water program. One felt this was especially so if there are current pretreatment standards.

The Agency disagrees that all activities that may contribute to storm water discharges at RCRA subtitle C facilities are being fully controlled and that requiring NPDES permits for storm water discharges at RCRA subtitle C facilities is redundant. First, the vast majority of permitted hazardous waste management facilities are industrial facilities involved in the manufacture or processing of products for distribution in commerce. Their hazardous waste management activities are incidental to the production-related activities. While RCRA subtitle C regulations impose controls in storm water runoff from hazardous waste management units and require cleanup of releases of hazardous wastes, they generally do not control non-systematic spills or process. These releases, from the process itself or the storage of raw materials or finished products are a potential source of storm water contamination. In addition, RCRA subtitle C (except via corrective action authority) does not address management of "non hazardous" industrial wastes, which nevertheless could also potentially contaminate storm water runoff.

Second, at commercial hazardous waste management facilities, the RCRA subtitle C permitting requirements and management standards do not control all releases of potentially toxic materials. For example, some permitted commercial treatment facilities may store and use chemicals in the treatment of RCRA hazardous wastes. Releases of these treatment chemicals from storage areas are a potential source of storm water contamination.

Finally, many RCRA subtitle C facilities have inactive Solid Waste Management Units (SWMU's) on the facility property. These SWMU's may contain areas on the land surface that are contaminated with hazardous constituents. RCRA requires that hazardous waste management facilities must investigate these areas of potential contamination, and then perform corrective action to remediate any SWMU's that are of concern. However, the corrective action process at these facilities will not be completed for a number of years due to the complexity of the cleanup decisions, and due to the fact that many hazardous waste management facilities do not yet have RCRA permits. Until corrective action has been completed at all such subtitle C facilities, SWMU's are a potential source of storm water contamination that should be addressed under the NPDES program. Finally, under section 1004(27) of RCRA, all point source discharges, including those at RCRA regulated facilities, are to be regulated by the NPDES program. Thus, there is no concern of regulatory overlap, and to the extent that the storm water regulations are effectively implemented, it will help address these units in a way that alleviates the need for expensive corrective action in the future.

(v) Landfills, land application sites, and open dumps that receive or have received industrial wastes and that are subject to regulation under subtitle D of RCRA. EPA received numerous comments supporting the regulation of municipal landfills which receive industrial waste and are subject to regulation under subtitle D of RCRA. EPA agrees with these comments. These industries have significant potential for storm water discharges that can adversely affect receiving water.

Two States argued that landfills should be addressed under the non-point source program. EPA disagrees that the non-point source program is sufficient for addressing these facilities. Further, addressing a class of facilities under the non-point source program does not exempt storm water discharges from these facilities from regulation under NPDES. The CWA requires EPA to promulgate regulations for controlling point source discharges of storm water from industrial facilities. Point sources from landfills consisting of storm water are such discharges requiring an NPDES permit. Several commenters argued that these discharges are adequately addressed by RCRA and that regulating them under this storm water rule would be redundant. However, as discussed above, RCRA expressly does not regulate point source discharges subject to NPDES permits. Given the nature of these facilities and of the material stored or disposed, EPA believes storm water permits are necessary. Similarly EPA rejects the comment that storm water discharges from these facilities are already adequately regulated by State authority. Congress has mandated that storm water discharges associated with industrial activity have an NPDES permit.

Received
August 26, 2011
Commission on
State Mandates

One commenter wanted EPA to define by size what landfills are covered. In response, it is the intent of these regulations to require permit applications from all landfills that receive industrial waste. Storm water discharges from such facilities are addressed because of the nature of the material with which the storm water comes in contact. The size of facility will not dictate what type of waste is exposed to the elements.

One commenter requested that the definition of industrial wastes be clarified. For the purpose of this rule, industrial waste consists of materials delivered to the landfill for disposal and whose origin is any of the facilities described under ß 122.26(b)(14) of this regulation.

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093. One commenter suggested that the recycling of materials such as paper, glass, plastics, etc., should not be classified as an industrial activity. EPA disagrees that such facilities should be excluded on that basis. These facilities may be considered industrial, as are facilities that manufacture such products absent recycling.

Other facilities exhibit traits that indicate industrial activity. In junkyards, the condition of materials and junked vehicles and the activities occurring on the yard frequently result in significant losses of fluids, which are sources of toxic metals, oil and grease and polychlorinated aromatic hydrocarbons. Weathering of plated and non-plated metal surfaces may result in contributions of toxic metals to storm water. Clearly such facilities cannot be classified as commercial or retail.

One municipality felt that "significant recycling" should be defined or clarified. EPA agrees that the proposed language is ambiguous. It has been clarified to require permit applications from facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093. These SIC codes describe facilities engaged in dismantling, breaking up, sorting, and wholesale distribution of motor vehicles and parts and a variety of other materials. The Agency believes these SIC codes clarify the term significant recycling.

One municipality stated that regulation of these facilities under NPDES would be duplicative if they are publicly owned facilities. One State expressed the view that automobile junkyards, salvage yards could not legitimately be considered industrial activity. As noted above, EPA disagrees with these comments. Facilities that are actively engaged in the storage and recycling of products including metals, oil, rubber, and synthetics are in the business of storing and recycling materials associated with or once used in industrial activity. These activities are not commercial or retail because they are engaged in the dismantling of motors for distribution in wholesale or retail, and the assembling, breaking up, sorting, and wholesale distribution of scrap and waste materials, which EPA views as industrial activity. Further, being a publicly owned facility does not confer non-industrial status.

(vii) Steam electric power generating facilities, including coal handling sites, and onsite and offsite ancillary transformer storage areas. Most of the comments were against requiring permit applications for onsite and offsite ancillary transformer facilities. One commenter stated that these transformers did not leak in storage and if there were leakage problems in handling transformers, such leaks were subject to Federal and State spill clean-up procedures. The same commenter suggested that if EPA required applications from such facilities that it exclude those that have regular inspections, management practices in place, or those that store 50 transformers at any one time.

EPA agrees that such facilities should not be covered by today's rule. As one commenter noted, the Toxic Substances Control Act (TSCA) addresses pollutants associated with transformers that may enter receiving water through storm water discharges. EPA has examined regulations under TSCA and agrees that regulation of storm water discharges from these facilities should be the subject of the studies being performed under section 402(p)(5), rather than regulations established by today's rule. Under TSCA, transformers are required to be stored in a manner that prevents rain water from reaching the stored PCBs or PCB items. 40 CFR 761.65(b)(1)(i). EPA considers transformer storage to be more akin to retail or other light commercial activities, where items are inventoried in buildings for prolonged periods for use or sale at some point in the future, and where there is no ongoing manufacturing or other industrial activity within the structure.

One commenter stated that this category of industries should be loosened so that all steam electric facilities are addressed -- oil fired and nuclear. EPA believes that the language as proposed broadly defines the type of industrial activity addressed without specifying each mode of steam electric production. One commenter noted that the EPA has no authority under the CWA (*Train* v. *CPIR, Inc.,* 426 U.S. 1 (1976) to regulate the discharge of source, special nuclear and by-product materials which are regulated under the Atomic Energy Act. EPA agrees permit applications may not

Received
August 26, 2011
Commission on
State Mandates

address those aspects of such facilities, however the facility in its entirety may not necessarily be exempt. A permit application will be appropriate for discharges from non-exempt categories.

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, material handling facilities, equipment cleaning operations or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, or which are identified in another subcategory of facilities under EPA's definition of storm water discharges associated with industrial activity. One commenter requested clarification of the terms "vehicle maintenance." Vehicle maintenance refers to the rehabilitation, mechanical repairing, painting, fueling, and lubricating of instrumentalities of transportation located at the described facilities. EPA is declining to write this definition into the regulation however since "vehicle maintenance" should not cause confusion as a descriptive term. One commenter wanted railroad tracks where rail cars are set aside for minor repairs excluded from regulation. In response, if the activity involves any of the above activities then a permit application is required. Train yards where repairs are undertaken are associated with industrial activity. Train yards generally have trains which, in and of themselves, can be classified as heavy industrial equipment. Trains, concentrated in train yards, are diesel fueled, lubricated, and repaired in volumes that connote industrial activity, rather than retail or commercial activity.

One commenter argued that if gasoline stations are not considered for permitting, then all transportation facilities should be exempt. EPA disagrees with the thrust of this comment. Transportation facilities such as bus depots, train yards, taxi stations, and airports are generally larger than individual repair shops, and generally engage in heavier more expansive forms of industrial activity. In keeping with Congressional intent to cover all industrial facilities, permit applications from such facilities are appropriate. In contrast, EPA views gas stations as retail commercial facilities not covered by this regulation. It should be noted that SIC classifies gas stations as retail.

(ix) POTW lands used for land application treatment technology/sludge disposal, handling or processing areas, and chemical handling and storage areas. One commenter wanted more clarification of the term POTW lands. Another commenter requested clarification of the terms sludge disposal, sludge handling areas, and sludge processing areas. One State recommended that a broader term than POTW should be used. EPA notes that on May 2, 1989, it promulgated NPDES Sewage Sludge Permit Regulations; State Sludge Management Program Requirements at 40 CFR part 501. This regulation identified those facilities that are subject to section 405(f) of the CWA as "treatment works treating domestic sewage."

In response to the above comments, EPA has decided to use this language to define what facilities are required to apply for a storm water permit. Under this rulemaking "treatment works treating domestic sewage," or any other sewage sludge or wastewater treatment device or system used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge, with a design flow of 1.0 mgd or more, or facilities required to have an approved pretreatment program under 40 CFR part 403, will be required to apply for a storm water permit. However, permit applications will not be required to address land where sludge is beneficially reused such as farm lands and home gardens or lands used for sludge management that are not physically located within the confines (offsite facility) of the facility or where sludge is beneficially reused in compliance with section 405 of the Clean Water Act (proposed rules were published on February 6, 1989, at 54 FR 5746). EPA believes that such activity is not "industrial" since it is agricultural or domestic application (non-industrial) unconnected to the facility generating the material.

EPA received many comments on the necessity and appropriateness of requiring permit applications for storm water discharges from POTW lands. It was anticipated by numerous commenters that the above cited sludge regulations would adequately address storm water discharges from lands where sludge is applied. However, the sewage sludge regulations do not directly address NPDES permit requirements for storm water discharges from POTW lands and related areas to the extent required by today's rulemaking; the regulations cover only permits for use or disposal of sludge. Also, the regulations proposed on February 4, 1989, cover primarily the technical standards for the composition of sewage sludge which is to be used or disposed. They do not include detailed permitting requirements for discharges of storm water from lands where sludge has been applied to the land. To that extent, EPA is not persuaded by these commenters that POTWs and POTW lands should be excluded from these storm water permit application requirements.

Two commenters noted that some States already regulate sludge use or disposal activities substantially and that EPA should refrain from further regulation. EPA disagrees that this is a basis for excluding facilities from Federal requirements. Notwithstanding regulations in existence under State law, EPA is required by the CWA to promulgate regu-

Received
August 26, 2011
Commission on
State Mandates

lations for permit application for storm water associated with industrial activity. Under the NPDES program, States are able to promulgate more rigorous requirements. However a minimum level of control is required under Federal law. One commenter also indicated that a State's sludge land application sites must follow a well defined plan to ensure there is no sludge related runoff. Notwithstanding that a State may require storm water controls for sludge land applications, as noted above, EPA is required to promulgate regulations requiring permit applications from appropriate facilities. EPA views facilities such as waste treatment plants that engage in on-site sludge composting, storage of chemicals such as ferric chloride, alum, polymers, and chlorine, and which may experience spills and bubbleovers are suitable candidates for storm water permits. Facilities using such materials are not characteristic of commercial or retail activities. Use and storage of chemicals and the production of material such as sludge, with attendant heavy metals and organics, is activity that is industrial in nature. The size and scope of activities at the facility will determine the extent to which such activities are undertaken and such materials used and produced at the facility. Accordingly, EPA believes limiting the facilities covered under this category to those of 1.0 mgd and those covered under the industrial pretreatment program is appropriate.

To the extent that permit applicants are already required to employ certain management practices regarding storm water, these may be incorporated into permits and permit conditions issued by Federal and State permitting authorities. EPA has selected facilities identified under 40 CFR part 501 (*i.e.* those with a design flow of 1.0 mgd or more or those required to have an approved pretreatment program) since these facilities will have largest contribution of industrial process discharges. Sludge from such facilities will contain higher concentrations of heavy metal and organic pollutants.

One commenter stated that sludge disposal is a public activity that should be addressed in a public facility's storm water management program under a municipal storm water management program. EPA disagrees. Industrial facilities, whether publicly owned or not, are required to apply for and obtain permits when they are designated as industrial activity.

Another comment stated that a permit should not be required for facilities that collect all runoff on site and treat it at the same POTW. EPA believes that a permit application should be required from such facilities. However, the above practice can be incorporated as a permit condition for such a facility. One commenter stated storm water from sludge and chemical handling areas can be routed through the headworks of the POTW. The agency agrees that this may be an appropriate management practice for POTWs as long as other NPDES regulatory requirements are fulfilled with regard to POTWs.

(x) Construction activities, including clearing, grading and excavation activities except operations that result in the disturbance of less than five acre total land area which are not part of a larger common plan of development or sale. EPA addresses whether these facilities should be covered by today's rule in section VI.F.8.

The December 7, 1988, proposal also requested comments on including the following other categories of discharges in the definition of industrial activities: (xii) Automotive repair shops classified as Standard Industrial Classification 751 or 753; (xiii) Gasoline service stations classified as Standard Industrial Code 5541; (xiv) Lands other than POTW lands (offsite facilities) used for sludge management; (xv) Lumber and building materials retail facilities classified as Standard Industrial Classification 5211; (xvi) Landfills, land application sites, and open dumps that do not receive industrial wastes and that are subject to regulation under subtitle D of RCRA; (xvii) Facilities classified as Standard Industrial Classification 46 (pipelines, except natural gas), and 492 (gas production and distribution); (xviii) Major electrical powerline corridors.

EPA received numerous comments on whether to require permit applications for these particular facilities. The December 7, 1988, proposal reflected EPA's intent not to require permits for these facilities, but rather to address these facilities in the two studies required by CWA sections 402(p)(5) and (6). After reviewing the comments on this issue, EPA believes that these facilities should be addressed under these sections of the CWA. Most of these facilities are classified as light commercial and retail business establishments, agricultural, facilities where residential or domestic waste is received, or land use activities where there is no manufacturing. It should be noted that although EPA is not requiring the facilities identified as categories (xii) to (xviii), in the December 7, 1988, proposal to apply for a permit application under this rulemaking, such facilities may be designated under section 402(p)(2)(E) of the CWA.

Three commenters recommended that EPA clarify that non-exempt Department of Energy and Department of Defense facilities should be covered by the storm water regulation. The regulation clearly states that Federal Facilities that are engaged in industrial activity (*i.e.* those activities in ß 122.26(b)(14)(i)-(xi)) are required to submit permit applications. Those applying for permits covering Federal facilities should consult the Standard Industrial Classifications for further clarification.

Received
August 26, 2011
Commission on
State Mandates

One commenter questioned how EPA intended to regulate municipal facilities engaged in industrial activities. Municipal facilities that are engaged in the type of industrial activity described above and which discharge into waters of the United States or municipal separate storm sewer systems are required to apply for permits. These facilities will be covered in the same manner as other industrial facilities. The fact that they are municipally owned does not in any way exclude them from needing permit applications under this rulemaking.

One commenter suggested exempting those facilities that have total annual sales less than five million dollars or occupy less than five acres of land. Another commenter thought that all minor permittees should be exempt. EPA believes that the quality of storm water and the extent to which discharges impact receiving water is not necessarily related to the size of the facility or the dollar value of its business. What is important in this regard, is the extent to which steps are taken at facilities to curb the quantity and type of material that may pollute storm water discharges from these facilities. Therefore EPA has not excluded facilities from permitting on such a basis. This same commenter stated that the proposed rules should not address facilities with multiple functions (industrial and retail). EPA disagrees. If a facility engages in activity that is defined in paragraphs (i) through (xi) above, it is required to apply for a permit regardless of the fact that it also has a retail element. Such facilities need only submit a permit application for the industrial portion of the facility (as long as storm water from the non-industrial portion is segregated, as discussed above). This commenter also felt that more studies needed to be undertaken to determine the best way to regulate industries. EPA agrees that storm water problems need further study and for that reason EPA has devoted substantial manpower and resources to complete comprehensive studies under section 402(p)(5), while also addressing industrial sources that need immediate attention under this rulemaking.

One commenter requested that EPA give examples of storm water discharges from each of the facilities that have been designated for submitting permit applications. Agency believes that this is unnecessary and impractical since every facility, regardless of the type of industry, will have different terrain, hydrology, weather patterns, management practices and control techniques. However, EPA intends to issue guidance on filing permit applications for storm water discharges from industrial facilities which details how an industry goes about filing an industrial permit and dealing with storm water discharges.

Today's rulemaking for storm water discharges associated with industrial activity at ß 122.26(c)(1)(i) includes special conditions for storm water discharges originating from mining operations, oil or gas operations (ß 122.26(c)(1)(iii)), and from the construction operations listed above (ß 122.26(c)(1)(ii)). These requirements are discussed in more detail in section VI.F.7 and section VI.F.9 of today's notice.

3. Individual Application Requirements

Today's rule establishes individual and group permit application requirements for storm water discharges associated with industrial activity. These requirements will address facilities precluded from coverage under the general permits to be proposed and promulgated by EPA in the near future. EPA considers it necessary to obtain the information required in individual permit applications from certain facilities because of the nature of their industrial activity and because of existing institutional mechanisms for issuing and tracking NPDES permits. Furthermore, some States will not have general permitting authority. Facilities located in such States will be required to submit individual applications or participate in a group application. The following response to comments received on these requirements pertains to these facilities.

Under the September 26, 1984, regulation operators of Group I storm water discharges were required to submit NPDES Form 1 and Form 2C permit applications. In response to post-regulation comments received on that rule, EPA proposed new permit application requirements (March 7, 1985, (50 FR 9362) and August 12, 1985, (50 FR 32548)) which would have decreased the analytical sampling requirements of the Form 2C and provided procedures for group applications. Passage of the WQA in 1987 gave the EPA additional time to consider the appropriate permit application requirements for storm water discharges. On December 7, 1988, application requirements were proposed and numerous comments were received. Based upon these comments, modifications and refinements have been made to the industrial storm water permit application.

Some commenters expressed the view that the permit application requirements are too burdensome, require too much paperwork, are of dubious utility, and focus too greatly on the collection of quantitative data. EPA disagrees. In comparison to prior approaches for permitting storm water discharges and other existing permitting programs, EPA has streamlined the permit application process, limited the quantitative data requirements, and required narrative information that will be used to determine permit conditions that relate to the quality of storm water discharge. To the extent that EPA needs non-quantitative information to develop appropriate permit conditions, EPA disagrees with the view of

Received
August 26, 2011
Commission on
State Mandates

some commenters that the information required is excessive. In response to comments on earlier rulemakings and a comment received on the December 7, 1988, proposal (stressing that the emphasis should be on site management, rather than monitoring, sampling, and reporting) EPA has shifted the emphasis of the permit application requirements for storm water discharges associated with industrial activity from the existing requirements for collection of quantitative data (sampling data) in Form 2C towards collection of less quantitative data supplemented by additional information needed for evaluation of the nature of the storm water discharges.

The permit application requirements proposed for storm water discharges reduce the amount of quantitative data required in the permit application and exempt discharges which contain entirely storm water (*i.e.* contain no other discharge that, without the storm water component, would require an NPDES permit), from certain reporting requirements of Form 2C. The proposed modifications also would exempt applicants for discharges which contain entirely storm water from several non-quantitative information collection provisions currently required in the Form 2C. The proposed modifications would rely more on descriptive information for assessing impacts of the storm water discharge. One commenter proposed that information that the applicant has submitted for other permits be incorporated by reference into the storm water permit application. EPA disagrees that incorporation by reference is appropriate. The permitting authority will need to have this information readily available for evaluating permit application and permit conditions. Furthermore, EPA feels that the applicant is in the best position to provide the information and verify its accuracy. However, if the applicant has such information and it accurately reflects current circumstances, then the applicant can rely on the information for meeting the information requirements of the application. Another commenter suggested that EPA should only require the information in ß 122.26(c)(1) (A) and (B) (*i.e.*, the requirement for a topographic map indicating drainage areas and estimate of impervious areas and material management practices). As explained in greater detail below, EPA is convinced that some quantitative data and the other narrative requirements are necessary for developing appropriate permit conditions.

Form 2F addressing permit applications for storm water discharges associated with industrial activity is included in today's final rule. A complete permit application for discharges composed entirely of storm water, will be comprised of Form 2F and Form 1. Operators of discharges which are composed of both storm water and non-storm water will submit, where required, a Form 1, an entire Form 2C (or Form 2D) and Form 2F when applying. In this case, the applicant will provide quantitative data describing the discharge during a storm event in Form 2F and quantitative data describing the discharge during non-storm events in Form 2C. Non-quantitative information reported in the Form 2C will not have to be reported again in the Form 2F.

Under today's rule, Form 2F for storm water discharges associated with industrial activity would not require the submittal of all of the quantitative information required in Form 2C, but would require that quantitative data be submitted for:

-- Any pollutant limited in an effluent guideline for an industrial applicant's subcategory;

-- Any pollutant listed in the facility's NPDES permit for its process wastewater;

-- Oil and grease, TSS, COD, pH, BOD5, total phosphorus, total Kjeldahl nitrogen; nitrate plus nitrite nitrogen; and

-- Any information on the discharge required under 40 CFR 122.2l(g)(7) (iii) and (iv).

In order to characterize the discharge(s) sampled, applicants need to submit information regarding the storm event(s) that generated the sampled discharge, including the date(s) the sample was taken, flow measurements or estimates of the duration of the storm event(s) sampled, rainfall measurements or estimates from the storm event(s) which generated the sampled runoff, and the duration between the storm event sampled and the end of the previous storm event. Information regarding the storm event(s) sampled is necessary to evaluate whether the discharge(s) sampled was generally representative of other discharges expected to occur during storm events and to characterize the amount and nature of runoff discharges from the site.

One commenter stated that the quantitative information should be limited to those pollutants that are expected to be known to the applicant. EPA believes this would be inappropriate since there will be no way of determining initially whether these pollutants are present despite the expectations of the applicant. Once the data is provided, permits can be drafted which address specific pollutants. This rulemaking requires that the applicant test for oil and grease, COD, pH, BOD5, TSS, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen and total phosphorus. Oil and grease and TSS are a common component of storm water and can have serious impacts on receiving waters. Oxygen demand (COD and BOD5) will help the permitting authority evaluate the oxygen depletion potential of the discharge. BOD5 is the most

Received
August 26, 2011
Commission on
State Mandates

commonly used indicator of potential oxygen demand. COD is considered a more inclusive indicator of oxygen demand, especially where metals interfere with the BOD5 test. The pH will provide the permitting authority with important information on the potential availability of metals to the receiving flora, fauna and sediment. Total Kjeldahl nitrogen, nitrate plus nitrite nitrogen and total phosphorus are measures of nutrients which can impact water quality. Because this data is useful in developing appropriate permit conditions, EPA disagrees with the argument made by one commenter that quantitative data requirements should be a permit condition and not part of the application process.

In the proposed rule, the Agency used total nitrogen as a parameter. This has been changed to total Kjeldahl nitrogen and nitrate plus nitrite nitrogen for clarity.

Today's rule defines sampling at industrial sites in terms of sampling for those parameters that have effluent limits in existing NPDES permits, as well as for any other conventional or nonconventional parameter that might be expected to be found at the outfall. Comments on the appropriateness of the defined parameters were solicited by the proposal. Numerous commenters maintained that either the parameter list be made industry specific, or that pollutant categories not detected in the initial screen be exempted from further testing. Some suggested that only conventional pollutants, inorganics, and metals be sampled unless reason for others is found.

In terms of specific water quality parameters, it was recommended that surfactants not be tested for unless foam is visible. One commenter also suggested that fecal coliform sampling is inappropriate for industrial permits applications. One commenter favored testing for TOC instead of VOC. In response, VOC has been eliminated from the list of parameters because it will not yield specific usable data. VOC is not specifically required in any sampling in today's rule, except where priority pollutant scans are required.

Some recommended that procedures be modified to facilitate quicker, less expensive lab analyses. Concern was also raised that industry might be required to collect its own rainfall data if there is no nearby observation station. Some commenters stated that EPA should not allow automatic sampling for either biological or oil and grease sampling due to the potential for contamination in sampling equipment.

In response, EPA believes that the sampling requirements for industry in today's rule are reasonable and not burdensome. These requirements address parameters that have effluent limits in existing NPDES permits, as well as for any other conventional or nonconventional parameter that might be expected to be found at the applicants outfall. Under this procedure both industry-specific and site-specific contaminants are already identified in the existing permit. Whether all these parameters need to be made a part of any discharge characterization plans, under the terms of the permit, will be a case-by-case determination for the permitting authority. EPA maintains that the test for surfactants (if in effluent guidelines or in the facility's NPDES permit for process water) is justifiable even when a foam is not obvious at the outfall. The presence of detergents in storm water may be indicated by foam, but the absence of foam does not indicate that detergents are not present.

EPA requested comments on fecal coliform as a parameter. Fecal coliform was included on the list as an indicator of the presence of sanitary sewage. In large concentrations, fecal coliform may be an effective indicator of sanitary sewage as opposed to other animal wastes. EPA believes that sanitary cross connections will also be found at industrial facilities. Furthermore, the test for fecal coliform is an inexpensive test and its inclusion or exclusion should make little impact financially on the individual application costs. Sampling for volatile organic carbon shall be accomplished when required, as it is an appropriate indicator of industrial solvents and organic wastes.

In response to comments, EPA acknowledges that there are certain pollutants that are capable of leaving residues in automatic sampling devices that will potentially contaminate subsequent samples. In these cases, such as for biological monitoring, if such a problem is perceived to exist and it is expected that the contaminant will render the subsequent samples unusable, manual grab samples may be needed. This would include grab samples for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, fecal coliform, and fecal streptococcus. EPA is not disallowing the use of automatic sampling because of possible contamination, as this type of sampling may be the best method for obtaining the necessary samples from a selected storm events.

In addition to the conventional pollutants listed above, this final rule requires applicants, when appropriate, to sample other pollutants based on a consideration of site-specific factors. These parameters account for pollutants associated with materials used for production and maintenance, finished products, waste products and non-process materials such as fertilizers and pesticides that may be present at a facility. Applicants must sample for any pollutant limited in an effluent guideline applicable to the facility or limited in the facility's NPDES permit. These pollutants will generally be

Received
August 26, 2011
Commission on
State Mandates

associated with the facility's manufacturing process or wastes. Other process and non-process related pollutants, will be addressed by complying with the requirements of 40 CFR 122.21(g)(7) (iii) and (iv).

Section 122.21(g)(7)(iii) requires applicants to indicate whether they know or have reason to believe that any pollutant listed in Table IV (conventional and nonconventional pollutants) of appendix D to 40 CFR part 122 is discharged. If such a pollutant is either directly limited or indirectly limited by the terms of the applicant's existing NPDES permit through limitations on an indicator parameter, the applicant must report quantitative data. For pollutants that are not contained in an effluent limitations guideline, the applicant must either report quantitative data or describe the reasons the pollutant is expected to be discharged. With regard to pollutants listed in Table II (organic pollutants) or Table III (metals, cyanide and total phenol) of appendix D, the applicant must indicate whether they know or have reason to believe such pollutants are discharged from each outfall and, if they are discharged in amounts greater than 10 parts per billion (ppb), the applicant must report quantitative data. An applicant qualifying as a small business under 40 CFR 122.21(g)(8), (*e.g.,* coal mines with a probable total annual production of less than 100,000 tons per year or, for all other applicants, gross total annual sales averaging less than $100,000 per year (in second quarter 1980 dollars)), is not required to analyze for pollutants listed in Table II of appendix D (the organic toxic pollutants).

Section 122.21(g)(7)(iv) requires applicants to indicate whether they know or have reason to believe that any pollutant in Table V of appendix D to 40 CFR part 122 (certain hazardous substances) is discharged. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged and report any existing quantitative data it has for the pollutant.

When collecting data for permit applications, applicants may make use of 40 CFR 122.2l(g)(7), which provides that "when an applicant has two or more outfalls with substantially identical effluents, the Director may allow the applicant to test only one outfall and report that the quantitative data also applies to the substantially identical outfalls." Where the facility has availed itself of this provision, an explanation of why the untested outfalls are "substantially identical" to tested outfalls must be provided in the application. Where the amount of flow associated with the outfalls with substantially identical effluent differs, measurements or estimates of the total flow of each of the outfalls must be provided. Several commenters stated that the time and expense associated with sampling and analysis would be saved if the applicant was able to pick substantially identical outfalls without prior approval of the permitting authority. EPA disagrees that this would be an appropriate devolution of authority to the permit applicant. The permitting authority needs to ensure that these outfalls have been grouped according to appropriate criteria (for example do the outfalls serve similar drainage areas at the facility). Furthermore, EPA is not requiring that the permit applicant engage in sampling to demonstrate that the outfalls are indeed substantially identical, because that would of course defeat the purpose of ß 122.21(g)(7). The procedure for establishing identical outfalls is not that onerous and provides a means for industry to save substantially on time and resources for sampling.

EPA proposed and requested comment on a requirement that the facility must sample a storm event that is typical for the area in terms of duration and severity. The storm event must be greater than 0.1 inches and must be at least 96 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. In general, variance of the parameters (such as the duration of the event and the total rainfall of the event) should not exceed 50 percent from the parameters of the average rainfall event in that area. EPA also requested comments on addressing snow melt events under this definition.

Commenters stated that: median or average rainfall is not an acceptable approach; the minimum depth and duration of rainfall must be specified; the allowable 50% variation is questionable; the total depth of the storm is irrelevant; and the storm should be viewed based on the average intensity of the storm. One commenter suggested that using the median rainfall event would be a better approach than the average rainfall event.

Others insisted that "representative" or typical storms do not exist in semi-arid climates and that representative rainfall must be site-specific (regional) and seasonal. Several commenters contended that the requirement for 96 dry hours between events is not acceptable, with 48 and 72 hours identified as possible alternatives.

One commenter believed that a typical standard design storm, such as the 1-year, 24-hour, or 10-year, 1-hour, would be preferable. Another commenter felt that the storm event should be based on the rainfall required to generate a minimum discharge level. One commenter questioned whether the storm is to be sampled at all sites simultaneously.

To clarify its decision on what storm event should be sampled, EPA notes that its selection of the storm event considers both regional and seasonal variation of precipitation. This is evidenced in the rule with regard to sites in the municipal application (three events sampled), and in the requirements for industrial group applications (a minimum of two

Received
August 26, 2011
Commission on
State Mandates

applicants, or one applicant in groups of less than 10, to be represented in each precipitation zone (*see* section VI.F.4 below).

The definition of a 0.1 inch minimum was determined by NURP and other studies to be the minimum rainfall depth capable of producing the rainfall/runoff characteristics necessary to generate a sufficient volume of runoff for meaningful sample analysis. EPA believes by requiring the average storm to be used as the basis for sampling that depth, duration, and therefore average rainfall intensity are being regionally defined. The Agency has also added the option of using the median rainfall event instead of the average. The potential for monitoring events that may not meet this specification should be minimized by allowing the proposed 50 percent variation in rainfall depth and/or duration from event statistics. However, the 50 percent variation need only be met when possible. Further, there is flexibility in the rule where the Director may allow or establish site specific requirements such as the minimum duration between the previous measurable storm event and the storm event sampled, the amount of precipitation from the storm event to be sampled, and the form of precipitation sampled (snowmelt or rainfall). If data is obtained from a rain event that does not meet the criteria above, the Director has the discretion to accept the data as valid.

The December 7, 1988, proposal called for a 96-hour period between events of measurable rainfall, here defined as 0.1 inch, which provided a four day minimum for the accumulation of pollutants on the surface of the outfalls' tributary areas. The key word in the definition is "measurable", which means that the 96-hour period did not necessarily have to be dry, only that no cleansing rainfall (*i.e.* 0.1 inch rain event) has occurred. However, after reviewing comments on this issue EPA has decided to change the period to 72 hours. Many commenters indicated that 96 hours is too restrictive and that securing a sample under such circumstances would be unnecessarily difficult. EPA agrees that the quality or representativeness of the sample would not be adversely affected by this change.

EPA does not agree with comments that the requirement of a particular "design" storm would be appropriate. Many commenters have expressed concern that they might sample an event not meeting the requirements for industrial group applications as defined. Because there is no way to know with sufficient certainty beforehand that an upcoming event will approximate a one-year, twenty-four hour storm, many events would be unnecessarily sampled before this event is realized.

EPA does not intend that a municipality or industry be required to sample all required outfalls for a single storm. This would represent a unmanageable investment in equipment and manpower. In some areas, it may be necessary to sample multiple sites for a single event due to the irregularity of rainfall, but not all sites.

EPA described parameters for selecting storm events for sampling of municipal and industrial outfalls in the December 7, 1988, proposal. EPA has received several comments regarding the problems that rainfall measurement in general presents. A recurring comment relative to reporting rainfall, and in verifying that the storm itself is representative, deals with the spatial distribution of rainfall. The rainfall measured at an airport does not always represent rainfall at the site, particularly in summer months when thunderstorms are prevalent. One commenter stated that it would be easier to base the selected storm on either a minimum discharge, or on a discharge duration other than on the total precipitation, because these parameters are easily measured at the site and are not dependent on the airport gauges receiving the same rainfall as the site. A few commenters questioned how to determine typical storm characteristics. One commenter advised that NOAA rainfall reporting stations provide data that represent only daily rainfall totals, not storm event data. One commenter pointed out that the time frame of the sampling requirement does not consider that a particular region may be in the midst of a multi-year drought cycle, and that what little rainfall occurs may have uncharacteristically high levels of pollutants.

The type of rain event sampled is an important parameter in any attempt to characterize system-wide loads based on the sampling results. Rainfall gauges that report only event total depth will provide the information necessary to characterize most events, provided that a reasonable estimate of the event duration can be made. If simulation models are to be used in estimating system-wide loads, rainfall measurement based on time and depth of rainfall will be needed. If the recording stations are not believed to accurately reflect this distribution, then the data will need to be collected by the applicant at a location central to the tributary area of the outfall.

The rainfall data collected by NOAA are in most cases available in the form of hourly rainfall depths. This information can be analyzed to develop characteristic storm depths and durations. In some cases, this information has already been analyzed for many long term reporting stations by various municipalities, states, and universities. The results of these investigations should be available to the applicants.

Received
August 26, 2011
Commission on
State Mandates

EPA realizes that prolonged rainless periods occur for both semi-arid areas and areas experiencing droughts and that the first storm after a prolonged dry period may well not be representative of "normal" runoff conditions. In order for the appropriate system-wide characterization of loads to be made, data must be collected. With regard to the municipal permit application, today's rule states that runoff characterization data will be collected during three events at from five to ten sites. The rule gives the Director the flexibility of modifying these requirements.

EPA has defined the parameters for selecting the storm event to be sampled such that at the discretion of the Director, seasonal, including winter, sampling might be required. EPA has received several comments regarding the problems that snowmelt sampling may present. Several commenters are opposed to monitoring of snowmelt events. The reasons cited include equipment problems and the unreasonableness of expecting this sampling, because of temperatures and the time required for personnel to be waiting for events. A few comments addressed the issues of snow pack depth, ambient temperature, and solar radiation levels, and that the snow pack may filter suspended solids or refreeze such that final melting is uncharacteristically over-polluted relative to normal conditions. Another commenter contended that it is impossible to manage the melting process and therefore unreasonable to expect controls to be implemented relative to snowmelt. In essence, it is contended that there is no first discharge unless the snow pack depth is low and melts quickly.

A few commenters favor monitoring snowmelt, for precisely the same reason that most oppose it: that the runoff from snowmelt is the most polluted runoff generated in some areas on an annual basis. Where this is the case, sampling snowmelt should be undertaken in order to accurately assess impacts to receiving streams. EPA is confident that in areas where automated sampling cannot be relied upon, grab sampling can probably be performed because the nature of the snowmelt process tends to make the timing of samples less of a problem when compared to typical rainfall events. EPA disagrees that management practices, either at industrial facilities or with regard to municipalities, cannot address snowmelt. Some areas may need to reassess their salt application procedures. In addition retention and detention devices may address snowmelt, as well as erosion controls at construction sites. Thus, obtaining samples of snowmelt is appropriate to allow development of such permit conditions.

Today's rule also modifies the Form 2C requirements by exempting applicants from the requirements at ß 122.21(g)(2) (line drawings), (g)(4) (intermittent flows), (g)(7) (i), (ii), and (v) (various sampling requirements to characterize discharges) if the discharge covered by the application is composed entirely of storm water. Permit applications for discharges containing storm water associated with industrial activity would require applicants to provide other non-quantitative information which will aid permit writers to identify which storm water discharges are associated with industrial activity and to characterize the nature of the discharge.

Numerous comments were received regarding the requirement to submit a topographic map and site drainage map. Many of these comments offered alternatives to EPA's proposal. Two commenters suggested that a simple sketch of the site would be sufficient. Two commenters stated that one or the other should be adequate. One commenter believed that the drainage map was a good idea, but that the topographic map should be optional. Several commenters submitted that a topographic map was sufficient and that only SPCC plans or SARA submittals should supplement that. Another commenter argued that information relating to the location of the nearest surface water or drinking wells would be sufficient. Other commenters believed that a drainage map alone would indicate all relevant site specific information. Numerous commenters expressed concern that the drainage area map would be too detailed and that one which depicts the general direction of flow should be sufficient. Clarification was requested on whether the final rule would require the location of any drinking water wells. One commenter stated that a U.S.G.S. 7.5 quadrangle map will not illustrate drainage systems in all cases, and that therefore the requirement should be optional.

Several commenters agreed with EPA's proposal. One commenter maintained that drainage maps should be required from developments greater than three acres and from all individual applicants. Several commenters agreed with EPA's proposal that both maps should be provided, with arrows indicating site drainage and entering and leaving points. It was advised that drainage maps are useful in locating sources of storm water contamination, and it is useful to identify areas and activities which require source controls or remedial action. One commenter recommended that the map should extend far enough offsite to demonstrate how the privately owned system connects to the publicly owned system.

After considering the merits of all the comments and the reasons supporting EPA's proposal, EPA is convinced that a topographic map and a site drainage map are necessary components of the industrial application. Existing permit application regulations at 40 CFR 122.21(f)(7) require all permit applicants to submit as part of Form 1 a topographic map extending one mile beyond the property boundaries of the source depicting: the facility and each intake and discharge structure; each hazardous waste treatment, storage, or disposal facility; each well where fluids from the facility are in-

Received
August 26, 2011
Commission on
State Mandates

jected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in the map area in public records or otherwise known to the applicant within one-quarter mile of the facility property boundary. (*See* 47 FR 15304, April 8, 1982.) However, as indicated by the comments the information provided under ß 122.21(f)(7) is generally not sufficient by itself for evaluating the nature of storm water discharges associated with industrial activity.

As stated in comments, a drainage map can provide more important site specific information for evaluating the nature of the storm water discharge in comparison to existing requirements, which require a larger map with only general information. The volume of a storm water discharge and the pollutants associated with it will depend on the configuration and activities occurring at the industrial site. One commenter suggested that it would be appropriate to submit an aerial photograph of the site with all the topographic and drainage information superimposed on the photograph. EPA agrees that this may be an appropriate method of providing this information. EPA is not requiring a specific format for submitting this information.

EPA is also requiring that a narrative description be submitted to accompany the drainage map. The narrative will provide a description of on-site features including: existing structures (buildings which cover materials and other material covers; dikes; diversion ditches, etc.) and non-structural controls (employee training, visual inspections, preventive maintenance, and housekeeping measures) that are used to prevent or minimize the potential for release of toxic and hazardous pollutants; a description of significant materials that are currently or in the past have been treated, stored or disposed outside; and the method of treatment, storage or disposal used. The narrative will also include: a description of activities at materials loading and unloading areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; a description of the soil; and a description of the areas which are predominately responsible for first flush runoff. This requirement is unchanged from the proposal.

Some commenters believed that information on pesticides, herbicides, and fertilizers and similar products is irrelevant, incidental to the facility's production activities, and should not be addressed by this rulemaking. EPA disagrees. As these materials are applied outside and hence subject to storm events, they are significant sources of pollutants in storm water discharges whether applied in residential or industrial settings. By providing this information in the permit application the permit writer will be able to determine whether such activity is associated with industrial activity and the subject of appropriate permit conditions. Nominal or incidental application of these materials at industrial facilities and non-detects in sampling of storm water discharges for the permit application will result, in most cases, in these materials not being addressed specifically in storm water permits.

Today's rule also requires that permit applicants for storm water discharges associated with industrial activity certify that all of the outfalls covered in the permit application have been tested or evaluated for non-storm water discharges which are not covered by an NPDES permit. (The applicant need not test for nonstorm water if the certification of the plant storm water discharges can be evaluated through the use of schematics or other adequate method). Section 405 of the WQA added section 402(p)(3)(B)(ii) to the CWA to require that permits for municipal separate storm sewers effectively prohibit non-storm water discharges to the storm sewer system. As discussed in part VI.F.7.b of today's preamble, untreated non-storm water discharges to storm sewers can create severe, wide-spread contamination problems and removing such discharges presents opportunities for dramatic improvements in the quality of such discharges. Although section 402(p)(3)(B)(ii) specifically addresses municipal separate storm sewers, EPA believes that illicit non-storm water discharges are as likely to be mixed with storm water at a facility that discharges directly to the waters of the United States as it is at a facility that discharges to a municipal storm sewer. Accordingly, EPA feels that it is appropriate to consider potential non-storm water discharges in permit applications for storm water discharges associated with industrial activity. The certification requirement would not apply to outfalls where storm water is intentionally mixed with process waste water streams which are already identified in and covered by a permit.

This rulemaking requires applicants for individual permits to submit known information regarding the history of significant spills at the facility. Several commenters indicated that the extent to which this information is required should be modified. One commenter stated that the requirement should be limited to those spills that resulted in a complaint or enforcement action. EPA disagrees. EPA believes that significant spills at a facility should generally include releases of oil or hazardous substances in excess of reportable quantities under section 311 of the Clean Water Act (*see* 40 CFR 110.10 and 40 CFR 117.21) or section 102 of CERCLA (*see* 40 CFR 302.4). Such a requirement is consistent with these regulations and the perception that such spills are significant enough to mandate the reporting of their occurrence. Some commenters stated that industries have already submitted this information in other contexts and should not be required to have to do it again. For the same reason another commenter felt that submittal of this information represents a waste of manpower and resources. EPA disagrees that requiring this information is unduly burdensome. If this information has already been provided for another purpose it follows that it is readily available to the industrial appli-

Received
August 26, 2011
Commission on
State Mandates

cant. Thus, the burden of providing this information cannot be considered undue. Furthermore, the permit authority will need to have this available in order to determine which drainage areas are likely to generate storm water discharges associated with industrial activity, evaluate pollutants of concern, and develop appropriate permit conditions. However, to keep this information requirement within reasonable limits and limited to information already available to individual facilities, EPA has declined to expand the reporting requirements to spills of other materials, such as food as one commenter has suggested. However, EPA has decided to add raw materials used in food processing or production to the list of significant materials. Materials such as these may find their way into storm water discharges in such quantities that serious water quality impacts occur. These materials may find there way into storm water from transportation vehicles carrying materials into the facility, loading docks, processing areas, storage areas, and disposal sites.

One commenter urged that any information requested should be limited to a period of three years, which is the general NPDES records retention requirement under 40 CFR 122.21(p) and 40 CFR 112.7(d)(8). EPA agrees with this comment and has limited historical information requirements to the 3 years prior to the date the application is submitted. In this manner this regulation will be consistent with records keeping practices under the NPDES and Oil Spill Prevention programs, except sludge programs.

The December 7, 1988, proposal required the applicant to submit a description of each past or present area used for outdoor storage or disposal of significant materials. One commenter felt that the definition of significant material was too imprecise. EPA disagrees that the language should be made more precise by delineating every conceivable material that may add pollutants to storm water. Rather the definition is broad, to encourage permit applicants to list those materials that have the potential to cause water quality impacts. Stating what materials are addressed in meticulous detail may result in potentially harmful materials remaining unconsidered in permits. However, EPA has decided to add "fertilizers, pesticides, and raw materials used in the production or processing of food" to the definition in response to the comment of one State authority that such materials need to be accounted for due to their potential danger to storm water discharge quality. This same commenter recommended that "hazardous chemicals" should be added. EPA agrees, and will delineate those chemicals as "hazardous substances" which are designated under section 101(14) of CERCLA. Further clarification has been added by requiring the listing of any chemical the facility is required to report pursuant to section 313 of title III of SARA.

Another commenter felt that EPA should not require information of past storage of significant materials. EPA agrees that this proposed requirement is overbroad and has limited the time frame to those materials that were stored in areas 3 years or fewer from the date of the permit application. The 3-year limit is consistent with other Agency reporting requirements as discussed above.

One commenter questioned EPA's proposal not to provide for a waiver from the requirement to submit quantitative data if the applicant can demonstrate that it is unnecessary for permit issuance. Another commenter said that a waiver is inappropriate. EPA believes relevant quantitative data are essential to the process, but in this rulemaking the number of pollutants that must be sampled and analyzed is reduced compared to previous regulations. The proposed requirements for quantitative data are limited to pollutants that are appropriate for given site-specific operations, thereby making a waiver unnecessary.

Although the concept of a waiver is attractive because of the perceived potential reduction in burdens for applicants, EPA believes that because the storm water discharge testing requirements have already been streamlined, a waiver would not in practice provide significant reductions in burden for either applicants or permit issuing authorities. Requirements to provide and verify data demonstrating that a waiver is appropriate for a storm water discharge may prove to be more of a burden to the applicant and the permitting authorities. Establishing such a waiver procedure would be administratively complex and time-consuming for both EPA and the applicants, without any justifiable benefit. Therefore, this rulemaking does not include a waiver provision.

In response to one commenter, EPA wishes to emphasize that if a facility has zero storm water discharge because it is discharging to a detention pond only, a permit application is not required. Only those discharges to the waters of the United States or municipal systems need submit notifications, individual or group permit applications, or notices of intent where applicable. However, if the detention pond overflows or the discharger anticipates that it may overflow, then a permit application should be submitted.

Two commenters agreed with EPA's proposed requirement to have a description of past and present material management practices and controls. EPA believes that this is important information directly relating to the quality of storm water that can be expected at a particular facility and this requirement is retained in today's rule. However, as with other historical information requirements, EPA is limiting past practices to those that occurred within three years of the date

Received
August 26, 2011
Commission on
State Mandates

that the application is submitted. One commenter argued that past practices should not be considered unless there is evidence that past practices cause current storm water quality problems. EPA anticipates that the information submitted by the applicant will be used to make this determination and that appropriate permit conditions can be developed accordingly.

One commenter requested clarification on the certification requirement that the data and information in the application is true and complete to the best of the certifying officer's knowledge. This is a fundamental and integral part of all NPDES permit applications. It essentially requires the signatory to assure the permit writer, based upon his or her personal knowledge, that the information has been submitted without a negligent, reckless, or purposeful misrepresentation. EPA intends to interpret this requirement in the same manner for storm water applications as other applications.

4. Group Applications

Today's final rule provides some industries with the option of participating in a group application, in lieu of submitting individual permits. There are several reasons for the group application. First, the group application procedure provides adequate information for issuing permits for certain classes of storm water discharges associated with industrial activity. Second, numerous commenters supported the concept of the group application as a way to reduce the costs and administrative burdens associated with storm water permit applications. Third, group applications will reduce the burden on the regulated community by requiring the submission of quantitative data from only selected members of the group. Fourth, the group application process will reduce the burden on the permit issuing authority by consolidating information for reviewing permit applications and for developing general permits suited to certain industrial groups. Where general permits are not appropriate or cannot be issued, a group application can be used to develop model individual permits, which can significantly reduce the burden of preparing individual permits.

As noted above in today's preamble, EPA intends to promulgate a general permit that will cover many types of industrial activity. Industrial dischargers eligible for such permits will generally be required to seek coverage by submittal of a notice of intent. Facilities that are ineligible for coverage under the general permit will be required to submit an individual permit application or submit a group application. The group application process promulgated today will serve as an important component to implement Tier III of EPA's industrial storm water permitting strategy discussed above. The general permit which EPA intends to promulgate in the near future shall set forth what types of facilities are eligible for coverage.

Some commenters criticized the group application procedure as an abdication of EPA's responsibility to effectively deal with pollutants in storm water discharges. One commenter stated that every facility subject to these regulations should be required to submit quantitative data. In response EPA believes, as do numerous commenters, that the group application procedure is a legitimate and effective way of dealing with a large volume of currently uncontrolled discharges. The only difference between the group application procedure and issuing individual permits based on individual applications is that the quantitative data requirements from individual facilities will be less if certain procedures are followed. EPA is convinced that marked improvements in the process of issuing permits will be achieved when these procedures are followed. Where the storm water discharge from a particular facility is identified as posing a special environmental risk, it can be required to submit individual applications and therefore separate quantitative data. It should also be noted that submittal of a group application does not exempt a facility from submitting quantitative data on its storm water discharge during the term of the permit.

The final rule refines and clarifies some of the requirements of the group application approach set forth in the December 7, 1988 proposal. Several commenters requested that EPA add a provision which would allow a facility that becomes subject to the regulations to "add on" to a group application after that group application has already been submitted. One commenter indicated that some trade associations are prohibited from engaging in an activity which would not apply to all its members, and that an "add on" provision was needed in the event such a prohibition was invoked. Another commenter noted that where a group is particularly large, for example one that consists of several thousand members, that it would be a logistical feat to ensure that all facilities eligible as members of the group are properly identified and listed on the application within the 120 day deadline for submitting part 1A of the application.

EPA believes that a group applicant should have a limited ability to add facilities to the group after part 1A has been submitted and that a provision which allows a group or group representative an unbridled ability to "add on" is impractical for a number of reasons. First, 10% of the facilities must submit quantitative data. Adding facilities after the group has been formed and approved would change the number of facilities that have to submit quantitative data on behalf of the group. This would result in an unwarranted administrative burden on the reviewing authority, which is in the position of having to examine the quantitative data and determine the appropriateness of group members (and those

Received
August 26, 2011
Commission on
State Mandates

that are required to submit quantitative data) within 2 months of receiving part 1 of the group application. Further, during the permit application process permitting authorities will be developing permit conditions for an identified and predetermined group of facilities. Allowing potentially significant numbers of permit applicants to suddenly inject themselves into a group application could unnecessarily hamper or disrupt the timely development of general and model permits. In addition, if a facility were "added on" the number of facilities having to submit quantitative data may drop below 10%. Thus the facility desiring to "add on" may be put in the position of having to submit the quantitative data themselves, which would clearly defeat the purpose of being a part of the group application.

Nevertheless, EPA has added a provision to 122.26(e) which enables facilities to add on to a group application at the discretion of the EPA's Office of Water Enforcement and Permits, and upon a showing of good cause by the group applicant. For the reasons noted above, EPA anticipates this provision will be invoked only in limited cases where good cause is shown. Facilities not properly identified in the group application, and which cannot meet the good cause test will be required to submit individual permit applications. EPA will advise such facilities within 30 days of receiving the request as to whether the facility may add on.

However, the "add on" facility must meet the following requirements: The application for the additional facility is made within 15 months of the final rule; and the addition of the facility does not reduce the percentage of the facilities that are required to submit quantitative data to below 10% unless there are over 100 facilities that are submitting quantitative data. Approval to become part of a group application is obtained from the group or the trade association and is certified by a representative of the group; approval for adding on to a group is obtained from the Office of Water Enforcement and Permits.

Several commenters stated that the application requirements for groups are so burdensome that the advantages of the process are undermined. These concerns are addressed in greater detail below. Among the requirements which commenters objected are the requirements to list every group member's company by name and address. EPA is convinced that a condition precedent to approving a group application is at least identifying the members of the group. Without such information it would be impossible to determine if all the facilities are sufficiently similar. EPA disagrees that industries will be dissuaded from using the group application process because the advantages of the process are undermined. Although commenters perceived many burdens associated with individual permit applications, by far the most significant burden identified by the comments is the requirement for obtaining and submitting quantitative data. The group application significantly reduces this burden by requiring only 10% of the facilities to submit quantitative data if the number in the group is over 100. If the number in the group is over 1000, then only 100 of the facilities need submit quantitative information. If group applicants develop cost sharing procedures to reduce the financial and administrative burdens of submitting quantitative data, it is evident that utilizing the group application could save industries as much as 90% on the most economically burdensome aspect of the application.

Several commenters perceived that the group application procedure did not offer them significant savings because under the proposal their particular industry would only be required to test for COD, BOD5, pH, TSS, oil and grease, nitrogen, and phosphorous. These commenters stated that sampling for these pollutants is not particularly expensive. EPA believes that even if a group is required only to submit minimal quantitative data on particular pollutants, substantial savings can accrue to a particular industry if the group has many members. This is particularly true when the number of outfalls to be sampled, the information on storm events, and flow measurements are factored into the cost analysis. An additional benefit for members of the group as well as for permit issuing agencies is that the process of developing a permit, including drafting and responding to public comments on the permit, is consolidated by the group application process. Accordingly, it is less resource intensive for the group to work with permit issuance authorities to develop well founded permit conditions.

One commenter raised a concern about the situation where one of the facilities that is designated for submitting quantitative data drops out of the group. If this happened, then another facility would have to submit quantitative data. In response, EPA notes that one approach would be for the group to have one or two more facilities submit quantitative data than needed to avoid problems from such a departure or to account for new additions to the group. Certainly this issue goes directly to the facility selection process which is a critical component of the group application; the facilities need to be carefully selected and reviewed by the group to prevent such difficulties.

Several comments indicated a confusion over what facilities are eligible to take advantage of the group application procedure. Any industry or facility that is required to submit a storm water permit application under these regulations is eligible to participate in a group application. However, whether a facility can obtain a storm water permit under a group application procedure will depend upon whether that facility is a member of the same effluent guideline subcategory, or

Received
August 26, 2011
Commission on
State Mandates

is sufficiently similar to other members of the group to be appropriate for a general permit or individual permit issued pursuant to the group application. Accordingly, group applications are not limited to national trade associations. The agency believes that the language in ß 122.26(c)(2) adequately addresses these concerns. The process does not prohibit a particular company with multiple facilities from filing a group application as long as those facilities are sufficiently similar.

One commenter expressed concern that a single company would not be able to take advantage of the group application benefits unless the company had more than ten facilities. Under such circumstances the company would have to become integrated with a larger group of facilities owned by other companies in order to take advantage of the benefits afforded by the group application procedure. In response, the Agency is providing for a group application of between four and ten members, however at least half the facilities must submit data. One commenter stated that the number of facilities required to submit quantitative data should be determined on a case by case basis. EPA believes that 10 percent for groups with over ten members will be easiest to implement for both industry and EPA, and will ensure that adequate representative quantitative data are obtained so that meaningful determinations of facility similarity can be made and appropriate permit conditions in general or model permits can be developed.

Another commenter suggested that one facility with a multitude of storm water discharge points should be able to use the group permit application to reduce the amount of quantitative data that it is required to submit. This is an accurate observation but only to the extent that the facility combines with several other facilities to form a group, in which case only 10% of the facilities need submit quantitative data. The group application procedure in today's rule is designed for use by multiple facilities only. However, if an individual facility has 10 outfalls with ten substantially identical effluents the discharger may petition the Director to sample only one of the outfalls, with that data applying to the remaining outfalls. See ß 122.21(g)(7). Thus, existing authority already allows for a "group-like" process for sampling a subset of storm water outfalls at a single facility.

Concern was expressed that the spill reporting requirement from each facility in part 1B would preclude any group from demonstrating that the facilities sampled are "representative," because the incidence of past spills is very site-specific. EPA notes that since it has dropped the part 1B requirements for other reasons discussed below, this comment is now moot.

Numerous commenters noted that if a facility is part of a group application and is subsequently rejected as a group applicant, such an entity would not have a full year to submit an individual permit application. EPA agrees that this is a significant concern. Accordingly, those facilities that apply as a member of a group application will be afforded a full year from the time they are notified of their rejection as a member of the group to file an individual application. EPA notes that it intends to act on group application requests within 60 days of receipt; thus this approach will only provide facilities that are rejected from a group application a short extension of the deadline for other individual applications.

One commenter complained that the cost of defending a group's choice of representative facilities may exceed the cost of submitting an individual permit application, thereby reducing the incentive to apply as group. The agency anticipates that the selection process will be one open to negotiation between the affected parties and one that will end in a mutually satisfactory group of facilities. It is the intent of EPA to reduce the costs of submitting a permit application as much as possible, while providing adequate information to support permitting activities.

Another commenter argued that the use of model permits will create a disincentive for participating in a group because model permits may be used by the permit issuing authority to issue individual permits for discharges from similar facilities that did not participate in the group application. EPA does not agree. The benefit of applying as a group applicant is to take advantage of reduced representative quantitative data requirements. This incentive will exist regardless of whether or how model permits are used. Further, technology transfer can occur during the development of permits based on individual applications as well as those based on group applications.

One commenter suggested moving some of the facility specific information requirements of part 1 of the group application to part 2 of the group application in order to provide more incentive to apply as a group. EPA has considered this and believes such a change would be inappropriate. Part 1 information will be used to make an informed decision about whether individual facilities are appropriate as group members and appropriate for submitting representative quantitative data. Furthermore, information burdens from providing site specific factors in part 1 is relatively minimal, and the information requirements in the proposed part 1B application have been eliminated.

One commenter suggested that trade associations develop model permits since they have the most knowledge about the characteristics of the industries they represent. As noted above, EPA expects that the industries and trade associa-

Received
August 26, 2011
Commission on
State Mandates

tions will have input, through the permit application process, as to how permit conditions for storm water discharges are developed. While the applicant can submit proposed permit conditions with any type of application, EPA however cannot delegate the drafting of model permits to the permittees. EPA is developing and publishing guidance in conjunction with this rulemaking for developing permit conditions.

One commenter suggested that new dischargers should be able to take advantage of general permits developed pursuant to group applications. As with other general permits, EPA anticipates that such discharges will be able to fall within the scope of a general permit based on a group application where appropriate.

One commenter stated that the group application does not benefit municipalities since there is no requirement for industrial discharges through municipal sewers to apply for a permit. As noted in a previous discussion, industrial discharges through municipal sewers must be covered by an NPDES permit. Such facilities may avail themselves of the group application procedure. Also, municipalities are not precluded from developing a group application procedure under their management plan for industries that discharge into their municipal system, in order to streamline developing controls for such industries.

One industry wanted clarification that facilities located within a municipality would be eligible to participate in a group application. All industrial activities required to submit an individual permit are entitled to submit as part of group application, except those with existing NPDES permits covering storm water. Those facilities that discharge through a municipal separate storm sewer systems required to submit an individual application (because they do not fall within a general permit) are not precluded from using the group application procedure if appropriate.

Other municipalities expressed confusion over the industrial group application concept. The following responds to these comments. First, municipalities are not eligible for participation in a group application because the group application process is designed for industrial activities. Sampling requirements for municipal permit applications are already limited to a small subset of the outfalls from the system, as discussed below. Furthermore, permits for municipal separate storm sewer systems will be issued on a system-wide or jurisdiction-wide basis, rather than individually for each outfall. Thus, today's regulation already incorporates a "grouplike" permit application process for municipalities. Furthermore, it is highly unlikely that various municipal storm sewer systems would be "substantially similar" enough to justify group treatment in the same way as industrial facilities. In response to another comment, this regulation does not directly give the municipality enforcement power over members of an industrial group who may be discharging through its system. Only the permitting authority and private citizens and organizations (including the municipality acting in such a capacity) will have enforcement power over members of the group once permits are issued to those members.

One commenter believed that the States with authorized NPDES programs rather than EPA should establish permit terms for permits based on group applications. In response to this comment, EPA wishes to clarify its role in the group application process. Group applications will be submitted to EPA headquarters where they will be reviewed and summarized. The summaries of the group application will be distributed to authorized NPDES States. EPA wishes to emphasize that NPDES States are not bound by draft model permits developed by EPA. States may adopt model permits for use in their particular area, making adjustments for local water quality standards and other regional characteristics. Where general permit coverage is believed to be inappropriate, facilities may be required to apply for individual permits. One commenter objected to the group application procedure because it is not consistent with existing Federal permitting procedures, which will lead to confusion in the regulated community. The agency disagrees with this assessment. The group application is a departure from established NPDES program procedures. However, the comments, when viewed in their entirety, reflect widespread support from the regulated community for a group application procedure. Further, the comments reflect that those affected by this rulemaking understand the components of the group application and the procedures under which permits will be obtained pursuant to the group application.

One commenter expressed concern regarding how BAT limits for groups of similar industries will be developed. Technology based limits will be developed based on the information received from the group applicants. If the group applicants possess similar characteristics in terms of their discharge, BAT/BCT limitations and controls will be developed accordingly for those members of the group. If the discharge characteristics are not similar then applying industries are not appropriate for the group.

One commenter has suggested that the proposed group application is too complex with regard to the part 1A, part 1B, and part 2 group application requirements and that EPA should repropose these provisions. As discussed below, EPA has simplified the industrial group application requirements by eliminating the part 1B application. Thus, reproposal is unnecessary.

Received
August 26, 2011
Commission on
State Mandates

One commenter criticized the group application concept as not achieving any type of reduction in administrative burden for NPDES States. EPA disagrees with this assessment. If industries take advantage of the group application procedure, EPA will have an opportunity to review information describing a large number of dischargers in an organized manner. EPA will perform much of the initial review and analysis of the group application, and provide NPDES States with summaries of the applications thereby reducing the burden on the States. Furthermore, the procedure encourages a potentially large number of facilities to be covered by a general permit, which will clearly reduce the administrative burden of issuing individual permits.

The final rule establishes a regulatory procedure whereby a representative entity, such as a trade association, may submit a group application to the Office of Water Enforcement and Permits (OWEP) at EPA headquarters, in which quantitative data from certain representative members of a group of industrial facilities is supplied. Information received in the group application will be used by EPA headquarters to develop models for individual permits or general permits. These model permits are not issued permits, but rather they will be used by EPA Regions and the NPDES States to issue individual or general permits for participating facilities in the State. In developing such permits, the Region or NPDES State will, where necessary, adapt the model permits to take into account the hydrological conditions and receiving water quality in their area. One commenter expressed the view that having this procedure managed by EPA headquarters would cause delays and it should be delegated to the States and Regions. EPA disagrees that delay will ensue using this procedure. Furthermore, consistency in development of model and general permits can be achieved if application review is coordinated at EPA headquarters.

a. Facilities Covered. Under this rule the group application is submitted for only the facilities specifically listed in the application and not necessarily for an entire industry. The facilities in the group application selected to do sampling must be representative of the group, not necessarily of the industry.

Facilities that are sufficiently similar to those covered in a general permit (issued pursuant to a group application) that commence discharging after the general permit has been issued, must refer to the provisions of that general permit to determine if they are eligible for coverage. Facilities that have already been issued an individual permit for storm water discharges will not be eligible for participation in a group application. Several commenters believed that this restriction is inequitable since they have experienced the administrative burden of submitting a permit application. EPA disagrees. Industries that have already obtained a permit for storm water discharges have developed a storm water management program, engaged in the collection of quantitative data, and possess familiarity and experience with submitting storm water permit applications. The Agency sees no point to instituting an entirely new permit application process for facilities that have storm water permits issued individually. It makes little sense for these industries to be involved with submitting another permit application before their current permit expires.

As noted above, once a general permit has been issued to a group of dischargers, a new facility may request that they be covered by the general permit. The permitting authority can then examine the request in light of the general permit applicability requirements and determine whether the facility is suitable or not.

b. Scope of Group Applications. Numerous comments were received on how facilities should be evaluated as members of a group application. Several commenters stated that effluent limitation guideline subcategories are not relevant to pollutants found in storm water, but rather to the facility's everyday activities, and therefore similarity should be based on each facility's discharge or the similarity of pollutants expected to be found in a facility's discharge. Other commenters felt that similarity of operations at facilities should be the criteria. Others, believed that an examination of the facility's impact on storm water quality should be the applied criteria. Other commenters suggested that EPA provide more guidance as to how broadly groups can be defined and that a failure to do so would discourage facilities from going to the trouble and expense of entering into the group application process. Some commenters were concerned that facilities would be rejected as a group because of variations in processes and process wastewater characteristics.

EPA does not agree that effluent limitation guideline subcategories are inappropriate as a method for determining group applications. EPA guideline subcategories are functional classifications, breaking down facilities into groups, for purposes of setting effluent limitations guidelines. The use of EPA subcategories will save time for both applicants and permitting authorities in determining whether a particular group is appropriate for a group application. Furthermore, EPA believes that this method of grouping provides adequate guidance for determining what facilities are grouped together. Establishing groups on the extent to which a facility's discharge affects storm water quality would not provide applicants with sufficient guidance as to the appropriateness of individual industries for group applications and would not provide information needed to draft appropriate model permit conditions for potentially different types of industries, industrial processes, and material management practices.

Received
August 26, 2011
Commission on
State Mandates

However, EPA recognizes that the subcategory designations may not always be available or an effective methodology for grouping applicants. Also, there are situations where processes that are subject to different subcategories are combined. EPA agrees that the group application option should be flexible enough to allow groups to be created where subcategories are too rigid or otherwise inappropriate for developing group applications or where facilities are integrated or overlap into other subcategories. For these reasons, this rulemaking does not limit the submission to EPA subcategories alone, but rather allows groups to be formed where facilities are similar enough to be appropriate for general permit coverage.

In determining whether a group is appropriate for general permit coverage, EPA intends that the group applicant use the factors set forth in 40 CFR 122.28(a)(2)(ii), the current regulations governing general permits, as a guide. If facilities all involve the same or similar types of operations, discharge the same types of wastes, have the same effluent limitation and same or similar monitoring requirements, where applicable, they would probably be appropriate for a group application. To that extent, facilities that attempt to form groups where the constituent makeup of its process wastewater is dissimilar may run the risk of not being accepted for purposes of a group application.

Some commenters expressed the view that categories formed using general permit factors are too broad or that the language is too vague. One commenter expressed the view that the standard is too subjective and that permit writers will be evaluating the similarity of discharge too subjectively, while other commenters felt that the criteria should be broad and flexible. Other commenters stated that the effluent guideline subcategory or general permit coverage factors are not related to storm water discharges, because much of the criteria are based upon what is occurring inside the plant, rather than activities outside of the plant. EPA believes that these criteria are reasonable for defining the scope of a group application. EPA disagrees that the procedure, which is adequate for the issuance of general permits, is inadequate for the development of a group application. EPA believes that the activities inside a facility will generally correspond to activities outside of the plant that are exposed to storm events, including stack emissions, material storage, and waste products. Furthermore, if facilities are able to demonstrate their storm water discharge has similar characteristics, that is one element in the analysis needed for establishing that the group is appropriate. EPA disagrees that the criteria are too vague. If facilities are concerned that general permit criteria is insufficient guidance, then subcategories under 40 CFR subchapter N should be used. EPA believes that the program will function best if flexibility for creating groups is maintained.

If a NPDES approved State feels that a tighter grouping of applicants is appropriate individual permit applications can be requested from those permit applicants. One commenter indicated that it was not clear whether the group application procedure could be used for all NPDES requirements. EPA would clarify that the group application is designed only to cover storm water discharges from the industrial facilities identified in ß 122.26(b)(14).

As noted above, EPA wishes to clarify that facilities with existing individual NPDES permits for storm water are not eligible to participate in the group application process. From an administrative standpoint EPA is not prepared to create an entirely different mechanism for permitting industries which already have such permits.

c. Group Application Requirements. The group application, as proposed, included the following requirements in three separate parts. Part 1A of a group application included: (A) Identification of the participants in the group application by name and location; (B) a narrative description summarizing the industrial activities of participants; (C) a list of significant materials stored outside by participants; and (D) identification of 10 percent of the dischargers participating in the group application for submitting quantitative data. A proposed part 1B of the group application included the following information from each participant in the group application: (A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) and related information; (B) an estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall and a narrative description of significant materials; (C) a certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested for the presence of non-storm water discharges; (D) existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility; (E) a narrative description of industrial activities at the facility that are different from or that are in addition to the activities described under part 1A; and (F) a list of all constituents that are addressed in a NPDES permit issued to the facility for any of non-storm water discharge. Part 2 of a group application required quantitative data from 10 percent of the facilities identified.

Some commenters felt that spill histories, drainage maps, material management practices, and information on significant materials stored outside are too burdensome or meaningless for evaluating similarity of discharges among group applicants. Several commenters stated that such requirements where the group may consist of several thousand facilities were impractical and would not assist EPA in developing model permits. Many commenters insisted that the re-

Received
August 26, 2011
Commission on
State Mandates

quirements imposed in part 1B would effectively discourage use of the group application procedure. EPA agrees in large part with these comments. After reevaluating the components of part 1B, and the entire rationale for instituting the group application procedure, EPA has decided to excise part 1B from the requirements, and rely on part 1A and part 2 for developing appropriate permit condition. Where appropriate, EPA may require facilities to submit the information, formerly in part 1B, during the term of the permit. In other cases, EPA will establish which facilities must submit individual permit applications where more site specific permits are appropriate.

Under the revised part 1 and part 2, EPA will receive information pertaining to the types of industrial activity engaged in by the group, materials used by the facilities, and representative quantitative data. EPA can use such information to develop management practices that address pollutants in storm water discharges from such facilities. For most facilities, general good housekeeping or management practices will eliminate pollutants in storm water. Such requirements can be further refined by determining the nature of a group's industrial activity and by obtaining information on material used at the facility and representative quantitative data from a percentage of the facilities. Thus, EPA is confident that model permits and general permits can be developed from the information to be submitted under part 1 and part 2.

One commenter felt that more guidance on what makes a facility representative for sampling as part of a group is needed. In response, the Agency believes the rule as currently drafted provides adequate notice.

Another commenter asked how much sampling needed to be done and how much monitoring will transpire over the life of the permit for members of a group. This will vary from permit to permit and will be determined in permit proceedings. This rulemaking only covers the quantitative data that is to be submitted in the context of the group permit application.

One commenter indicated that because of the amount of diversity in the operations of a particular industry, obtaining a sample that could be considered representative would be extremely difficult. EPA recognizes that obtaining representative quantitative data through the group application process will prove to be difficult; however, EPA has sought to minimize these perceived problems. Under the group application concept, industries must be sufficiently similar to qualify. Industries which have significantly different operations from the rest of the group that affects the quality of their storm water discharge may be required to obtain an individual permit. Use of the nine precipitation zones will enable the data in the permit application to be more easily analyzed and patterns observed on the basis of hydrology and other regional factors. How EPA will evaluate the representativeness of the sample is discussed below.

Several commenters asked why the precipitation zone of group members is relevant to the application. The need to identify precipitation zones arises because the amount of rainfall is likely to have a significant impact on the quality of the receiving water. According to an EPA study (Methodology for Analysis of Detention Basins for Control of Urban Runoff Quality; Office of Water, Nonpoint Source Branch, Sept. 1986) the United States can be divided into nine general precipitation zones. These zones are characterized by differences in precipitation volume, precipitation intensity, precipitation duration, and precipitation intervals. Industrial facilities that seek general permits via the group application option may show significantly different loading rates as a result of these regional precipitation differences. As an example, precipitation in Seattle, Washington, located in Zone 7, approaches the mean annual storm intensity of .024 inches/hour with a mean annual storm duration of 20 hours for that Zone. In contrast, precipitation in Atlanta, Georgia, located in Zone 3 approaches the mean annual storm intensity of .102 inches/hour and a mean storm duration of 6.2 hours for that Zone. Atlanta, receives on the average four times more precipitation per hour with storms lasting one-third as long. As a result of these differences, if identical facilities within a group application were situated in each of these areas, their storm water discharges would likely exhibit different pollutant characteristics. Accordingly, data should be submitted from facilities in each zone.

One commenter felt that the EPA should abandon or modify its rainfall zone concept, because storm water quality will depend more on what materials are used at the facility than rainfall. EPA disagrees. Because storm water loading rates may differ significantly as a result of regional precipitation differences, it is necessary that for each precipitation zone containing representatives of a group application, the group must provide samples from some of those representatives. In comments to previous rulemakings it was argued that the amount of rainfall will affect the degree of impact a storm water discharge may have on the receiving stream.

One commenter stated that the precipitation zones illustrated in appendix E of the proposed rulemaking do not adequately reflect regional differences in precipitation and that in some cases the zones cut through cities where there are concentrations of industries without differences in their precipitation patterns. The rainfall zone map is a general guide to determining what areas of the country need to be addressed when determining representative rainfall events and

Received
August 26, 2011
Commission on
State Mandates

quantitative data. When dealing with rainfall on a national scale, it is near impossible to make generalized statements with a great deal of accuracy. In the case of rainfall zones, rainfall patterns may be similar for facilities in close proximity to each other but none the less in different rainfall zones. In response, EPA has created these zones to reflect regional rainfall patterns as accurately as possible. Because of the variable nature of rainfall such circumstances are sure to arise. However, in order to obtain a degree of representativeness EPA is convinced that the use of these rainfall zones as described is appropriate for the submittal of group applications and the quantitative data therein.

The second and third requirements of part 1 of the group application instruct the applicant to describe the industrial activity (processes) and the significant materials used by the group. For the significant materials listed, the applicant is to discuss the materials management practices employed by members of the group. For example, the applicant should identify whether such materials are commonly covered, contained, or enclosed, and whether storm water runoff from materials storage areas is collected in settling ponds prior to discharge or diverted away from such areas to minimize the likelihood of contamination. Also, the approximate percentage of facilities in the group with no practices in place to minimize materials stored outside is to be identified.

EPA considers that the processes and materials used at a particular facility may have a bearing on the quality of the storm water. Thus, if there are different processes and materials used by members of the group, the application must identify those facilities utilizing the different processes and materials, with an explanation as to why these facilities should still be considered similar.

One commenter felt that a facility should be able to describe in its permit application the possibility of individual materials entering receiving waters. EPA supports the applicant adding site specific information which will assist the permit writer making an informed decision about the nature of the facility, the quality of its storm water discharge, and appropriate permit conditions.

The fourth element of part 1 of the group application is a commitment to submit quantitative data from ten percent of the facilities listed. EPA proposed that there must be a minimum of ten and a maximum of one hundred facilities within a group that submit data. Comments reflected some dissatisfaction with this requirement. Some commenters asserted that ten percent was too high a number and would discourage group applications, while one commenter suggested a lesser percentage would be appropriate where the group can certify that facilities are representative. One commenter suggested that EPA have the discretion to allow for a smaller percentage. Several commenters argued that EPA should be satisfied with fewer than ten percent because EPA often relies on data from less than ten percent of the plants in a subcategory when promulgating effuent guidelines and that EPA should rely on data collection goals with affected groups as was done in the 1985 storm water proposal. Other commenters pointed out that an anomalous situation could arise where the group was small and facilities were scattered throughout the precipitation zones. For example, if a group consisted of 20 members where a minimum of ten facilities had to submit samples, and two or more members were in each precipitation zone; a total of 18 facilities (90% of the group) would have to submit quantitative data. EPA believes that there must be a sufficient number of facilities submitting data for any patterns and trends to be detectable. However, in light of these comments EPA has decided to modify the language in ß 122.26(c) to allow 1 discharger in each precipitation zone to submit quantitative data where 10 or fewer of the group members are located in a particular precipitation zone. EPA believes, however, that one hundred facilities would in most cases be sufficient to characterize the nature of the runoff and thus 100 should remain the maximum. If the data are insufficient, EPA has the authority to request more sampling under section 308 of the CWA.

One commenter suggested that the ten facility cutoff was unreasonable, and that instead of cutting off the group at ten, allow a smaller number in the group and allow the facilities to sample ten percent of their outfalls instead. EPA agrees, in part, and will allow groups of between four and ten to submit a group application. However, the ten percent rule would not be effective in such cases. Therefore, at least half the facilities in a group of four to ten will be required to provide quantitative data from at least one outfall, with each precipitation zone represented by at least one facility.

For any group application, in addition to selecting a sufficient number of facilities from each precipitation zone, facilities selected to do the sampling should be representative of the group as a whole in terms of those characteristics identifying the group which were described in the narrative, i.e., number and range of facilities, types of processes used, and any other relevant factors. If there is some variation in the processes used by the group (40 percent of the group of food processors are canners and 60 percent are canners and freezers, for example), the different processes are to be represented. Also, samples are to be provided from facilities utilizing the materials management practices identified, including those facilities which use no materials management practices. The representation of these different factors, to the extent feasible, is to be roughly equivalent to their proportion in the group.

Received
August 26, 2011
Commission on
State Mandates

EPA wishes to emphasize that the provision that ten percent of the facilities need to submit quantitative data only applies to the permit application process. The general or individual permit itself may require quantitative data from each facility.

Submittal of Part 2 of the Group Application. As with part 1, part 2 of the Group Application would be submitted to the Office of Water Enforcement and Permits, in Washington, DC. If the information is incomplete, or simply is found to be an inadequate basis for establishing model permit limits, EPA has the authority under section 308 of the Clean Water Act to require that more information be submitted, which may include sampling from facilities that were part of the group application but did not provide data with the initial submission. If the group application is used by a Region or NPDES State to issue a general permit, the general permit should specify procedures for additional coverage under the permit.

If a part 2 is unacceptable or insufficient, EPA has the option to request additional information or to require that the facilities that participated in the group application submit complete individual applications (e.g. facilities that have submitted Form 1 with the group application may be required to submit Form 2F, or facilities which have submitted complete Form 1 and Form 2F information in the group application generally would not have to submit additional information).

Once the group applications are reviewed and accepted, EPA will use the information to establish draft permit terms and conditions for models for individual and general permits. NPDES approved States and EPA regional offices will continue to be the permit-issuing authority for storm water discharges. The NPDES approved States accepting the group application approach and the EPA Regions may then take the model permits and adapt them for their particular area, making adjustments for local water quality standards and other localized characteristics, and making determinations as to the need for an individual storm water permit where general permit coverage is felt to be inappropriate. Permits would be proposed by the Region or NPDES approved State in accordance with current regulations for public comment before becoming final. In NPDES States without general permit authority, or where an individual permit is deemed appropriate, the model permit can serve as the basis for issuing an individual permit.

The group application is an NPDES permit application just like any other and, as such, would be handled through normal permitting procedures, subject to the regulatory provisions applicable to permit issuance. Incomplete or otherwise inadequate submissions would be handled in the same manner as any other inadequate permit application. The permit issuing authority would retain the right to require submission of Form 1, Form 2C and Form 2F from any individual discharger it designates.

Some commenters offered other procedures for developing a group application procedure; however, these were frequently entirely different approaches or so novel that a reproposal would be required. One commenter suggested that those industries that are identified as being likely to pollute should be required to submit quantitative data. Numerous commenters contended that a generic approach for meeting the required information requirements for group applications would allow EPA to develop adequate general permits. EPA does not view these approaches as appropriate.

5. Group Application: Applicability in NPDES States

Many commenters expressed concern about how the group application procedure will work within the framework of an NPDES approved State. The relationship between EPA and the States that are authorized to administer the NPDES program, including implementation of the storm water program, is a complicated aspect of this rulemaking. Approved States (there are 38 States and one territory so approved) must have requirements that are at least as stringent as the Federal program; they may be more stringent if they choose. Authority to issue general permits is optional with NPDES States.

EPA has determined that ten percent of the facilities must provide quantitative data in the permit application as noted above. Furthermore, these applications are submitted to EPA headquarters. Consequently States, whether NPDES approved or not, are not in a position to reject or modify this requirement. Such States may determine the amount of sampling to be done pursuant to permit conditions. If they choose to issue general permits they may include such authority in their NPDES program and, upon approval of the program by EPA, may then issue general permits. Within the context of the NPDES provisions of the CWA, if States do not have general permitting authority, then general permits are not available in those States.

In response to one comment, EPA does not have authority to issue general or individual permits to facilities in NPDES approved states. Today's rule provides a means for affected industries to be covered by general permits developed via the group application procedure as well as from general permits developed independently of the group applica-

Received
August 26, 2011
Commission on
State Mandates

tion process. Accordingly, today's rule anticipates that most NPDES States will seek general permit issuance authority to implement the storm water program in the most efficient and economical way. Without general permit issuance authority NPDES States will be required to issue individual permits covering storm water discharges to potentially thousands of industrial facilities.

One commenter recommended that States with approved NPDES programs should be involved in determining what industries are representative for submitting quantitative data. EPA recognizes that States will have an interest in this determination and may possess insight as to the appropriateness of using some facilities. However, EPA may be managing hundreds of group applications and approving or disapproving them as expeditiously as possible. EPA believes that involving the States in this already administratively complex and time consuming undertaking would be counterproductive. In any event, NPDES approved States are not bound by the determinations of EPA as to the appropriateness of groups or the issuance of permits based on model permits or individual permits. However, States will be encouraged to use model permits that are developed by EPA. EPA will endeavor to design general and model permits that are effective while also adaptable to the concerns of different States. Again, States are able to develop more stringent standards where they deem it to be appropriate. There are currently seventeen States that have authority to issue general permits: Arkansas, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, New Jersey, North Dakota, Oregon, Rhode Island, Utah, Washington, West Virginia and Wisconsin. As suggested in the comments, EPA is encouraging more States to develop general permit issuing authority in order to facilitate the permitting process.

One commenter advised that the rules should state that a NPDES approved State may accept a group application or require additional information. EPA has decided not to explicitly state this in the rule. However, this comment does raise some points that need to be addressed. Because the group application option is a modification of existing NPDES permit application requirements, the State is free to adopt this option, but is not required to. If the State chooses to adopt the group application and it does not have general permit authority, the group application can be used to issue individual permits. If an approved NPDES State chooses to not issue permits based on the group application, facilities that discharge storm water associated with industrial activity that are located in that State must submit individual applications to the State permitting authority. Before submitting a group application, facilities should ascertain from the State permitting authority whether that State intends to issue permits based upon a group application approved by EPA for the purpose of developing general permits. For facilities that discharge storm water associated with industrial activity which are named in a group application, the Director may require an individual facility to submit an individual application where he or she determines that general permit coverage would be inappropriate for the particular facility.

One commenter stressed that EPA should streamline the procedure for States desiring to obtain general permit coverage. EPA has, over the last year, streamlined this procedure and encourages States to take advantage of this procedure. EPA recommends that States consider obtaining general permit authority as a means to efficiently issue permits for storm water discharges. These States should contact the Office of Water Enforcement and Permits at EPA Headquarters as soon as possible.

6. Group Application: Procedural Concerns

One commenter claimed that the proposed group application process and procedures violated federal law. This commenter claimed that EPA was abrogating its responsibility by allowing a trade association to design a data collection plan in lieu of completing an NPDES application form designed by EPA, thus violating the Federal Advisory Committee Act. The commenter stated that EPA would be improperly influenced by special interests if trade associations were able to design their own storm water data gathering plans. The commenter further asserted that any decisions by EPA on the content of specific group applications would be rulemakings and thus subject to the provisions of the Administrative Procedure Act.

EPA disagrees with the comment that the group application violates the Federal Advisory Committee Act (FACA). FACA governs only those groups that are established or "utilized" by an agency for the purpose of obtaining "advice" or "recommendations." The group application option does not solicit or involve any "advice" or "recommendations." It simply allows submission of data by certain members of a group in accordance with specific regulatory criteria for determining which facilities are "representative" of a group. As such, the group application is merely a submission in accordance and in compliance with specific regulatory requirements and does not contain discretionary uncircumscribed "advice" or "recommendations" as to which facilities are representative of a group.

Thus, the determination of which facilities should submit testing data in accordance with regulatory criteria is little different from many other regulatory requirements where an applicant must submit information in accordance with certain criteria. For example, under 40 CFR 122.21 all outfalls must be tested except where two or more have "substantial-

Received
August 26, 2011
Commission on
State Mandates

ly identical" effluents. Similarly, quantitative data for certain pollutants are to be provided where the applicant knows or "has reason to believe" such pollutants are discharged. Both of these provisions allow the applicant to exercise discretion in making certain judgments but such action is circumscribed by regulatory standards. EPA further has authority to require these facilities to submit individual applications. In none of these instances are "recommendations" or "advice" involved. EPA also notes that it is questionable whether, in providing for group applications, it is "soliciting" advice or recommendations from groups or that such groups are being "utilized" by EPA as a "preferred source" of advice. See 48 FR 19324 (April 28, 1983). Furthermore, this data collection effort may be supplemented by EPA if, after review of the data, EPA determines additional data is necessary for permit issuance. Other information gathering may act as a check on the group applications received.

EPA also does not agree with this commenter's claim that the group application scheme represents an impermissible delegation of the Administrator's function in violation of the CWA regarding data gathering. The Administrator has the broadest discretion in determining what information is needed for permit development as well as the manner in which such information will be collected. The CWA does not require every discharger required to obtain a permit to file an application. Nor does the CWA require that the Administrator obtain data on which a permit is to be based through a formal application process (see 40 CFR 122.21). For years "applications" have not been required from dischargers covered by general permits. EPA currently obtains much information beyond that provided in applications pursuant to section 308 of the CWA. This is especially true with respect to general permit and effluent limitations guidelines development. The group application option is simply another means of data gathering. The Administrator may always collect more data should he determine it necessary upon review of a groups' data submission. And, he may obtain such additional data by whatever means permissible under the Statute that he deems appropriate. Thus, it can hardly be said that by this initial data gathering effort the Administrator has delegated his data gathering responsibilities. In addition, since groups are required to select "representative" facilities, etc., in accordance with specific regulatory requirements established by the Administrator and because EPA will scrutinize part 1 of the group applications and either accept or reject the group as appropriate for a group application, no impermissible delegation has occurred. EPA will make an independent determination of the acceptability of a group application in view of the information required to be submitted by the group applicant, other information available to EPA (such as information on industrial subcategories obtained in developing effluent limitations guidelines as well as individual storm water applications received as a result of today's rule) and any further information EPA may request to supplement part 1 pursuant to section 308 of the CWA. Moreover, any concerns that a general permit may be based upon biased data can be dealt with in the public permit issuance process.

Finally, EPA also does not agree that the group application option violates the Administrative Procedures Act. Again, the group application scheme is simply a data gathering device. EPA could very well have determined to gather data informally via specific requests pursuant to section 308 of the CWA. In fact, general permit and effluent limitations guideline development proceed along these lines. It would make little sense if the latter informal data gathering process were somehow illegal simply because it is set forth in a rule that allows applicants some relief upon certain showings. In this respect, several of EPA's existing regulations similarly allow an applicant to be relieved from certain data submission requirements upon appropriate demonstrations. For example, testing for certain pollutants and or certain outfalls may be waived under certain circumstances. Most importantly, the operative action of concern that impacts on the public is individual or general permit issuance based upon data obtained. As previously stated, ample opportunity for public participation is provided in the permit issuance proceeding.

7. Permit Applicability and Applications for Oil and Gas and Mining Operations

Oil, gas and mining facilities are among those industrial sites that are likely to discharge storm water runoff that is contaminated by process wastes, toxic pollutants, hazardous substances, or oil and grease. Such contamination can include disturbed soils and process wastes containing heavy metals or suspended or dissolved solids, salts, surfactants, or solvents used or produced in oil and gas operations. Because they have the potential for serious water quality impacts, Congress recognized, throughout the development of the storm water provisions of the Water Quality Act of 1987, the need to control storm water discharges from oil, gas, and mining operations, as well as those associated with other industrial activities.

However, Congress also recognized that there are numerous situations in the mining and oil and gas industries where storm water is channeled around plants and operations through a series of ditches and other structural devices in order to prevent pollution of the storm water by harmful contaminants. From the standpoint of resource drain on both EPA as the permitting agency and potential permit applicants, the conclusion was that operators that use good management practices and make expenditures to prevent contamination must not be burdened with the requirement to obtain a

Received
August 26, 2011
Commission on
State Mandates

permit. Hence, section 402(1)(2) creates a statutory exemption from storm water permitting requirements for uncontaminated runoff from these facilities.

To implement section 402(1)(2), EPA intends to require permits for contaminated storm water discharges from oil, gas and mining operations. Storm water discharges that are not contaminated by contact with any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations will not be required to obtain a storm water discharge permit.

The regulated discharge associated with industrial activity is the discharge from any conveyance used for collecting and conveying storm water located at an industrial plant or directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Industrial plants include facilities classified as Standard Industrial Classifications (SIC) 10 through 14 (the mining industry), including oil and gas exploration, production, processing, and treatment operations, as well as transmission facilities. See 40 CFR 122.26(b)(14)(iii). This also includes plant areas that are no longer used for such activities, as well as areas that are currently being used for industrial processes.

a. Oil and Gas Operations. In determining whether storm water discharges from oil and gas facilities are "contaminated", the legislative history reflects that the EPA should consider whether oil, grease, or hazardous materials are present in storm water runoff from the sites described above in excess of reportable quantities (RQs) under section 311 of the Clean Water Act or section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). [Vol. 132 Cong. Rec. H10574 (daily ed. October 15, 1986) Conference Report].

Many of the comments received by EPA regarding this exemption focused on the concern that EPA's test for requiring a permit is and would subject an unnecessarily large number of oil and gas facilities to permit application requirements. Specific comments made in support of this concern are addressed below.

A primary issue raised by commenters centered on how to determine when a storm water discharge from an oil or gas facility is "contaminated", and therefore subject to the permitting program under section 402 of the CWA. Many of the comments received from industry representatives objected to the Agency's intent as expressed in the proposal to use past discharges as a trigger for submitting permit applications.

The proposed rule provided that the notification requirements for releases in excess of RQs established under the CWA and CERCLA would serve as a basis for triggering the submittal of permit applications for storm water discharges from oil and gas facilities. As described in the proposal, oil and gas operations that have been required to notify authorities of the release of either oil or a hazardous substance via a storm water route would be required to submit a permit application. In other words, any facility required to provide notification of the release of an RQ of oil or a hazardous substance in storm water in the past would be required to apply for a storm water permit under the current rule. In addition, any facility required to provide notification regarding a release occurring from the effective date of today's rule forward would be required to apply for a storm water permit.

Commenters maintained that the use of historical discharges to require permit applications is inconsistent with the language and intent of section 402(1)(2) of the CWA, and relevant legislative history, both of which focus on present contamination. Requiring storm water permits based solely on the occurrence of past contaminated discharges, even where no present contamination is evident, would go beyond the statutory requirement that EPA not issue a permit absent a finding present contamination. Commenters also noted that the proposal did not take into account the fact that past problems leading to such releases may have been corrected, and that requiring an NPDES permit may no longer be necessary. The result of such a requirement, commenters maintained, would be an excessive number of unnecessary permit applications being submitted, at significant cost and minimal benefit to both regulated facilities and regulating authorities.

Commenters also indicated that using the release of reportable quantities of oil, grease or hazardous substances as a permit trigger would identify discharges of an isolated nature, rather than the continuous discharges, which should be the focus of the NPDES permit program under section 402. Such an approach, commenters maintained, is inconsistent with existing regulations under section 311 of the CWA, and would result in permit applications from facilities that are more appropriately regulated under section 311.

Despite these criticisms, many commenters recognized that the Agency is left with the task of determining when discharges from oil and gas facilities are contaminated, in order to regulate them under section 402(1)(2). It was suggested by numerous commenters that the EPA adopt an approach similar to that used under section 311 of the CWA for Spill Prevention Control and Countermeasure (SPCC) Plans. Under SPCC, facilities that are likely to discharge oil into waters of the United States are required to maintain a SPCC plan. In the event the facility has a spill of 1,000 gallons or

Received
August 26, 2011
Commission on
State Mandates

2 or more reportable quantities of oil in a 12 month period, the facility is required to submit its SPCC plan to the Agency. The triggering events proposed by the commenters for storm water permits for oil and gas operations are six reportable sheens or discharges of hazardous substances (other than oil) in excess of section 311 or section 102 reportable quantities via a storm water point source route over any thirty-six month period. It was suggested that if this threshold is reached, an operator would then file a permit application (or join a group application) based upon the presumption that its current storm water discharges are contaminated.

In response to these comments, the Agency believes that past releases that are reportable quantities can be a valid indicator of the potential for present contamination of discharges. The legislative history as cited above supports this conclusion. EPA would note that the existence of a RQ release would serve only as a triggering mechanism for a permit application. Under the proposed rule, evidence of past contamination would merely require submission of a permit application and would not be used as conclusive evidence of current contamination. The determination as to whether a permit would be actually required due to current contaminated discharge would be made by the permitting authority after reviewing the permit application. The fact of a past RQ release does not necessarily imply a conclusive finding of contamination, only that sufficient potential for contamination exists to warrant a permit application or the collection of other further information. Today's rule does not change the proposed approach in this respect. Thus, EPA does not believe that today's rule exceeds the authority of section 402(1)(2).

EPA believes that there is no legal impediment to using past RQ discharges as a trigger for requiring a storm water permit application. EPA notes that, as mentioned above, even those commenters who objected to the proposed test on legal authority grounds merely offered an alternate test that requires more releases to have occurred within a shorter period of time before a permit application is required.

Therefore, the only disagreement that remains is over what constitutes a reasonable test that will identify facilities with the potential for storm water contamination. EPA notes that neither the statute nor the legislative history provides any guidance on this question. Furthermore, EPA disagrees with the commenters who suggested that 6 releases in the past 3 years or 2 releases in the past year are necessarily more valid measures of the potential for current contamination than EPA's proposed test. There is no statistical or other basis for preferring one test to the other. However, EPA does agree with those commenters that suggest that a single release in the distant past may not accurately reflect current conditions and the current potential for contamination.

EPA has therefore amended today's rule to provide that only oil and gas facilities which have had a release of an RQ of oil or hazardous substances in storm water in the past three years will be required to submit a permit application. EPA believes that limiting the permit trigger to events of the past three years will address commenters' concerns regarding the use of "stale history" in determining whether an application is required. EPA notes that the three year cutoff is consistent with the requirement for industrial facilities to report significant leaks or spills at the facility in their storm water permit applications. See 40 CFR 122.26(c)(1)(i)(D).

Commenters asserted that EPA and the States must have some reasonable basis for concluding that a storm water discharge is contaminated before requiring permit applications or permits. Commenters believed that ß 122.26(c)(1)(iii)(B) as proposed implied that the Agency's authority in this respect is unrestricted. In response, EPA may collect such data by whatever appropriate means the statute allows, in order to obtain information that a permit is required. Usually, the most practical tool for doing so is the permit application itself. However, if necessary to supplement the information made available to the Agency, EPA has broad authority to obtain information necessary to determine whether or not a permit is required, under section 308 of the Clean Water Act. Given the plain language of the CWA and the Congressional intent as manifested in the legislative history, the Agency is convinced that the approach described above is appropriate. Yet, as further discussed below, EPA has also deleted as redundant ß 122.26(c)(1)(iii)(B).

Regarding the types of facilities included in the storm water regulation, a number of commenters suggested that the Agency has misconstrued the meaning of facilities "associated with industrial activity", and has proposed an overly broad definition of such facilities in the oil and gas industry. Specifically, commenters suggested that only the manufacturing sector of the oil and gas industry should be subject to storm water permit application requirements, and that exploration and production activities, gas stations, terminals, and bulk plants should all be exempted from storm water permitting requirements. Commenters maintain that this broad interpretation would subject many oil and gas facilities to the storm water permit requirements, when these were not intended by Congress to be so regulated. As a second point related to this issue, some commenters felt that transmission facilities were not intended to be regulated under the storm water provisions, and should be exempted from permit requirements. This would be consistent, it was argued, with leg-

Received
August 26, 2011
Commission on
State Mandates

islative history which concluded that transmission facilities do not significantly contribute to the contamination of water.

The Agency disagrees that these facilities do not fall under the storm water permitting requirements as envisioned by Congress. SIC 13, which is relied upon by EPA to identify these oil and gas operations, describes oil and gas extraction industries as including facilities related to crude oil and natural gas, natural gas liquids, drilling oil and gas wells, oil and gas exploration and field services. Moreover, legislative history as it applies to industrial activities, and thus to oil and gas (mining) operations, expressly includes exploration, production, processing, transmission, and treatment operations within the purview of storm water permitting requirements and exemptions. EPA's intent is for storm water permit requirements (and the exemption at hand) to apply to the activities listed above (exploration, production, processing, treatment, and transmission) as they relate to the categories listed in SIC 13.

Commenters requested clarification from the Agency that storm water discharges from oil and gas facilities require a permit or the filing of a permit application only when they are contaminated at the point of discharge into waters of the United States. Commenters noted that large amounts of potentially contaminated stormwater may not enter waters of the United States, or may enter at a point once the discharge is no longer "contaminated". In these cases, it should be clear that no permit or permit application is required.

EPA agrees that oil and gas exploration, production, processing, or treatment operations or transmission facilities must only obtain a storm water permit when a discharge to waters of the U.S. (including those discharges through municipal separate storm sewers) is contaminated. A permit application will be required when any discharge in the past three years or henceforth meets the test discussed above.

Under the proposed rule, the Agency stated at ß122.26(c)(1)(iii)(B) that the Director may require on a case-by-case basis the operator of an existing or new storm water discharge from an oil or gas exploration, production, processing, or treatment operation, or transmission facility to submit an individual permit application. The Agency has removed this section since CWA section 402(1)(2), as codified in 122.26(c)(1)(iii)(A), adequately addresses every situation where a permit should be required for these facilities.

b. Use of Reportable Quantities to Determine if a Storm Water Discharge from an Oil or Gas Operation is Contaminated. Section 311(b)(5) of the CWA requires reporting of certain discharges of oil or a hazardous substance into waters of the United States (see 44 FR 50766 (August 29, 1979)). Section 304(b)(4) of the Act requires that notification levels for oil and hazardous substances be set at quantities which may be harmful to the public health or welfare of the United States, including but not limited to fish, shellfish, wildlife, and public or private property, shorelines and beaches. Facilities which discharge oil or a hazardous substance in quantities equal to or in excess of an RQ, with certain exceptions, are required to notify the National Response Center (NRC).

Section 102 of CERCLA extended the reporting requirement for releases equal to or exceeding an RQ of a hazardous substance by adding chemicals to the list of hazardous substances, and by extending the reporting requirement (with certain exceptions) to any releases to the environment, not just those to waters of the United States.

Pursuant to section 311 of the CWA, EPA determined reportable quantities for discharges by correlating aquatic animal toxicity ranges with 5 reporting quantities, i.e., 1-, 10-, 100-, 1000-, and 5000- pounds per 24 hour period levels. Reportable quantity adjustments made under CERCLA rely on a different methodology. The strategy for adjusting reportable quantities begins with an evaluation of the intrinsic physical, chemical, and toxicological properties of each designated hazardous substance. The intrinsic properties examined, called "primary criteria," are aquatic toxicity, mammalian toxicity (oral, dermal, and inhalation), ignitability, reactivity, and chronic toxicity. In addition, substances that were identified as potential carcinogens have been evaluated for their relative activity as potential carcinogens. Each intrinsic property is ranked on a five-tier scale, associating a specific range of values on each scale with a particular reportable quantity value. After the primary criteria reportable quantities are assigned, the hazardous substances are further evaluated for their susceptibility to certain extrinsic degradation processes (secondary criteria). Secondary criteria consider whether a substance degrades relatively rapidly to a less harmful compound, and can be used to raise the primary criteria reportable quantity one level.

Also pursuant to section 311, EPA has developed a reportable quantity for oil and associated reporting requirements at 40 CFR part 110. These requirements, known as the oil sheen regulation, define the RQ for oil to be the amount of oil that violates applicable water quality standards or causes a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or causes a sludge or emulsion to be deposited.

Received
August 26, 2011
Commission on
State Mandates

Reportable quantities developed under the CWA and CERCLA were not developed as effluent guideline limitations which establish allowable limits for pollutant discharges to surface waters. Rather, a major purpose of the notification requirements is to alert government officials to releases of hazardous substances that may require rapid response to protect public health, welfare, and the environment. Notification based on reportable quantities serves as a trigger for informing the government of a release so that the need for response can be evaluated and any necessary response undertaken in a timely fashion. The reportable quantities do not themselves represent any determination that releases of a particular quantity are actually harmful to public health, welfare, or the environment.

EPA requested comment on the use of RQs for determining contamination in discharges from oil and gas facilities. As noted above numerous commenters supported the concept of using reportable quantities under certain circumstances. Comments on the measurement of oil sheens for the purpose of triggering a permit application were divided. Some commented that it is much too stringent because the amount of oil creating a sheen may be a relatively small amount. Others viewed the test as a quick, easy, practical method that has been effective in the past.

In relying on the reporting requirements associated with releases in excess of RQs for oil or hazardous substances to trigger the submittal of permit applications for oil and gas operations, the Agency believes that the use of the reporting requirements for oil will be particularly useful. The Agency believes that the release of oil to a storm water discharge in amounts that cause an oil sheen is a good indicator of the potential for water quality impacts from storm water releases from oil and gas operations. In addition, given the extremely high number of such operations (the Agency estimates that there are over 750,000 oil wells alone in the United States), relying on the oil sheen test to determine if storm water discharges from such sites are "contaminated" will be a far easier test for operators to determine whether to file a storm water permit application than a test based on sampling. The detection of a sheen does not require sophisticated instrumentation since a sheen is easily perceived by visual observation. EPA agrees with those comments calling the oil sheen test an appropriate measure for triggering a storm water permit application. In adopting this approach, EPA recognizes, as pointed out by many commenters that an oil sheen can be created with a relatively small amount of oil.

One commenter suggested that contamination must be caused by contact with on-site material before being subject to permit application requirements. The Agency agrees with this comment. Those facilities that have had releases in excess of reportable quantities will generally have contamination from contact with on-site material as described in the CWA. Thus, use of the RQ test is an appropriate trigger. As discussed above, determination of whether contamination is present to warrant issuance of a permit will be made in the context of the permit proceeding.

One commenter believed that the use of RQs is inappropriate because "the statute intended to exempt only oil and gas runoff that is not contaminated at all." The Agency wishes to clarify that reportable quantities are being used to determine what facilities need to file permit applications and to describe what is meant by the term "contaminated." The Director may require a permit for any discharges of storm water runoff contaminated by contact with any overburden, raw material, intermediate product, finished product, by product or waste product at the site of such operations. The use of RQs is solely a mechanism for identifying the facilities most likely to need a storm water permit consistent with the legislative history of section 402(l)(2).

c. Mining Operations. The December 7, 1988 proposal would establish background levels as the standard used to define when a storm water discharge from a mining operation is contaminated. When a storm water discharge from a mining site was found to contain pollutants at levels that exceed background levels, the owner or operator of the site was required to submit a permit application for that operation. The proposal was founded upon language in the legislative history stating that the determination of whether storm water is contaminated by contact with overburden, raw material, intermediate product, finished product, byproduct, or waste products "shall take into consideration whether these materials are present in such stormwater runoff . . . above natural background levels". [Vol. 132 Cong. Rec. H10574 (daily ed. Oct. 15, 1986) Conference Report].

Comments received on this component of the rule suggested that background levels of pollutants would be very difficult to calculate due to the complex topography frequently encountered in alpine mining regions. For example, if a mine is located in a mountain valley surrounded on all sides by hills, the site will have innumerable slopes feeding flow towards it. Under such circumstances, determining how the background level is set would prove impractical. Commenters indicated that it is very difficult to measure or determine background levels at sites where mining has occurred for prolonged periods. In many instances, data on original background levels may not be available due to long-term site activity. As a result, any background level established will vary based on the type and level of previous activity. In addition, mining sites typically have background levels that are naturally distinct from the surrounding areas. This is due to

Received
August 26, 2011
Commission on
State Mandates

the geologic characteristics that makes them valuable as mining sites to begin with. This also makes it difficult to establish accurate background levels.

Because of these concerns EPA has decided to drop the use of background levels as a measure for determining whether a permit application is required. Accordingly, a permit application will be required when discharges of storm water runoff from mining operations come into contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site. Similar to the RQ test for oil and gas operations, EPA intends to use the "contact" test solely as a permit application trigger. The determination of whether a mining operation's runoff is contaminated will be made in the context of the permit issuance proceedings.

If the owner or operator determines that no storm water runoff comes into contact with overburden, raw material, intermediate product, finished product, byproduct, or waste products, then there is no obligation to file a permit application. This framework is consistent with the statutory provisions of section 402(1)(2) and is intended to encourage each mining site to adopt the best possible management controls to prevent such contact.

Several commenters stated that EPA's use of total pollutant loadings for determining permit applicability is not consistent with the general framework of the NPDES program. Their concern is that such evaluation criteria depart from how the NPDES program has been administered in the past, based on concentration limits. In addition, commenters requested that EPA clarify that information on mass loading will be used for determining the need for a permit only. Since the analysis of natural background levels as a basis for a permit application has been dropped from this rulemaking, these issues are moot.

Commenters noted that the proposed rule did not specify what impact this rulemaking has on the storm water exemptions in 40 CFR 440.131. The commenters recommended not changing any of these provisions. Some commenters indicated that mining facilities that have NPDES permits should not be subject to additional permitting under the storm water rule. EPA does not intend that today's rule have any effect on the conditional exemptions in 40 CFR 440.131. Where a facility has an overflow or excess discharge of process-related effluent due to stormwater runoff, the conditional exemptions in 40 CFR 440.131 remain available.

Several commenters note that the term overburden, as used in the context of the proposed storm water rule, is not defined and recommended that this term should be defined to delineate the scope of the regulation. EPA agrees that the term overburden should be defined to help properly define the scope the storm water rule. In today's rule, the term overburden has been clarified to mean any material of any nature overlying a mineral deposit that is removed to gain access to that deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations. This definition is patterned after the overburden definition in SMCRA, and is designed to exclude undisturbed lands from permit coverage as industrial activity. However, the definition provided in this regulation may be revised at a later date, to achieve consistency with the promulgation of RCRA Subtitle D mining waste regulations in the future.

Numerous commenters raised issues pertaining to the inclusion of inactive mining areas as subject to the stormwater rule. Some commenters indicated that including inactive mine operations in the rule would create an unreasonable hardship on the industry. EPA has included inactive mining areas in today's rule because some mining sites represent a significant source of contaminated stormwater runoff. EPA has clarified that inactive mining sites are those that are no longer being actively mined, but which have an identifiable owner/operator. The rule also clarifies that active and inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities required for the sole purpose of maintaining the mining claim are undertaken. The Agency would clarify that claims on land where there has been past extraction, beneficiation, or processing of mining materials, but there is currently no active mining are considered inactive sites. However, in such cases the exclusion discussed above for uncontaminated discharges will still apply.

EPA's definition of active and inactive mining operations also excludes those areas which have been reclaimed under SMCRA or, for non-coal mining operations, under similar applicable State or Federal laws. EPA believes that, as a general matter, areas which have undergone reclamation pursuant to such laws have concluded all industrial activity in such a way as to minimize contact with overburden, mine products, etc. EPA and NPDES States, of course, retain the authority to designate particular reclaimed areas for permit coverage under section 402(p)(2)(E).

The proposed rule had included an exemption for areas which have been reclaimed under SMCRA, although the language of the proposed rule inadvertently identified the wrong universe of coal mining areas. The final rule language has been revised to clarify that areas which have been reclaimed under SMCRA (and thus are no longer subject to 40

Received
August 26, 2011
Commission on
State Mandates

CFR part 434 subpart E) are not subject to today's rule. Today's rule thus is consistent with the coal mining effluent guideline in its treatment of areas reclaimed under SMCRA.

In response to comments, EPA has also expanded this concept to exclude from coverage as industrial activity non-coal mines which are released from similar State or Federal reclamation requirements on or after the effective date of this rule. EPA believes it is appropriate, however, to require permit coverage for contaminated runoff from inactive non-coal mines which may have been subject to reclamation regulations, but which have been released from those requirements prior to today's rule. EPA does not have sufficient evidence to suggest that each State's previous reclamation rules and/or Federal requirements, if applicable, were necessarily effective in controlling future storm water contamination.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 19

Received
August 26, 2011
Commission on
State Mandates

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 1. The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 1.5. The annual calculation of the appropriations limit under this article for each entity of local government shall be reviewed as part of an annual financial audit.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 2. (a) (1) Fifty percent of all revenues received by the State in a fiscal year and in the fiscal year immediately following it in excess of the amount which may be appropriated by the State in compliance with this article during that fiscal year and the fiscal year immediately following it shall be transferred and allocated, from a fund established for that purpose, pursuant to Section 8.5 of Article XVI.

(2) Fifty percent of all revenues received by the State in a fiscal year and in the fiscal year immediately following it in excess of the amount which may be appropriated by the State in compliance with this article during that fiscal year and the fiscal year immediately following it shall be returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years.

(b) All revenues received by an entity of government, other than the State, in a fiscal year and in the fiscal year immediately following it in excess of the amount which may be appropriated by the entity in compliance with this article during that fiscal year and the fiscal year immediately following it shall be returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 3. The appropriations limit for any fiscal year pursuant to Sec. 1 shall be adjusted as follows:

(a) In the event that the financial responsibility of providing services is transferred, in whole or in part, whether by annexation,

Received
August 26, 2011
Commission on
State Mandates

incorporation or otherwise, from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount.

(b) In the event that the financial responsibility of providing services is transferred, in whole or in part, from an entity of government to a private entity, or the financial source for the provision of services is transferred, in whole or in part, from other revenues of an entity of government, to regulatory licenses, user charges or user fees, then for the year of such transfer the appropriations limit of such entity of government shall be decreased accordingly.

(c) (1) In the event an emergency is declared by the legislative body of an entity of government, the appropriations limit of the affected entity of government may be exceeded provided that the appropriations limits in the following three years are reduced accordingly to prevent an aggregate increase in appropriations resulting from the emergency.

(2) In the event an emergency is declared by the Governor, appropriations approved by a two-thirds vote of the legislative body of an affected entity of government to an emergency account for expenditures relating to that emergency shall not constitute appropriations subject to limitation. As used in this paragraph, "emergency" means the existence, as declared by the Governor, of conditions of disaster or of extreme peril to the safety of persons and property within the State, or parts thereof, caused by such conditions as attack or probable or imminent attack by an enemy of the United States, fire, flood, drought, storm, civil disorder, earthquake, or volcanic eruption.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 4. The appropriations limit imposed on any new or existing entity of government by this Article may be established or changed by the electors of such entity, subject to and in conformity with constitutional and statutory voting requirements. The duration of any such change shall be as determined by said electors, but shall in no event exceed four years from the most recent vote of said electors creating or continuing such change.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 5. Each entity of government may establish such contingency, emergency, unemployment, reserve, retirement, sinking fund, trust, or similar funds as it shall deem reasonable and proper. Contributions to any such fund, to the extent that such contributions are derived from the proceeds of taxes, shall for purposes of this Article constitute appropriations subject to limitation in the year of contribution. Neither withdrawals from any such fund, nor expenditures of (or authorizations to expend) such withdrawals, nor

Received
August 26, 2011
Commission on
State Mandates

transfers between or among such funds, shall for purposes of this Article constitute appropriations subject to limitation.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SECTION 5.5. Prudent State Reserve. The Legislature shall establish a prudent state reserve fund in such amount as it shall deem reasonable and necessary. Contributions to, and withdrawals from, the fund shall be subject to the provisions of Section 5 of this Article.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 6. (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates:

(1) Legislative mandates requested by the local agency affected.

(2) Legislation defining a new crime or changing an existing definition of a crime.

(3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

(b) (1) Except as provided in paragraph (2), for the 2005-06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the State pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law.

(2) Payable claims for costs incurred prior to the 2004-05 fiscal year that have not been paid prior to the 2005-06 fiscal year may be paid over a term of years, as prescribed by law.

(3) Ad valorem property tax revenues shall not be used to reimburse a local government for the costs of a new program or higher level of service.

(4) This subdivision applies to a mandate only as it affects a city, county, city and county, or special district.

(5) This subdivision shall not apply to a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local government employee organization, that arises from, affects, or directly relates to future, current, or past local government employment and that constitutes a mandate subject to this section.

(c) A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State

Received
August 26, 2011
Commission on
State Mandates

previously had complete or partial financial responsibility.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 7. Nothing in this Article shall be construed to impair the ability of the State or of any local government to meet its obligations with respect to existing or future bonded indebtedness.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 8. As used in this article and except as otherwise expressly provided herein:

(a) "Appropriations subject to limitation" of the State means any authorization to expend during a fiscal year the proceeds of taxes levied by or for the State, exclusive of state subventions for the use and operation of local government (other than subventions made pursuant to Section 6) and further exclusive of refunds of taxes, benefit payments from retirement, unemployment insurance, and disability insurance funds.

(b) "Appropriations subject to limitation" of an entity of local government means any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity and the proceeds of state subventions to that entity (other than subventions made pursuant to Section 6) exclusive of refunds of taxes.

(c) "Proceeds of taxes" shall include, but not be restricted to, all tax revenues and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service, and (2) the investment of tax revenues. With respect to any local government, "proceeds of taxes" shall include subventions received from the State, other than pursuant to Section 6, and, with respect to the State, proceeds of taxes shall exclude such subventions.

(d) "Local government" means any city, county, city and county, school district, special district, authority, or other political subdivision of or within the State.

(e) (1) "Change in the cost of living" for the State, a school district, or a community college district means the percentage change in California per capita personal income from the preceding year.

(2) "Change in the cost of living" for an entity of local government, other than a school district or a community college district, shall be either (A) the percentage change in California per capita personal income from the preceding year, or (B) the percentage change in the local assessment roll from the preceding year for the jurisdiction due to the addition of local nonresidential new construction. Each entity of local government shall select its change in the cost of living pursuant to this paragraph annually by a recorded vote of the entity's governing body.

(f) "Change in population" of any entity of government, other than the State, a school district, or a community college district, shall be determined by a method prescribed by the Legislature.

"Change in population" of a school district or a community college

Received
August 26, 2011
Commission on
State Mandates

district shall be the percentage change in the average daily attendance of the school district or community college district from the preceding fiscal year, as determined by a method prescribed by the Legislature.

"Change in population" of the State shall be determined by adding (1) the percentage change in the State's population multiplied by the percentage of the State's budget in the prior fiscal year that is expended for other than educational purposes for kindergarten and grades one to 12, inclusive, and the community colleges, and (2) the percentage change in the total statewide average daily attendance in kindergarten and grades one to 12, inclusive, and the community colleges, multiplied by the percentage of the State's budget in the prior fiscal year that is expended for educational purposes for kindergarten and grades one to 12, inclusive, and the community colleges.

Any determination of population pursuant to this subdivision, other than that measured by average daily attendance, shall be revised, as necessary, to reflect the periodic census conducted by the United States Department of Commerce, or successor department.

(g) "Debt service" means appropriations required to pay the cost of interest and redemption charges, including the funding of any reserve or sinking fund required in connection therewith, on indebtedness existing or legally authorized as of January 1, 1979, or on bonded indebtedness thereafter approved according to law by a vote of the electors of the issuing entity voting in an election for that purpose.

(h) The "appropriations limit" of each entity of government for each fiscal year is that amount which total annual appropriations subject to limitation may not exceed under Sections 1 and 3. However, the "appropriations limit" of each entity of government for fiscal year 1978-79 is the total of the appropriations subject to limitation of the entity for that fiscal year. For fiscal year 1978-79, state subventions to local governments, exclusive of federal grants, are deemed to have been derived from the proceeds of state taxes.

(i) Except as otherwise provided in Section 5, "appropriations subject to limitation" do not include local agency loan funds or indebtedness funds, investment (or authorizations to invest) funds of the State, or of an entity of local government in accounts at banks or savings and loan associations or in liquid securities.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 9. "Appropriations subject to limitation" for each entity of government do not include:

(a) Appropriations for debt service.

(b) Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly.

(c) Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 121/2 cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes.

Received
August 26, 2011
Commission on
State Mandates

(d) Appropriations for all qualified capital outlay projects, as defined by the Legislature.

(e) Appropriations of revenue which are derived from any of the following:

(1) That portion of the taxes imposed on motor vehicle fuels for use in motor vehicles upon public streets and highways at a rate of more than nine cents ($0.09) per gallon.

(2) Sales and use taxes collected on that increment of the tax specified in paragraph (1).

(3) That portion of the weight fee imposed on commercial vehicles which exceeds the weight fee imposed on those vehicles on January 1, 1990.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 10. This Article shall be effective commencing with the first day of the fiscal year following its adoption.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 10.5. For fiscal years beginning on or after July 1, 1990, the appropriations limit of each entity of government shall be the appropriations limit for the 1986-87 fiscal year adjusted for the changes made from that fiscal year pursuant to this article, as amended by the measure adding this section, adjusted for the changes required by Section 3.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 11. If any appropriation category shall be added to or removed from appropriations subject to limitation, pursuant to final judgment of any court of competent jurisdiction and any appeal therefrom, the appropriations limit shall be adjusted accordingly. If any section, part, clause of phrase in this Article is for any reason held invalid or unconstitutional, the remaining portions of this Article shall not be affected but shall remain in full force and effect.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 12. "Appropriations subject to limitation" of each entity of government shall not include appropriations of revenue from the Cigarette and Tobacco Products Surtax Fund created by the Tobacco Tax and Health Protection Act of 1988. No adjustment in the

Received
August 26, 2011
Commission on
State Mandates

appropriations limit of any entity of government shall be required pursuant to Section 3 as a result of revenue being deposited in or appropriated from the Cigarette and Tobacco Products Surtax Fund created by the Tobacco Tax and Health Protection Act of 1988.

CALIFORNIA CONSTITUTION
ARTICLE 13B GOVERNMENT SPENDING LIMITATION

SEC. 13. "Appropriations subject to limitation" of each entity of government shall not include appropriations of revenue from the California Children and Families First Trust Fund created by the California Children and Families First Act of 1998. No adjustment in the appropriations limit of any entity of government shall be required pursuant to Section 3 as a result of revenue being deposited in or appropriated from the California Children and Families First Trust Fund. The surtax created by the California Children and Families First Act of 1998 shall not be considered General Fund revenues for the purposes of Section 8 of Article XVI.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 20

Received
August 26, 2011
Commission on
State Mandates

CALIFORNIA CONSTITUTION
ARTICLE 13D (ASSESSMENT AND PROPERTY-RELATED FEE REFORM)

SECTION 1. Application. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIIIC shall be construed to:

(a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.

(b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.

(c) Affect existing laws relating to the imposition of timber yield taxes.

CALIFORNIA CONSTITUTION
ARTICLE 13D (ASSESSMENT AND PROPERTY-RELATED FEE REFORM)

SEC. 2. Definitions. As used in this article:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIIIC.

(b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."

(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.

(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.

(e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

(f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.

(g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

(h) "Property-related service" means a public service having a direct relationship to property ownership.

(i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

CALIFORNIA CONSTITUTION
ARTICLE 13D (ASSESSMENT AND PROPERTY-RELATED FEE REFORM)

Received
August 26, 2011
Commission on
State Mandates

SEC. 3. Property Taxes, Assessments, Fees and Charges Limited. (a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIIIA.

(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIIIA.

(3) Assessments as provided by this article.

(4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

CALIFORNIA CONSTITUTION
ARTICLE 13D (ASSESSMENT AND PROPERTY-RELATED FEE REFORM)

SEC. 4. Procedures and Requirements for All Assessments. (a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

(b) All assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may

Received
August 26, 2011
Commission on
State Mandates

indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).

CALIFORNIA CONSTITUTION
ARTICLE 13D (ASSESSMENT AND PROPERTY-RELATED FEE REFORM)

SEC. 5. Effective Date. Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new, or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:

(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be

Received
August 26, 2011
Commission on
State Mandates

subject to the procedures and approval process set forth in Section 4.

CALIFORNIA CONSTITUTION
ARTICLE 13D (ASSESSMENT AND PROPERTY-RELATED FEE REFORM)

SEC. 6. Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except

Received
August 26, 2011
Commission on
State Mandates

for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 21

Received
August 26, 2011
Commission on
State Mandates

DEERING'S CALIFORNIA CODES ANNOTATED
Copyright (c) 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 192 & EXTRA. SESS. CH. 8 ***
OF THE 2011 SESSION
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 1. Legislative Intent

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code ß 17500 (2011)

ß 17500. Legislative findings and declarations

The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIIIB of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.

It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIIIB of the California Constitution. Further, the Legislature intends that the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner in accordance with the requirements of Section 6 of Article XIIIB of the California Constitution.

HISTORY:

Added Stats 1984 ch 1459 ß 1. Amended Stats 2004 ch 890 ß 2 (AB 2856).

NOTES:

Amendments:

2004 Amendment:

Received
August 26, 2011
Commission on
State Mandates

Deleted "and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the constitution" at the end of the first sentence in the second paragraph.

Note

Stats 2005 ch 72 provides:

SEC. 17. (a) Notwithstanding any other provision of law, the Commission on State Mandates, no later than June 30, 2006, shall reconsider its test claim statement of decision in CSM-4202 on the Mandate Reimbursement Program to determine whether Chapter 486 of the Statutes of 1975 and Chapter 1459 of the Statutes of 1984 constitute a reimbursable mandate under Section 6 of Article XIII B of the California Constitution in light of federal and state statutes enacted and federal and state court decisions rendered since these statutes were enacted. If a new test claim is filed on Chapter 890 of the Statutes of 2004, the commission shall, if practicable, hear and determine the new test claim at the same time as the reconsideration of CSM-4202. The commission, if necessary, shall revise its parameters and guidelines in CSM-4485 to be consistent with this reconsideration and, if practicable, shall include a reasonable reimbursement methodology as defined in Section 17518.5 of the Government Code. If the parameters and guidelines are revised, the Controller shall revise the appropriate claiming instructions to be consistent with the revised parameters and guidelines. Any changes by the commission to the original statement of decision in CSM-4202 shall be deemed effective on July 1, 2006.

(b) Notwithstanding any other provision of law, the Commission on State Mandates shall set-aside all decisions, reconsiderations, and parameters and guidelines on the Open Meetings Act (CSM-4257) and Brown Act Reform (CSM-4469) test claims. The operative date of these actions shall be the effective date of this act. In addition, the Commission on State Mandates shall amend the appropriate parameters and guidelines, and the Controller shall revise the appropriate reimbursement claiming instructions, as necessary to be consistent with any other provisions of this act.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 324 "Jurisdiction: Subject Matter Jurisdiction".

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 474 "Availability of Judicial Review of Agency Decisions".

Cal. Employment Law (Matthew Bender(R)), ß 21.02.

9 Witkin Summary (10th ed) Taxation ß 122.

Hierarchy Notes:

Tit. 2, Div. 4 Note

Tit. 2, Div. 4, Pt. 7 Note

NOTES OF DECISIONS 1. Generally 1.5. Particular Determinations 2. Legislative Intent 2.5. Construction 3. Construction with Other Law 4. Jurisdiction

1. Generally

Gov C ß 17500-17630 was enacted to implement Cal Const Art XIII B ß 6. County of Fresno v. State (1991) 53 Cal 3d 482, 280 Cal Rptr 92, 808 P2d 235, 1991 Cal LEXIS 1363.

Gov C ß 17556(d) declares that the commission shall not find costs mandated by the state if, after a hearing, the commission finds that the local government has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. County of Fresno v. State (1991) 53 Cal 3d 482, 280 Cal Rptr 92, 808 P2d 235, 1991 Cal LEXIS 1363.

Received
August 26, 2011
Commission on
State Mandates

1.5. Particular Determinations

State's practice of paying only a nominal amount for mandated programs, while indefinitely deferring the remaining costs, did not comply with the mandate reimbursement requirements of Cal Const Art XIII B ß 6, and the implementing statutes contained in Gov C ß 17500 et seq., as clearly expressed in Gov C ß 17561. Thus, school districts were entitled to declaratory relief under CCP ß 1060. California School Boards Assn. v. State of California (2011, 4th Dist) 192 Cal App 4th 770, 121 Cal Rptr 3d 696, 2011 Cal App LEXIS 164, review denied California School Boards Association v. State of California (2011, Cal.) 2011 Cal. LEXIS 5321.

2. Legislative Intent

In enacting Gov C ß 17500 et seq., the Legislature established the Commission on State Mandates as a quasi-judicial body to carry out a comprehensive administrative procedure for resolving claims for reimbursement of state-mandated local costs arising out of Cal Const Art XIII B ß 6. The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of Cal Const Art XIII B ß 6, lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establish procedures that exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce Cal Const Art XIII B ß 6. Thus, the statutory scheme contemplates that the commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Redevelopment Agency v. California Comm'n on State Mandates (1996, Cal App 4th Dist) 43 Cal App 4th 1188, 51 Cal Rptr 2d 100, 1996 Cal App LEXIS 267.

2.5. Construction

Although the State may require local entities to provide new programs or services, it may not require the local entities to use their own revenues to pay for the programs. Payment at some later, undefined time is impermissible. California School Boards Assn. v. State of California (2011, 4th Dist) 192 Cal App 4th 770, 121 Cal Rptr 3d 696, 2011 Cal App LEXIS 164, review denied California School Boards Association v. State of California (2011, Cal.) 2011 Cal. LEXIS 5321.

3. Construction with Other Law

The Legislature's initial appropriation to reimburse counties for the costs of Pen C ß 987.9 (funding by court for preparation of defense for indigent defendants in capital cases), was not a final and unchallengeable determination that the statute constitutes a state mandate, nor did the Commission on State Mandates err in finding that the statute is not a state mandate, despite the Legislature's finding to the contrary in a later appropriations bill. The commission was not bound by the Legislature's determination, and it had discretion to determine whether a state mandate existed. The comprehensive administrative procedures for resolution of claims arising out of Cal Const Art XIII B ß 6 (Gov C ß 17500 et seq.), are the exclusive procedures by which to implement and enforce the constitutional provision. Thus, the commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Any legislative findings are irrelevant to the issue of whether a state mandate exists, and the commission properly determined that no such mandate existed. In any event, the Legislature itself ceased to regard the provisions of Pen C ß 987.9, as a state mandate in 1983. County of Los Angeles v. Commission on State Mandates (1995, Cal App 2d Dist) 32 Cal App 4th 805, 38 Cal Rptr 2d 304, 1995 Cal App LEXIS 161, review denied (1995, Cal) 1995 Cal LEXIS 3339.

While the legislative history of an amendment to Lab C ß 4707 may have evinced the understanding or belief of the Legislature that the amendment created a state mandate, such understanding or belief was irrelevant to the issue of whether a state mandate existed. The Legislature has entrusted that determination to the Commission on State Mandates, subject to judicial review (Gov C ßß 17500, 17559), and has provided that the initial determination by Legislative Counsel is not binding on the Commission. (Gov C ß 17575.) City of Richmond v. Commission on State Mandates (1998, Cal App 3d Dist) 64 Cal App 4th 1190, 75 Cal Rptr 2d 754, 1998 Cal App LEXIS 546, review denied (1998, Cal) 1998 Cal LEXIS 5509.

Received
August 26, 2011
Commission on
State Mandates

4. Jurisdiction

The superior court had jurisdiction to adjudicate a county's assertion that the Legislature's transfer to counties of the responsibility for providing health care services for medically indigent adults constituted a new program that required state funding under Cal Const Art XIII B ß 6 (reimbursement to local government for costs of new state-mandated program). Although the administrative procedures for determining state-mandated local costs, set forth in Gov C ß 17500 et seq., are the exclusive means by which the state's obligations under Cal Const Art XIII B ß 6, are to be determined, in this case requiring the county to resort to the statutory procedures would have unduly restricted the county's constitutional right. Other counties' test claim to determine the state's obligations, which was supposed to create an administrative process capable of resolving all disputes, was settled and dismissed without resolving the pertinent issues. This undermined the adequacy of the statutory procedures. Moreover, the county had twice filed claims for reimbursement with the Commission on State Mandates, but the commission did not respond. Requiring the county to pursue further, futile administrative procedures would have resulted in irreparable harm in light of the county's expressed intent to terminate, for lack of funding, its program for the medically indigent. County of San Diego v.State of California (1995, 4th Dist) 33 Cal App 4th 1787, 40 Cal Rptr 2d 193, 1995 Cal App LEXIS 364, review granted ty of San Diego (1995) 46 Cal Rptr 2d 586, 904 P 2d 1197, 1995 Cal LEXIS 4446.

In a water quality regulation dispute, Gov C ß 17500 et seq., deprived the trial court of jurisdiction to consider an issue regarding state-mandated costs. San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd. (2010, 3d Dist) 183 Cal App 4th 1110, 108 Cal Rptr 3d 290, 2010 Cal App LEXIS 514, review denied San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Board (2010, Cal.) 2010 Cal. LEXIS 6312.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 22

Received
August 26, 2011
Commission on
State Mandates

DEERING'S CALIFORNIA CODES ANNOTATED
Copyright (c) 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 192 & EXTRA. SESS. CH. 8 ***
OF THE 2011 SESSION
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 2. General Provisions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code ß 17514 (2011)

ß 17514. "Costs mandated by the state"

"Costs mandated by the state" means any increased costs which a local agency or school district 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.

HISTORY:

Added Stats 1984 ch 1459 ß 1.

NOTES:

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 472 "Public Agency Rules".

Attorney General's Opinions:

Regarding claims for "costs mandated by the state" filed with the Board of Control before January 1, 1985, and transferred to the Commission on State Mandates upon its establishment pursuant to Government Code Section 17630 and based upon a statute enacted after July 1, 1980, the Commission should determine if the claim is for "costs mandated by the state" as defined in Government Code Section 17514, and, if it is, allow it; if the claim does not meet the definition, the Commission should determine if it is for "costs mandated by the state" as defined in Revenue and Taxation Code Section 2207 or 2207.5, and, if it is, allow it; or if the claim does not meet any of the foregoing definitions, the Commission should reject it. 68 Ops. Cal. Atty. Gen. 244.

Received
August 26, 2011
Commission on
State Mandates

Hierarchy Notes:

Tit. 2, Div. 4 Note

Tit. 2, Div. 4, Pt. 7 Note

NOTES OF DECISIONS 1. Constitutionality 2. Construction 3. Construction with Other Law 4. Error

1. Constitutionality

Because Gov C ß 17516(c) was unconstitutional to the extent that it exempted regional water quality control boards from the constitutional state mandate subvention requirement, a trial court properly issued a writ of mandate directing the California Commission on State Mandates to resolve, on the merits and without reference to ß 17516(c), test claims presented by a county and several cities seeking reimbursement for carrying out obligations required by a National Pollutant Discharge Elimination System Permit for municipal stormwater and urban runoff discharges that was issued by a regional water quality control board. County of Los Angeles v. Commission on State Mandates (2007, Cal App 2d Dist) 150 Cal App 4th 898, 58 Cal Rptr 3d 762, 2007 Cal App LEXIS 711.

Gov C ß 17516c is unconstitutional to the extent that it purports to exempt orders issued by regional water quality control boards from the definition of "executive orders" for which subvention of funds to local governments for carrying out state mandates is required pursuant to Cal Const Art XIII B, ß 6 because the exemption contravenes the clear, unequivocal intent of Cal Const Art XIII B, ß 6 that subvention of funds was required whenever any state agency mandated a new program or higher level of service on any local government, and whether one or both of the subject two obligations constitutes a state mandate necessitating subvention of funds under Cal Const Art XIII B, ß 6 is an issue that must in the first instance be resolved by the California Commission on State Mandates. Moreover, a contrary conclusion is not compelled by virtue of the fact that Gov C ß 17516c essentially mirrors the language of Rev & Tax C ß 2209(c) because a statute cannot trump the constitution. County of Los Angeles v. Commission on State Mandates (2007, Cal App 2d Dist) 150 Cal App 4th 898, 58 Cal Rptr 3d 762, 2007 Cal App LEXIS 711.

2. Construction

Simply because a state law or order may increase the costs borne by local government in providing services, this does not necessarily establish that the law or order constitutes an increased or higher level of the resulting "service to the public" under Cal Const Art XIII B ß 6, and Gov C ß 17514. San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal 4th 859, 16 Cal Rptr 3d 466, 94 P3d 589, 2004 Cal LEXIS 7079.

3. Construction with Other Law

No hearing costs incurred in carrying out those expulsions that are discretionary under Ed C ß 48915, including costs related to hearing procedures claimed to exceed the requirements of federal law, are reimbursable; the discretionary expulsion provision of ß 48915 is not a "new program or higher level of service" under Cal Const Art XIII B ß 6, and under Gov C ß 17514. San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal 4th 859, 16 Cal Rptr 3d 466, 94 P3d 589, 2004 Cal LEXIS 7079.

California Public Safety Officers Procedural Bill of Rights Act, Gov C ß 3300 et seq., is not a reimbursable mandate as to school districts and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties. Department of Finance v. Commission on State Mandates (2009, 3d Dist) 170 Cal App 4th 1355, 89 Cal Rptr 3d 93, 2009 Cal App LEXIS 152.

State auditing rule used to reduce reimbursement claims by school districts and community college districts for state-mandated programs, which stated that there would be a reduction for health fees authorized by Ed C ß 76355, subd. (a)(1), was valid under Gov C ß 11350, subd. (a), because it was not a regulation as defined in Gov C ß 11342.600. Such a reduction was required by Gov C ßß 17514, 17556, subd. (d), which make clear that costs are not state-mandated if local fees could be imposed to recover the costs, whether or not actually imposed. Clovis Unified School Dist. v. Chiang (2010, 3d Dist) 188 Cal App 4th 794, 116 Cal Rptr 3d 33, 2010 Cal App LEXIS 1643, modified, rehearing denied (2010, Cal. App. 3d Dist.) 2010 Cal. App. LEXIS 1774.

Received
August 26, 2011
Commission on
State Mandates

4. Error

Trial court erred in upholding the California Commission on State Mandates' determination that, as to school districts not compelled by statute to employ peace officers, the California Public Safety Officers Procedural Bill of Rights Act, Gov C ß 3300 et seq., requirements were a reimbursable state mandate where its judgment rested on the insupportable legal conclusion that the districts, identified in Gov C ß 3301, were as a practical matter compelled to exercise their authority to hire peace officers; districts in issue were authorized, but not required, to provide their own peace officers and did not have provision of police protection as an essential and basic function. Department of Finance v. Commission on State Mandates (2009, 3d Dist) 170 Cal App 4th 1355, 89 Cal Rptr 3d 93, 2009 Cal App LEXIS 152.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 23

Received
August 26, 2011
Commission on
State Mandates

DEERING'S CALIFORNIA CODES ANNOTATED
Copyright (c) 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 192 & EXTRA. SESS. CH. 8 ***
OF THE 2011 SESSION
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

GOVERNMENT CODE
Title 2. Government of the State of California
Division 4. Fiscal Affairs
Part 7. State-Mandated Local Costs
Chapter 4. Identification and Payment of Costs Mandated by the State
Article 1. Commission Procedure

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code ß 17556 (2011)

ß 17556. Criteria for not finding costs mandated by state

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:

(a) The claim is submitted by a local agency or school district that requests or previously requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this subdivision. This subdivision applies regardless of whether the resolution from the governing body or a letter from a delegated representative of the governing body was adopted or sent prior to or after the date on which the statute or executive order was enacted or issued.

(b) The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued.

(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. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. This subdivision applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

Received
August 26, 2011
Commission on
State Mandates

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, 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. This subdivision applies regardless of whether a statute, executive order, or appropriation in the Budget Act or other bill that either provides for offsetting savings that result in no net costs or provides for additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

(f) The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

(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.

HISTORY:

Added Stats 1984 ch 1459 ß 1. Amended Stats 1986 ch 879 ß 4; Stats 1989 ch 589 ß 1; Stats 2004 ch 895 ß 14 (AB 2855); Stats 2005 ch 72 ß 7 (AB 138), effective July 19, 2005; Stats 2006 ch 538 ß 279 (SB 1852), effective January 1, 2007; Stats 2010 ch 719 ß 31 (SB 856), effective October 19, 2010.

NOTES:

Amendments:

1986 Amendment:

(1) Deleted subdivision designation (a) at the beginning of the section; **(2)** redesignated former subds (a)(1)-(a)(7) to be subds (a)-(g); and **(3)** deleted former subd (b) which read: "(b) The commission may find costs mandated by the state, as defined in Section 2207 or 2207.5 of the Revenue and Taxation Code, solely with regard to a statute enacted, or an executive order implementing a statute enacted, before January 1, 1975. However, such a finding shall not constitute costs mandated by the state as defined in Section 17514."

1989 Amendment:

Added ", 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" in subd (e).

2004 Amendment:

(1) Generally substituted "that" for "which" in subds (a), (b), (e) and (f); **(2)** added "a mandate" in subd (b); **(3)** amended subd (c) by **(a)** substituting "imposes a requirement that is mandated by a federal law or regulation and results" for "implemented a federal law or regulation and resulted"; **(b)** substituting the second instance of "that" for "which" in the first sentence; and **(c)** adding the last sentence; **(4)** substituted "The statute, executive order, or an appropriation in a Budget Act or other bill" for "The statute or executive order" at the beginning of subd (e); and **(5)** added "or local" in subd (f).

2005 Amendment:

Received
August 26, 2011
Commission on
State Mandates

Amended subd (f) by (1) substituting "imposes" for "imposed"; (2) substituting "are necessary to implement, reasonably within the scope of, or" for "were"; and (3) adding the last sentence.

2006 Amendment:

(1) Substituted "any one of the following" for "that" after "the commission finds" in the introductory paragraph; (2) substituted "subdivision" for "paragraph" after "meaning of this" in subd (a); and (3) added the comma after "expressly included in" in subd (f).

2010 Amendment:

(1) Added "requests or previously" in the first sentence of subd (a); (2) added the last sentence of subds (a), (b), (d), and (e); (3) substituted "has" for "had" after "mandate that" in the first sentence of subd (b); and (4) substituted "or are expressly" for "reasonably within the scope of, or expressly" in the first sentence of subd (f).

Note

Stats 2008 ch 751 provides:

SEC. 75. Notwithstanding any other provision of law, the Commission on State Mandates, upon final resolution of any pending litigation challenging the constitutionality of subdivision (f) of Section 17556 of the Government Code, shall reconsider its test claim statement of decision in CSM-4509 on the Sexually Violent Predator Program to determine whether Chapters 762 and 763 of the Statutes of 1995 and Chapter 4 of the Statutes of 1996 constitute a reimbursable mandate under Section 6 of Article XIIIB of the California Constitution in light of ballot measures approved by the state's voters, federal and state statutes enacted, and federal and state court decisions rendered since these statutes were enacted. The commission shall, if necessary, issue a statewide cost estimate and revise its parameters and guidelines in CSM-4509 to be consistent with this reconsideration and shall, if practicable, include a reasonable reimbursement methodology as defined in Section 17518.5 of the Government Code. If the parameters and guidelines are revised, the Controller shall revise the appropriate claiming instructions to be consistent with the revised parameters and guidelines. Any changes by the commission to the original statement of decision in CSM-4509 shall be deemed effective on July 1, 2009.

Cross References:

Untimely filing of reimbursement claims: Gov C ß 17568.

Collateral References:

9 Witkin Summary (10th ed) Taxation ß 121.

Hierarchy Notes:

Tit. 2, Div. 4 Note

Tit. 2, Div. 4, Pt. 7 Note

NOTES OF DECISIONS 1. Generally 2. Constitutionality 3. Construction 4. Applicability

Received
August 26, 2011
Commission on
State Mandates

1. Generally

Gov C ß 17556(d) provides that the commission shall not find costs mandated by the state if, after a hearing, the commission finds that the local government has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. County of Fresno v. State (1991) 53 Cal 3d 482, 280 Cal Rptr 92, 808 P2d 235, 1991 Cal LEXIS 1363.

2. Constitutionality

In a proceeding by a county seeking reversal of a decision by the Commission on State Mandates that the state was not required by Cal Const Art XIII B ß 6, to reimburse the county for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (H & S C ß 25500 et seq.), the trial court properly found that Gov C ß 17556, subd. (d) (costs are not state-mandated if agency has authority to levy charge or fee sufficient to pay for program), was constitutional. Cal Const Art XIII B was intended to apply to taxation and was not intended to reach beyond it, as is apparent from the language of the measure and confirmed by its history. It was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues and, read in textual and historical contexts, requires subvention only when the cost in question can be recovered solely from tax revenues. Section 17556, subd. (d), effectively construed the term "cost" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that construction is altogether sound. Accordingly, Gov C ß 17556, subd. (d), is facially constitutional under Cal Const Art XIII B ß 6. County of Fresno v. State (1991) 53 Cal 3d 482, 280 Cal Rptr 92, 808 P2d 235, 1991 Cal LEXIS 1363.

State reimbursement statute, Gov C ß 17556(d) was facially constitutional because it did not create a new exception to reimbursement as required by Cal Const Art XIII B ß 6. County of Fresno v. State (1991) 53 Cal 3d 482, 280 Cal Rptr 92, 808 P2d 235, 1991 Cal LEXIS 1363.

To the extent that Gov C ß 17556, subd. (f), as amended, allows the legislature to impose on local governments nonreimbursable costs resulting from duties that are necessary to implement or expressly included in a ballot measure, it does not violate Cal Const Art XIII B, ß 6; however, additional language declaring that no reimbursement is necessary for duties that are reasonably within the scope of a ballot measure is impermissibly broad because it allows for denial of reimbursement when reimbursement is required by Cal Const Art XIII B, ß 6. California School Boards Assn. v. State of California (2009, 3d Dist) 171 Cal App 4th 1183, 90 Cal Rptr 3d 501, 2009 Cal App LEXIS 302.

To the extent that Gov C ß 17556, subd. (f), as amended, provides that the state need not reimburse local governments for imposing duties that are expressly included in or necessary to implement a ballot measure, the statute is consistent with Cal Const Art XIII B, ß 6. However, any duty not expressly included in or necessary to implement the ballot measure gives rise to a reimbursable state mandate, even if the duty is reasonably within the scope of the ballot measure. California School Boards Assn. v. State of California (2009, 3d Dist) 171 Cal App 4th 1183, 90 Cal Rptr 3d 501, 2009 Cal App LEXIS 302.

3. Construction

"Reasonably within the scope of" language contained in Gov C ß 17556, subd. (f), is invalid; the language is so broad that it cannot be used as a standard for determining whether the state must reimburse a local government for having imposed a duty resulting in costs. California School Boards Assn. v. State of California (2009, 3d Dist) 171 Cal App 4th 1183, 90 Cal Rptr 3d 501, 2009 Cal App LEXIS 302.

Phrase "reasonably within the scope of" is grammatically, functionally and volitionally separable from the remainder of Gov C ß 17556, subd. (f); therefore, the phrase can and must be severed from the remaining language in ß 17556, subd. (f). California School Boards Assn. v. State of California (2009, 3d Dist) 171 Cal App 4th 1183, 90 Cal Rptr 3d 501, 2009 Cal App LEXIS 302.

Gov C ß 17556, subd. (f), is, in part, inconsistent with Cal Const Art XIII B, ß 6, and must be interpreted to eliminate that inconsistency. California School Boards Assn. v. State of California (2009, 3d Dist) 171 Cal App 4th 1183, 90 Cal Rptr 3d 501, 2009 Cal App LEXIS 302.

"Necessary to implement" language of Gov C ß 17556, subd. (f), is consistent with Cal. Const., art. XIII B, ß 6, because it denies reimbursement only to the extent that costs imposed by a statute are necessary to implement a ballot measure; therefore, the "necessary to implement" language of the statute does not violate Cal Const Art XIII B, ß 6.

Received
August 26, 2011
Commission on
State Mandates

California School Boards Assn. v. State of California (2009, 3d Dist) 171 Cal App 4th 1183, 90 Cal Rptr 3d 501, 2009 Cal App LEXIS 302.

Even if a statewide regulatory amendment, increasing the level of purity required when reclaimed wastewater is used for certain types of irrigation, constituted a new program for state-mandated costs purposes, the costs were not reimbursable, since the water districts had the authority to levy fees to pay for the program (Wat C ß 35470). Rev & Tax C former ß 2253.2 (now Gov C ß 17556), provides that the Board of Control shall not find a reimbursable cost if the local agency has the "authority," i.e., the right or power, to levy service charges, fees, or assessments sufficient to pay for the mandated program. The plain language of the statute precluded a construction of "authority" to mean a practical ability in light of surrounding economic circumstances. Connell v. Superior Court (1997, Cal App 3d Dist) 59 Cal App 4th 382, 69 Cal Rptr 2d 231, 1997 Cal App LEXIS 948, review or rehearing denied Santa Margarita Water Dist. v. State Controller (1998, Cal) 1998 Cal LEXIS 1379.

State auditing rule used to reduce reimbursement claims by school districts and community college districts for state-mandated programs, which stated that there would be a reduction for health fees authorized by Ed C ß 76355, subd. (a)(1), was valid under Gov C ß 11350, subd. (a), because it was not a regulation as defined in Gov C ß 11342.600. Such a reduction was required by Gov C ßß 17514, 17556, subd. (d), which make clear that costs are not state-mandated if local fees could be imposed to recover the costs, whether or not actually imposed. Clovis Unified School Dist. v. Chiang (2010, 3d Dist) 188 Cal App 4th 794, 116 Cal Rptr 3d 33, 2010 Cal App LEXIS 1643, modified, rehearing denied (2010, Cal. App. 3d Dist.) 2010 Cal. App. LEXIS 1774.

4. Applicability

In litigation by several water districts against the State Controller to enforce a State Board of Control decision that a statewide regulatory amendment, increasing the level of purity required when reclaimed wastewater is used for certain types of irrigation, constituted a state-mandated program for which water districts were entitled to reimbursement from the state, the public interest exception to the doctrine of administrative collateral estoppel permitted defendant to raise the purely legal issue that Rev & Tax C former ß 2253.2 (now Gov C ß 17556), precluded reimbursement. The statute provides that the Board of Control shall not find a reimbursable cost if the local agency has the "authority," i.e., the right or power, to levy service charges, fees, or assessments sufficient to pay for the mandated program, and plaintiffs had such authority. The board's finding to the contrary was thus not binding. Connell v. Superior Court (1997, Cal App 3d Dist) 59 Cal App 4th 382, 69 Cal Rptr 2d 231, 1997 Cal App LEXIS 948, review or rehearing denied Santa Margarita Water Dist. v. State Controller (1998, Cal) 1998 Cal LEXIS 1379.

Even if the hearing procedures set forth in Ed C ß 48918 constitute a new program or higher level of service, this statute does not trigger any right to reimbursement because the hearing provisions that assertedly exceed federal requirements are merely incidental to fundamental federal due process requirements and the added costs of such procedures are de minimis; all hearing costs incurred under ß 48918, triggered by a school district's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under Gov C ß 17556(c). San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal 4th 859, 16 Cal Rptr 3d 466, 94 P3d 589, 2004 Cal LEXIS 7079.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 24

Received
August 26, 2011
Commission on
State Mandates

DEERING'S CALIFORNIA CODES ANNOTATED
Copyright (c) 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 192 & EXTRA. SESS. CH. 8 ***
OF THE 2011 SESSION
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

WATER CODE
Division 7. Water Quality
Chapter 1. Policy

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code ß 13000 (2011)

ß 13000. Legislative findings and declarations

The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

The Legislature further finds and declares that the health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state; that the waters of the state are increasingly influenced by interbasin water development projects and other statewide considerations; that factors of precipitation, topography, population, recreation, agriculture, industry and economic development vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.

HISTORY:

Added Stats 1969 ch 482 ß 18, operative January 1, 1970.

NOTES:

Historical Derivation:

Former ß 13000, as added Stats 1949 ch 1549 ß 1, amended Stats 1963 ch 1463 ß 1, Stats 1965 ch 1657 ß 2, Stats 1967 ch 284 ß 136.7.

Received
August 26, 2011
Commission on
State Mandates

Editor's Notes

See note to ß 12617.1 respecting the purpose of Stats 1969 ch 482.

Cross References:

Consumer booklet on water pollution as environmental hazard: B & P C ß 10084.1.

Regulation of specified underground storage structures: H & S C ß 25280.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 308 "Insurance".

Cal. Points & Authorities (Matthew Bender(R)) ch 120 "Insurance," ß 120.45.

Cal. Points & Authorities (Matthew Bender(R)) ch 165 "Negligence," ß 165.70.

Cal. Ins. Law & Practice (Matthew Bender(R)), ch 41, Liability insurance in General ß 41.30.

Cal. Torts (Matthew Bender(R)), ß 81.01.

8 Witkin Summary (10th ed) Constitutional Law ß 1073.

12 Witkin Summary (10th ed) Real Property ß 893.

13 Witkin Summary (10th ed) Equity ß 151.

Federal Water Pollution Control Act: 33 USCS ßß 1251 et seq.

Cal. Legal Forms, (Matthew Bender) ßß 33.13, 33.14[5], 33.210[2], 33.212[2], 33.222[2], 33.232[2], 33.233[2], 39.25.

Proof of Facts:

To protect Delta water quality, State Water Resources Control Board may modify permits held by Central Valley and State Water Projects. 9 CEB Real Prop Rep No. 6 p 134.

Law Review Articles:

Water quality control in California--a regional approach. 7 Cal Western LR 138.

Filling wetlands: California law and regulation. 17 CEB Real Prop Rep 1.

Quality control and re-use of water in California. 45 CLR 586.

State regulation of hazards growing out of use of atomic energy. 46 CLR 84.

Water quality control at Lake Tahoe. 58 CLR 1273.

Electricity or the environment: A study of public regulation without public control. 61 CLR 961.

Addressing California's Uncertain Water Future by Coordinating Long-Term Land Use and Water Planning: Is a Water Element in the General Plan the Next Step? 31 Ecology LQ 117.

Federal and state regulation of oil pollution from ocean petroleum production. 22 Hast LJ 485.

Received
August 26, 2011
Commission on
State Mandates

New directions in water quality management. 6 Lincoln LR 51.

Emerging forums for groundwater dispute resolution in California: A glimpse at the second generation of groundwater issues and how agencies work towards problem resolution. 20 Pacific LJ 31.

Local control of pollution from federal facilities; Federal Water Pollution Control Act. 11 San Diego LR 989.

Environmental protection in California: Court action powers of state and local government attorneys. 14 Santa Clara Law 296.

State control of water pollution. 1 UCD LR 1.

Special problems of water pollution--the private sector. 1 UCD LR 105.

Pollution of ground water. 1 UCD LR 141.

Development of the California and Federal water pollution control programs. 5 UCD LR 234.

Environmental law. 5 USF LR 10.

Blame It on the Rain? El Nino is no Excuse to Pollute. 21 Whittier LR 737.

Symposium on the 25th Anniversary of the Report of the Governor's Commission to Review California Water Rights Law Part 1 of 2: Toward Greater Certainty in Water Rights: Searching for Certainty in a State of Flux: How Administrative Procedures Help Provide Stability in Water Rights Law. 36 McGeorge LR 73.

Annotations:

Validity and construction of anti-water pollution statutes or ordinances. 32 ALR3d 215.

Landowner's right to relief against pollution of his water supply by industrial or commercial waste. 39 ALR3d 910.

Pollution control: validity and construction of statutes, ordinances, or regulations controlling discharge of industrial wastes into sewer system. 47 ALR3d 1224.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency. 60 ALR3d 665.

Federal common law of nuisance as basis for relief in environmental pollution cases. 29 ALR Fed 137.

Abstention doctrine in action challenging state watercraft pollution control statutes. 32 L Ed 2d 257.

Hierarchy Notes:

Div. 7 Note

Div. 7, Ch. 1 Note

LexisNexis 50 State Surveys, Legislation & Regulations

Water Quality

NOTES OF DECISIONS 1. Construction of Law 2. Power of Board 3. Duty of Board 4. Municipal Police Power 5. Damage Claims 6. Preemption 7. Judicial Review

1. Construction of Law

Because the Porter-Cologne Water Quality Control Act (Wat. Code, ß 13000 et seq.) is patterned after the federal Water Pollution Control Act (33 USCS ß 1251 et seq.), California courts look to federal authority in construing the state act. People v. Buena Vista Mines, Inc. (1998, Cal App 2d Dist) 60 Cal App 4th 1198, 71 Cal Rptr 2d 101, 1998 Cal App LEXIS 41.

Received
August 26, 2011
Commission on
State Mandates

In a case in which regional water boards had initiated remedial administrative proceedings against an insured pursuant to the Porter-Cologne Act, an insurer's indemnification obligation was expressly extended beyond court-ordered money "damages" to include expenses incurred in responding to government agency orders administratively imposed outside the context of a government lawsuit to cleanup and abate environmental pollution. Powerine Oil Co., Inc. v. Superior Court (2005) 37 Cal 4th 377, 33 Cal Rptr 3d 562, 118 P3d 589, 2005 Cal LEXIS 9547.

Gov C ß 17516c is unconstitutional to the extent that it purports to exempt orders issued by regional water quality control boards from the definition of "executive orders" for which subvention of funds to local governments for carrying out state mandates is required pursuant to Cal Const Art XIII B, ß 6 because the exemption contravenes the clear, unequivocal intent of Cal Const Art XIII B, ß 6 that subvention of funds was required whenever any state agency mandated a new program or higher level of service on any local government, and whether one or both of the subject two obligations constitutes a state mandate necessitating subvention of funds under Cal Const Art XIII B, ß 6 is an issue that must in the first instance be resolved by the California Commission on State Mandates. Moreover, a contrary conclusion is not compelled by virtue of the fact that Gov C ß 17516c essentially mirrors the language of Rev & Tax C ß 2209(c) because a statute cannot trump the constitution. County of Los Angeles v. Commission on State Mandates (2007, Cal App 2d Dist) 150 Cal App 4th 898, 58 Cal Rptr 3d 762, 2007 Cal App LEXIS 711.

United States Fish and Wildlife Service (FWS) was entitled to summary judgment in an action under 16 U.S.C.S. ß 1540(g)(1)(A), which was filed by builder associations challenging FWS's designation of the Central California population of the California tiger salamander as "threatened" under the Endangered Species Act, 16 U.S.C.S. ß 1531 et seq.; FWS considered the inadequacy of existing regulatory mechanisms as required by 16 U.S.C.S. ß 1533(a)(1), and it rationally concluded that there was inadequate protection under the Clean Water Act, 33 U.S.C.S. ß 1251 et seq., the California Streambed Alteration Act, F & G C ß 1600 et seq., the California Environmental Quality Act, Pub Res C ß 21000 et seq., and the California Porter-Cologne Water Quality Control Act, Wat C ß 13000 et seq.Home Builders Ass'n v. United States Fish & Wildlife Serv. (2007, ND Cal) 529 F Supp 2d 1110, 2007 US Dist LEXIS 80881, aff'd Home Builders Ass'n of N. Cal. v. United States Fish & Wildlife Serv. (2009, 9th Cir. Cal.) 2009 U.S. App. LEXIS 7748.

2. Power of Board

It was not legislative intent to place in state water pollution control board or any of its regional boards exclusive power to determine whether nuisance exists and to abate nuisance created by pollution of water. People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in TrafficSchoolOnline, Inc. v. Clarke (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

Water quality orders promulgated by the State Water Resources Control Board and a regional water quality control board establishing limitations for coliform effluent applied to a youth correctional facility's wastewater treatment plant and were consistent with the applicable basin plan and the Porter-Cologne Water Quality Control Act, Wat C ß 13000 et seq.County of Sacramento v. State Water Resources Control Bd. (2007, Cal App 3d Dist) 153 Cal App 4th 1579, 64 Cal Rptr 3d 302, 2007 Cal App LEXIS 1300.

Although a county argued that water quality orders were not applicable to a county-owned youth correctional facility's wastewater treatment plant because the groundwater in the vicinity was not used for domestic or municipal supply, the county's argument was rejected. Restricting the water quality objective for bacteria to groundwaters based on current uses would have read in a temporal element not found in the language of the applicable basin plan. County of Sacramento v. State Water Resources Control Bd. (2007, Cal App 3d Dist) 153 Cal App 4th 1579, 64 Cal Rptr 3d 302, 2007 Cal App LEXIS 1300.

Given the expansive scope of the legislature's findings contained in Wat C ß 13000, plus the findings in the 2001 MS4 permit issued by the California Regional Water Quality Control Board, Los Angeles Region, citing water quality objectives for discharges to the state's coastal waters, allowing a regional water quality control board to interpret its authority under Wat C ß 13241 to include the development of water quality objectives based on potential, as opposed to probable, beneficial uses would be appropriate. Therefore, a trial court erred in limiting the regional board's exercise of its discretion in developing water quality objectives. City of Arcadia v. State Water Resources Control Bd. (2010, 4th Dist) 191 Cal App 4th 156, 2010 Cal App LEXIS 2150.

Under the Porter-Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and nine regional boards as the principal state agencies for enforcing federal and state water pollution law and for issuing permits. NRDC v. County of L.A. (2011, CA9 Cal) 2011 US App LEXIS 4647.

Received
August 26, 2011
Commission on
State Mandates

3. Duty of Board

There is no provision requiring any county or municipality damaged by public nuisance, or health of whose inhabitants is endangered by such nuisance, to institute any proceedings before either regional water pollution control board or state board. People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in TrafficSchoolOnline, Inc. v. Clarke (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

If person ordered to correct nuisance or pollution found by regional water pollution control board to exist by virtue of discharge of sewage fails to comply with board's order, only then is it duty of regional board to certify facts to district attorney of county in which discharge of sewage originates, and it is duty of district attorney to seek injunction against persons causing pollution or nuisance. People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in TrafficSchoolOnline, Inc. v. Clarke (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

In a case involving the adoption and approval by the State Water Resources Control Board and a regional water quality control board of a small tributary stream's temperature amendment to the existing water quality control plan for two river basins, the boards' finding that the stream had no viable population of rainbow trout had sufficient evidentiary support and did not violate the California Porter-Cologne Water Quality Control Act, Wat C ß 13000 et seq., by failing to protect the stream's native cold water fish where: (1) data collected through a series of fish surveys by different parties constituted credible evidence that a population of rainbow trout was not present in the stream; (2) only a few isolated adult trout were observed in a single survey in 1994; (3) the temperature survey data demonstrated that summer water temperatures found throughout the stream were incompatible with viable rainbow trout populations; and (4) an inference could be drawn from the evidence that the limited presence of trout in deep, spring-fed pools was not likely to be adversely affected by the amended temperature objectives. California Sportfishing Protection Alliance v. State Water Resources Control Bd. (2008, 1st Dist) 160 Cal App 4th 1625, 73 Cal Rptr 3d 560, 2008 Cal App LEXIS 382.

4. Municipal Police Power

Right of city under its police power to set up standards reasonably designed to safeguard health of its inhabitants is not impaired but is affirmed by provisions of Dickey Act (Wat Cal ßß 13000 et seq.) and H & S Cal ß 5415. People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in TrafficSchoolOnline, Inc. v. Clarke (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

5. Damage Claims

In an action by a property owner for reimbursement of costs incurred removing hazardous materials from the property, CC ß 3482 precluded state law claims against the government defendants. Pollutants entering a storm drain under the maintenance of the government defendants were authorized by a permit issued by the water quality control board. However, a corporate defendant was not entitled to summary judgment on causes of action for trespass and nuisance. Plaintiff could rely on the doctrine of res ipsa loquitur to establish that defendant's negligence in allowing material to be dumped. Carson Harbor Village, Ltd. v. Unocal Corp. (1997, CD Cal) 990 F Supp 1188, 1997 US Dist LEXIS 22574, aff'd in part, rev'd in part (2000) 227 F.3d 1196, 2000 U.S. App. LEXIS 23206, 2000 Cal. Daily Op. Service 7668, 2000 D.A.R. 10199, 51 Env't Rep. Cas. (BNA) 1193, 31 Envtl. L. Rep. 20141, 154 Oil & Gas Rep. 477, aff'd in part, rev'd in part (2001) 270 F.3d 863, 2001 U.S. App. LEXIS 22863, 2001 Cal. Daily Op. Service 9080, 2001 D.A.R. 11365, 53 Env't Rep. Cas. (BNA) 1321, 32 Envtl. L. Rep. 20180, 154 Oil & Gas Rep. 509.

6. Preemption

Federal preemption under the Federal Power Act, 16 U.S.C. ß 791a et seq., precluded enforcement of the waste discharge requirements of the Porter-Cologne Water Quality Control Act, Wat C ß 13000 et seq., as to the reporting of waste discharges into the reservoirs of hydroelectric dams operating under a federal license. Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region (2010, 1st Dist) 2010 Cal App LEXIS 427.

7. Judicial Review

Received
August 26, 2011
Commission on
State Mandates

In a case in which a trial court vacated a resolution by a regional water quality control board after it completed a periodic review of its water quality control plan, the trial court erred in declaring that the regional board and the California Water Resources Control Board had a duty to consider the statements of legislative intent found in Wat C ß 13000 in adopting the MS4 permit and incorporating the trash total maximum daily load requirements into it. Section 13000's general statement of legislative intent does not impose any affirmative duty that would be enforceable through a writ of mandate. City of Arcadia v. State Water Resources Control Bd. (2010, 4th Dist) 191 Cal App 4th 156, 2010 Cal App LEXIS 2150.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 25

Received
August 26, 2011
Commission on
State Mandates

DEERING'S CALIFORNIA CODES ANNOTATED
Copyright (c) 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 192 & EXTRA. SESS. CH. 8 ***
OF THE 2011 SESSION
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

WATER CODE
Division 7. Water Quality
Chapter 2. Definitions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code ß 13050 (2011)

ß 13050. Terms used in this division

As used in this division:

(a) "State board" means the State Water Resources Control Board.

(b) "Regional board" means any California regional water quality control board for a region as specified in Section 13200.

(c) "Person" includes any city, county, district, the state, and the United States, to the extent authorized by federal law.

(d) "Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

(e) "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.

(f) "Beneficial uses" of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.

(g) "Quality of the water" refers to chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use.

(h) "Water quality objectives" means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.

(i) "Water quality control" means the regulation of any activity or factor which may affect the quality of the waters of the state and includes the prevention and correction of water pollution and nuisance.

(j) "Water quality control plan" consists of a designation or establishment for the waters within a specified area of all of the following:

Received
August 26, 2011
Commission on
State Mandates

(1) Beneficial uses to be protected.

(2) Water quality objectives.

(3) A program of implementation needed for achieving water quality objectives.

(k) "Contamination" means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. "Contamination" includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

(l)

(1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

(2) "Pollution" may include "contamination."

(m) "Nuisance" means anything which meets all of the following requirements:

(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

(2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(3) Occurs during, or as a result of, the treatment or disposal of wastes.

(n) "Recycled water" means water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefor considered a valuable resource.

(o) "Citizen or domiciliary" of the state includes a foreign corporation having substantial business contacts in the state or which is subject to service of process in this state.

(p)

(1) "Hazardous substance" means either of the following:

(A) For discharge to surface waters, any substance determined to be a hazardous substance pursuant to Section 311(b)(2) of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.).

(B) For discharge to groundwater, any substance listed as a hazardous waste or hazardous material pursuant to Section 25140 of the Health and Safety Code, without regard to whether the substance is intended to be used, reused, or discarded, except that "hazardous substance" does not include any substance excluded from Section 311(b)(2) of the Federal Water Pollution Control Act because it is within the scope of Section 311(a)(1) of that act.

(2) "Hazardous substance" does not include any of the following:

(A) Nontoxic, nonflammable, and noncorrosive stormwater runoff drained from underground vaults, chambers, or manholes into gutters or storm sewers.

(B) Any pesticide which is applied for agricultural purposes or is applied in accordance with a cooperative agreement authorized by Section 116180 of the Health and Safety Code, and is not discharged accidentally or for purposes of disposal, the application of which is in compliance with all applicable state and federal laws and regulations.

(C) Any discharge to surface water of a quantity less than a reportable quantity as determined by regulations issued pursuant to Section 311(b)(4) of the Federal Water Pollution Control Act.

(D) Any discharge to land which results, or probably will result, in a discharge to groundwater if the amount of the discharge to land is less than a reportable quantity, as determined by regulations adopted pursuant to Section 13271, for substances listed as hazardous pursuant to Section 25140 of the Health and Safety Code. No discharge shall be deemed a discharge of a reportable quantity until regulations set a reportable quantity for the substance discharged.

(q)

Received
August 26, 2011
Commission on
State Mandates

(1) "Mining waste" means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in Section 2732 of the Public Resources Code, and tailings, slag, and other processed waste materials, including cementitious materials that are managed at the cement manufacturing facility where the materials were generated.

(2) For the purposes of this subdivision, "cementitious material" means cement, cement kiln dust, clinker, and clinker dust.

(r) "Master recycling permit" means a permit issued to a supplier or a distributor, or both, of recycled water, that includes waste discharge requirements prescribed pursuant to Section 13263 and water recycling requirements prescribed pursuant to Section 13523.1.

HISTORY:

Added Stats 1969 ch 482 ß 18, operative January 1, 1970. Amended Stats 1969 ch 800 ß 2.5; Stats 1970 ch 202 ß 1; Stats 1980 ch 877 ß 1; Stats 1989 ch 642 ß 2; Stats 1991 ch 187 ß 1 (AB 673); Stats 1992 ch 211 ß 1 (AB 3012); Stats 1995 ch 28 ß 17 (AB 1247), ch 847 ß 2 (SB 206); Stats 1996 ch 1023 ß 429 (SB 1497), effective September 29, 1996.

NOTES:

Editor's Notes

The above section was enacted without a subdivision (k)(B)(1).

Amendments:

1969 Amendment:

Added the last sentence in subd (c).

1970 Amendment:

(1) Added ", including such waste placed within containers of whatever nature prior to, and for purposes of, disposal" at the end of subd (d); and **(2)** substituted "aesthetic" for "esthetic" after "recreation;" in subd (f).

1980 Amendment:

Added subd (p).

1989 Amendment:

In addition to making technical changes, added **(1)** "all of the following:" in the introductory clause of subd (j); **(2)** "either of the following" in the introductory clause of subd (*l*); **(3)** "meets all of the following requirements" in the introductory clause of subd (m); and **(4)** added subd (q).

1991 Amendment:

Amended subd (n) by adding **(1)** "or 'recycled water' "; and **(2)** "and is therefor considered a valuable resource".

Received
August 26, 2011
Commission on
State Mandates

1992 Amendment:

In addition to making technical changes, **(1)** substituted ", and" for "or any department or agency thereof. 'Person' includes" in subd (c); **(2)** deleted "of whatever nature" after "processing operation" in subd (d); **(3)** substituted "surface water or groundwater" for "water, surface or underground" in subd (e); **(4)** deleted "or 'quality of the waters' " after "of the water" in subd (g); **(5)** deleted "of California" after "the State" both times it appears in subd (o); **(6)** substituted "Federal Water Pollution Control Act" for "Clean Water Act" in subd (p)(1)(A), (p)(1)(B), and (p)(1)(C); **(7)** deleted "the applicability of" after "excluded from" in subd (p)(1)(B); and **(8)** added subd (r).

1995 Amendment:

(1) Redesignated former subd (*l*) to be subd (*l*)(1); **(2)** added subdivision designation (*l*)(2); **(3)** deleted "Reclaimed water or" in the beginning of subd (n); **(4)** added "and" after "nonflammable," in subd (p)(2)(A); **(5)** redesignated former subd (q) to be subd (q)(1); **(6)** added ", including cementitious materials that are managed at the cement manufacturing facility where the materials were generated" at the end of subd (q)(1); **(7)** added subd (q)(2); and **(8)** amended subd (r) by substituting **(a)** "recycled" for "reclaimed" after "or both, of"; and **(b)** "recycling" for "reclamation" after "and water". (As amended Stats 1995 ch 847, compared to the section as it read prior to 1995. This section was also amended by an earlier chapter, ch 28. See Gov C ß 9605.)

1996 Amendment:

Substituted "Section 116180" for "Section 2426" in subd (p)(2)(B).

Historical Derivation:

(a) Former Wat C ß 13005, as added Stats 1949 ch 1549 ß 1, amended Stats 1957 ch 603 ß 1, Stats 1959 ch 1299 ß 5, Stats 1963 ch 1463 ß 4, Stats 1965 ch 1656 ß 1, ch 1657 ß 7, Stats 1967 ch 70 ß 1, ch 284 ß 139, ch 1447 ß 6.

(b) Former Wat C ß 13005.1, as added Stats 1967 ch 1446 ß 2, amended Stats 1967 ch 1447 ß 20.

Editor's Notes

For investigation of analytic procedures, see the 1989 Note following Wat C ß 13260.

Cross References:

Discharges from houseboats in or on the waters of the state as constituting significant source of waste as defined in this Section: Wat C ß 13900.

Coloring of pipes designed to carry reclaimed water: H & S C ß 116815.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 418 "Pollution And Environmental Matters".

Received
August 26, 2011
Commission on
State Mandates

4 Witkin Summary (10th ed) Security Transactions in Real Property ß 208.

12 Witkin Summary (10th ed) Real Property ß 893.

Miller & Starr, Cal Real Estate 3d ßß 23:55, 23:56.

Cal. Legal Forms, (Matthew Bender) ßß 25A.144, 33.13.

Law Review Articles:

Control of water quality and water pollution. 45 CLR 586.

Some reflections on environmental considerations in water rights administration. 2 ELQ 695.

The delta decisions: The quiet revolution in California water rights. 19 Pacific LJ 1111.

State regulation of groundwater pollution caused by changes in groundwater quantity or flow in California. 19 Pacific LJ 1267.

Municipal Storm Water Permitting in California. 40 San Diego LR 245.

Development of the California and Federal water pollution control programs; the California Porter-Cologne Act. 5 UCD LR 265.

Regional water quality control policies and plans. 5 UCD LR 275.

Toxic torts as absolute nuisances. 16 Western St LR 5.

Blame It on the Rain? El Nino is no Excuse to Pollute. 21 Whittier LR 737.

Symposium on the 25th Anniversary of the Report of the Governor's Commission to Review California Water Rights Law Part 2 of 2: Protection of Instream Flows: An Overview of the Protection of Instream Uses. 36 McGeorge LR 295.

Attorney General's Opinions:

Garbage disposals not affecting water as not constituting nuisance under former statute; waste from construction operations dumped or drained into water as constituting industrial waste under former statute. 16 Ops. Cal. Atty. Gen. 125.

Jurisdiction of water pollution control board over drainage into surface streams or lakes of water containing harmful concentration of minerals from inoperative or abandoned mining operations; person upon whom is imposed waste discharge requirements prescribed by regional water pollution control board to correct pollution or nuisance which may result from such drainage when fee of land on which mine is located is owned separately from mineral rights. 26 Ops. Cal. Atty. Gen. 88.

Contamination as existing only when actual hazards to public health through poisoning or spread of disease exists. 26 Ops. Cal. Atty. Gen. 253.

Debris resulting from logging operations, solid industrial wastes found in dumps, return irrigation or drainage water from agricultural operation, and harmful materials released from wells, as constituting waste discharge subject to control by regional water pollution boards. 27 Ops. Cal. Atty. Gen. 182.

Discharge into state waters of sewage or industrial waste containing fine-grained materials, under various situations, as constituting pollution. 27 Ops. Cal. Atty. Gen. 217.

Industrial waste resulting from extraction of minerals from stream beds. 32 Ops. Cal. Atty. Gen. 139.

Hierarchy Notes:

Received
August 26, 2011
Commission on
State Mandates

Div. 7 Note

LexisNexis 50 State Surveys, Legislation & Regulations

Water Quality

NOTES OF DECISIONS 1. Power to Abate Nuisance Generally 2. Power of Board 3. Silt and Sediment 4. Nuisance

1. Power to Abate Nuisance Generally

Right of regional water pollution control board to initiate action pursuant to former Wat Cal ß 13063, to enforce its orders relative to pollution of waters or to abate nuisance, as "nuisance" is defined by this section, is not inconsistent with right of cities to prosecute cause of action to abate public nuisance as such nuisance is defined in CC ß 3479. People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in TrafficSchoolOnline, Inc. v. Clarke (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

2. Power of Board

Under Wat. Code, ß 13050, subd. (i), investing broad responsibility for water quality control in the State Water Resources Control Board, the board has power to impose gross limitations on pollutant discharge when necessary to safeguard the quality of the receiving water. Accordingly, the board has power to require a utility operating a nuclear generating plant to remove pollutants entering its generating station through its power intake valve, rather than regulating only those pollutants which it actually added to the water. Southern Cal. Edison Co. v. State Water Resources Control Bd. (1981, Cal App 4th Dist) 116 Cal App 3d 751, 172 Cal Rptr 306, 1981 Cal App LEXIS 1541.

In cities' action challenging a regional water quality control board's basin plan to incorporate a trash in total maximum daily load (Trash TMDL) for a flood control channel, the trial court erred by substituting its own judgment for that of the regional board and the State Water Resources Control Board on the issue of whether the adoption of the Trash TMDL should have been preceded by a scientific study of the assimilative capacity of the channel because the water boards' decision not to conduct or require an assimilative capacity study was within their expertise, not the court's; federal law did not require the regional water board to conduct an assimilative capacity study before adopting the Trash TMDL, and the evidence amply showed that because of the nature of trash, including Styrofoam containers and other materials that were undiluted by water, in contrast to chemical pollutants, and the dangers to wildlife of even small amounts of trash, an assimilative capacity study would be difficult to conduct and of little value at the outset. City of Arcadia v. State Water Resources Control Bd. (2006, Cal App 4th Dist) 135 Cal App 4th 1392, 38 Cal Rptr 3d 373, 2006 Cal App LEXIS 92, rehearing denied City of Arcadia v. State Water Resources Control Board (2006, Cal App 4th Dist) 2006 Cal App LEXIS 221, review denied Arcadia, City of v. State Water Resources Control Board (2006, Cal) 2006 Cal LEXIS 4781.

In a case involving the adoption and approval by the State Water Resources Control Board and a regional water quality control board of a small tributary stream's temperature amendment to the existing water quality control plan for two river basins, the boards' finding that the stream had no viable population of rainbow trout had sufficient evidentiary support and did not violate the California Porter-Cologne Water Quality Control Act, Wat C ß 13000 et seq., by failing to protect the stream's native cold water fish where: (1) data collected through a series of fish surveys by different parties constituted credible evidence that a population of rainbow trout was not present in the stream; (2) only a few isolated adult trout were observed in a single survey in 1994; (3) the temperature survey data demonstrated that summer water temperatures found throughout the stream were incompatible with viable rainbow trout populations; and (4) an inference could be drawn from the evidence that the limited presence of trout in deep, spring-fed pools was not likely to be adversely affected by the amended temperature objectives. California Sportfishing Protection Alliance v. State Water Resources Control Bd. (2008, 1st Dist) 160 Cal App 4th 1625, 73 Cal Rptr 3d 560, 2008 Cal App LEXIS 382.

Amendment to a water quality control plan that provided for the interim use of an existing water quality objective for another part of the river, which had comparable water quality, was permissible under Wat C ß 13050, subd. (h), and constituted a program of implementation under Wat C ß 13242; accordingly, Wat C ß 13241 did not apply. San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd. (2010, 3d Dist) 183 Cal App 4th

Received
August 26, 2011
Commission on
State Mandates

1110, 108 Cal Rptr 3d 290, 2010 Cal App LEXIS 514, review denied San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Board (2010, Cal.) 2010 Cal. LEXIS 6312.

Under California law, the regional boards' water quality plans, called basin plans, must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. NRDC v. County of L.A. (2011, CA9 Cal) 2011 US App LEXIS 4647.

3. Silt and Sediment

Under a State Water Resources Control Board's cleanup and abatement order requiring a dam operator to refrain from flushing accumulated sediment into a creek and to submit a plan for cleanup of the sediment, silt material passing through the gate valve of the dam was "waste associated with human habitation" within the meaning of Wat. Code, ß 13050, subd. (d) (water quality). The dam received a natural substance, silt, that is innocuous in its unconcentrated form, but, by furnishing a man-made artificial location for its concentration, the innocuous substance is changed into one that is deadly to aquatic life. The dam was not a mere conduit through which the dangerous substance passed. Section 13050, subd. (d) does not require that waste be sewage or industrial waste, and it does not require that waste be discharged from land owned by the discharger. Lake Madrone Water Dist. v. Department of Water Resources Control Bd. (1989, Cal App 3d Dist) 209 Cal App 3d 163, 256 Cal Rptr 894, 1989 Cal App LEXIS 269.

Wat Cal ß 13050 has been interpreted to mean that water pollution occurring as a result of treatment or discharge of wastes in violation of Wat Cal ßß 13000 et seq. is a public nuisance per se. The definition of "waste" has been interpreted as including concentrated silt or sediment associated with human habitation and harmful to the aquatic environment. Although a runoff at a lake could be associated with human habitation, statutorily defined nuisance only applies when such waste is discharged during, or as a result of, the disposal or treatment of wastes. Simply building a house does not fall within this definition. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency (1999, D Nev) 34 F Supp 2d 1226, 1999 US Dist LEXIS 767, rev'd in part (2000, CA9 Nev) 216 F3d 764, 2000 US App LEXIS 13941.

4. Nuisance

Property owners stated a claim for continuing private nuisance against a manufacturer of dry cleaning machines because the owners alleged that the manufacturer designed and installed certain machines and instructed the owners' predecessors to dispose of contaminated wastewater in a manner that resulted in a public nuisance. Cal. Dep't of Toxic Substances Control v. Payless Cleaners (2005, ED Cal) 368 F Supp 2d 1069, 2005 US Dist LEXIS 7873.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 26

Received
August 26, 2011
Commission on
State Mandates

DEERING'S CALIFORNIA CODES ANNOTATED
Copyright (c) 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 192 & EXTRA. SESS. CH. 8 ***
OF THE 2011 SESSION
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

WATER CODE
Division 7. Water Quality
Chapter 4. Regional Water Quality Control
Article 4. Waste Discharge Requirements

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code ß 13260 (2011)

ß 13260. Reports; Fees; Recoverable Costs; Waiver; Exemptions

(a) Each of the following persons shall file with the appropriate regional board a report of the discharge, containing the information that may be required by the regional board:

(1) A person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system.

(2) A person who is a citizen, domiciliary, or political agency or entity of this state discharging waste, or proposing to discharge waste, outside the boundaries of the state in a manner that could affect the quality of the waters of the state within any region.

(3) A person operating, or proposing to construct, an injection well.

(b) No report of waste discharge need be filed pursuant to subdivision (a) if the requirement is waived pursuant to Section 13269.

(c) Each person subject to subdivision (a) shall file with the appropriate regional board a report of waste discharge relative to any material change or proposed change in the character, location, or volume of the discharge.

(d)

(1)

(A) Each person who is subject to subdivision (a) or (c) shall submit an annual fee according to a fee schedule established by the state board.

(B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(C) Recoverable costs may include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance

Received
August 26, 2011
Commission on
State Mandates

with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, adopting, reviewing, and revising water quality control plans and state policies for water quality control, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out these actions.

(D) In establishing the amount of a fee that may be imposed on a confined animal feeding and holding operation pursuant to this section, including, but not limited to, a dairy farm, the state board shall consider all of the following factors:

(i) The size of the operation.

(ii) Whether the operation has been issued a permit to operate pursuant to Section 1342 of Title 33 of the United States Code.

(iii) Any applicable waste discharge requirement or conditional waiver of a waste discharge requirement.

(iv) The type and amount of discharge from the operation.

(v) The pricing mechanism of the commodity produced.

(vi) Any compliance costs borne by the operation pursuant to state and federal water quality regulations.

(vii) Whether the operation participates in a quality assurance program certified by a regional water quality control board, the state board, or a federal water quality control agency.

(2)

(A) Subject to subparagraph (B), the fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund, which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, solely for the purposes of carrying out this division.

(B)

(i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

(ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region.

(iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

(3) A person who would be required to pay the annual fee prescribed by paragraph (1) for waste discharge requirements applicable to discharges of solid waste, as defined in Section 40191 of the Public Resources Code, at a waste management unit that is also regulated under Division 30 (commencing with Section 40000) of the Public Resources Code, shall be entitled to a waiver of the annual fee for the discharge of solid waste at the waste management unit imposed by paragraph (1) upon verification by the state board of payment of the fee imposed by Section 48000 of the Public Resources Code, and provided that the fee established pursuant to Section 48000 of the Public Resources Code generates revenues sufficient to fund the programs specified in Section 48004 of the Public Resources Code and the amount appropriated by the Legislature for those purposes is not reduced.

(e) Each person that discharges waste in a manner regulated by this section shall pay an annual fee to the state board. The state board shall establish, by regulation, a timetable for the payment of the annual fee. If the state board or a regional board determines that the discharge will not affect, or have the potential to affect, the quality of the waters of the state, all or part of the annual fee shall be refunded.

(f)

(1) The state board shall adopt, by emergency regulations, a schedule of fees authorized under subdivision (d). The total revenue collected each year through annual fees shall be set at an amount equal to the revenue levels set forth in

Received
August 26, 2011
Commission on
State Mandates

the Budget Act for this activity. The state board shall automatically adjust the annual fees each fiscal year to conform with the revenue levels set forth in the Budget Act for this activity. If the state board determines that the revenue collected during the preceding year was greater than, or less than, the revenue levels set forth in the Budget Act, the state board may further adjust the annual fees to compensate for the over and under collection of revenue.

(2) The emergency regulations adopted pursuant to this subdivision, any amendment thereto, or subsequent adjustments to the annual fees, shall be adopted by the state board in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health, safety, and general welfare. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, any emergency regulations adopted by the state board, or adjustments to the annual fees made by the state board pursuant to this section, shall not be subject to review by the Office of Administrative Law and shall remain in effect until revised by the state board.

(g) The state board shall adopt regulations setting forth reasonable time limits within which the regional board shall determine the adequacy of a report of waste discharge submitted under this section.

(h) Each report submitted under this section shall be sworn to, or submitted under penalty of perjury.

(i) The regulations adopted by the state board pursuant to subdivision (f) shall include a provision that annual fees shall not be imposed on those who pay fees under the national pollutant discharge elimination system until the time when those fees are again due, at which time the fees shall become due on an annual basis.

(j) A person operating or proposing to construct an oil, gas, or geothermal injection well subject to paragraph (3) of subdivision (a) shall not be required to pay a fee pursuant to subdivision (d) if the injection well is regulated by the Division of Oil and Gas of the Department of Conservation, in lieu of the appropriate California regional water quality control board, pursuant to the memorandum of understanding, entered into between the state board and the Department of Conservation on May 19, 1988. This subdivision shall remain operative until the memorandum of understanding is revoked by the state board or the Department of Conservation.

(k) In addition to the report required by subdivision (a), before a person discharges mining waste, the person shall first submit both of the following to the regional board:

(1) A report on the physical and chemical characteristics of the waste that could affect its potential to cause pollution or contamination. The report shall include the results of all tests required by regulations adopted by the board, any test adopted by the Department of Toxic Substances Control pursuant to Section 25141 of the Health and Safety Code for extractable, persistent, and bioaccumulative toxic substances in a waste or other material, and any other tests that the state board or regional board may require, including, but not limited to, tests needed to determine the acid-generating potential of the mining waste or the extent to which hazardous substances may persist in the waste after disposal.

(2) A report that evaluates the potential of the discharge of the mining waste to produce, over the long term, acid mine drainage, the discharge or leaching of heavy metals, or the release of other hazardous substances.

(l) Except upon the written request of the regional board, a report of waste discharge need not be filed pursuant to subdivision (a) or (c) by a user of recycled water that is being supplied by a supplier or distributor of recycled water for whom a master recycling permit has been issued pursuant to Section 13523.1.

HISTORY:

Added Stats 1969 ch 482 ß 18, operative January 1, 1970. Amended Stats 1980 ch 656 ß 1; Stats 1984 ch 268 ß 32.8, effective June 30, 1984; Stats 1985 ch 653 ß 1, ch 1591 ß 4; Stats 1986 ch 31 ß 1, effective March 21, 1986, ch 1013 ß 5, effective September 23, 1986; Stats 1988 ch 1026 ß 1; Stats 1989 ch 627 ß 1, ch 642 ß 5. Supplemented by the Governor's Reorganization Plan No. 1 of 1991 ß 194, effective July 17, 1991. Amended Stats 1992 ch 211 ß 2 (AB 3012); Stats 1993 ch 656 ß 57 (AB 1220), effective October 1, 1993; Stats 1995 ch 28 ß 20 (AB 1247); Stats 1997 ch 775 ß 1 (AB 1186); Stats 2002 ch 1124 ß 56 (AB 3000), effective September 30, 2002. Amended Stats 2003 1st Ex Sess 2003-2004 ch 1 ß 3 (AB 10x); Stats 2011 ch 2 ß 28 (AB 95), effective March 24, 2011.

NOTES:

Editor's Notes

Received
August 26, 2011
Commission on
State Mandates

Under Gov C ß 12080.5, the Governor's Reorganization Plan No. 1 of 1991, of May 17, 1991, became effective July 17, 1991.

Pub Res C ß 46801, referred to in subdivision (d)(3), was repealed Stats 1993 ch 656 ß 36, effective October 1, 1993. The repealed section related to the operator's annual fee.

The phrase "Each person discharges" at the beginning of subd (e) is as set out by Stats 1st Extra Session 2003 ch 1x. The phrase was probably intended to read "Each person who discharges."

Amendments:

1980 Amendment:

Amended subd (d) by **(1)** substituting "ten thousand dollars ($10,000)" for "one thousand dollars ($1,000)"; and **(2)** adding the second sentence.

1984 Amendment:

Substituted "fifty thousand dollars ($50,000)" for "ten thousand dollars ($10,000)" in subd (d).

1985 Amendment:

In addition to making technical changes **(1)** amended subd (a) by **(a)** adding the introductory clause; **(b)** adding subdivision designations (a)(1) and (a)(2); **(c)** substituting the period for ", and" at the end of subd (a)(1); **(d)** deleting ", shall file with the regional board of that region a report of the discharge, containing such information as may be required by the board" at the end of subd (a)(2); and **(e)** adding subd (a)(3). (As amended by Stats 1985, ch 1591, compared to the section as it read prior to 1985. This section was also amended by an earlier chapter, ch 653. See Gov C ß 9605.)

1986 Amendment:

(1) Added "regional" near the end of the introductory clause of subd (a); **(2)** added "operating or" in subd (a)(3); **(3)** designated the former last paragraph of subd (a) to be subd (b); **(4)** substituted "pursuant to subdivision (a) if" for "when" in subd (b); **(5)** redesignated former subds (b)-(d) to be subds (c)-(e); **(6)** substituted "subject to subdivision (a)" for "discharging waste" in subd (c); **(7)** added "submitted" in subds (d) and (e); and **(8)** substituted subd (f) for former subd (e) which read: "(e) When a report filed by any person pursuant to this section is not adequate in the judgment of the regional board, the board may require the person to supply the additional information which it deems necessary."

1988 Amendment:

(1) Added "of waste discharge" in subd (b); **(2)** added "waste discharge relative to" in subd (c); **(3)** substituted subds (d)-(f) for former subds (d)-(f) which read: "(d) Each report submitted under this section shall be sworn to or submitted under penalty of perjury.

"(e) Each report submitted under this section shall be accompanied by a filing fee of not to exceed fifth thousand dollars ($50,000) according to a reasonable fee schedule established by the state board. Fees shall be calculated on the basis of total flow, volume, number of animals, or area involved and shall be reasonably related to the costs to the regional board.

Received
August 26, 2011
Commission on
State Mandates

"(f) The state board shall adopt regulations setting forth reasonable time limits within which the regional board shall determine the adequacy of a report submitted under this section."; and **(4)** added subds (g)-(k).

1989 Amendment:

(1) Redesignated former subd (d) to be subd (d)(1); **(2)** added subd (d)(2); **(3)** amended subd (f)(1) by **(a)** substituting "revenue" for "reimbursement" before "levels" in the second and third sentences; and **(b)** added the fourth sentence; **(4)** substituted "the time when" for "such time as" after "until" in subd (i); and **(5)** added subd (*l*). (As amended Stats 1989, ch 642, compared to the section as it read prior to 1989. This section was also amended by an earlier chapter, ch 627. See Gov C ß 9605.)

1992 Amendment:

In addition to making technical changes, **(1)** substituted "appropriate regional board" for "regional board of that region" in the introductory clause of subd (a) and subd (c); **(2)** amended subd (k) by **(a)** adding "appropriate" after "Conservation, in lieu of the"; **(b)** deleting "State Water Resources Control Board and the" after "entered into between the"; and **(c)** substituting "state board" for "State Water Resources Control Board" after "revoked by the" near the end; **(3)** substituted "Department of Toxic Substances Control" for "State Water Resources Control Board" in subd (*l*); and **(4)** added subd (m).

1993 Amendment:

Added subd (d)(3).

1995 Amendment:

Amended subd (m) by substituting **(1)** "recycled" for "reclaimed" both times it appears; and **(2)** "recycling" for "reclamation" before "permit".

1997 Amendment:

(1) Redesignated former subd (d)(2) to be subd (d)(2)(A); **(2)** added "Subject to subparagraph (B)," in subd (d)(2)(A); and **(3)** added subds (d)(2)(B)(i)-(d)(2)(B)(iii).

2002 Amendment:

(1) Amended subd (d)(1) by **(a)** substituting "twenty thousand dollars ($20,000)" for "ten thousand dollars ($10,000)" **(b)** adding "threat to water quality,"; **(2)** amended subd (d)(2)(B) by **(a)** substituting "stormwater" for "storm water" throughout; **(b)** adding subd (4); **(3)** amended subd (f)(1) by **(a)** deleting "On or before January 1, 1990," before "The state board" in the first sentence; **(b)** deleting "and filing" before "fees shall be set" in the second sentence; **(c)** deleting "and filing" before "fees each fiscal year" in the third sentence; **(d)** deleting "filing" before "fees to compensate" in the last sentence; and **(4)** amended subd (f)(2) by adding "any amendment thereto," in the first sentence.

2003 Amendment:

Received
August 26, 2011
Commission on
State Mandates

(1) Redesignated former subd (d)(1) to be subd (d)(1)(A); **(2)** amended subd (d)(1)(A) by **(a)** substituting "who is subject to subdivision (a) or (c)" for "for whom waste discharge requirements have been prescribed pursuant to Section 13263"; **(b)** deleting "not to exceed twenty thousand dollars ($20,000)," after "submit an annual fee"; and **(c)** deleting the former second sentence which read: "Fees shall be calculated on the basis of total flow, volume, number of animals, threat to water quality, or area involved."; **(3)** added subds (d)(1)(B)-(d)(1)(D); **(4)** amended subd (d)(2)(A) by **(a)** adding a comma after "Fund" in the first sentence; and **(b)** adding "solely" in the second sentence; **(5)** deleted "and who is or will be subject to the fee imposed pursuant to Section 46801 of the Public Resources Code in the same fiscal year," after "Public Resources Code," in subd (d)(3); **(6)** deleted former subd (d)(4) which read: "The maximum fee amount set forth in paragraph (1) of subdivision (d) shall be adjusted annually to reflect increases or decreases in the cost of living as measured by the Consumer Price Index prepared by the Department of Industrial Relations or a successor agency."; **(7)** substituted subd (e) for former subd (e) which read "(e) Each report of waste discharge for a new discharge submitted under this section shall be accompanied by a fee equal in amount to the annual fee for the discharge. If waste discharge requirements are issued, the fee shall serve as the first annual fee. If waste discharge requirements are waived pursuant to Section 13269, all or part of the fee shall be refunded."; **(8)** substituted "subdivision (d)." for "subdivisions (d) and (j)" in the first sentence of subd (f)(1); **(9)** substituted "national pollutant discharge elimination system" for "National Pollutant Discharge Elimination System" in subd (i); **(10)** deleted former subd (j) which read: "(j) Facilities for confined animal feeding or holding operations, including dairy farms, which have been issued waste discharge requirements or exempted from waste discharge requirements prior to January 1, 1989, are exempt from subdivision (d). If the facility is required to file a report under subdivision (c) after January 1, 1989, the report shall be accompanied by a filing fee, to be established by the state board in accordance with subdivision (f), not to exceed two thousand dollars ($2,000), and the facility shall be exempt from any annual fee."; **(11)** redesignated former subds (k)-(m) to be subds (j)-*(l)* (l); and **(12)** added "both of" after "first submit" in the introductory clause of subd (k).

2011 Amendment:

(1) Amended the introductory clause of subd (a) by substituting (a) "Each" for "All" at the beginning; and (b) "that" for "which" after "the information"; (2) substituted "A person" for "Any person" at the beginning of subds (a)(1)-(a)(3), (d)(3), and (j); (3) substituted "Each" for "Every" at the beginning of subd (c); (4) added "adopting, reviewing, and revising water quality control plans and state policies for water quality control," in subd (d)(1)(C); (5) substituted "a" for "any" after "imposed on" and after "limited to," in the introductory clause of subd (d)(1)(D); (6) substituted "the" for "any" after "subparagraph (B)," in the first sentence of subd (d)(2)(A); (7) added "that" after "Each person" in the first sentence of subd (e); (8) deleted the commas after "subdivision (a)" and after "subdivision (d)" in the first sentence of subd (j); and (9) substituted "a" for "any" after "subdivision (a), before" in the introductory clause of subd (k).

Historical Derivation:

(a) Former Wat C ß 13054, as added Stats 1949 ch 1549 ß 1, amended Stats 1951 ch 1139 ß 3, Stats 1959 ch 1299 ß 15, Stats 1967 ch 1447 ß 9.

(b) Former Wat C ß 13054.1, as added Stats 1959 ch 1299 ß 16, amended Stats 1967 ch 1447 ß 10.

Note

Stats 1983 ch 40 provides:

SEC. 8. Notwithstanding subdivision (d) of Section 13260 of the Water Code, filing fees for market and manufacturing milk dairy farms or dairy feedlots shall not exceed the fee charged to the facility when the initial report of proposed discharge was filed or a waiver of the report of waste discharge was granted by the regional board plus an annual adjustment for inflation based on the consumer price index not to exceed 6 percent per year. Any fees heretofore collected in excess of the fees permitted by this subdivision shall be refunded to the discharger.

Stats 1989 ch 642 provides:

Received
August 26, 2011
Commission on
State Mandates

SEC. 8. On or before January 1, 1991, the State Water Resources Control Board shall investigate current analytic procedures, if any, which are available to test mining waste for acid-forming potential and report to the Legislature on all of the following:

(a) Whether a practical procedure exists that can be used to predict the acid-forming potential of mining waste.

(b) If a practical procedure is not available, whether a test for acid-forming potential should be developed.

(c) If the state board's recommendation is that a test specified in subdivision (b) should be developed, the state board's estimate of the cost of developing and validating the test and possible sources of funding that might be used to pay for those development costs.

Stats 1st Extra Session 2003 ch 1x provides:

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIIIB of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Stats 2010 ch 718 provides:

SEC. 28. (a) (1) No later than March 1, 2011, the State Water Resources Control Board shall submit to the budget committees in each house of the Legislature an analysis and report, pursuant to Section 9795 of the Government Code, on the costs of regulating water quality at active landfills.

(2) The requirement for submitting a report imposed under this subdivision is inoperative on January 1, 2015, pursuant to Section 10231.5 of the Government Code.

(b) It is the intent of the Legislature to avoid any unnecessary adverse effects to permittees resulting from the cessation of the fee waiver granted pursuant to paragraph (3) of subdivision (d) of Section 13260 of the Water Code. In order to maximize the permittee's ability to prepare to pay the assessment of the Waste Discharge Fee, the State Water Resources Control Board shall, on a one-time basis, bill permittees in the second half of the 2010-11 fiscal year for the entire fiscal year.

Stats 2010 ch 718 provides:

SEC. 28. (a) (1) No later than March 1, 2011, the State Water Resources Control Board shall submit to the budget committees in each house of the Legislature an analysis and report, pursuant to Section 9795 of the Government Code, on the costs of regulating water quality at active landfills.

(2) The requirement for submitting a report imposed under this subdivision is inoperative on January 1, 2015, pursuant to Section 10231.5 of the Government Code.

(b) It is the intent of the Legislature to avoid any unnecessary adverse effects to permittees resulting from the cessation of the fee waiver granted pursuant to paragraph (3) of subdivision (d) of Section 13260 of the Water Code. In order to maximize the permittee's ability to prepare to pay the assessment of the Waste Discharge Fee, the State Water Resources Control Board shall, on a one-time basis, bill permittees in the second half of the 2010-11 fiscal year for the entire fiscal year.

Cross References:

Prohibited participation of member of regional board in any board action pursuant to this Article which involves himself or in which he has direct personal financial interest: Wat C ß 13207.

Received
August 26, 2011
Commission on
State Mandates

Duty of person discharging pollutants or proposing to discharge pollutants to navigable waters of the United States within jurisdiction of this state to file report of such discharge in compliance with procedures set forth in this Section: Wat C ß 13376.

Inapplicability of exemption from filing fees requirement: Gov C ß 6103.4.

Review and approval of development projects: Gov C ß 65963.1.

Perjury and subornation of perjury: Pen C ßß 118 et seq.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 418 "Pollution And Environmental Matters".

Waste discharge reports and requirements: 23 Cal Adm Code ßß 2200 et seq.

Miller & Starr, Cal Real Estate 3d ßß 23:22, 23:54.

Law Review Articles:

Control of water quality and pollution. 45 CLR 586.

State regulation of groundwater pollution caused by changes in groundwater quantity or flow in California. 19 Pacific LJ 1267.

Attorney General's Opinions:

Regional boards must establish, and may prescribe in advance, discharge requirements for privately operated sewage disposal devices such as septic tanks or cesspools; where local health ordinances prescribe satisfactory standards for discharge requirements for privately-operated sewage disposal devices, the requirement of regional board may prescribe that compliance be had with such ordinances. 16 Ops. Cal. Atty. Gen. 112.

Regional boards may not control garbage disposals not affecting water, but may control waste from construction operations dumped or drained into water. 16 Ops. Cal. Atty. Gen. 125.

Regional board may not disapprove sewage or waste disposal sites on ground of threatened nuisance or potential depreciation of neighboring property values. 16 Ops. Cal. Atty. Gen. 200.

Regional board may formulate sewage and industrial waste disposal requirements by describing the characteristics of the discharge, or by describing the discharge in terms of the condition to be maintained in the receiving waters or other disposal area, or by a combination of the two methods. 16 Ops. Cal. Atty. Gen. 203.

Jurisdiction of water pollution control board over drainage into surface streams or lakes of water containing harmful concentration of minerals from inoperative or abandoned mining operations; person upon whom is imposed waste discharge requirements prescribed by regional water pollution control board to correct pollution or nuisance which may result from such drainage when fee of land on which mine is located is owned separately from mineral rights. 26 Ops. Cal. Atty. Gen. 88.

Waste discharge requirements prescribed by Regional Water Pollution Control Board to be imposed upon persons having legal control over property from which harmful material arises. 27 Ops. Cal. Atty. Gen. 182.

Responsibility of Water Pollution Control Boards to prevent or eliminate pollution and nuisance by issuance and enforcement of waste discharge requirements. 27 Ops. Cal. Atty. Gen. 217.

Industrial waste resulting from extraction of minerals from stream beds; fact that discharger of industrial waste holds license from California debris commission or lease from state lands commission as not exempting him from requirements established by water pollution control board. 32 Ops. Cal. Atty. Gen. 139.

Received
August 26, 2011
Commission on
State Mandates

Requirement that State Water Resources Control Board and Regional Water Quality Control Boards, in prescribing waste discharge requirements, consider effects of proposed discharge on all aspects of environment. 57 Ops. Cal. Atty. Gen. 19.

Annotations:

Pollution control: validity and construction of statutes, ordinances, or regulations controlling discharge of industrial wastes into sewer system. 47 ALR3d 1224.

Hierarchy Notes:

Div. 7 Note

Div. 7, Ch. 4 Note

Div. 7, Ch. 4, Art. 4 Note

LexisNexis 50 State Surveys, Legislation & Regulations

Water Quality

NOTES OF DECISIONS 1. Legislative Intent 2. Control of Contamination 3. Dredging 4. Failure to Comply 5. Institution of Proceedings

1. Legislative Intent

It was not legislative intent to place in state water pollution control board or any of its regional boards exclusive power to determine whether nuisance exists and to abate nuisance created by pollution of water. People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in TrafficSchoolOnline, Inc. v. Clarke (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

2. Control of Contamination

While regional water pollution control board may act in cases where there is pollution of waters and nuisance created thereby and, consequently, may act though pollution may also result in contamination, if contamination and public nuisance endangering health of inhabitants of any city or county exists, statutes place power to control in other public agencies, including state department of health, local health officers, counties and municipalities. People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in TrafficSchoolOnline, Inc. v. Clarke (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

Assuming that control of pollution of waters of bay and nuisances, created by such pollution, is vested in regional pollution water control board, such board did not have exclusive control over conditions shown by complaint alleging not only pollution of waters of bay, but also contamination thereof and creation and existence of condition constituting public nuisance both in those waters and on the shore of bay, detrimental to health of inhabitants of plaintiff cities. People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in TrafficSchoolOnline, Inc. v. Clarke (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

3. Dredging

In consolidated actions for injunctive relief by the San Francisco Bay Conservation and Development Commission and a Regional Water Quality Control Board against a corporation engaged in dredging sand and mud from the bottom of the bay, the trial court erred in entering a preliminary injunction permitting defendant to continue its operations at a rate which had been approved by the commission and the board for a similar operation in a different location, where

Received
August 26, 2011
Commission on
State Mandates

defendant had, at both locations, greatly exceeded the amount of dredging originally permitted and had neither obtained a permit from the commission as required by Gov Cal ßß 66604, 66632, or reported to the board as required by Wat Cal ß 13260, with respect to the new location. People ex rel. Younger v. F. E. Crites, Inc. (1975, Cal App 1st Dist) 51 Cal App 3d 961, 124 Cal Rptr 664, 1975 Cal App LEXIS 1423.

4. Failure to Comply

If person ordered to correct nuisance or pollution found by regional water pollution control board to exist by virtue of discharge of sewage fails to comply with board's order, only then is it duty of regional board to certify facts to district attorney of county in which discharge of sewage originates, and it is duty of district attorney to seek injunction against persons causing pollution or nuisance. People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in TrafficSchoolOnline, Inc. v. Clarke (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

5. Institution of Proceedings

There is no provision requiring any county or municipality damaged by public nuisance, or health of whose inhabitants is endangered by such nuisance, to institute any proceedings before either regional water pollution control board or state board. People v. Los Angeles (1958, Cal App 2d Dist) 160 Cal App 2d 494, 325 P2d 639, 1958 Cal App LEXIS 2145, superseded by statute as stated in TrafficSchoolOnline, Inc. v. Clarke (2003, Cal App 2d Dist) 112 Cal App 4th 736, 5 Cal Rptr 3d 408, 2003 Cal App LEXIS 1549.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 27

Received
August 26, 2011
Commission on
State Mandates

DEERING'S CALIFORNIA CODE ANNOTATED
Copyright © 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 192 & EXTRA. SESS. CH. 8 ***
OF THE 2011 SESSION
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

WATER CODE
Division 7. Water Quality
Chapter 4. Regional Water Quality Control
Article 4. Waste Discharge Requirements

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code ß 13263 (2010)

ß 13263. Requirements prescribed by board; Review, revision, and notice; Absence of vested right to discharge waste

(a) The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system, with relation to the conditions existing in the disposal area or receiving waters upon, or into which, the discharge is made or proposed. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.

(b) A regional board, in prescribing requirements, need not authorize the utilization of the full waste assimilation capacities of the receiving waters.

(c) The requirements may contain a time schedule, subject to revision in the discretion of the board.

(d) The regional board may prescribe requirements although no discharge report has been filed.

(e) Upon application by any affected person, or on its own motion, the regional board may review and revise requirements. All requirements shall be reviewed periodically.

(f) The regional board shall notify in writing the person making or proposing the discharge or the change therein of the discharge requirements to be met. After receipt of the notice, the person so notified shall provide adequate means to meet the requirements.

(g) No discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into waters of the state are privileges, not rights.

(h) The regional board may incorporate the requirements prescribed pursuant to this section into a master recycling permit for either a supplier or distributor, or both, of recycled water.

Received
August 26, 2011
Commission on
State Mandates

(i) The state board or a regional board may prescribe general waste discharge requirements for a category of discharges if the state board or that regional board finds or determines that all of the following criteria apply to the discharges in that category:

(1) The discharges are produced by the same or similar operations.

(2) The discharges involve the same or similar types of waste.

(3) The discharges require the same or similar treatment standards.

(4) The discharges are more appropriately regulated under general discharge requirements than individual discharge requirements.

(j) The state board, after any necessary hearing, may prescribe waste discharge requirements in accordance with this section.

HISTORY:

Added Stats 1969 ch 482 ß 18, operative January 1, 1970. Amended Stats 1992 ch 211 ß 3 (AB 3012); Stats 1995 ch 28 ß 21 (AB 1247), ch 421 ß 2 (SB 572).

NOTES:

Amendments:

1992 Amendment:

In addition to making technical changes, added subd (h).

1995 Amendment:

(1) Amended subd (a) by **(a)** substituting "in an existing discharge," for "therein"; **(b)** deleting "from time to time" after "the conditions existing" in the first sentence; **(c)** adding "any" after "shall implement"; and **(d)** substituting "that" for "if any" after "quality control plans" in the second sentence; **(2)** added "regional" at the beginning of subd (d); **(3)** substituted "recycling" for "reclamation" and "recycled" for "reclaimed" in subd (h); and **(4)** added subds (i) and (j). (As amended Stats 1995 ch 421, compared to the section as it read prior to 1995. This section was also amended by an earlier chapter, ch 28. See Gov C ß 9605.)

Historical Derivation:

(a) Former Wat C ß 13002, as added Stats 1949 ch 1549 ß 1, amended Stats 1959 ch 1299 ß 4, Stats 1967 ch 1447 ß 5.3.

(b) Former Wat C ß 13054.2, as added Stats 1959 ch 1299 ß 17.

(c) Former Wat C ß 13054.3, as added Stats 1959 ch 1299 ß 18, amended Stats 1967 ch 1447 ß 11.

Editor's Notes

For investigation of analytic procedures, see the 1989 Note following Wat ß 13260.

Received
August 26, 2011
Commission on
State Mandates

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 418 "Pollution And Environmental Matters".

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 472A "Agency Rulemaking Procedures0".

Federal grants for construction of treatment works: 33 USCS ßß 1281 et seq.

Miller & Starr, Cal Real Estate 3d ßß 23:22, 23:54.

Law Review Articles:

Some reflections on environmental considerations in water rights administration. 2 Ecology LQ 695.

Development of the California and Federal water pollution control programs; the California Porter-Cologne Act. 5 UCD LR 265.

Attorney General's Opinions:

Requirement that State Water Resources Control Board and Regional Water Quality Control Boards, in prescribing waste discharge requirements, consider effects of proposed discharge on all aspects of environment. 57 Ops. Cal. Atty. Gen. 19.

Hierarchy Notes:

Div. 7 Note

Div. 7, Ch. 4 Note

Div. 7, Ch. 4, Art. 4 Note

LexisNexis 50 State Surveys, Legislation & Regulations

Water Quality

NOTES OF DECISIONS .5. Construction of Statute 1. Notice of Hearings 2. Opportunity to Appear 3. Federal Facilities

.5. Construction of Statute

Cal. Water Code ß 13263(c), stating that waste discharge requirements "may contain a time schedule," does not expressly or impliedly authorize schedules of compliance that allow delayed compliance with effluent limitations necessary to achieve water quality standards where the state water quality standards or implementing regulations do not provide for schedules of compliance. City of Burbank v. State Water Resources Control Bd. (2003, Cal App 2d Dist) 111 Cal App 4th 245, 4 Cal Rptr 3d 27, 2003 Cal App LEXIS 1236, rehearing denied (2003, Cal App 2d Dist) 2003 Cal App LEXIS 1421, affd in part, remanded in part, (2005) 35 Cal 4th 613, 26 Cal Rptr 3d 304, 108 P3d 862, 2005 Cal LEXIS 3486.

Whether a regional water control quality board should have complied with Wat Cal ßß 13263 and 13241 of California's Porter-Cologne Water Quality Control Act by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits, depended on whether those restrictions met or exceeded the requirements of the federal Clean Water Act, 33 USCS ß 1251 et seq.33 USCS ß 1251(b) reserves to the states significant aspects of water quality policy, and 33 USCS ß 1370 specifically grants the states authority to enforce any effluent limitation that is not less stringent than the federal standard. City of Burbank v. State Water Resources Control Bd. (2005) 35 Cal 4th 613, 26 Cal Rptr 3d 304, 108 P3d 862, 2005 Cal LEXIS 3486, rehearing denied (2005, Cal) 2005 Cal LEXIS 7185.

Received
August 26, 2011
Commission on
State Mandates

1. Notice of Hearings

In a mandate proceeding seeking to restrain enforcement of orders of the Regional Water Quality Control Board prohibiting further sewer connections until water quality standards were met by districts discharging sewage into San Francisco Bay, the trial court correctly found that all persons affected by the orders were given due notice of hearings thereon, even though a particular citizens association was not given individual mailed notice, where a general notice of the board's hearing was published in a local newspaper, giving all those interested an opportunity to be heard, where notices were sent to all individuals and agencies which had contacted the board indicating an interest in the hearings, and where notices were also sent by certified mail to each of the dischargers, to a local builders exchange, and to legal counsel for a state builders council. Morshead v. California Regional Water Quality Control Board (1975, Cal App 1st Dist) 45 Cal App 3d 442, 119 Cal Rptr 586, 1975 Cal App LEXIS 1698.

2. Opportunity to Appear

On appeal from a judgment denying property owners, builders, and developers a writ of mandate that would have restrained enforcement of orders of the Regional Water Quality Control Board prohibiting further sewage connections until water quality standards were met by districts discharging sewage into San Francisco Bay, plaintiffs could not successfully assert that they were denied an opportunity to present their own evidence or cross-examine witnesses and refute evidence presented in support of the board's eventual determination, where the record fully supported the trial court's finding that, at hearings before panels of the board, which led to the issuance of the orders, all affected persons were given an opportunity to testify and present evidence, and where it appeared that plaintiff's counsel was given every opportunity to cross-examine witnesses, and that he availed himself of such opportunities. Morshead v. California Regional Water Quality Control Board (1975, Cal App 1st Dist) 45 Cal App 3d 442, 119 Cal Rptr 586, 1975 Cal App LEXIS 1698.

3. Federal Facilities

Under Federal Water Pollution Control Act amendments of 1972, 86 Stat. 816, 33 USCS ßß 1251 et seq., federal installations discharging water pollutants in state with federally approved permit program are not required to secure permits from state under its program adopted pursuant to National Pollutant Discharge Elimination System, since amendments do not subject federal facilities to such state permit requirements with requisite degree of clarity. EPA v. California (1976) 426 US 200, 48 L Ed 2d 578, 96 S Ct 2022, 1976 US LEXIS 105.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 28

Received
August 26, 2011
Commission on
State Mandates

DEERING'S CALIFORNIA CODE ANNOTATED
Copyright © 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 192 & EXTRA. SESS. CH. 8 ***
OF THE 2011 SESSION
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

WATER CODE
Division 7. Water Quality
Chapter 5.5. Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code ß 13374 (2010)

ß 13374. "Waste discharge requirements"

The term "waste discharge requirements" as referred to in this division is the equivalent of the term "permits" as used in the Federal Water Pollution Control Act, as amended.

HISTORY:

Added Stats 1972 ch 1256 ß 1, effective December 19, 1972.

NOTES:

Collateral References:

Federal Water Pollution Control Act: 33 USCS ßß 1251 et seq.

Hierarchy Notes:

Div. 7 Note

Div. 7, Ch. 5.5 Note

LexisNexis 50 State Surveys, Legislation & Regulations

Water Quality

NOTES OF DECISIONS 1. Effect of Federal Law

1. Effect of Federal Law

Received
August 26, 2011
Commission on
State Mandates

Measures adopted by the State Water Resources Control Board which utilized a state waste discharge permit system to regulate nonpoint source pollution into Lake Tahoe were not beyond the authority granted the board under Wat. Code, ß 13170, to enact a water quality control plan required by the Federal Water Pollution Control Act (33 USCS ß 1251 et seq.). Although federal permits are not used for regulation of nonpoint sources of pollution under the federal act, a state is not precluded from resorting to this method of regulation under its own authority. The Water Code is designed to insure a limited conformity of state law with federal law, not to oust the state of its own powers to control nonpoint sources of water pollution. Wat. Code, ß 13374 requires equivalency with federal law only for purposes of state compliance with the minimum requirements of the federal mandate, and federal law does not preclude the state from utilizing its broader authority to regulate nonpoint sources of pollution. Tahoe-Sierra Preservation Council v. State Water Resources Control Bd. (1989, Cal App 3d Dist) 210 Cal App 3d 1421, 259 Cal Rptr 132, 1989 Cal App LEXIS 595.

Regional water quality board's authority under Wat C ß 13374 to issue permits within its region as provided in Wat C ßß 13200(d), 13225 did not conflict with the statewide jurisdiction requirements imposed by 40 C.F.R. pts. 123.1(g)(1), 123.22(b); hence, the board had authority to issue a National Pollutant Discharge Elimination System permit for municipal storm water and urban runoff discharges. County of Los Angeles v. State Water Resources Control Bd. (2006, Cal App 2d Dist) 143 Cal App 4th 985, 50 Cal Rptr 3d 619, 2006 Cal App LEXIS 1546, rehearing denied County of Los Angeles v. California Regional Water Quality Board (2006, Cal App 2d Dist) 2006 Cal App LEXIS 2095, review denied Los Angeles, County of v. California State Water Resources Control Board (2007, Cal) 2007 Cal LEXIS 1538.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 2

TAB 29

Received
August 26, 2011
Commission on
State Mandates

DEERING'S CALIFORNIA CODES ANNOTATED
Copyright (c) 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH URGENCY CHAPTER 192 & EXTRA. SESS. CH. 8 ***
OF THE 2011 SESSION
SPECIAL NOTICE: CHAPTERS ENACTED BETWEEN OCTOBER 20, 2009, AND NOVEMBER 2, 2010, ARE SUBJECT TO REPEAL BY PROPOSITION 22.

WATER CODE
Division 7. Water Quality
Chapter 5.5. Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code ß 13377 (2011)

ß 13377. Boards' issuance of requirements pursuant to federal act

Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

HISTORY:

Added Stats 1972 ch 1256 ß 1, effective December 19, 1972. Amended Stats 1978 ch 746 ß 3.

NOTES:

Amendments:

1978 Amendment:

Substituted the section for the former section which read: "Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements which ensure compliance with any applicable effluent limitations, water quality related effluent limitations, national standards of performance, toxic and pretreatment effluent standards, and any ocean discharge criteria."

Cross References:

Received
August 26, 2011
Commission on
State Mandates

Legislative intent that Board not adopt enforcement orders against publicly owned dischargers mandating construction costs absent federal financing: Rev & Tax C ß 2209.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 472A "Agency Rulemaking Procedures0".

12 Witkin Summary (10th ed) Real Property ß 896.

Federal Water Pollution Control Act: 33 USCS ßß 1251 et seq.

Water quality related effluent limitations under the Federal Water Pollution Control Act: 33 USCS ß 1312.

Law Review Articles:

Municipal Storm Water Permitting in California. 40 San Diego LR 245.

Attorney General's Opinions:

Requirement that State Water Resources Control Board and regional water quality control boards, in prescribing water discharge requirements, consider effects of proposed discharge on all aspects of environment. 57 Ops. Cal. Atty. Gen. 19.

Hierarchy Notes:

Div. 7 Note

Div. 7, Ch. 5.5 Note

LexisNexis 50 State Surveys, Legislation & Regulations

Water Quality

NOTES OF DECISIONS 1. Required Findings 2. State and Federal Law

1. Required Findings

While the Clean Water Act of 1977 (33 USCS ßß 1251 et seq.) allows states or their agencies to enact stricter limitations than those found in the federal guidelines (33 USCS ß 1370) the State Water Resources Control Board's responses to this invitation (1978 Water Control Plan for Ocean Waters of California) permits the regional water board to set more restrictive limitations than those contained in the plan only as necessary for the protection of the beneficial uses of the ocean. Accordingly, before the regional board may exercise its authority to issue a permit prescribing limits on the "gross" rather than "net" discharge of waste, it must first enunciate its reasoning which must in turn be supported by the evidence, since the plan speaks only in terms of "net" requirements. Accordingly, an order of the board granting a permit setting gross discharge requirements for a nuclear generating plant was not supported by adequate findings, where the findings did not include factual evidence supporting a conclusion gross limitations were necessary to protect any specific beneficial uses of the ocean. Southern Cal. Edison Co. v. State Water Resources Control Bd. (1981, Cal App 4th Dist) 116 Cal App 3d 751, 172 Cal Rptr 306, 1981 Cal App LEXIS 1541.

Under Wat. Code, ß 13377, the State Water Resources Control Board is specifically empowered to impose more stringent effluent standards or limitations than those contained in its 1978 Water Quality Control Plan for Ocean Waters of California as necessary to implement water quality control plans, or for the protection of beneficial uses or to prevent nuisance. However, in order for the board to implement stricter standards than those found in the ocean plans, it must

Received
August 26, 2011
Commission on
State Mandates

first hold hearings and then state its reasons explaining why such stricter standards are necessary to effect the purposes of the Water Quality Control Act. Accordingly, an order of a regional board setting limitations on waste discharges from a utility's private secondary sewage treatment plant equal to federal limitations imposed on municipal sewage treatment facilities, which were stricter than those contained in the ocean plans, was not supported by adequate findings where the findings failed to explain how a specific use or uses would be benefited by implementation of the stricter standards or why stricter standards were in fact necessary. Southern Cal. Edison Co. v. State Water Resources Control Bd. (1981, Cal App 4th Dist) 116 Cal App 3d 751, 172 Cal Rptr 306, 1981 Cal App LEXIS 1541.

Economic costs are not a valid consideration at the permit level for establishing effluent limits. 33 USCS ß 1311(b)(1)(C) is an integral part of a permitting authority's continuing obligations under the Clean Water Act, 33 USCS ßß 1251 et seq.City of Burbank v. State Water Resources Control Bd. (2003, Cal App 2d Dist) 111 Cal App 4th 245, 4 Cal Rptr 3d 27, 2003 Cal App LEXIS 1236, rehearing denied (2003, Cal App 2d Dist) 2003 Cal App LEXIS 1421, affd in part, remanded in part, (2005) 35 Cal 4th 613, 26 Cal Rptr 3d 304, 108 P3d 862, 2005 Cal LEXIS 3486.

2. State and Federal Law

Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law, and state law specifically allows the imposition of controls more stringent than federal law. Building Industry Assn. of San Diego County v. State Water Resources Control Bd. (2004, Cal App 4th Dist) 124 Cal App 4th 866, 22 Cal Rptr 3d 128, 2004 Cal App LEXIS 2073, rehearing denied Building Industry Assn. v. State Water Resources Control Bd. (2005, Cal App 4th Dist) 2005 Cal App LEXIS 7, review denied Building Industry Association of San Diego County v. California Regional Water Quality Control Board (2005, Cal) 2005 Cal LEXIS 3489.

Regional water quality board did not improperly interfere in local general plans when it issued a National Pollutant Discharge Elimination System permit for municipal storm water and urban runoff discharges; it had enforcement authority under Wat C ß 13377. County of Los Angeles v. State Water Resources Control Bd. (2006, Cal App 2d Dist) 143 Cal App 4th 985, 50 Cal Rptr 3d 619, 2006 Cal App LEXIS 1546, rehearing denied County of Los Angeles v. California Regional Water Quality Board (2006, Cal App 2d Dist) 2006 Cal App LEXIS 2095, review denied Los Angeles, County of v. California State Water Resources Control Board (2007, Cal) 2007 Cal LEXIS 1538.

Because Gov C ß 17516(c) was unconstitutional to the extent that it exempted regional water quality control boards from the constitutional state mandate subvention requirement, a trial court properly issued a writ of mandate directing the California Commission on State Mandates to resolve, on the merits and without reference to ß 17516(c), test claims presented by a county and several cities seeking reimbursement for carrying out obligations required by a National Pollutant Discharge Elimination System Permit for municipal stormwater and urban runoff discharges that was issued by a regional water quality control board. County of Los Angeles v. Commission on State Mandates (2007, Cal App 2d Dist) 150 Cal App 4th 898, 58 Cal Rptr 3d 762, 2007 Cal App LEXIS 711.

Under the Porter-Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and nine regional boards as the principal state agencies for enforcing federal and state water pollution law and for issuing permits. NRDC v. County of L.A. (2011, CA9 Cal) 2011 US App LEXIS 4647.

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 3

MISCELLANEOUS AUTHORITIES

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

VOLUME 3 – INDEX Miscellaneous Authorities	
DOCUMENT NAME	**TAB NO.**
In Re Test Claim on Los Angeles Regional Quality Control Board, Order No. 01-182, Permit CAS004001 – Statement of Decision (July 31, 2009)	1
In Re Test Claim on San Diego Regional Water Quality control Board, Order No. R9-2007-0001, Permit CAS0108758 – Statement of Decision (March 26, 2010)	2
In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association, State Water Resources Control Board, Order No. WQ 2001-15 (November 15, 2001)	3
National Pollutant Discharge Elimination System Implementation Agreement Ventura Countywide Stormwater Quality Management Program (July 14, 2010)	4
NPDES Memorandum of Agreement Between the U.S. Environmental Protection Agency and the California State Water Resources Control Board (September 22, 1989)	5
Letter from the State Water Resources Control Board to the Los Angeles Regional Water Quality Control Board (March 10, 2010)	6
Letter from the Los Angles Regional Water Quality Control Board to the State Water Resources Control Board (March 11, 2010)	7
Notice of Public Hearing issued by the Los Angles Regional Water Quality Control Board re: Reconsideration of the National Pollutant Discharge Elimination System Permit for the County of Ventura Watershed Protection District, the County of Ventura, and Incorporated Cities Therein (May 5, 2010)	8

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 3

TAB 1

Received
August 26, 2011
Commission on
State Mandates

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Los Angeles Regional Quality Control Board Order No. 01-182 Permit CAS004001 Parts 4C2a., 4C2b, 4E & 4F5c3 Filed September 2, 2003, (03-TC-04) September 26, 2003 (03-TC-19) by the County of Los Angeles, Claimant Filed September 30, 2003 (03-TC-20 & 03-TC-21) by the Cities of Artesia, Beverly Hills, Carson, Norwalk, Rancho Palos Verdes, Westlake Village, Azusa, Commerce, Vernon, Bellflower, Covina, Downey, Monterey Park, Signal Hill, Claimants	Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 *Municipal Stormwater and Urban Runoff Discharges* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted July 31, 2009)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 31, 2009. Leonard Kaye and Judith Fries appeared on behalf of the County of Los Angeles. Howard Gest appeared on behalf of the cities. Michael Lauffer appeared on behalf of the State Water Resources Control Board and the Regional Water Quality Control Board. Carla Castaneda and Susan Geanacou appeared on behalf of the Department of Finance. Geoffrey Brosseau appeared on behalf of the Bay Area Stormwater Management Agencies Association.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 4-2.

Summary of Findings

The consolidated test claim, filed by the County of Los Angeles and several cities, allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of various facilities to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board.

The Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate on local agencies subject to the permit that are not subject to a trash total

Received
August 26, 2011
Commission on
State Mandates

maximum daily load:[1] "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

BACKGROUND

The claimants allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board (LA Regional Board), a state agency.

History of the test claims

The test claims were filed in September 2003,[2] by the County of Los Angeles and several cities within it (the permit covers the Los Angeles County Flood Control District and 84 cities in Los Angeles County, all except Long Beach). The Commission originally refused jurisdiction over the permits based on Government Code section 17516's definition of "executive order" that excludes permits issued by the State Water Resources Control Board (State Water Board) or Regional Water Quality Control Boards (regional boards). After litigation, the Second District Court of Appeal held that the exclusion of permits and orders of the State and Regional Water Boards from the definition of "executive order" is unconstitutional. The court issued a writ commanding the Commission to set aside the decision "affirming your Executive Director's rejection of Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21" and to fully consider those claims.[3]

The County of Los Angeles and the cities re-filed their claims in October and November 2007. The claims were consolidated by the Executive Director in December 2008. Thus, the

---

[1] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

[2] Originally, test claims 03-TC-04 (*Transit Trash Receptacles*) and 03-TC-19 (*Inspection of Industrial/Commercial Facilities)* were filed by the County of Los Angeles on September 5, 2003. Test claim 03-TC-21 (*Stormwater Pollution Requirements*) was filed by the Cities of Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina on September 30, 2003. Test claim 03-TC-20 (*Waste Discharge Requirements*) was filed by Cities of Artesia, Beverly Hills, Carson, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino, and Westlake Village on September 30, 2003.

[3] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.

Received
August 26, 2011
Commission on
State Mandates

reimbursement period is as though the claims were filed in September 2003, i.e., beginning July 1, 2002.[4]

Before discussing the specifics of the permit, an overview of municipal stormwater pollution puts the permit in context.

Municipal stormwater

One of the main objectives of the permit is "to assure that stormwater discharges from the MS4 [Municipal Separate Storm Sewer Systems][5] shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-stormwater to the MS4 has been effectively prohibited." (Permit, p. 13.)

Stormwater runoff flows untreated from urban streets directly into streams, lakes and the ocean. To illustrate the effect of stormwater[6] on water pollution, the Ninth Circuit Court of Appeal has stated the following:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[7]

---

[4] Government Code section 17557, subdivision (e).

[5] Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

[6] Storm water means "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26 (b)(13).)

[7] *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832, 840-841.

Received
August 26, 2011
Commission on
State Mandates

Because of the stormwater pollution problems described by the Ninth Circuit above, California and the federal government regulate stormwater runoff as described below.

California law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board).
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[8]

Much of what the regional board does, especially as pertaining to permits like the one in this claim, is based in federal law as described below.

Federal law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[9] from point sources[10] to waters of the United States, since

---

[8] *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

[9] According to the federal regulations, "Discharge of a pollutant" means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

[10] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Received
August 26, 2011
Commission on
State Mandates

discharges of pollutants are illegal except under a permit.[11] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[12] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[13]

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California's permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a regional board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

> 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 (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent*

---

[11] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[12] *Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean. (40 C.F.R. § 122.2.)

[13] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 621. Actually, State and regional board permits allowing discharges into state waters are called "waste discharge requirements" (Wat. Code, § 13263).

Received
August 26, 2011
Commission on
State Mandates

> than required by federal law-from taking into account the economic effects of doing so.[14]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[15]

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[16]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[17] The federal Clean Water Act specifies the following criteria for municipal storm sewer system 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.[18]

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application.

---

[14] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 627-628.

[15] Best management practices, or BMPs, means "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 CFR § 122.2.)

[16] *Environmental Defense Center, Inc. v. U.S. E.P.A., supra,* 344 F.3d 832, 841-842.

[17] 33 USCA 1342 (p)(2)(C).

[18] 33 USCA 1342 (p)(3)(B).

Received
August 26, 2011
Commission on
State Mandates

The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[19]

General state-wide permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[20] as described in the permit as follows:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. … Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations. (Permit, p. 11.)

The State Board has statutory fee authority to conduct inspections to enforce the general state-wide permits.[21] The statewide permits are discussed in further detail in the analysis.

The Los Angeles Regional Board permit (Order No. 01-182, Permit CAS004001)

To obtain the permit, the County of Los Angeles, on behalf of all permittees, submitted on January 31, 2001 a Report of Waste Discharge, which constitutes a permit application, and a Stormwater Quality Management Program, which constituted the permittees' proposal for best management practices that would be required in the permit.[22]

---

[19] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[20] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

[21] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

[22] State Water Resources Control Board, comments submitted April 18, 2008, page 8 and attachment 36.

Received
August 26, 2011
Commission on
State Mandates

The permit states that its objective is: "to protect the beneficial uses of receiving waters in Los Angeles County."[23] The permit was upheld by the Second District Court of Appeal in 2006, which described it as follows:

> The 72-page permit is divided into 6 parts. There is an overview and findings followed by a statement of discharge prohibitions; a listing of receiving water limitations; the Storm Water Quality Management Program; an explanation of special provisions; a set of definitions; and a list of what are characterized as standard provisions. The county, the flood control district, and the 84 cities are designated in the permit as the permittees.[24]

After finding that "the county, the flood control district, and the 84 cities discharge and contribute to the release of pollutants from "municipal separate storm sewer systems" (storm drain systems)" and that the discharges were the subject of regional board permits in 1990 and 1996, the regional board found that the storm drain systems in the county discharged a host of specified pollutants into local waters. The permit summed up by stating: "Various reports prepared by the regional board, the Los Angeles County Grand Jury, and academic institutions indicated pollutants are threatening to or actually impairing the beneficial uses of water bodies in the Los Angeles region."[25]

The permit also specifies prohibited and allowable discharges, receiving water limitations, the implementation of the Storm Water Quality Management Program "requiring the use of best management practices to reduce pollutant discharge into the storm drain systems to the maximum extent possible."[26] As the court described the permit:

> In the prohibited discharges portion of the permit, the county and the cities were required to "effectively prohibit non-stormwater discharges" into their storm sewer systems. This prohibition contains the following exceptions: where the discharge is covered by a National Pollutant Discharge Elimination permit for non-stormwater emission; natural springs and rising ground water; flows from riparian habitats or wetlands; stream diversions pursuant to a permit issued by the

---

[23] Permit page 13. The permit also says: "This permit is intended to develop, achieve, and implement a timely comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the US subject to the Permittees' jurisdiction."

[24] *County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 990.

[25] *County of Los Angeles v. California State Water Resources Control Board , supra,* 143 Cal.App.4th 985, 990

[26] *County of Los Angeles v. California State Water Resources Control Board,, supra,* 143 Cal.App.4th 985, 994.

Received
August 26, 2011
Commission on
State Mandates

> regional board; "uncontaminated ground water infiltrations" … and waters from emergency fire-fighting flows.[27]

There is also a list of permissible discharges that are incidental to urban activity, as specified (e.g., landscape irrigation runoff, etc.). In the part on receiving water limitations, the permit prohibits discharges from storm sewer systems that "cause or contribute" to violations of "Water Quality Standards" objectives in receiving waters as specified in state and federal water quality plans. Storm or non-stormwater discharges from storm sewer systems which constitute a nuisance are also prohibited.[28]

To comply with the receiving water limitations, the permittees must implement control measures in accordance with the permit.[29]

The permittees are also to implement the Storm Water Quality Management Program (SQMP) that meets the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduces the pollutants in stormwaters to the maximum extent possible with the use of best management practices. And the permittees must revise the SQMP to comply with specified total maximum daily load (TMDL) allocations.[30] If a permittee modified the countywide SQMP, it must implement a local management program. Each permittee is required by November 1, 2002, to adopt a stormwater and urban runoff ordinance. By December 2, 2002, each permittee must certify that it had the legal authority to comply with the permit through adoption of ordinances or municipal code modifications.[31]

---

[27] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985, 991-992.

[28] "'Nuisance' means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes." *Id.* at 992.

[29] If the Storm Water Quality Management Program did not assure compliance with the receiving water requirements, the permittee must immediately notify the regional board; submit a Receiving Water Limitations Compliance Report that describes the best management practices currently being used and proposed changes to them; submit an implementation schedule as part of the Receiving Water Limitations Compliance Report; and, after approval by the regional board, promptly implement the new best management practices. If the permittee makes these changes, even if there were further receiving water discharges beyond those addressed in the Water Limitations Compliance Report, additional changes to the best management practices need not be made unless directed to do so by the regional board. *Id.* at 993.

[30] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

[31] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

Received
August 26, 2011
Commission on
State Mandates

The permit gives the County of Los Angeles additional responsibilities as principal permittee, such as coordination of the SQMP and convening watershed management committees. In addition, the permit contains a development construction program under which permittees are to implement programs to control runoff from construction sites, with additional requirements imposed on sites one acre or larger, and more on those five acres or larger. Permittees are to eliminate all illicit connections and discharges to the storm drain system, and must document, track and report all cases.

In this claim, however, claimants only allege activities in parts 4C2a, 4C2b, 4E and 4F5c3 of the permit. These parts concern placement and maintenance of trash receptacles at transit stops, and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites, as quoted below.

Co-Claimants' Position

Co-claimants assert that parts 4C2a, 4C2b, 4E and 4F5c3 of the LA Regional Board's permit constitute a reimbursable state-mandate within the meaning of article XIII B, section 6, and Government Code section 17514.

Transit Trash Receptacles: Los Angeles County ("County") filed test claims 03-TC-04 and 03-TC-19. In 03-TC-04, *Transit Trash Receptacles*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, the claimants allege the following activities as stated in the permit part 4F5c3 (Part 4, Special Provisions, F. Public Agency Activities Program, 5. Storm Drain Operation and Management):

> c. Permittees not subject to a trash TMDL[32] shall: [¶]...[¶]
>
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Claimant County asserts that this permit condition requires the following:

1. Identifying all transit stops within its jurisdiction except for the Los Angeles River and Ballona Creek Watershed Management areas.
2. Selecting proper trash receptacle design and evaluating proper placement of trash receptacles.
3. Designing receptacle pad improvement, if needed.
4. Constructing and installing trash receptacle units.
5. Collecting trash and maintaining receptacles.

Inspection of Industrial and Commercial Facilities: In claim 03-TC-19, *Inspection of Industrial/ Commercial Facilities*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, claimants allege the following activities as stated in the permit parts 4C2a and 4C2b (Part 4, Special Provisions, C. Industrial/Commercial Facilities Control Program):

---

[32] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

Received
August 26, 2011
Commission on
State Mandates

2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:

a) Commercial Facilities

(1) Restaurants

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections-: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with State law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP [Storm Water Quality Management Program]. At each restaurant, inspectors shall verify that the restaurant operator:

- has received educational materials on stormwater pollution prevention practices;
- does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
- keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
- does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;
- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;

Received
August 26, 2011
Commission on
State Mandates

- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO [Retail Gasoline Outlet] and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;
- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices.

Received
August 26, 2011
Commission on
State Mandates

b) Phase I Facilities[33]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[34] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[35] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[36] to stormwater. For those facilities that do

---

[33] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[34] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[35] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

[36] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... <u>The following categories of facilities are considered to be engaging in "industrial activity"</u> for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

Received
August 26, 2011
Commission on
State Mandates

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Inspection of Construction Sites: In claims 03-TC-20 and 03-TC-21, *Waste Discharge Requirements*, the cities allege the activities in permit parts 4C2a, 4C2b, and 4F5c3, as listed in the test claims cited above, in addition to the following activities as stated in part 4E of the permit (Part 4, Special Provisions, E. Development Construction Program):

- For construction sites one acre or greater, each Permittee shall comply with all conditions in section E1 above and shall: …

  (b) Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. The Local SWPPP [Storm Water Pollution Prevention Plan] shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been attained, the Permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

  Part 4E3 of the Order provides, in relevant part, as follows:

  3. For sites five acres and greater, each Permittee shall comply with all conditions in Sections E1 and E2 and shall:

  a) require, prior to issuing a grading permit for all projects requiring coverage under the state general permit,[37] proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction

---

except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;" [40 CFR §122.26 (b)(14), Emphasis added.]

[37] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA [Clean Water Act] within a geographical area." (40 CFR § 122.2.) California has issued one general permit for construction activity and one for industrial activity.

Received
August 26, 2011
Commission on
State Mandates

Activity Storm Water Permit][38] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.

b) Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.

c) Use an effective system to track grading permits issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

Both county and city claimants allege more than $1000 in costs in each test claim to comply with the permit activities.

In comments submitted June 4, 2009 on the draft staff analysis, the County of Los Angeles asserts that local agencies do not have fee authority to collect trash from trash receptacles that must be placed at transit stops, and that voter approval under Proposition 218 would be required to do so. The County also argues that voter approval under Proposition 218 would be required for stormwater inspection costs, and cites as evidence the City of Santa Clarita's stormwater pollution prevention fee, as well as legislative proposals now in the legislature that would, if enacted, provide fee authority.

In comments submitted June 8, 2009 on the draft staff analysis, the cities disagree with the conclusion that they have fee authority to recoup the costs of the transit-stop trash receptacles, and disagree that they have fee authority to inspect facilities covered by the state-issued general stormwater permits, as discussed in more detail below.

State Agency Positions

Department of Finance: Finance, in comments filed March 27, 2008 on all four test claims, alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because "The permit conditions imposed on the local agencies are required by federal laws" so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that "requirements of the permit are federally required to comply with the NPDES [National Pollutant Discharge Elimination System] program … [and] is enforceable under the federal CWA [Clean Water Act]."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The permittees submitted a Storm Water Quality Management Program prevention report with their applications, in which they had the option to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies prescribed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[39] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

---

[38] See page 11, paragraph 22 of the permit for a description of the statewide permits.

[39] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727

Received
August 26, 2011
Commission on
State Mandates

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance submitted comments on the draft staff analysis on June 19, 2009, agreeing that the local agencies have fee authority sufficient to pay for the mandated activities. Finance disagrees, however, with the portion of the analysis that finds that the activities are not federal mandates.

State Water Resources Control Board: The State Board filed comments on the four test claims on April 18, 2008, noting that the federal CWA mandates that municipalities apply for and receive permits regulating discharges of pollutants from their municipal separate storm sewer system (MS4) to waters of the United States. "Pursuant to federal regulations, the Permit contains numerous requirements for the cities and County to take actions to reduce the flow of pollutants into the rivers and the Bay, known as Best Management practices (BMPs)."

The State Board asserts that the permit is mandated on the local governments by federal law, and applies to many dischargers of stormwater, both public and private, so it is not unique to local governments. The federal mandate requires that the permit be issued to the local governments, and the specific requirements challenged are consistent with the minimum requirements of federal law. According to the State Board, even if the permit were interpreted as going beyond federal law, any additional state requirements are de minimis. And the costs are not subject to reimbursement because the programs were proposed by the cities and County themselves, and because they have the ability to fund these requirements through charges and fees and are not required to raise taxes.

In comments filed with the State Board on April 10, 2008 (attached to the State Board comments on the test claim), the United States Environmental Protection Agency (U.S. EPA) asserts that the permit conditions reduce pollutants to the "maximum extent practicable." The transit trash receptacle and inspection programs, according to U.S. EPA, are founded in section 402 (p) of the Clean Water Act, and are well within the scope of the federal regulations (40 CFR § 122.26 (d)(2)(iv)(A)(3)).

In its comments on the draft staff analysis submitted June 5, 2009, the State Board agrees with the conclusion and staff recommendation to deny the test claim, but disagrees with parts of the analysis. The State Board asserts that federal law: (1) requires local agencies to obtain NPDES permits from California Water Boards, and (2) mandates the permit, which is less stringent than permits for private industry. The State Board also states that the permit does not exceed the minimum federal mandate, as found by a court of appeal. Finally, the State Board argues that the federal stormwater law is one of general application, and therefore does not impose a state mandate.

Interested Party Positions

Bay Area Stormwater Management Agencies Association: In comments on the draft staff analysis received June 3, 2009 (although the letter is dated April 29, 2009) the Bay Area Stormwater Management Agencies Association (BASMAA) states that this matter is of statewide importance with broad implications, and fundamentally a matter of public finance. BASMAA also urges keeping the voters' objectives paramount. BASMAA agrees that the permit requirements are a new program or higher level of service and that the requirements go beyond the federal Clean Water Act's mandates. As for the portion of the draft staff analysis that

Received
August 26, 2011
Commission on
State Mandates

discusses local agency fee authority, BASMAA calls it "myopic" saying it "falls short in its consideration of all potentially relevant issues and appellate court precedents that need to be presented to the Commission to serve the interest of the public." (Comments p. 3.) BASMAA contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the Proposition 218 voting requirement or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

League of California Cities and California State Association of Counties (CSAC): In joint comments on the draft staff analysis received June 4, 2009, the League of Cities and CSAC agree with the draft staff analysis that the permit is a mandate, but question whether the *Connell* and *County of Fresno* decisions are still valid as applied to Government Code section 17556, subdivision (d), which prohibit the Commission from finding costs mandated by the state if the local agency has fee authority. This is because of the voters' approval of Proposition 218 in 1996. The League and CSAC urge the Commission not to find that fee authority exists for local agencies (1) to the extent there may be doubt about whether a local agency has it, and (2) to the extent that there is no person upon which the local agency can impose the fee.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[40] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[41] "Its purpose 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."[42] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

---

[40] Article XIII B, section 6, subdivision (a), provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[41] *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

[42] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

Received
August 26, 2011
Commission on
State Mandates

task.[43] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[44]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[45] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[46] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[47]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[48]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[49] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[50]

The permit provisions in the consolidated test claim are discussed separately to determine whether they are reimbursable state-mandates.

---

[43] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[44] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[45] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[46] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[47] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[48] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[49] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[50] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Received
August 26, 2011
Commission on
State Mandates

Issue 1: Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, and whether they constitute a federal mandate.

A. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which defines an "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following:

(a) The Governor.
(b) Any officer or official serving at the pleasure of the Governor.
(c) Any agency, department, board, or commission of state government."[51]

The LA Regional Water Board is a state agency.[52] The permit it issued is both a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) the result of claimants' discretion?

The permit provisions require placing and maintaining trash receptacles at transit stops and inspecting specified facilities and construction sites.

The Department of Finance, in comments submitted March 27, 2008, asserts that the claimants had discretion over what activities and conditions to include in the permit application, so that any resulting costs are downstream of the claimant's decision to include those provisions in the permit. Thus, Finance argues that the costs are not mandated by the state.

Similarly, the State Board, in its April 18, 2008 comments, cites the Stormwater Quality Management Program (SQMP) submitted by the county that constituted the claimants' proposal for the BMPs required under the permit. The State Water Board refers to (on p. 28 of the SQMP) the county's proposal to "collect trash along open channels and encourage voluntary trash collection in natural stream channels." The State Water Board further states that the SQMP (pp. 22-23) contains the municipalities' proposal for (1) site visits to industrial and commercial facilities, including automotive service businesses and restaurants to verify evidence of BMP

---

[51] Section 17516 also states: ""Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 904.

[52] Water Code section 13200 et seq.

Received
August 26, 2011
Commission on
State Mandates

implementation, and (2) maintaining a database of automotive and food service facilities including whether they have NPDES stormwater permit coverage.

Claimant County of Los Angeles, in its June 23, 2008 rebuttal comments (pp.3-4), stated whether or not most jurisdictions place transit receptacles at transit stops is not relevant to the existence of a state mandate because Government Code section 17565 provides that if a local agency has been incurring costs for activities that are subsequently mandated by the state, the activities are still subject to reimbursement. The County also states that the permit application only proposed an industrial/commercial *educational* site visit program, not an inspection program. The claimants allege that the inspection program was previously the state's duty, but that the permit shifted it to the local agencies.

Claimant cities in their June 28, 2008 comments also construe the SQMP proposal as involving only educational site visits, which they characterize as very different from compliance inspections. And cities assert that "nowhere in the Report of Waste Discharge do the applicants propose compliance inspections of facilities that hold general industrial and general construction stormwater permits for compliance with those permits." According to the cities, the city and county objected orally and in writing to the inspection permit provision.

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[53]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants were required by state and federal law to submit the NPDES permit application in the form of a Report of Waste Discharge and SQMP. Submitting them was not discretionary. According to the record,[54] the county on behalf of all claimants, submitted on January 31, 2001 a Report of Waste Discharge (ROWD), which constitutes a permit application, and a SQMP, which constitutes the claimants' proposal for best management practices that would be required in the permit.

The duty to apply for an NPDES permit is not within the claimants' discretion. According to the federal regulation:

> a) *Duty to apply.* (1) Any person[55] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a

[53] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

[54] State Water Resources Control Board, comments submitted April 18, 2008, page 8 & attachment 36.

[55] *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

Received
August 26, 2011
Commission on
State Mandates

> complete application to the Director in accordance with this section and part 124 of this chapter.[56]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state … shall file a report of the discharge in compliance with the procedures set forth in Section 13260 …"[57] Thus, submitting the ROWD is not discretionary.

Federal regulations also anticipate the filing of an application for a stormwater permit, which contains the information in the SQMP. The regulation states in part:

> (d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application.[58]

According to the permit, section 122.26, subdivision (d), of the federal regulations contains the essential components of the SQMP (p. 32), which is an enforceable element of the permit (p. 45). Section 122.26, subdivision (d)(2)(iv)(C), in the federal regulations is interpreted in the permit to "require that MS4 permittees implement a program to monitor and control pollutants in discharges to the municipal system from industrial and commercial facilities that contribute a substantial pollutant load to the MS4." (p. 35.) In short, the claimants were required by law to submit the ROWD and SQMP, with specified contents.

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which were not the result of the claimants' discretion.

C. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b)?

The next issue is whether the parts of the permit at issue are federally mandated, as asserted by the State Board and the Department of Finance (whose comments are detailed below). If so, the parts of the permit would not constitute a state mandate.

In *County of Los Angeles v. Commission on State Mandates,* the court stated as follows regarding this permit: "We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."[59] But after

---

[56] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[57] Water Code section 13376.

[58] 40 Code of Federal Regulations, section 122.26 (d).

[59] *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 914.

Received
August 26, 2011
Commission on
State Mandates

summarizing the arguments on both sides, the court declined to decide the issue, stating: "Resolution of the federal or state nature of these [permit] obligations therefore is premature and, thus, not properly before this court."[60] The court agreed with the Commission (calling it an "inescapable conclusion") that the federal versus state issues in the test claims must be addressed in the first instance by the Commission.[61]

The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes … by their terms, provide for reimbursement only of *state*- mandated costs, not *federally* mandated costs."[62]

When analyzing federal law in the context of a test claim under article XII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[63] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[64]

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find "costs mandated by the state" if "[t]he 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."

In *Long Beach Unified School Dist. v. State of California*,[65] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[66] The *Long Beach* court stated that unlike the federal law at issue, "the executive

---

[60] *Id.* at page 918.

[61] *Id.* at page 917. The court cited *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830, 837, in support.

[62] *San Diego Unified School Dist. v. Commission on State Mandates, supra,* 33 Cal.4th 859, 879-880, emphasis in original.

[63] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

[64] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1594.

[65] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[66] *Id.* at page 173.

Received
August 26, 2011
Commission on
State Mandates

Order and guidelines require specific actions … [that were] required acts. These requirements constitute a higher level of service."[67]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[68] Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[69] The federal Clean Water Act also allows for more stringent measures, as follows:[70]

> Permits for discharges from municipal storm sewers [¶]…[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the … State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

As discussed further below, the Commission finds that the permit activities are not federally mandated because federal law does not require the permittees to install and maintain trash receptacles at transit stops, or require inspections of restaurants, automotive service facilities, retail gasoline outlets or automotive dealerships. As to inspecting phase I facilities or construction sites, the federal regulatory scheme authorizes states to perform the inspections under a general statewide permit, making it possible to avoid imposing a mandate on the local agencies to do so.

In its June 2009 comments on the draft staff analysis, the State Board disagrees that specific mandates in the permit exceed the federal requirements, the State Board argues:

> This approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. … The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not convert the federal mandate into a state mandate.[71]

The Commission disagrees. Based on the *Long Beach Unified School Dist.* case discussed above and applied in the analysis below, the specific requirements in the permit may constitute a state mandate even though they are imposed in order to comply with the federal Clean Water Act.

---

[67] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[68] 33 U.S.C. § 1370.

[69] *City of Burbank v. State Water Resources Control Board, supra,* 35 Cal.4th 613, 618, 628.

[70] 33 USCA section 1370.

[71] State Board comments submitted June 2009, page 6.

Received
August 26, 2011
Commission on
State Mandates

Finance, in its June 2009 comments on the draft staff analysis, distinguishes this permit from the issue in the *Long Beach Unified School Dist.* case. According to Finance, in *Long Beach,* the courts had suggested certain steps and approaches that might help alleviate racial discrimination, although the state's executive order and guidelines required specific actions. But in this claim, federal law requires NPDES permits to include specific requirements.

The Commission agrees that NPDES permits are required to include specific measures. But as discussed in more detail below, those measures are not the same as the specific requirements at issue in this permit (in Parts 4C2a, 4C2b, 4E, and 4F5c3).

The State Board's June 2009 comments also discuss *County of Los Angeles v. State Water Resources Control Board,*[72] which involved the same permit as in this test claim. The State Board asserts that this case holds, in an unpublished part, that "the permit did not exceed the federal minimum requirements for the MS4 program."[73] (Comments, p. 5.) The State Board asserts that the Commission is bound by this decision.

The Commission reads the *County of Los Angeles* case differently than the State Board. The plaintiffs (permittees and others) in that case challenged the permit on a variety of issues, including that the regional board did not have jurisdiction to issue it, and that it violated the California Environmental Quality Act. The court did not, however, discuss the permit conditions at issue in this test claim. In the portion cited by the State Board, the court was addressing the consideration of the permit's economic effects. One of the plaintiffs' challenges to the permit was that the regional board was required to consider the economic effects in issuing the permit. By alleging the regional board had not done so, the plaintiffs argued that the permit imposed conditions more stringent than required by the federal Clean Water Act. The court held that the plaintiff's contentions were waived for failure to set forth all the documents received by the regional board, and that the regional board had considered the costs and benefits of implementation of the permit. In other parts of the opinion, however, the court acknowledged the regional board's authority to impose permit restrictions beyond the "maximum extent feasible"[74]

The *County of Los Angeles* case is silent on the permit provisions at issue in this claim[75] (Parts 4C2a, 4C2b, 4E, and 4F5c3) except when it said: "we need no [sic] address the parties'

---

[72] *County of Los Angeles v. State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

[73] The court's opinion, including the unpublished parts, are in attachment 26 of the State Board's comments submitted April 18, 2008.

[74] See page 18 of attachment 26 of the State Board's comments submitted April 18, 2008.

[75] In *County of Los Angeles,* the plaintiffs also challenged the following parts of the permit: (1) part 2.1 that deals with receiving water restrictions and that prohibits all water discharges that violate water quality standards or objectives regardless of whether the best management practices are reasonable; (2) part 3.C, which requires the permittees to revise their storm water quality management programs in order to implement the total maximum daily loads for impaired water bodies, and (3) parts 3.G and 4., which authorize the regional board to require strict requirements with numeric limits on pollutants which are incorporated into the total maximum daily load restrictions. The court held that these contentions were waived for failure to set forth all the

Received
August 26, 2011
Commission on
State Mandates

remaining contentions concerning trash receptacles."[76] The court also said inspections under the permit were not unlawful. Nonetheless, the case is not binding on the Commission in deciding the issues in this claim.

California in the NPDES program: By way of background, under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, the section that describes the NPDES program (and which, in subdivision (p), describes the requirements for the municipal stormwater system permits) states in part:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

> [S]hall 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 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is neither required to have an NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[77] to comply with the Federal Water Pollution Control Act of 1972 stated the following findings and declaration in Water Code section 13370:

> (a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants … to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.
>
> (b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.
>
> (c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the

---

applicable evidence, and that the regional board has authority to impose restrictions beyond the maximum extent feasible.

[76] See page 22, attachment 26 of the State Board's comments submitted April 18, 2008.

[77] Water Code section 13374 states: "The term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the Federal water Pollution Control Act, as amended."

Received
August 26, 2011
Commission on
State Mandates

> provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this Water Code section 13370, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[78] to effect the stormwater permit program.

Any further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

In its June 2009 comments on the draft staff analysis, the State Board argues as follows:

> [T]he … analysis treats the state's decision to *administer* the NPDES permit program in 1972 as the 'choice' referred to in *Hayes*. …The state's 'choice' to administer the program in lieu of the federal government does not alter the federal requirement on municipalities to reduce pollutants in these discharges to the maximum extent practicable.[79]

Finance, in its June 2009 comments, also disagrees with this part of the draft staff analysis, asserting that the duty to apply for a NPDES permit is required by federal law on public and private dischargers, which in this case are local agencies.

Even though California opted into the NPDES program, further analysis is needed to determine whether the federal regulations impose a mandate on the local agencies. To the extent that state requirements go beyond the federal requirements, there would be a state mandate.[80] Thus, the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402(p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26.

Placing and maintaining trash receptacles at transit stops (part 4F5c3): This part of the permit states:

> c. Permittees not subject to a trash TMDL[81] shall: [¶]…[¶]
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

The comments of the State Water Board and U.S. EPA assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations. The U.S.

---

[78] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[79] State Board comments submitted June 2009, page 4.

[80] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173. Government Code section 17556, subdivision (b).

[81] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

Received
August 26, 2011
Commission on
State Mandates

EPA submitted a letter to the State Water Board regarding the permit conditions in April 2008, which the State Water Board attached to its comments. Regarding the trash receptacles, the letter states:

> [M]aintaining trash receptacles at all public transit stops is well within the scope of these [Federal] regulations. Among the minimum controls required to reduce pollutants from runoff from commercial and residential areas are practices for "operating and maintaining public streets, roads, and highways … [40 CFR] § 122.26(d)(2)(iv)(A)(3).[82]

U.S. EPA also cites EPA's national menu of BMPs for stormwater management programs, "which recommends a number of BMPs to reduce trash discharges." Among the recommendations is 'improved infrastructure' for trash management when necessary, which includes the placement of trash receptacles at appropriate locations based on expected need."[83]

The State Water Board, in comments filed April 18, 2008, states that part 4F of the permit (regarding trash receptacles) concerns "the municipalities' own activities, as opposed to its regulation of discharges into its system by others." The State Water Board cites the same section 122.26 regulation as U.S. EPA, and states that the requirements "reflect the federal requirement to reduce pollutants from the MS4 to the maximum extent practicable. It is federal law that animates the requirement and federal law that mandates specificity in describing the BMPs." The State Water Board alleges that two appellate courts[84] have determined that the permit provisions constitute the "maximum extent practicable" standard, which is the minimum requirement under federal law.

The Department of Finance also asserts that the permit requirements are a federal mandate.

The County of Los Angeles, in comments filed June 23, 2008, states that "Nothing in the federal Clean Water Act requires the County to install trash receptacles at transit stops. Nothing in the federal regulations or the Clean Water Act itself imposes this obligation." The county states that the U.S.EPA's citation to BMPs for stormwater management programs "may be permitted under federal law … and even encouraged as 'reasonable expectations.' But such requirements are not mandated on the County by federal law." The County admits the existence of "an abundance of federal guidance and encouragement to have the County install and maintain trash receptacles at all public transit stops. But these are merely federal suggestions, not mandates."

The city claimants, in comments filed June 25, 2008, also argue that the requirement for transit trash receptacles is not a federal mandate, stating that nothing in the Clean Water Act or the federal regulations requires cities to install trash receptacles at transit stops. City claimants also submit a survey of other municipal stormwater permits, finding that none of those issued by U.S. EPA required installation of trash receptacles at transit stops.

---

[82] Letter from Alexis Strauss, Director, Water Division, U.S. EPA, to Tam M. Doduc, Chair, and Dorothy Rice, Executive Director, State Water Resources Control Board, April 10, 2008, page 3.

[83] *Id.* at page 3.

[84] The State Water Board cites: *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region* (2006) 135 Cal.App.4th 1377; *County of Los Angeles v. California State Water Resources Control Board* (2006) 148 Cal.App.4th 985.

Received
August 26, 2011
Commission on
State Mandates

The federal law applicable to this issue is section 402 of the Clean Water Act, which states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[85] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[86] of a discharge[87] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]
>
> (2) Part 2 of the application shall consist of: [¶]...[¶]
>
> (iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design

---

[85] Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative. (40 CFR § 122.2.)

[86] "*Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2.)

[87] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

Received
August 26, 2011
Commission on
State Mandates

> and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:
>
> (A) A description of structural and source control measures[88] to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]...[¶]
>
> (3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities. (40 CFR § 122.26(d)(2)(iv)(A)(3).) [Emphasis added.]

The Commission finds that the plain language of the federal statute (33 USCA § 1342 (p)(3)(B)) and regulation (40 CFR § 122.26 (d)(2)(iv)(A)(3)) does not require the permitees to install and maintain trash receptacles at transit stops.

Specifically, the state freely chose[89] to impose the transit trash receptacle requirement on the permittees because neither the federal statute nor the regulations require it. Nor do they require the permittees to implement "practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems"[90] although the regulation requires a description of practices for doing so. Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that "mandate costs that exceed the mandate in the federal law or regulation."[91]

---

[88] Minimum control measures are defined in 40 CFR § 122.34 to include: 1) Public education and outreach on storm water impacts; (2) Public involvement/participation; (3) Illicit discharge detection and elimination. (4) Construction site storm water runoff control; (5) Post-construction storm water management in new development and redevelopment.; (6) Pollution prevention/good housekeeping for municipal operations.

[89] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[90] 40 CFR § 122.26(d)(2)(iv)(A)(3).

[91] Government Code section 17556, subdivision (c).

Received
August 26, 2011
Commission on
State Mandates

In *Long Beach Unified School Dist. v. State of California,*[92] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[93] The *Long Beach Unified School District* court stated:

> Where courts have suggested that certain steps and approaches may be helpful [in meeting constitutional and case law requirements] the executive Order and guidelines require *specific actions.* ...[T]he point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.[94] [Emphasis added.]

The reasoning of *Long Beach Unified School Dist.* is applicable to this claim. Although "operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems..."[95] is a federal requirement on municipalities, the permit requirement to place trash receptacles at all transit stops and maintain them is an activity, like in *Long Beach Unified School Dist.,* that is a *specified action* going beyond federal law.[96]

Neither of the cases cited by the State Water Board demonstrate that placing trash receptacles at transit stops is required by federal law. In *City of Rancho Cucamonga v. Regional Water Quality Control Board –Santa Ana Region*[97] the court upheld a stormwater permit similar to the one at issue in this claim. The City of Rancho Cucamonga challenged the permit on a variety of grounds, including that it exceeded the federal requirements for stormwater dischargers to "reduce the discharge of pollutants to the maximum extent practicable"[98] and that it was overly prescriptive. The court concluded that the permit did not exceed the maximum extent practicable standard and upheld the permit in all respects. There is no indication in that case, however, that the permit at issue required trash receptacles at transit stops. Similarly, in a suit regarding the same permit at issue in this case, the *Los Angeles County*[99] court dismissed various challenges to the permit, but made no mention of the permit's transit trash receptacle provision.

---

[92] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[93] *Id.* at page 173.

[94] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[95] 40 Code of Federal Regulations, section 122.26 (d)(2)(iv)(A)(3).

[96] *Ibid.*

[97] *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region, supra,* 135 Cal.App.4th 1377.

[98] 33 USCA section 1342 (p)(3(B)(iii).

[99] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

Received
August 26, 2011
Commission on
State Mandates

Therefore, the Commission finds that placing and maintaining trash receptacles at all transit stops within the jurisdiction of each permittee, as specified, is not a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b).

Part 4F5c3 of the permit states as follows:

> c. Permittees not subject to a trash TMDL shall: (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Based on the mandatory language (i.e., "shall") in part 4F5c3 of the permit, the Commission finds it is a state mandate for the claimants that are not subject to a trash TMDL to place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003, and to maintain all trash receptacles as necessary.

Inspecting commercial facilities (part 4C2a): Section 4C2a of the permit requires inspections of restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships as follows:

> 2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:
>
> (a) Commercial Facilities
>
> (1) Restaurants
>
> Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.
>
> Level of Inspections: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with Statw law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each restaurant, inspectors shall verify that the restaurant operator:
>
> - has received educational materials on stormwater pollution prevention practices;
> - does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
> - keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
> - does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;

Received
August 26, 2011
Commission on
State Mandates

- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;
- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;

Received
August 26, 2011
Commission on
State Mandates

- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices. [¶]...[¶]

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The state asserts that these inspection requirements in permit part 4C2a are a federal mandate.

In comments filed April 18, 2008, the State Water Board quotes from the MS4 Program Evaluation Guide issued by U.S. EPA, asserting that it requires inspections of businesses. The State Water Board also states:

> The federal regulations also specifically require local stormwater agencies, as part of their responsibilities under NPDES permits, to conduct inspections. [citing 40 CFR § 122.26(d)(2)(iv)(C).] Throughout the federal law, there are numerous requirements for entities that discharge pollutants to waters of the United States to monitor and inspect their facilities and their effluent. [citing Clean Water Act §402(b)(2)(B); 40 CFR § 122.44(i)).] The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers they must conduct inspections.

Similarly, the April 10, 2008 letter from U.S. EPA to the State Water Board and attached to the Board's comments submitted April 18, 2008, states:

> A program for commercial and industrial facility inspection and enforcement that includes restaurants and automobile facilities, would appear to be both practicable and effective. Such an inspection program ensures that stormwater discharges from such facilities are reducing their contribution of pollutants and that there are no non-stormwater discharges or illicit connections. Thus these programs are founded in both 402 (p)(3)(B)(ii) and (iii) and are well within the scope of 40 CFR § 122.26(d)(2)(iv)(A) and (B).

The County of Los Angeles, in its June 23, 2008 rebuttal comments, asserts that federal law requires prohibiting non-stormwater discharges into the storm sewers, and reducing the discharge of pollutants in stormwater to the maximum extent practicable (33 USC 1342(p)) but not inspecting restaurants, automotive service facilities, retail gas outlets, or automotive dealerships.

Received
August 26, 2011
Commission on
State Mandates

Only municipal landfills, hazardous waste treatment, disposal and recovery facilities and related facilities are required to be inspected (40 CFR § 122.26(d)(2)(iv)(C)).

In comments received June 25, 2008, the city claimants argue that the LA Regional Board freely chose to impose the permit requirements on the permittees, and make the following arguments: (1) The inspection obligations were not contained in two prior permits issued to the cities and the County—thus, the requirements are not federal mandates; (2) No federal statute or regulation requires the cities or the County to inspect restaurants, automotive service facilities, retail gas outlets, automotive dealerships or facilities that hold general industrial permits; (3) Stormwater NPDES permits issued by the U.S. EPA do not contain the requirement to inspect restaurants, auto service facilities, retail gas outlets and automotive dealerships, or require the extensive inspection of facilities that hold general industrial stormwater permits as contained in the Order [i.e. permit]; (4) The Administrator of U.S. EPA, as well as the head of the water division for U.S. EPA Region IX, have specifically stated that a municipality has an obligation under a stormwater permit only to assure compliance with local ordinances; the state retains responsibility to inspect for compliance with state law, including state-issued permits.

The city claimants dispute the State Board's contention that the court in *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377 held that federal law required inspections like those at issue in the permit. The cities quote part of the *City of Rancho Cucamonga* case with the following emphasis:

> Rancho Cucamonga and the other permittees are responsible for inspecting construction and industrial sites and commercial facilities within their jurisdiction for compliance with and enforcement of local municipal ordinances and permits. *But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.* The Regional Board may conduct its own inspections but permittees must still enforce their own laws at these sites. (40 C.F.R. § 122.26, subd. (d)(2) (2005).)

In discussing the federal mandate issue, the applicable federal law is section 402 of the Clean Water Act, which states that municipal storm sewer system 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 USCA § 1342 (p)(3)(B).)

The applicable federal regulations (40 CFR § 122.26 (d)(2)(iv)(B)&(C)) state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such

Received
August 26, 2011
Commission on
State Mandates

> operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]
>
> (2) Part 2 of the application shall consist of: [¶]...[¶]
>
> (iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]...[¶]
>
> (B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:
>
> (1) A description of a program, <u>including inspections</u>, to implement and enforce an ordinance, orders or similar means <u>to prevent illicit discharges to the municipal separate storm sewer system</u>; this program description shall address all types of illicit discharges, however the following category of non-stormwater discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States [¶]...[¶]
>
> (C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:
>
> (1) Identify priorities and procedures <u>for inspections</u> and establishing and implementing control measures for such discharges. (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

There is a requirement in subdivision (d)(2)(iv)(B)(1) for implementing and enforcing "an ordinance, orders, or similar means to prevent illicit discharges to the municipal separate storm system." There is no express requirement in federal law, however, to inspect restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Nor does the

Received
August 26, 2011
Commission on
State Mandates

portion of the MS4 Program Evaluation Guide quoted by the State Water Board contain mandatory language to conduct inspections for these facilities.

In its April 2008 comments, the State Water Board argues that this reading of the regulations is not reasonable, and that U.S. EPA acknowledged that the initial selection by MS4s was only a starting point. In its comments (p.15), the State Water Board also states:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.

The State Water Board would have the Commission read requirements into the federal law that are not there. The Commission, however, cannot read a requirement into a statute or regulation that is not on its face or its legislative history.[100]

Based on the plain language of the federal regulations that are silent on the types of facilities at issue in the permit, the Commission finds that performing inspections at restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships, as specified in the permit, is not a federal mandate.

Moreover, the requirement to inspect the facilities listed in the permit is an activity, as in the *Long Beach Unified School Dist.* case discussed above, [101] that is a specified action going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, the inspections are not federally mandated.

The permit states in part: "Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified ..." Based on the mandatory language in part 4C2a of the permit, the Commission finds that this part is a state mandate on the claimants to perform the inspections at restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships at the frequency and levels specified in the permit.

Inspecting phase I industrial facilities (part 4C2b): Part 4C2b of the permit regarding phase I industrial facilities requires the following:

---

[100] *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 219-220. "Rules governing the interpretation of statutes also apply to interpretation of regulations." *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037.

[101] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

Received
August 26, 2011
Commission on
State Mandates

b) Phase I Facilities[102]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[103] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[104] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity to stormwater. For those facilities that do have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

---

[102] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[103] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[104] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

Received
August 26, 2011
Commission on
State Mandates

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The issue is whether these inspection requirements for phase I industrial facilities is a federal mandate. The governing federal regulation is 40 CFR section 122.26 (d)(2)(iv)(B)&(C), which is cited above. Specifically on point is subpart (C), which states that the proposed management program must include the following:

> (C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:
>
> (1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges; (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

The phase I facilities in the permit are defined to include.

> (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities. (Permit, p. 62)

And the Tier 1 facilities in the permit include municipal landfills, hazardous waste treatment, disposal and recovery facilities and facilities subject to SARA Title III (see permit attachment B, pp. B-1 to B-2). Thus, there is a federal requirement to inspect these phase I and tier 1 facilities in the permit. The issue is whether this requirement constitutes a federal mandate on local agencies. The Commission finds that it does not.

It is the state that mandates the phase I inspection and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[105] This is because the federal regulatory scheme provides an alternative means of regulating and inspecting these industrial facilities under the state-enforced, statewide permit, as follows:

---

[105] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

> (c) Application requirements for stormwater discharges associated with industrial activity[106] and stormwater discharges associated with small construction activity -
>
> (1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit <u>or seek coverage under a promulgated stormwater general permit.</u> Facilities that are required to obtain an individual permit, or any discharge of stormwater which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph. [Emphasis added.]

The state has issued a statewide general activity industrial permit (GIASP) that is enforced through the regional boards.[107] This, along with the statewide construction permit, is described in the permit itself:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. The GCASP was reissued on August 19, 1999. The GIASP was reissued on April 17, 1997. Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The USEPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and

---

[106] According to 40 CFR § 122.26, (b)(14): "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶](x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more."

[107] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

Received
August 26, 2011
Commission on
State Mandates

> non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.[108]

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspections of industrial facilities (specified in part 4C2b of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4C2b of the permit. In fact, the State Board collects fees for the regional boards for performing inspections under the GIASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

In its April 18, 2008 comments, the State Water Board asserts:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.[109]

The Commission disagrees. Inasmuch as the federal regulation (40 CFR § 122.26 (c)) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) does not expressly require those inspections to be performed by the county or cities (or the "owner or operator of the discharge") the Commission finds that the state has freely chosen[110] to impose these activities on the permittees. Therefore, the Commission finds that there is no federal mandate on the claimants to perform inspections of phase I facilities as specified in part 4C2b of the permit.

As to whether the permit is a state mandate, part 4C2b contains the following mandatory language:

---

[108] Permit, page 11, paragraph 22.

[109] State Water Board comments, submitted April 18, 2008, page 15.

[110] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

b) Phase I Facilities[111]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below. [Emphasis added.]

Frequency of Inspection

Facilities in Tier 1 Categories:[112] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[113] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[114] to stormwater. For those facilities that do

---

[111] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[112] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills …; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III …;* Restaurants; *Wholesale trade (scrap, auto dismantling)…;* Automotive service facilities; *Fabricated metal products …; Motor freight …; Chemical/allied products …;* Automotive Dealers/Gas Stations …; *Primary Metals.*"

[113] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary…; Air Transportation …; Rubbers/Miscellaneous Plastics …; Local/Suburban Transit …; Railroad Transportation …; Oil & Gas Extraction …; Lumber/Wood Products…; Machinery Manufacturing …; Transportation Equipment …; Stone, Clay, Glass, Concrete …; Leather/Leather Products…; Miscellaneous Manufacturing …; Food and kindred Products…; Mining of Nonmetallic Minerals …; Printing and Publishing …; Electric/Electronics …; Paper and Allied Products …; Furniture and Fixtures …;* Laundries …; *Instruments…; Textile Mills Products …; Apparel …*"

[114] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. … The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]…[¶] (x) Construction activity including clearing, grading and excavation,

Received
August 26, 2011
Commission on
State Mandates

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Based on this mandatory language to perform the inspections of phase I facilities as specified, the Commission finds that part 4C2b of the permit is a state-mandate.

Inspecting construction sites (part 4E): Part 4E of the permit contains the following requirements:

- Implement a program to control runoff from construction activity at all construction sites within each permittees jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

For construction sites one acre or greater, each permittee shall:

- Require the preparation and submittal of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
    - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).
    - If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
    - If non-compliance continues the Regional Board shall be notified for further joint enforcement actions. (Permit, 4E2b.)

---

except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more." [40 CFR §122.26 (b)(14), Emphasis added.]

Received
August 26, 2011
Commission on
State Mandates

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP (Permit, 4E2c.)
- For sites five acres and greater:
  - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
  - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
  - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

The applicable federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) on the issue of whether the inspection of construction sites is a federal mandate is as follows:

> (d) Application requirements for large[115] and medium[116] municipal separate storm sewer discharges. The operator[117] of a discharge from a large or medium

[115] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as

Received
August 26, 2011
Commission on
State Mandates

> municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. … Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]
>
> (2) Part 2 of the application shall consist of: [¶]…[¶]
>
> (iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]…[¶]
>
> (D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in stormwater runoff

---

determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. …" (40 CFR § 122.26 (b)(4).)

[116] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. …" (40 CFR § 122.26 (b)(7).)

[117] "*Owner or operator* means the owner or operator of any 'facility or activity' subject to regulation under the NPDES program." (40 CFR § 122.2.)

Received
August 26, 2011
Commission on
State Mandates

> from construction sites to the municipal storm sewer system, which shall include: [¶]…[¶]
>
> (3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and … [Emphasis added.]

The language of the federal regulation indicates a duty to inspect construction sites and enforce control measures as specified in part 4E of the permit. The *Rancho Cucamonga* case cited by the State Board also states that federal law requires NPDES permittees to inspect construction sites.[118]

The issue, however, is whether the federal requirements to inspect construction sites and enforce control measures amounts to a federal mandate on the local agencies. The Commission finds that it does not. First, the federal regulations quoted above do not specify the frequency or other specifics of the inspection program as the permit does. These are activities, as in the *Long Beach Unified School Dist.* case discussed above,[119] that are specified actions going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, it is not a federal mandate for the local agency permittees to inspect construction sites.

Moreover, it is the state that mandates the inspections of construction sites and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[120] The federal regulations do not require: (1) a municipality to have a separate permit for construction activity or enforcement; or (2) that the inspections and related activities in part 4E of the permit be conducted by the owner or operator of the discharge. Rather, these activities may be conducted by the state under a state-wide, state-enforced, general permit, as stated in the federal stormwater regulation (40 CFR § 122.26 (c)), which states in part:

> (c) Application requirements for stormwater discharges associated with industrial activity [includes construction activity of five or more acres] and stormwater discharges associated with small construction activity[121] [construction activity from one to less than five acres]--

---

[118] *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region, supra,* 135 Cal.App.4th 1377, 1390.

[119] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[120] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[121] According to 40 CFR § 122.26, (b)(15): "Storm water discharge associated with small construction activity means the discharge of storm water from: (i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The

Received
August 26, 2011
Commission on
State Mandates

> (1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. [Emphasis added.]

The state has issued a statewide general construction permit, as described on page 11 of the permit as quoted above, which is enforced through the regional boards.[122] In fact, the State Board collects fees for the regional board for performing inspections under the GCASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspection of construction sites and related activities (in part 4E of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4E of the permit. Therefore, the Commission finds that the requirement for local-agency permittees to inspect construction sites in section 4E of the permit is not a federal mandate.

The Commission finds that, based on the permit's mandatory language, the following activities in part 4E are state mandates on the permittees within the meaning of article XIII B, section 6:

- Implement a program to control runoff from construction activity at all construction sites within each permittee's jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater:

- Require the preparation of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).

Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where: …"

[122] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

Received
August 26, 2011
Commission on
State Mandates

- If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
- If non-compliance continues, notify the Regional Board for further joint enforcement actions. (Permit, 4E2b.)

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP. (Permit, 4E2c.)
- For sites five acres and greater:
  - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
  - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
  - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

One of the requirements in part 4E3c of the permit is to: "Use an effective system to track grading permits issued by each permittee. To satisfy this requirement, the use of a database or

Received
August 26, 2011
Commission on
State Mandates

GIS system is encouraged, but not required." The Commission finds that, based on the plain language of this provision, using an effective system to track grading permits is a state mandate, although use of a database or GIS system is not.

Overall, the Commission finds that the permit provisions (parts 4C2a, 4C2b, 4E & 4F5c3) are subject to article XIII B, section 6, of the California Constitution.

Issue 2: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) impose a new program or higher level of service?

The next issue is whether the permit provisions at issue, i.e., found above to be state-mandated, are a program, and whether they are a new program or higher level of service.

First, courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[123]

The State Water Board, in its April 2008 comments, argues that the NPDES program is not a program because "the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES stormwater permits."

In comments submitted June 25, 2008, the cities call the State Board's argument inapposite, and cite the *Carmel Valley Fire Protection District* case[124] regarding whether the permit constitutes a "program." According to claimant, "[t]he test is not whether the general program applies to both governmental and non-governmental entities. The test is whether the specific executive orders at issue apply to both government and non-governmental entities."

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. The permit activities are limited to local governmental entities. The permit defines the "permittees" as the County of Los Angeles and 84 incorporated cities within the Los Angeles County Flood Control District (Permit, p. 1 & attachment A). The permit lists no private entities as "permittees." Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County. (Or as stated on page 13 of the permit: "The objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County.") Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

In its comments on the draft staff analysis submitted June 5, 2009, the State Board disagrees with this conclusion because NPDES permits may also apply to private entities.

The State Board made this same argument in *County of Los Angeles v. Commission on State Mandates*, which the court addressed by stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation

---

[123] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[124] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

Received
August 26, 2011
Commission on
State Mandates

thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[125]

In other words, the issue is not whether NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitutes a program because this permit is the only one over which the Commission has jurisdiction. Because they apply exclusively to local agencies, the Commission finds that the activities (parts 4C2a, 4C2b, 4E & 4F5c3) in this permit (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitute a program within the meaning of article XIII B, section 6.

The next step to determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption.[126]

The Commission finds that local agencies were not required by state or federal law to place and maintain trash receptacles at transit stops before the permit was adopted. Whether or not most cities or counties do so, as argued by the State Water Board in its April 2008 comments, is not relevant to finding a state-mandated new program or higher level of service because even if they do, Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate."

Because the transit trash receptacle requirement is newly mandated by the permit, and based on the plain language of part 4F5c3 of the permit, the Commission finds that it is a new program or higher level of service to place trash receptacles at transit stops and maintain them as specified in the permit.

For the same reason, the Commission finds that the inspections and enforcement activities at industrial and commercial facilities, including restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, and phase I facilities (in parts 4C2a & 4C2b of the permit) as well as inspection and enforcement at construction sites (in part 4E of the permit) are a new program or higher level of service. These were not required activities of the permittees prior to the permit's adoption.

In sum, the Commission finds that all the permit provisions at issue in this test claim impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Issue 3: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E & 4F5c3) impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

---

[125] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.

[126] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

Received
August 26, 2011
Commission on
State Mandates

The final issue is whether the permit provisions impose costs mandated by the state,[127] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claims. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district 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.

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement.

In test claims 03-TC-20 and 03-TC-21, the cities' claimant representative declares (p. 24) that the cities will incur costs estimated to exceed $1000 to implement the permit conditions.

In test claim 03-TC-04, the County of Los Angeles states (p. 18) that the costs in providing the services claimed "far exceed the minimum reimbursement amount of $1000 per annum." In the attached declaration for *Transit Trash Receptacles*, the County declares (pp. 22-23) the following itemization of costs from December 13, 2001 to October 31, 2002:

(1) Identify all transit stops in the jurisdiction: $19,989.17;

(2) Select proper trash receptacle design, evaluate proper placement, specification and drawing preparation: $38,461.87;

(3) Preliminary engineering works (construction contract preparation, specification reviewing process, bid advertising and awarding): $19,662.02;

(4) Construct and install trash receptacle units: $230,755.58, construction management $34,628.31;

(5) Trash collection and receptacle maintenance in FY 2002-03, $3,513.94, maintenance contractor costs for maintaining and collecting trash in FY 2002-03, $93,982.50;

(6) Projected costs for on-going maintenance in FY 2003-04, $375,570.00.

Similarly, attached to claim 03-TC-19 (pp. 20-21) are declarations that itemize the County of Los Angeles' costs for *Inspection of Industrial/Commercial Facilities* program, from December 13, 2001 to September 15, 2003, as follows:

(1) inspect 1744 restaurants: $234,931.83;

(2) inspect 1110 automotive service facilities: $149,526.36;

(3) inspect 249 retail gasoline outlets and automotive dealerships: $33,542.45;

(4) Identify and inspect all Phase I (387 Tier 1 and 543 Tier 2) facilities within the jurisdiction: $125,155.31;

(5) Total $543,155.95.

---

[127] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

Received
August 26, 2011
Commission on
State Mandates

These declarations illustrate that the costs associated with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Did the claimants request the activities in the permit within the meaning of Government Code section 17556, subdivision (a)?

The first issue is whether the claimants requested the activities in the permit. The Department of Finance and the State Water Board both asserted that they did. As discussed above, the claimants were required to submit a Report of Waste Discharge and Stormwater Quality Management Plan before the permit was issued.

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

> (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. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency ... that requests authorization for that local agency ... to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Do the claimants have fee authority for the permit activities within the meaning of Government Code section 17556, subdivision (d)?

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency ... if, after a hearing, the commission finds any one of the following: [¶]...[¶] (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.

The constitutionality of Government Code section 17556, subdivision (d), was upheld by the California Supreme Court in *County of Fresno v. State of California*,[128] in which the court held that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes. The court stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to

[128] *County of Fresno v. State of California , supra,* 53 Cal.3d 482.

Received
August 26, 2011
Commission on
State Mandates

> preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[129]

In *Connell v. Superior Court,*[130] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the Districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section

[129] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487.

[130] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

Received
August 26, 2011
Commission on
State Mandates

17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[131]

In its April 18, 2008 comments (p. 19), the State Board asserted that the claimants have fee authority to pay for the trash receptacle and inspection programs in the permit. Likewise, the Department of Finance, in its March 2008 comments, states that "some local agencies have set fees to be used toward funding the claimed permit activities" that should be considered offsetting revenues.

Los Angeles County, in its comments submitted in June 2008, states (p. 2) that it is "without sufficient fee authority to recover its costs." The County points out that the state or regional board has fee authority in Water Code section 13260, subdivision (d)(2)(B)(iii) for inspections of industrial and commercial facilities, but those fees are not shared with the County or the cities.[132] The County also states that the inspections are to determine compliance with the general industrial permit that is enforced by the regional boards.[133]

In their comments received June 25, 2008, the city claimants assert that they do not have fee authority. The cities first note that, for facilities that hold state-issued general industrial or general construction stormwater permits, the state already imposes an annual fee and therefore has occupied the field (Wat. Code, § 13260, subd. (d)(2)(B)(iii)). The cities also relate the difficulty of imposing a fee for inspecting restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships because, although the cities could enact a general businesses license on all businesses, "the cities could not charge other businesses for the cost of inspecting this subgroup without again running the risk of charging fees on the other businesses for services not related to regulation of them." The cities also dispute the State Water Board's assertion that transit users could be charged a fee for the transit trash receptacles because the County and cities do not operate the transit system.

---

[131] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 398-402.

[132] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii) states:

> (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund. (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

[133] Page 3 of the General Industrial Permit states in part: "Following adoption of this General Permit, the Regional Water Boards shall enforce its provisions."

Received
August 26, 2011
Commission on
State Mandates

In comments on the draft staff analysis submitted in June 2009, the League of California Cities and California State Association of Counties (CSAC) question whether the decisions in *Connell* (1997), and *County of Fresno* (1991), can any longer be cited as good authority for the constitutionality of Government Code section 17556, subdivision (d), given the voter-approval requirement of Proposition 218 (discussed below) added to the state Constitution in 1996. Proposition 218 requires, among other things, that new or increased property-related fees be approved by a majority of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners, except for property-related fees for sewer, water, or refuse collection services (Cal. Const., art. XIII D, § 6, subd. (c)).

The League and CSAC also urge the Commission, to the extent there may be legal doubt whether a local agency has the authority to impose a fee, to not find that the fee authority exception to reimbursement in Government Code section 17556, subdivision (d), applies.

The Commission disagrees with the League and CSAC. The Commission cannot ignore the precedents of *Connell* or *County of Fresno*, or find that they conflict with article XIII D of the California Constitution (Proposition 218), until the issue is decided by a court of law. With regards to Government Code section 17556, subdivision (d), article III, section 3.5 of the California Constitution forbids the Commission or any state agency from declaring a statute unenforceable or refusing to enforce it on the basis of its unconstitutionality unless an appellate court declares that it is unconstitutional. Since no appellate court has so declared, the Commission is bound to uphold and analyze the application of Government Code section 17556, subdivision (d), to this test claim.

The issue of local fee authority for the municipal stormwater permit activities, however, is one of first impression for the Commission. Although there are no authorities directly on point, some legal principles emerge that guide the analysis, as discussed below.

1. Local fee authority to inspect commercial and industrial and construction sites (parts 4C2a, 4C2b & 4E)

Fee authority to inspect under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

The Third District Court of Appeal has stated that article XI, section 7, includes the authority to impose fees. In *Mills v. Trinity County*,[134] a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without the two-thirds affirmative vote of the county electors. In upholding the fees, the court stated:

> [S]o long as the local enactments are not in conflict with general laws, the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution.[135]

---

[134] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656.

[135] *Mills v. County of Trinity, supra,* 108 Cal.App.3d 656, 662.

Received
August 26, 2011
Commission on
State Mandates

In addition to the *Mills* case, courts have held that water pollution prevention is a valid exercise of government police power.[136] And municipal inspections in furtherance of sanitary regulations have been upheld as "an exercise of that branch of the police power which pertains to the public health."[137]

In *Sinclair Paint v. State Board of Equalization*,[138] the California Supreme Court upheld a fee imposed on manufacturers of paint that funded a child lead-poisoning program, ruling it was a regulatory fee and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution (Proposition 13). The court recognized that determining under Proposition 13 whether impositions were fees or taxes is a question of law. In holding that the fee on paint manufacturers was "regulatory" and not a special tax, the court stated:

> From the viewpoint of general police power authority, we see no reason why statutes <u>or ordinances</u> calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[139] [Emphasis added.]

The *Sinclair Paint* court also recognized that regulatory fees help to prevent pollution when it stated: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[140]

Although the court's holding in *Sinclair Paint* applied to a state-wide fee, the language it used (putting "ordinances" in the same category as "statutes") recognizes that local agencies also have the police power to impose regulatory fees. Moreover, the court relied on local government police power cases in its analysis.[141]

---

[136] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[137] *Sullivan v. City of Los Angeles Dept. of Bldg. & Safety* (1953) 116 Cal.App.2d 807, 811.

[138] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

[139] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 877.

[140] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 877.

[141] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

Received
August 26, 2011
Commission on
State Mandates

A regulatory fee is an imposition that funds a regulatory program[142] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. …the regulatory program is for the protection of the health and safety of the public."[143] Courts will uphold regulatory fees if they comply with the following principles:

> Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A section 4 analysis if the "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." [Citations omitted] "A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." [Citations omitted] "Such costs ... include all those incident to the issuance of the license or permit, investigation, <u>inspection</u>, administration, maintenance of a system of supervision and enforcement." [Citations omitted] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee."[144] [Emphasis added.]

Local fees for inspections of commercial and industrial facilities, and construction sites, would be preventative and could be imposed to comply with the criteria the courts have used to uphold regulatory fees, articulated above. And the regulatory fees fall within the local police power to prevent, clean up, or mitigate pollution.

Therefore, pursuant to article XI, section 7, the Commission finds that the claimants have fee authority within the meaning of Government Code section 17556, subdivision (d), sufficient to carry out the mandated activities in parts 4C2a, 4C2b and 4E of the permit. Therefore, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code section 17514 and 17556 to perform the activities in those parts of the permit (commercial, phase I, and construction site inspections and related activities).

In fact, in June 2005, claimant Covina adopted stormwater inspection fees on restaurants, retail gasoline outlets, automotive service facilities, etc., as part of its business license fee, expressly for the purpose of complying with the permit at issue in this test claim.[145]

<u>Statutory fee authority to operate and maintain storm drains:</u> Health and Safety Code section 5471 expressly authorizes cities and counties to charge fees for storm drainage maintenance and operation services:

---

[142] *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

[143] *Ibid.*

[144] *California Assn. of Prof. Scientists v. Dept. of Fish and Game, supra,* 79 Cal.App.4th 935, 945.

[145] City of Covina, Resolution No. 05-6455.

Received
August 26, 2011
Commission on
State Mandates

> [A]any entity[146] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. ... Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities ....

The statute makes no mention of "inspecting" commercial or industrial facilities or construction sites. Rather, the fee revenues are used for "maintenance and operation" of storm drainage facilities. Thus, for the types of businesses regulated by the permit (restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites) the Commission cannot find that pursuant to Health and Safety Code section 5471, the claimants have fee authority "sufficient" to pay for the mandated inspection program within the meaning of Government Code section 17556. The statute's "operation and maintenance" of storm drainage facilities does not encompass the state-mandated inspections of the facilities or construction sites specified in the permit.

2. Local fee authority under the police power and the Public Resources Code to place and maintain trash receptacles at transit stops (Permit, 4F5c3)

As discussed above, part 4F5c3 of the permit requires the County and cities to place and maintain trash receptacles at transit stops in their jurisdictions. Public Resources Code section 40059, subdivision (a), suggests that the County and cities have fee authority to perform this activity as follows:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following: (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

The statute gives local governments the authority over the "nature, location and extent of providing solid waste handling services" and is broad enough to encompass "placing and maintaining" receptacles at transit stops. The statute also provides local governments with broad authority over the "level of services, charges and fees."

The draft staff analysis determined that the claimants had fee authority under Public Resources Code section 40059 and the police power (Cal. Const. art. XI, § 7) to install and maintain trash receptacles at transit stops and recommended that the Commission deny the test claim with respect to part 4F5c3 of the permit.

---

[146] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

Received
August 26, 2011
Commission on
State Mandates

The city claimants, in June 2009 comments on the draft staff analysis, argue that section 40059, subdivision (a), does not apply here because it was adopted as a "savings provision" in legislation establishing the Integrated Waste Management Board (IWMB) in order to ensure that local trash collection agreements would not be affected by the IWMB legislation. The cities also cite *Waste Resources Technologies v. Department of Public Health* (1994) 23 Cal.app.4th 299, which held that the statute reflected the Legislature's intent to allow for local regulation of waste collection. According to the cities, the statute "was not intended as an *imprimatur* for local agencies to assess fees on their residents or on businesses to pay for the costs of trash generated by transit users when that requirement was established not as a matter of local choice but rather state mandate." (Comments, p. 7.)

The cities also argue that a valid fee must have a causal connection or nexus between the person or entity paying the fee, and the benefit or burden being addressed. Claimants assert that there is no group on which the claimants can assess a fee that has a relationship with the trash receptacles because the burden is created by the transit riders but benefits the public at large. City claimants also argue that they cannot assess fees on transit agencies or increase transit fares to recoup the cost of installing and maintaining trash receptacles because they have no authority to do so. As an example, the claimants cite the Metropolitan Transit Authority's (the largest public transit operator in Los Angeles County) authority to set fares (Pub. Util. Code, § 30638) that rests exclusively with the MTA's board.

As to the police power, City claimants argue that they cannot use it to assess fees on property owners or businesses for the cost of transit trash receptacles because doing so would collect more than the actual cost of the collection and thereby create a special tax that would require a two-thirds vote (Cal. Const. art. XIII A, § 4). And according to the claimants, they do not have statutory fee authority to assess property owners for the cost of installing and maintaining trash receptacles. Finally, claimants assert that a fee on property owners for transit stop trash receptacles, even if it were not a special tax, would require a vote under Proposition 218 (Cal. Const., art. XIII D).

The County of Los Angeles, in its June 2009 comments on the draft staff analysis, argues that local agencies do not have fee authority over bus operators, and for support cites *Biber Electric Co. v. City of San Carlos* (1960) 181 Cal.App.2d 342, which held that a local fee would conflict with a general state Vehicle Code provision. The County also asserts that no fee could be imposed on bus riders because the pollution prevention would benefit all county residents, not only those riding buses, and that such a fee would require a vote under Proposition 218 because the fee's purpose would be excluding trash from storm drains rather than routine collection.

The League of California Cities and CSAC, in their June 2009 comments on the draft staff analysis, criticize the conclusion that fee authority exists for transit trash receptacles because the analysis does not discuss upon whom the fee would be imposed. They also dispute the application of the *Connell* case because the issue is not whether the fee is economically feasible, but whether it is legally feasible. The League and CSAC point out that local agencies have no authority to impose the fee on transit agencies or their ridership, and that Proposition 218 imposes procedural and substantive requirements on adjacent business owners and residences, so that the local agency could not impose the fee or assessment on them without their consent. Thus, the League and CSAC argue that the local agencies do not have fee authority pursuant to

Received
August 26, 2011
Commission on
State Mandates

Government Code section 17556, subdivision (d): "sufficient to pay for the mandated program or increased level of service."

After considering these arguments, the Commission agrees that Government Code section 17556, subdivision (d), does not apply to the placement and maintenance of transit trash receptacles as specified in the permit because the claimants do not have the authority to impose fees.

Michael Lauffer was asked at the Commission hearing on July 31, 2009, why the transit trash requirement in the permit was not imposed on transit agencies. Mr. Lauffer testified that transit agencies were not named historically on the permits, and that the Board, at the time it established the requirements, thought it was appropriate to place them on municipalities. He also testified that nothing would prevent the municipalities under the permit from working with Metropolitan Transit Authority (MTA) to cooperatively implement the transit trash requirement, or to have the MTA carry out the primary obligation for meeting it. He added that the transit stops were public facilities, the language used in the federal regulations, which is why the permit included the requirement to place the trash receptacles there.[147]

Because the trash receptacles are required to be placed at transit stops that would typically be on city property (sidewalks)[148] or transit district property (for bus or metro or subway stations), there are no entities on which the claimants would have authority to impose the fees. The plain language of Public Resources Code section 40059 provides no fee authority over transit districts or transit riders, and the Metropolitan Transit Authority's fee statutes grant fee authority exclusively to its board (Pub. Util. Code, §§ 30638 & 130051.12).

Additionally, the claimants do not have fee authority under the police power because they do not provide the "services necessary to the activity for which the fee is charged."[149]

Thus, the Commission finds that part 4F5c3 of the permit imposes costs mandated by the state within the meaning of Government Code section 17514 and 17556.

The remainder of this analysis addresses the arguments raised by the claimants that their local fee authority for inspections would be preempted by a statute granting the state fee authority, and that a local fee would be a special tax. The application of Proposition 218 on the fee authority for inspection is also discussed.

---

[147] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, pages 52-53.

[148] "The general rule views the sidewalk as part of the street; it … holds the city liable for pedestrian injuries caused by the dangerous condition of the sidewalk." *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 832.

[149] *California Assn. of Prof. Scientists v. Dept of Fish and Game, supra,* 79 Cal.App.4th, 935, 945.

Received
August 26, 2011
Commission on
State Mandates

3. Local fee authority to inspect industrial or construction sites (parts 4C2a, 4C2b & 4E) performed under the statewide general permits would not be preempted by state fee authority in Water Code section 13260, subdivision (b)(2)(B)

In their comments submitted in June 2008 (p. 14), the city claimants argue that the permittees cannot impose fees for inspections of industrial or commercial or construction sites as follows:

> [W]ith respect to facilities that hold state-issued general industrial or general construction stormwater permits, the state had occupied the field. ...[T]he state already imposes an annual fee on general industrial and general construction stormwater permittees. That fee is explicitly designated, in part, to cover inspections of these facilities and regulatory compliance. Water Code § 13260(d)(2)(B).
>
> This state fee thus preempts any fee that the Cities or County could charge for inspection of these facilities.

The cities also assert that in 2001, the regional board initiated negotiation of a contract with the County whereby the regional board would pay the County to perform inspections of facilities that held general industrial stormwater permits (the 'Phase I facilities') on the regional board's behalf. Immediately after the permit was issued, the regional board terminated those negotiations.

In comments submitted in June 2009 on the draft staff analysis, city claimants clarify that their comments "are not directed towards the claimants' ability to assess fees for inspections of the other commercial establishments, i.e., restaurants and automotive service facilities, retail gasoline outlets and automobile dealerships, or Phase I facilities or construction sites that are not required to hold a state-issued general industrial or general construction stormwater permit."

According to the city claimants, fees for inspecting the phase I industrial facilities and construction sites under the statewide permits (the GIASP and GCASP) would be preempted by state fee authority in Water Code section 13260, under which the State Board collects fees for inspecting those sites. The city claimants state the fact that the specific destination of the funds from the fees in Water Code section 13260, subdivision (d)(2)(iii) is spelled out is evidence of intent that the Legislature fully occupied the field for inspections of GIASP and GCASP permit holders.

Because the fee authority to inspect commercial facilities (identified in the permit as restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships) is not contested by the city claimants, the discussion below is limited to industrial and construction site inspections performed under the statewide permits concurrently with the permit at issue in this claim.

The California Supreme Court has outlined the following rules as to when a statute preempts a local ordinance by fully occupying the field:

> A local ordinance *enters a field fully occupied* by state law in either of two situations-when the Legislature "expressly manifest[s]" its intent to occupy the legal area or when the Legislature "impliedly" occupies the field. (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p.

Received
August 26, 2011
Commission on
State Mandates

> 551["[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost."].)
>
> When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality." (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)[150]

The state statute at issue, the stormwater fee statute, in subdivision (d) of section 13260 of the Water Code, reads in pertinent part:

> (d)(1)(A) Each person who is subject to subdivision (a) [who discharges waste that affects the quality of waters of the state] or (c) shall submit an annual fee according to a fee schedule established by the state board.
>
> (B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.
>
> (C) Recoverable costs include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out those actions. [¶]...[¶]
>
> (2) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.
>
> (B) (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a <u>general industrial or construction stormwater permit</u> under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

---

[150] *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068. Emphasis in original.

Received
August 26, 2011
Commission on
State Mandates

> (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in that region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. (Wat. Code, § 13260, subds. (d)(1) & (d)(2).) [Emphasis added.]

The State Water Board has adopted regulations to implement the stormwater fee that include fee schedules based on the threat to water quality and a complexity rating.[151] At the hearing on July 31, 2009, Michael Lauffer of the State Water Board testified that the fee is established annually by the State Board, based on the legislative appropriation for the boards to carry out their responsibilities. Mr. Lauffer testified that the annual fee for industrial facilities under this Water Code statute is $833, and the fee for construction facilities is variable, starting at $238, plus $24 per acre, with a cap of $2,600.[152]

The issue is whether Water Code section 13260, subdivision (d)(1) and (d)(2), preempts local fee authority. In resolving this, we look for express or implied preemption or intent to occupy the field.[153]

First, there is no express intent on the face of the Water Code statute to preempt any local fee ordinance because the statute is silent on local fees. As to implied intent to occupy the field of law, the Supreme Court has stated that it may be found if:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.[154]

The city claimants, in their comments on the draft staff analysis submitted in June 2009, argue as follows with regard to Water Code section 13260:

> Here, the Legislature adopted a statute that specifically established a mechanism for fees to be assessed on GIASP and GCASP holders, for those funds to be

---

[151] Fees for NPDES permits for municipal separate stormwater sewer systems are in subdivision (b) of section 2200 of title 23 of the California Code of Regulations.

[152] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, page 111.

[153] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[154] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

Received
August 26, 2011
Commission on
State Mandates

> segregated and sent to the regional boards, and for a specified amount of those funds ("not less than 50 percent of the money") to be used by the regional boards "solely" on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. Water Code section 13260(d)(2)(iii). Such a specific determination as to the destination of the funds for the purposes of inspection and compliance evidences the intent of the Legislature that the issue of funding for GIASP and GCASP inspections be "fully occupied."

The Commission disagrees. Specific determination of funds is not a factor the courts use to determine whether a state statute fully occupies the field. Applying the Supreme Court's factors from the *O'Connell v. City of Stockton* case, the subject matter of stormwater fees has not been "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern."[155] The Water Code's single fee statute for state permit holders does not rise to that level. Second, the Commission cannot find that "the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action."[156] No clear indication of a paramount state concern can be found on the face of the Water Code fee statute. And the third instance does not apply because the subject is not "of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality."

The legislative history of the Water Code provision does not indicate any intent to occupy the field. The legislative history of the amendment to require 50 percent of the fees to be used for stormwater inspection and regulatory compliance issues indicated as follows:

> ...California's 1994 Water Quality Inventory Report states that storm waters and urban run-off are the leading sources of pollution in California estuaries and ocean waters. Proponents argue that non-compliance is rampant, with approximately 10,000 industries in the Los Angeles area alone who are required but have failed to obtain storm water permits. Further, proponents point out that the Los Angeles Regional Water Quality Control Board has only two staff to contact, educate, and control each site and question whether adequate revenues are returned to the regional boards for this program.[157]

The Legislature acknowledged that the state inspections at the time the statute was enacted were inadequate to prevent the pollution that the statewide permits were intended to prevent.

And the regional board, via the permit, acknowledges the role of both local regulation and state regulation under the general permits. Page 11 of the permit states:

---

[155] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[156] *Ibid.*

[157] Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assem. Bill No. 1186 (1997-1998 Reg. Sess.) as amended August 6, 1997.

Received
August 26, 2011
Commission on
State Mandates

> The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.

As to inspection of construction sites, section 4E of the permit states:

> If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

Moreover, the Water Code statute provides broader fee authority than a local inspection fee. The statute requires the regional board to "spend not less than 50 percent of that money solely on stormwater inspection <u>and regulatory compliance issues</u> associated with industrial and construction stormwater programs." (Wat. Code, § 13260, subd. (d)(2)(iii). Emphasis added.) Because the fees for GIASP and GCASP permit holders may also be spent on "regulatory compliance issues" in addition to the inspections, the Commission cannot find that a local fee ordinance would duplicate or be "coextensive" with state fee authority, and therefore cannot find that the state fee statute occupies the field. A local fee would merely partially overlap with the state fee.

As for the phase I facilities[158] subject to inspection, the inspections do not occupy the field because the permit specifies that these need not be inspected if the regional board has inspected them within the past 24 months.

According to the State Board's April 2008 comments, the overlapping fees were envisioned by U.S./EPA.

> In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge stormwater "associated with industrial activity." (fn. CWA § 402(p)(2)(B)). As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits. (fn. CWA § 402(p).) The State Water Board has issued

[158] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

Received
August 26, 2011
Commission on
State Mandates

> permits for industrial and construction discharges of stormwater, and the Los Angeles Water Board administers those permits within its jurisdiction. Therefore, the Los Angeles Water Board does conduct inspections at businesses in Los Angeles County to ensure compliance with the state permits. In addition, the MS4 Permit requires the permittees also to conduct inspections. This approach, which may result in two different entities inspecting the same businesses to review stormwater practices, was specifically envisioned and required by U.S. EPA in adopting its stormwater regulations.

U.S./EPA, in its "MS4 Program Evaluation Guidance" document, acknowledged regulation at both the local and state levels as follows:[159]

> In addition to regulation of construction site stormwater at the local level, EPA regulations also require construction sites disturbing greater than one acre to obtain an NPDES permit. This permit can be issued by the state permitting authority or EPA, depending on whether the state has been delegated the NPDES authority. This dual regulation of construction sites at both the local and state or federal level can be confusing to permittees and construction operators.[160]

In fact, as to inspection duties and costs under two permit systems, one court has stated regarding a permit similar to the one in this claim:

> Rancho Cucamonga and the other permittees are responsible for inspection construction and industrial sites and commercial facilities within their jurisdiction for compliance with the enforcement of local municipal ordinance and permits. But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.[161]

The reasoning of the *City of Rancho Cucamonga* case is instructive because a local regulatory fee could be used for local-government inspections, and the state fee is for state or regional inspections under the general statewide permits.

The state permit program and local inspection program under the regional board's permit can be viewed as two programs with similar, overlapping goals. Viewed in this way, the fees for two sets of inspections for construction sites (or for phase I facilities not inspected by the regional board within the past two years) would not necessarily exceed the costs of both sets of inspections.

In short, a local regulatory fee ordinance that provided for inspections of the industrial facilities and construction sites specified in the permit (parts 4C2a, 4C2b & 4E) would not be preempted

---

[159] State Water Resources Control Board, comments submitted April 18, 2008, attachment 33.

[160] *Ibid.*

[161] *City of Rancho Cucamonga v. Regional Water Quality Control Board, supra,* 135 Cal.App.4th 1377. The test claim record is silent as to the number of facilities within the permit area that are subject to the General Industrial Activity Storm Water Permit, or how many construction sites within the permit area are subject to the General Construction Activity Storm Water Permit.

Received
August 26, 2011
Commission on
State Mandates

by the state fee authority in Water Code section 13260 or in title 23 of the California Code of Regulations.

4. Local fee authority to inspect industrial or construction sites covered under the state permits would not be a "special tax" under article XIII A, section 4, of the California Constitution

In their June 2008 rebuttal comments, the city claimants assert that they do not have sufficient fee authority under Government Code section 17556, subdivision (d). They focus on facilities that hold state-issued general industrial or construction stormwater permits and pay the state-imposed fees pursuant to Water Code section 13260, arguing that an additional local fee for inspecting these facilities would be considered a special tax. According to the city claimants:

> In order for a fee to be considered a "fee" as opposed to a "special tax," the fee cannot exceed the reasonable cost of providing the services necessary for which the fee is charged. See *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660. Any fee assessed by the Cities or the County for inspection of these facilities would be a double assessment, and thus run afoul of this rule.

The city claimants, in their June 2009 comments on the draft staff analysis, again assert that forcing claimants to recover their costs for inspecting the state-permitted GIASP and GCASP facilities and sites, the regional board is creating a special tax on holders of those state permits.

Special taxes are governed by article XIII A, section 4, of the California Constitution:

> Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Government Code section 50076 states that a fee is not a special tax under article XIII A, section 4, if the fees are: (1) "charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged," and (2) "are not levied for unrelated revenue purposes." The California Supreme Court has reaffirmed this rule.[162]

The Commission finds that a local regulatory stormwater fee, if appropriately calculated and charged, would not be a special tax within the meaning of article XIII A, section 4. There is no evidence in the record that a local regulatory fee charged for the stormwater inspections would exceed the reasonable cost of providing the inspections and related services or would otherwise violate the criteria in section 50076.

As the court stated in the *Connell v. Superior Court* case discussed above:

---

[162] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th at p. 876: "[T]he term "special taxes" in article XIII A, section 4, does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes."

Received
August 26, 2011
Commission on
State Mandates

> The [Water] Districts argue any fees levied by the districts "cannot exceed the cost to the local agency to provide such service," because such excessive fees would constitute a special tax. However, the districts fail to explain how this is an issue. No one is suggesting the districts levy fees that exceed their costs.[163]

Similarly, in this claim no one is suggesting that the local agencies levy regulatory fees that exceed their costs. Therefore, the Commission finds that a local regulatory fee for stormwater would not be a "special tax" under article XIII A, section 4, of the California Constitution for the activities at issue in the permit.

5. The local fee to inspect industrial and construction sites would not be subject to voter approval under article XIII D (Proposition 218) of the California Constitution

Some local government fees are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 (1996). Article XIII D defines a property-related fee or charge as any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service. Among other things, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (article XIII D, § 6, subd. (c)). Exempt from voter approval, however, are property-related fees for sewer, water, or refuse collection services (*Ibid*).

In 2002, an appellate court decision in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to impose storm water fees if they are imposed "as an incident of property ownership."

The Commission finds that local fees for inspections of phase I facilities, restaurants, retail gasoline outlets, automotive dealerships, etc., would not be subject to the vote requirement of Proposition 218. In a case involving inspections of apartments in the City of Los Angeles in which a fee was charged to landlords, the California Supreme Court ruled that the regulatory fee for inspecting apartments was not a "levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service" [164] within the meaning of Proposition 218. The court interpreted the phrase "incident of property ownership" as follows:

> The foregoing language means that a levy may not be imposed on a property owner as such-i.e., in its capacity as property owner-unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge

[163] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 402.

[164] That is the definition of "fee" or "charge" in article XIII D, section 2, subdivision (e).

Received
August 26, 2011
Commission on
State Mandates

> against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.[165]
>
> [¶]...[¶] In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners.* The [City of Los Angeles'] ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords.[166]

Following the reasoning of the *Apartment Assoc.* case, the inspection fees on restaurants, retail gasoline outlets, automotive dealerships, phase I facilities, etc., like the fee in *Apartment Assoc.*, would not be imposed on landowners as landowners, nor as an incident of property ownership, but by virtue of business ownership. Thus, the inspection fee would fall outside the voter requirement of Proposition 218.

As to the fees for inspecting construction sites, the Commission finds that they too would not be subject to Proposition 218's voter requirement. Article XIII D of the California Constitution states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[167]

Moreover, the California Supreme Court, in determining whether water connection fees are within the purview of Proposition 218, reasoned that "water service" fees were within the meaning of "property-related services" but "water connection" fees were not.

> Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.[168]

The Supreme Court's reasoning applies to local stormwater fees for inspecting construction sites. That is, the fee would not be an incident of property ownership because it results from the owner's voluntary decision to build on or develop the property. Therefore, the Commission finds that local inspection fees for stormwater compliance at construction sites would not be within the purview of the election requirement of Proposition 218. A recent report by the Office of the Legislative Analyst concurs with this conclusion.[169]

---

[165] *Apartment Assoc. of Los Angeles County v.City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

[166] *Id.* at 842 [Emphasis in original.]

[167] Article XIII D, section 1, subdivision (b).

[168] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427.

[169] "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners.

Received
August 26, 2011
Commission on
State Mandates

In its June 2009 comments, the County disagrees that stormwater pollution fees would not be subject to the voter requirement in Proposition 218, or that fee authority exists. In support, the County points to unadopted legislation pending in the current or in past legislative sessions that would provide fee authority or expressly exempt stormwater fees from the Proposition 218 voting requirement. For example SCA 18 (2009) would add "stormwater and urban runoff management" fees to those expressly exempted from the vote requirement in article XIII D, putting them in the same category as trash and sewer fees. SB 2058 (2002) would have required the regional water boards to share their fees with counties and cities. And SB 210 (2009) would provide cities and counties with stormwater regulatory or user-based fee authority.

The Commission finds that the unadopted legislative proposals cited by the County are unconvincing to show a lack of regulatory fee authority for business inspections as discussed above. First, courts have said that "As evidence of legislative intent, unadopted proposals have been held to have little value."[170] Second, if they were enacted, the legislative proposals would grant broader fee authority than is found in this analysis. For example, SCA 18, by adding a stormwater exception from the vote requirement in Proposition 218, would authorize *user* fees on residential property for stormwater and urban runoff programs, whereas this analysis addresses the much narrower issue of *regulatory* fees on businesses for inspections. Likewise, SB 2058 would have required the State Board's permit fees to be shared with "counties and cities" for the broad purpose of carrying out stormwater programs rather than for the narrower purpose of inspecting businesses. And SB 210 would likewise provide fee authority that is broader than regulatory fees; as the May 28, 2009 version expressly states in proposed section 16103, subdivision (c), of the Water Code: "The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter." In short, the legislative proposals cited by the County do not indicate that fee authority does not exist. Rather, the proposals would, if enacted, provide broader fee authority than now exists.

In comments received June 3, 2009, the Bay Area Stormwater Management Agencies Association (BASMAA) contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the voting requirements of Proposition 218 or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56.

[170] *County of Sacramento v. State Water Resources Control Board* (2007) 153 Cal.App.4th 1579, 1590.

Received
August 26, 2011
Commission on
State Mandates

The Commission disagrees. BASMAA raises issues that are outside the scope of the portions of the Los Angeles stormwater permit (parts 4C2a, 4C2b, 4E & 4Fc3) that were pled by the test claimants. Because the Commission's jurisdiction is limited by those parts of the permit pled in the test claim, it cannot opine on other issues outside the pleadings, even if it would raise issues closely related to other NPDES permits (or even other parts of this NPDES permit).

In sum, the Commission finds that the inspections and related activities at issue in the Los Angeles stormwater permit are not subject to voter approval in article XIII D of the California Constitution (Proposition 218), so a regulatory fee ordinance for stormwater inspections would not be subject to voter approval.

Given the existence of local regulatory fee authority under the police power (Cal. Const, art. XI, § 7), and lacking any evidence or information to the contrary, the Commission finds that the claimants' authority to adopt a regulatory fee is sufficient (pursuant to Gov. Code, § 17556, subd. (d)) to pay for the inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites, and related activities specified in the permit. Therefore, for the inspections and related activities at issue, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556.

CONCLUSION

For the reasons discussed above, the Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate within the meaning of Government Code sections 17514 and 17556: For local agencies subject to the permit that are not subject to a trash TMDL[171] to: "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

[171] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

Received
August 26, 2011
Commission on
State Mandates

Abbreviations

BMP - Best management practice

CWA – Clean Water Act

GCASP - General Construction Activity Storm Water Permit

GIASP - General Industrial Activity Storm Water Permit

MS4 - Municipal Separate Storm Sewer Systems

NOI - Notice of Intent for coverage under the GCASP

NPDES - national pollutant discharge elimination system

RGO - Retail Gasoline Outlet

ROWD – Report of Waste Discharge

SQMP - Storm Water Quality Management Program

SWPPP - Storm Water Pollution Prevention Plan

TMDL - Total Maximum Daily Load

U.S. EPA – United States Environmental Protection Agency

WDID - Waste Discharger Identification

Received
August 26, 2011
Commission on
State Mandates

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 3

TAB 2

Received
August 26, 2011
Commission on
State Mandates

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758 Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L. Filed June 20, 2008, by the County of San Diego, Cites of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, San Diego, and Vista, Claimants.	Case No.: 07-TC-09 *Discharge of Stormwater Runoff - Order No. R9-2007-0001* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted on March 26, 2010)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on March 26, 2010. Tim Barry, John VanRhyn, Helen Peak, Shawn Hagerty and James Lough appeared on behalf of the claimants. Elizabeth Jennings appeared on behalf of the State Water Resources Control Board. Carla Shelton and Susan Geanacou appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 6-1.

Summary of Findings

The test claim, filed by the County of San Diego and several cities, alleges various activities related to reducing stormwater pollution in compliance with a permit issued by the San Diego Regional Water Quality Control Board, a state agency.

The Commission finds that the following activities in the permit (as further specified on pp. 122-132 below) are a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution:

Received
August 26, 2011
Commission on
State Mandates

- street sweeping (permit part D.3.a(5));
- street sweeping reporting (part J.3.a.(3)(c) x-xv);
- conveyance system cleaning (part D.3.a.(3));
- conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii));
- educational component (part D.5.a.(1)-(2) & D.5.b.(1)(c)-(d) & D.5.(b)(3));
- watershed activities and collaboration in the Watershed Urban Runoff Management Program (part E.2.f & E.2.g);
- Regional Urban Runoff Management Program (parts F.1., F.2. & F.3);
- program effectiveness assessment (parts I.1 & I.2);
- long-term effectiveness assessment (part I.5) and
- all permittee collaboration (part L.1.a.(3)-(6)).

The Commission also finds that the following test claim activities are not reimbursable because the claimants[1] have fee authority sufficient (within the meaning of Gov. Code § 17556, subd. (d)) to pay for them: hydromodification management plan (part D.1.g) and low-impact development (parts D.1.d.(7) & D.1.d.(8)), as specified below.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and

- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.

- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

BACKGROUND

The claimants allege various activities for reducing stormwater pollution in compliance with a permit issued by the California Regional Water Quality Control Board, San Diego Region, (Regional Board), a state agency. Before discussing the specifics of the permit, an overview of the permit's purpose, and municipal stormwater pollution in general, puts the permit in context.

[1] In this analysis, claimants and the permit term "copermittees" are used interchangeably, even though two of the copermittees (the San Diego Unified Port District and San Diego County Regional Airport Authority) are not claimants. The following are the claimants and copermittees that are subject to the permit requirements: Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, Vista, County of San Diego.

Received
August 26, 2011
Commission on
State Mandates

Municipal Stormwater

The purpose of the permit is to specify "requirements necessary for the copermittees[2] to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP)." Each of the copermittees or dischargers "owns or operates a municipal separate storm sewer system (MS4),[3] through which it discharges urban runoff into waters of the United States within the San Diego region."

Stormwater[4] runoff flowing untreated from urban streets directly into creeks, streams, rivers, lakes and the ocean, creates pollution, as the Ninth Circuit Court of Appeal has stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[5]

Because of these stormwater pollution problems described by the Ninth Circuit, both California and the federal government regulate stormwater runoff.

California Law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

---

[2] "Copermittees" are entities responsible for National Pollutant Discharge Elimination System (NPDES) permit conditions pertaining to their own discharges. (40 C.F.R. § 122.26 (b)(1).)

[3] Municipal separate storm sewer system means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

[4] Storm water means "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26 (b)(13).)

[5] *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832, 840-841.

Received
August 26, 2011
Commission on
State Mandates

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.)
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[6]
>
> In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits [national pollutant discharge elimination system] required by federal law. (§ 13374.)[7]

As to waste discharge requirements, section 13377 of the California Water Code states:

> Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

Much of what the Regional Board does, especially that pertains to permits like the one in this claim, is based in the federal Clean Water Act.

Federal Law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[8] from point sources[9] to waters of the United States, since

---

[6] *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

[7] *Id.* at page 621. State and regional board permits allowing discharges into state waters are called "waste discharge requirements." (Wat. Code, § 13263).

[8] According to the federal regulations, "Discharge of a pollutant" means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other

Received
August 26, 2011
Commission on
State Mandates

discharges of pollutants are illegal except under a permit.[10] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[11] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[12]

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California's permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a Regional Board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

> 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

---

conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

[9] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[10] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[11] *Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean. (40 C.F.R. § 122.2.)

[12] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 621. State and regional board permits allowing discharges into state waters are called "waste discharge requirements" (Wat. Code, § 13263).

Received
August 26, 2011
Commission on
State Mandates

> to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent* than required by federal law-from taking into account the economic effects of doing so.[13]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[14]

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[15]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[16] The federal Clean Water Act specifies the following criteria for municipal storm sewer system 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.[17]

---

[13] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 627-628.

[14] Best management practices are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 CFR § 122.2.)

[15] *Environmental Defense Center, Inc. v. U.S. E.P.A., supra,* 344 F.3d 832, 841-842.

[16] 33 USCA section 1342 (p)(2)(C).

[17] 33 USCA section 1342 (p)(3)(B).

Received
August 26, 2011
Commission on
State Mandates

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application. The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[18]

General State-Wide Permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[19] as described in the permit as follows:

> In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (state and local) storm water regulation. Under this dual system, the Regional Board is responsible for enforcing the General Construction Activities Storm Water Permit, SWRCB Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, SWRCB Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit), and each municipal Copermittee is responsible for enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.

The State and Regional Boards have statutory fee authority to conduct inspections to enforce the general statewide permits.[20]

The Regional Board Permit (Order No. R9-2007-001, Permit CAS0108758)

Under Part A, "Basis for the Order," the permit states:

> This Order Renews National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108758, which was first issued on July 16, 1990 (Order No. 90-42), and then renewed on February 21, 2001 (Order No. 2001-01). On August 25, 2005, in accordance with Order NO. 2001-01, the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit.

Attachment B of the permit (part 7(q)) states that "This Order expires five years after adoption." Attachment B also says (part 7 (r)) that the terms and conditions of the permit "are automatically

---

[18] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[19] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

[20] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

Received
August 26, 2011
Commission on
State Mandates

continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of the expired permits (40 CFR 122.6) are complied with."[21]

Part J.2.d. of the permit requires the Principal Permittee (County of San Diego) to "submit to the Regional Board, no later than 210 days in advance of the expiration of this order, a report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements." The permit specifies the contents of the ROWD.

The permit is divided into 16 sections. It prohibits discharges from MS4s that contain pollutants that "have not been reduced to the maximum extent practicable" as well as discharges "that cause or contribute to the violation of water quality standards." The permit also prohibits non-storm water discharges unless they are authorized by a separate NPDES permit, or fall within specified exemptions. The copermittees are required to "establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means." The copermittees are also required to develop and implement an updated Jurisdictional Urban Runoff Management Program (JURMP) for their jurisdictions that meets the requirements specified in the permit as well as a Watershed Urban Runoff Management Program (watersheds are defined in the permit) and a Regional Urban Runoff Management Program, each of which are to be assessed annually and reported on. Annual fiscal analyses are also required of the copermittees. The principal permittee has additional responsibilities, as specified.

The Regional Board prepared a 115-page Fact Sheet/Technical Report for this permit in which are listed, among other things, Regional Board findings, the federal law, and the reasons for the various permit requirements.

The 2001 version of the Regional Board's permit (treated as prior law in this analysis) was challenged by the Building Industry Association of San Diego County, among others. They alleged that the permit provisions violate federal law because they prohibit the municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law.[22] The court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[23]

Attached to the claimants' February 2009 comments is a document entitled "Comparison Between the Requirement of Tentative Order 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order 90-42), and Previous Drafts of the San Diego Municipal Stormwater Permit" that compares the 2001 permit with the 1990 and earlier permits. One of the document's conclusions regarding the 2001 permit is: "40% of the requirements in Tentative Order 2001-01 which 'exceed the federal regulations' are based

[21] California Code of Regulations, title 23, section 2235.4.

[22] *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880..

[23] *Id.* at page 870.

Received
August 26, 2011
Commission on
State Mandates

almost exclusively on (1) guidance documents developed by USEPA and (2) SWRCB's [State Board's] orders describing statewide precedent setting decision on MS4 permits."

Claimants' Position

Claimants assert that various parts of the Regional Board's 2007 permit constitute a reimbursable state mandate within the meaning of article XIII B, section 6, and Government Code section 17514. The parts of the permit pled by claimants are quoted below:

I. Regional Requirements for Urban Runoff Management Programs

A. Copermittee collaboration

Parts F.2. and F.3. (F. Regional Urban Runoff Management Program) of the permit provide:

> Each Copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program. The Regional Urban Runoff Management Program shall meet the requirements of section F of this Order, reduce the discharge of pollutants[24] from the MS4 to the MEP, and prevent urban runoff[25] discharges from the MS4 from causing or contributing to a violation of water quality standards.[26] The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]
>
> 2. Develop the standardized fiscal analysis method required in section G of this Order.[27]
>
> 3. Facilitate the assessment of the effectiveness of jurisdictional, watershed,[28] and regional programs.

---

[24] Pollutant is defined in Attachment C of the permit as "Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated."

[25] Urban Runoff is defined in Attachment C of the permit as "All flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water illicit discharges (dry weather flows).

[26] Water Quality Standards is defined in Attachment C of the permit as "The beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.) of water and the water quality objectives necessary to protect those uses.

[27] Section G requires the permittees to "collectively develop a standardized method and format for annually conducting and reporting fiscal analyses of their urban runoff management programs in their entirety (including jurisdictional, watershed, and regional activities)." Specific components of the method and time tables are specified in the permit (Permit parts G.2 & G.3).

[28] Watershed is defined in Attachment C of the permit as "That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as a drainage area, catchment, or river basin)."

Received
August 26, 2011
Commission on
State Mandates

Part L (All Copermittee Collaboration) of the Permit states:

> 1. Each Copermittee collaborate [sic] with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.
>
> a. Management structure – All Copermittees shall jointly execute and submit to the Regional Board no later than 180 days after adoption of this Order, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum:
>
> (1) Identifies and defines the responsibilities of the Principal Permittee[29] and Lead Watershed Permittees;[30]
> (2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;
> (3) Establishes a management structure to promote consistency and develop and implement regional activities;
> (4) Establishes standards for conducting meetings, decision-making, and cost-sharing.
> (5) Provides guidelines for committee and workgroup structure and responsibilities;
> (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;
> (7) Includes any and all other collaborative arrangements for compliance with this order.

Claimants stated that the Copermittees' costs to comply with this activity for fiscal year 2007-2008 was $260,031.29.

B. Copermittee collaboration – Regional Residential Education Program Development and Implementation

Part F.1 of the Permit provides:

The Regional Urban Runoff Management Program shall, at a minimum:

> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
>
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

---

[29] The Principal Permittee is the County of San Diego.

[30] According to the permit: "Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area]."

Received
August 26, 2011
Commission on
State Mandates

Claimants stated that the Copermittees' costs to comply with this activity was $131,250 in fiscal year 2007-2008.

C. Hydromodification[31]

Part D.1.g. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, g. Hydromodification – Limits on Increases of Runoff Discharge Rates and Durations) states:

> g. HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS
>
> Each Copermittee shall collaborate with the other Copermittees to develop and implement a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects,[32]

---

[31] Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."

Hydromodification is also defined as changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." *Draft Hydromodification Management Plan for San Diego County*, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009 .

[32] According to the permit, "Priority Development Projects" are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

[¶]...[¶] [Part D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This

Received
August 26, 2011
Commission on
State Mandates

where such increased rates and durations are likely to cause increased erosion[33] of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses[34] and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan][35] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for

---

category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.
(g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[33] Erosion is defined in Attachment C of the permit as "When land is diminished or worn away due to wind, water, or glacial ice. Often the eroded debris (silt or sediment) becomes a pollutant via storm water runoff. Erosion occurs naturally but can be intensified by land clearing activities such as farming, development, road building and timber harvesting."

[34] Beneficial Uses is defined in Attachment C of the permit as "the uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. … "Beneficial Uses" are equivalent to "Designated Uses" under federal law." (Wat. Code, § 13050, subd. (f).)

[35] The Standard Urban Storm Water Mitigation Plan is defined in Attachment C of the permit as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

Received
August 26, 2011
Commission on
State Mandates

erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations[36] shall not exceed pre-project runoff flow rates and durations,[37] where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow[38] that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

---

[36] Flow duration is defined in Attachment C of the permit as "The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). … Flow duration within the range of geomorphologically significant flows is important for managing erosion.

[37] Attachment C of the permit defines "Pre-project or pre-development runoff conditions (discharge rates, durations, etc.) as "Runoff conditions that exist onsite immediately before the planned development activities occur. This definition is not intended to be interpreted as that period before any human-induced land activities occurred. This definition pertains to redevelopment as well as initial development."

[38] Critical channel flow, according to Attachment C of the permit, is "the channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc [critical channel flow], it should be based on the weakest boundary material – either bed or bank."

Received
August 26, 2011
Commission on
State Mandates

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

(2) The HMP may include implementation of planning measures (e.g., buffers and restoration activities, including revegetation, use of less-impacting facilities at the point(s) of discharge, etc.) to allow expected changes in stream channel cross sections, vegetation, and discharge rates, velocities, and/or durations without adverse impacts to channel beneficial uses. Such measures shall not include utilization of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc.

(3) Section D.1.g.(1)(c) does not apply to Development Projects[39] where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g.,

[39] Development projects, according to Attachment C of the permit, are "New development or redevelopment with land disturbing activities; structural development, including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects, and land subdivision."

Received
August 26, 2011
Commission on
State Mandates

with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[40]

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) the project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

[40] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

Received
August 26, 2011
Commission on
State Mandates

(b) the project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) the project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

Claimants stated that the total cost of this activity is $1.05 million, of which $630,000 was spent in fiscal year 2007-2008, and the remaining $420,000 will be spent in fiscal year 2008-2009.

D. Low-Impact Development[41] ("LID") and Standard Urban Storm Water Mitigation Plan ("SMUSP")

Part D.1.d. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, d. Standard Urban Storm Water Mitigation Plans – Approval Process Criteria and Requirements for Priority Development Projects), paragraphs (7) and (8) state as follows:

(7) Update of SUSMP BMP Requirements

The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP[42] requirements that meet or exceed the requirements of sections D.1.d.(4)[43] and D.1.d.(5),[44] and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs.[45] In addition, the update shall

---

[41] Low Impact Development (LID) is defined in Attachment C of the permit as "A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions."

[42] Source Control BMPs are defined in Attachment C of the permit as "Land use or site planning practices, or structural or nonstructural measures that aim to prevent urban runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and urban runoff."

[43] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[44] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

[45] A treatment control BMP, according to Attachment C of the permit, is "Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants,

Received
August 26, 2011
Commission on
State Mandates

include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.
ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.
iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.
iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.
v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.
vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.
vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either

(1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

---

filtration, biological uptake, media absorption or any other physical, biological, or chemical process."

Received
August 26, 2011
Commission on
State Mandates

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).
ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

Claimants stated that the total cost of this activity is $52,200 to be spent in fiscal year 2007-2008.

E. Long Term Effectiveness Assessment

Part I.5 (I. Program Effectiveness Assessment) of the permit states:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6) of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).[46]

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The claimants state that this activity is budgeted to cost $210,000.

[46] See footnote 50, page 21.

Received
August 26, 2011
Commission on
State Mandates

II. Jurisdictional Urban Runoff Management Program

A. Street Sweeping

Part D.3.a.(5) of the Permit (D.3 Existing Development Component, a. Municipal) provides:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Part J.3.a.(3)(c)x-xv (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xiii. Identification of the total distance of curb-miles swept.
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
> xv. Amount of material (tons) collected from street and parking lot sweeping.

Claimants state the following costs for this activity: in fiscal year 2007-2008: Equipment: $2,080,245, Staffing: $1,014,321, Contract costs: $382,624; for 2008-2009: Equipment: $3,566,139 (for 2008-2012), Staffing $1,054,893 (4% increase), Contract costs: $382,624.

Received
August 26, 2011
Commission on
State Mandates

B. Conveyance System Cleaning

Part D.3.a.(3) of the Permit (D.3. Existing Development Component, a. Municipal) provides:

> (3) Operation and Maintenance of Municipal Separate Storm Sewer System and Structural Controls
>
> (a) Each Copermittee shall implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Each Copermittee shall implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year[47] for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter[48] in a timely manner.
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
> v. Proper disposal of waste removed pursuant to applicable laws.
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

Part J.3.a.(3)(c) iv-viii (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

---

[47] According to Attachment C of the permit, May 1 through September 30 is the dry season.

[48] Attachment C of the permit defines "anthropogenic litter" as "trash generated from human activities, not including sediment."

Received
August 26, 2011
Commission on
State Mandates

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.
vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

The claimants state that this activity costs $3,456,087 in fiscal year 2007-2008, and increases 4% in subsequent years.

C. Program Effectiveness Assessment

Part I.1 and I.2 of the permit states:

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[49] Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[50] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

---

[49] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[50] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral

Received
August 26, 2011
Commission on
State Mandates

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[51] Water Quality Assessment,[52] and Integrated Assessment,[53] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff

---

Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

[51] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[52] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[53] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

Received
August 26, 2011
Commission on
State Mandates

Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[54] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as

---

[54] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists the hydrologic units and major receiving water bodies.

Received
August 26, 2011
Commission on
State Mandates

necessary to achieve compliance with section A of this Order.[55] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Claimants state that this activity in I.1. and I.2 costs $392,363 in fiscal year 2007-2008, is expected to increase to $862,293 in fiscal year 2008-2009, and is expected to increase 4% annually thereafter.

D. Educational Surveys and Tests

Part D.5 of the permit (under D. Jurisdictional Urban Runoff Management Program) states:

5. Education Component

Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

· Municipal Departments and Personnel
· Construction Site Owners and Developers
· Industrial Owners and Operators
· Commercial Owners and Operators
· Residential Community, General Public, and School Children

a. GENERAL REQUIREMENTS

(1) Each Copermittee shall educate each target community on the following topics where appropriate:

[55] Section A is "Prohibitions and Receiving Water Limitations."

Received
August 26, 2011
Commission on
State Mandates

Table 3. Education

Laws, Regulations, Permits, & Requirements	**Best Management Practices**
• Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board's General NPDES Permit for Ground Water Dewatering • Regional Board's 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	**Other Topics**
• Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections	• Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation •Alternative materials and designs to maintain peak runoff values •Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

Received
August 26, 2011
Commission on
State Mandates

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[56] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

---

[56] Attachment C of the permit defines grading as "the cutting and/or filling of the land surface to a desired slope or elevation."

Received
August 26, 2011
Commission on
State Mandates

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

Claimants state that this activity in D.5 will cost $62,617 in fiscal year 2007-2008, and is expected to increase to $171,319 in fiscal year 2008-2009, and rise 4% annually thereafter.

III. Watershed Urban Runoff Management Program

A. Copermittee Collaboration

Parts E.2.f and E.2.g of the permit state:

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 below to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]…[¶]

Received
August 26, 2011
Commission on
State Mandates

f. Watershed Activities[57]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source

---

[57] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

Received
August 26, 2011
Commission on
State Mandates

abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

Claimants state that the copermittees' staffing costs for watershed program implementation in fiscal year 2007-2008 is $1,033,219 and is expected to increase to $1,401,765 in fiscal year 2008-2009, and are expected to increase four percent annually. For consultant services, the costs are $599,674 in fiscal year 2007-2008 and are expected to be $657,101 in 2008-2009, and are expected to rise five percent annually. For Watershed Urban Runoff Management Program implementation, claimants allege that the cost in fiscal year 2008-2009 is $1,053,880.

Claimants filed a 60-page rebuttal to Finance's and the State Board's comments on February 9, 2009, which is addressed in the analysis below.

Claimant County of San Diego filed comments on the draft staff analysis in January 2010 that disagrees with the findings regarding fee authority for certain permit activities involving development. These arguments are discussed further below.

State Agency Positions

Department of Finance: In comments filed November 16, 2008, Finance alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because the permit conditions are required by federal laws so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that the State and Regional Water Boards "act on behalf of the federal government to develop, administer, and enforce the NPDES program in compliance with Section 402 of the CWA." Finance also states that more activities were included in the 2007 permit than the prior permit because "it appears … they were necessary to comply with federal law."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The copermittees elected to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies proposed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[58] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

[58] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727.

Received
August 26, 2011
Commission on
State Mandates

As to the claimants' identifying NPDES permits approved by other states to show the permit exceeds federal law, Finance states that this "demonstrates the variation envisioned by the federal authority in granting the administering agencies flexibility to address specific regional needs in the most practical manner."

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance commented on the draft staff analysis in February 2010, echoing the comments of the State Board, which are summarized and addressed below.

State Water Resources Control Board: The State Board and Regional Board filed joint comments on the test claim on October 27, 2008, alleging that the permit is mandated on the local agencies by federal law, and that it is not unique to government because NPDES permits apply to private dischargers also. The State Board also states that the requirements are consistent with the minimum requirements of federal law, but even if the permit is interpreted as going beyond federal law, any additional state requirements are de minimis. In addition, the State Board alleges that the costs are not subject to reimbursement because most of the programs were proposed by the cities and County themselves, and because the claimants may comply with the permit requirements by charging fees and are not required to raise taxes.

The State Board further comments that the 2007 permit mirrors or is identical to the requirements in the 2001 permit, only providing more detail to the requirements already in existence and to implement the MEP performance standard. Like earlier permits, the 2007 permit implements the federal standard of reducing pollutants from the MS4 to the MEP (maximum extent practicable), but according to the State Board, "what *has* changed in successive permits is the level of specificity included in the permit to define what constitutes MEP." [Emphasis in original.] The State Board asserts that this level of specificity does not make the permit a state mandate, but that even if it is, the additional requirements are de minimis. The State Board also states that the local agencies have fee authority to pay for the permit requirements.

The State Board also addresses specific allegations in the test claim, as discussed below.

The State Board submitted comments on the draft staff analysis in January 2010, arguing that the test claim should not be reimbursable because (1) federal law requires local agencies to obtain NPDES permits from California Water Boards; (2) federal law mandates the permit that was issued, which is less stringent than permits for private industry; (3) the draft staff analysis incorrectly applies the *Hayes* case because the state did not shift the cost of the federal mandate to the local agencies; rather the federal mandate was imposed directly on local agencies and not on the state; (4) the permit provisions are not in addition to, but are required by federal law; (5) even though municipalities are singled out in the federal storm water law, the law is one of general application; and (6) potential limitations on the exercise of fee authority due to Proposition 218 do not invalidate claimants' fee authority because Government Code section 17556, subdivision (d), does not require unlimited or unilateral fee authority. These arguments are addressed below.

Received
August 26, 2011
Commission on
State Mandates

Interested Party Comments

Bay Area Stormwater Management Agencies Association (BASMAA): In comments submitted February 4, 2009, BASMAA speaks generally about California's municipal stormwater permitting program, stating that "increased requirements entail both new programs and higher levels of service." BASMAA also states:

> [T]he State essentially asserts that the federal minimum for stormwater permitting is anything one of its Water Boards says it is. Likewise, the State's assertion that its 'discretion to exceed MEP [the maximum extent practicable standard] originates in federal law' and 'requires [it], as a matter of law, to include other such permit provisions as it deems appropriate' is nothing more than an oxymoron that begs the question of what the federal Clean Water Act actually mandates rather than allows a delegated state permit writer to require as a matter of discretion. [Emphasis in original.]

BASMAA emphasizes that the water boards have wide discretion in determining the content of a municipal stormwater permit beyond the federal minimum requirements, and says that the boards need to work "proactively and collaboratively" with local governments in "prioritizing and phasing in actions that realistically can be implemented given existing and projected local revenues."

League of California Cities (League) and California State Association of Counties (CSAC): The League and CSAC filed joint comments on the draft staff analysis on January 26, 2010, expressing support for it "and its recognition of the constraints placed on cities and counties with respect to adopting new or increased property-related fees."

The League and CSAC disagree, however, with the finding that the hydromodification management plan (HMP, part D.1.g.), the requirement to include low impact development (LID) in the Standard Urban Stormwater Mitigation Plans (SUSMPs) (part D.1.d.(7)-(8)), and parts of the education component (part D.5) are not reimbursable because the claimants have fee authority (under Gov. Code, § 66000 et seq., The Mitigation Fee Act) sufficient to pay for them. The League and CSAC point out examples where a city or county constructs a priority development project for which no third party is available upon whom to assess a fee. They also assert that for these city or county projects, a nexus requirement cannot be demonstrated "because no private development impact have generated the need for the projects."

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[59] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[60] "Its

[59] Article XIII B, section 6, subdivision (a), provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new

Received
August 26, 2011
Commission on
State Mandates

purpose 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."[61] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[62]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[63]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[64] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[65] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[66]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[67]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[68] In making its

---

> crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[60] *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

[61] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

[62] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[63] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[64] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[65] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[66] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[67] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

Received
August 26, 2011
Commission on
State Mandates

decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[69]

The permit provisions in the test claim are discussed separately to determine whether they are reimbursable state-mandates.

Issue 1: Is the permit subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, whether they constitute a program, and whether they are a federal mandate or a state-mandated new program or higher level of service.

A. Is the permit an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which describes "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) Any agency, department, board, or commission of state government."[70]

The California Regional Water Board, San Diego Region, is a state agency.[71] The permit it issued is a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Is the permit the result of claimants' discretion?

The permit requires claimants to undertake various activities to reduce stormwater pollution in compliance with a permit issued by the Regional Board.

The Department of Finance, in comments submitted November 6, 2008, asserts that the claimants "had the option to use best management practices that would identify alternative practices to reduce pollution in water to the maximum extent practicable" Finance asserts that the claimants proposed permit requirements when they submitted the application for the permit,

---

[68] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[69] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[70] Section 17516 also states: ""Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 904.

[71] Water Code section 13200 et seq.

Received
August 26, 2011
Commission on
State Mandates

and that increased costs due to downstream activities of an underlying discretionary activity are not reimbursable.

Similarly, the State Board, in its October 27, 2008 comments, states that the copermittees proposed the concepts that were incorporated into and form the basis of the permit provisions for which they now seek reimbursement.

In rebuttal comments submitted February 9, 2009, claimants dispute that the Report of Waste Discharge (ROWD, or permit application) "represents a copermittee proposal for 2007 Permit content or that the adopted 2007 Permit is 'based on the ROWD." According to claimants, the 2007 permit provisions "were not taken directly from, nor are they generally consistent with the intent of, most of the specific ROWD content upon which the state contends they are based."

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity ... do not trigger a state mandate and hence do not require reimbursement of funds— even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[72]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants are required by law to submit the NPDES permit application in the form of a Report of Waste Discharge.[73] Submitting it is not discretionary, as shown in the following federal regulation:

> a) *Duty to apply.* (1) Any person[74] who discharges or proposes to discharge pollutants ... and who does not have an effective permit ... must submit a complete application to the Director in accordance with this section and part 124 of this chapter.[75]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state ... shall file a report of the discharge in compliance with the procedures set forth in Section 13260 ..."[76] Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.

---

[72] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

[73] The Report of Waste Discharge is attachment 36 of the State Water Resources Control Board comments submitted October 2008.

[74] *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

[75] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[76] Water Code section 13376.

Received
August 26, 2011
Commission on
State Mandates

In addition to federal and state law, the 2001 permit required submission of the ROWD. The 2007 permit, under Part A "Basis for the Order," states: "On August 25, 2005, in accordance with Order No. 2001-01 [the 2001 Permit], the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit."[77]

And although the ROWD provides a basis for some (but not all) of the 2007 permit provisions at issue in this test claim, there is a substantial difference between what was included in the claimants' ROWD and the specific requirements the Regional Board adopted (e.g., copermittee collaboration, parts F.2., F.3 & L, Regional Residential Education Program Development, part F.1., Low Impact Development, part D.1.d(7)-(8), long-term effectiveness assessment, part I.5, program effectiveness assessment, parts I.1 & I.2, educational surveys and tests, part D.5, and the Watershed Urban Runoff Management Program, parts E.2.f & E.2.g). Other permit activities were not proposed in the ROWD (e.g., hydromodification, part D.1.g., street sweeping, parts D.2.a(5) & J.3.a(3)(c)x-xv, conveyance system cleaning, part D.3.a(3) & J.3.a(3)(c)iv-viii).

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which are not the result of the claimants' discretion.

C. Does the permit constitute a program within the meaning of article XIII B, section 6 of the California Constitution?

As to whether the permit provisions in the test claim constitute a "program," courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[78]

The State Board, in its October 2008 comments, argues that the NPDES program is not a program because the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government in that industrial and construction facilities must also obtain NPDES stormwater permits.

The State Board reiterates this argument in its January 2010 comments, asserting that the draft analysis "fails to consider that private entities, as well as certain state … and … federal agencies also receive NPDES permits for storm water discharges." The State Board and Finance also cite *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, for the proposition that "where municipalities have separate but not more stringent requirements than private entities, there is no program subject to reimbursement." Finance, in its February 2010 comments, asserts that "the requirements within the test claim permit apply generally to state and private dischargers."

---

[77] The 2001 Permit is attached to the State Water Resources Control Board, comments submitted October 2008, Attachment 25.

[78] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

Received
August 26, 2011
Commission on
State Mandates

Claimants, in their February 2009 rebuttal comments, disagree with the State Board and assert that an MS4 permit is unique to government and subject to unique regulations. Claimants cite the definition of an MS4 in 40 C.F.R. § 122.26(b)(8) as "a conveyance or system of conveyances ... owned or operated by a State, city, town, borough, county, parish, district, association, or other public body ...." Claimants argue that prohibiting "non-stormwater discharges into the storm sewers"[79] is a uniquely government function that provides for the health, safety, and welfare of the citizens in a community. Claimants also point out that the federal regulations for MS4 permits are in 40 C.F.R. §122.26(d), while the regulations pertaining to private industrial dischargers are in 40 C.F.R. § 122.26(c), different regulations that apply the Best Available Technology standard rather than the Maximum Extent Practicable standard imposed on MS4s.

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. In *County of Los Angeles v. Commission on State Mandates*, the State Board argued that an NPDES permit[80] issued by the Los Angeles Regional Water Quality Control Board does not constitute a "program." The court dismissed this argument, stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[81] In other words, whether the law regarding NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6 is not relevant. The only issue before the Commission is whether the permit in this test claim constitutes a program.

The permit activities in this claim (order no. R9-2007-001, NPDES no. CAS0108758) are limited to the local governmental entities specified in the permit. The permit defines the "permittees" as the County of San Diego and 18 incorporated cities, along with the San Diego Unified Port District and San Diego County Regional Airport Authority.[82] No private entities are regulated under this permit, so it is not a law (or executive order) of general application. That fact distinguishes this claim from the *City of Richmond* case cited by Finance and the State Board, in which the workers' compensation law was found to be one of general application. The same cannot be said of the permit in this claim (order no. R9-2007-001, NPDES no. CAS0108758) because no private entities are regulated by it.

Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in San Diego County. As stated in the permit: "This order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable."

---

[79] 33 U.S.C. § 1342(p)(3).

[80] Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001. The Commission issued a decision on parts 4C2a, 4C2b, 4E and 4Fc3 of this permit (test claims 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21) at its July 31, 2009 hearing.

[81] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.

[82] The cities are Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

Received
August 26, 2011
Commission on
State Mandates

Thus, the permit carries out the governmental function of providing public services, and also imposes unique requirements on local agencies in San Diego County to implement a state policy that does not apply generally to all residents and entities in the state. Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

D. Are the permit provisions in the test claim a federal mandate or a state-mandated new program or higher level of service?

The next issue is whether the parts of the permit alleged in the test claim are a state mandate, or federally mandated, as asserted by the State Board and the Department of Finance. If so, the permit would not constitute a state mandate. The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes ... by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs."[83]

Also discussed is whether the permit is a new program or higher level of service. To determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption, in this case, the 2001 permit.[84]

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[85] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[86]

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find "costs mandated by the state" if "[t]he 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."

In *Long Beach Unified School Dist. v. State of California*,[87] the court considered whether a state executive order involving school desegregation constituted a state mandate. The regulations required, for example, conducting mandatory biennial racial and ethnic surveys, developing a reasonably feasible plan every four years to alleviate and prevent segregation to include specifics

---

[83] *San Diego Unified School Dist. v. Commission on State Mandates, supra,* 33 Cal.4th 859, 879-880, emphasis in original.

[84] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[85] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

[86] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1594.

[87] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

Received
August 26, 2011
Commission on
State Mandates

elements, and taking mandatory steps to involve the community including public hearings. The state argued that its Executive Order did not mandate a new program because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. The court held that the executive order did require school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements imposed on school districts.[88] The court stated:

> A review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. ...[T]he executive Order and guidelines require specific actions ... [that were] required acts. These requirements constitute a higher level of service."[89]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[90] The federal Clean Water Act allows for more stringent state-imposed measures, as follows:

> Permits for discharges from municipal storm sewers [¶]...[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the ... State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[91]

<u>California in the NPDES program</u>: Under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, which describes the NPDES program (and subdivision (p), which describes the requirements for the municipal stormwater system permits) states in part:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, <u>the Governor of each State desiring to administer its own permit program for discharges</u> into navigable waters within its jurisdiction <u>may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law</u> or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and

---

[88] *Id.* at 173.

[89] *Ibid.*

[90] 33 U.S.C. section 1370.

[91] *City of Burbank v. State Water Resources Control Board, supra,* 35 Cal.4th 613, 618, 628.

Received
August 26, 2011
Commission on
State Mandates

> system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is not required to have its own NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[92] to comply with the Federal Water Pollution Control Act of 1972, stated the following findings and declaration in Water Code section 13370:

> (a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants … to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.
>
> (b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.
>
> (c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this statute, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[93] to effect the stormwater permit program. Further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

Finance, in its February 2010 comments on the draft staff analysis, states:

> The state's role as a permitting authority acting on behalf of the federal government negates the existence of a state mandate because the test claim permit is issued in compliance with federal law. …[N]o state mandate exists if the state requirements, in the absence of state statute, would still be imposed upon local agencies by federal law.

Similarly, the State Board's January 2010 comments argue that the *Hayes* case is distinguishable from this test claim because NPDES permits do not impose a federal mandate on the state. Rather, federal law requires municipalities to comply with the permit. The State Board also states:

---

[92] Water Code section 13374 states: "The term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the Federal water Pollution Control Act, as amended."

[93] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

> This [draft staff analysis'] approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. ... The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not indicate that requirements extend beyond federal law, as in *Long Beach,* or convert the federal mandate into a state mandate.[94]

The Commission disagrees. As discussed above, the federal Clean Water Act[95] authorizes states to impose more stringent measures than required by federal law. The California Supreme Court has also recognized that permits may include state-imposed, in additional to federally required measures.[96] Those state measures that may constitute a state mandate if they "exceed the mandate in … federal law."[97] Thus, although California opted into the NPDES program, further analysis is needed to determine whether the state requirements exceed the federal requirements imposed on local agencies.

The permit provisions are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402 (p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26. The federal stormwater statute states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[98] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)).

The issues are whether the parts of the permit in the test claim are federal mandates or state mandates, and whether they are a new program or higher level of service.

---

[94] State Board comments submitted January 2010.

[95] 33 U.S.C. sections 1370 and 1342 (p)(3)(B)(iii).

[96] *City of Burbank v. State Water Resources Control Board, supra,* 35 Cal.4th 613, 618, 628.

[97] Government Code section 17556, subdivision (b). *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[98] Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative. (40 CFR § 122.2.)

Received
August 26, 2011
Commission on
State Mandates

I. Jurisdictional Urban Runoff Management Program and Reporting (Parts D & J)

Part D of the permit describes the Jurisdictional Urban Runoff Management Program (JURMP) of which each copermittee "shall develop and implement" an updated version (p.15). Part J of the permit ("Reporting") requires the JURMP to be updated and revised to include specified information. The test claim includes parts D.1.g (hydromodification management plan), D.1.d.(7)-(8) (low-impact development or LID), D3a(5) (street sweeping) and J.3.a(3)x-xv (reporting on street sweeping), D.3.a.(3) (conveyance system cleaning) and J.3.a.(3)(c)(iv)-(viii) (reporting on conveyance system cleaning), and D.5 (educational surveys and tests).

Hydromodification (part D.1.g.): Part D.1 of the permit is entitled "Development Planning." Part D.1.g. requires developing and implementing, in collaboration with other copermittees, a hydromodification management plan (HMP) "to manage increases in runoff discharge rates and durations from all Priority Development Projects."[99] Priority development projects can include both private projects, and municipal (city or county) projects. The purpose of the HMP is:

---

[99] According to the permit, Priority Development Projects are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)..

[¶]...[¶] [Section D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment

Received
August 26, 2011
Commission on
State Mandates

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."[100]

As detailed in the permit and on pages 12-17 above, the HMP must have specified content, including "a description of how the copermittees will incorporate the HMP requirements into their local approval processes." Also required is collaborative reporting on the HMP and implementation 180 days after the HMP is approved by the Regional Water Board, with earlier implementation encouraged.

According to the State Board's comments submitted in October 2008 the requirement to develop and implement a HMP is necessary to meet the minimum federal MEP standard. The Board states that "broad federal legal authority is contained in CWA sections 402(p)(3)(B)(ii)-(iii), CWA section 402(a), and in 40 C.F.R. sections 122.26 (d)(2)(i)(B)-(C), (E), and (F), 131.12, and 122.26(d)(2)(iv)(A)(2), which states:

---

will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[100] It is also defined as "changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." Draft Hydromodification Management Plan for San Diego County, page 4. <http://www.projectcleanwater.org/pdf/susmp/ sd_hmp_2009.pdf> as of May 28, 2009.

Received
August 26, 2011
Commission on
State Mandates

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[101] of a discharge[102] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. … Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]

(2) *Part 2.* Part 2 of the application shall consist of: [¶]…[¶]

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]…[¶]

---

[101] "*Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2)

[102] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

Received
August 26, 2011
Commission on
State Mandates

> (*2*) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. …

The State Board also cited the U.S. Supreme Court decision, *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700, for the state's authority to regulate flow under the federal Clean Water Act in order to protect water quality standards.

In response, the claimants' February 2009 comments state that the permit's Fact Sheet did not cite any federal authorities to justify the HMP portion of the permit, and that none exists. Claimants also assert that no other jurisdiction in the United States that was surveyed for the claim has a permit that requires a HMP. Claimants call the HMP requirement a flood control measure that is not a requirement in any other permit outside of California, and that the HMP exceeds the federal requirements and constitutes a state mandate. Claimants also point to the language in section 122.26(d)(2)(iv)(A)(2) that they say is:

> [A]imed directly at controlling pollutant discharges from an MS4 that originate in areas of new development. [The regulation] does not mention the need to include controls to reduce the *volume* of storm water discharged from these areas. … controls designed only to limit volume are not expressly required.

As to the *P.U.D. No. 1 v. Washington Department of Ecology* decision cited by the State Board, the claimants distinguish it as being decided under section 401 of the Clean Water Act, wherein the permit was issued under section 402. Claimants state that the *P.U.D.* case recognized state authority under the Clean Water Act rather than a federal mandate.

The Commission agrees with claimants about the applicability of the *P.U.D.* case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it. This was not addressed in the *P.U.D.* decision.

Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation."[103] As in *Long Beach Unified School Dist. v. State of California*,[104] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[105] to

---

[103] Government Code section 17556, subdivision (c).

[104] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[105] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

impose these requirements. Thus, the Commission finds that part D.1.g. of the permit is not a federal mandate.

All of part D.1.g. of the permit requires the HMP to have specified contents except part D.1.g.(2), which states that the HMP "*may* include implementation of planning measures ..." as specified. As the plain language of this part does not require the implementation of planning measures, the Commission finds that part D.1.g.(2) of the permit is not a state mandate.

The Commission also finds that HMP is not a state mandate for municipal (city or county) projects that are priority development projects, such as a hospital, laboratory or other medical facility, recreational facility, airfield, parking lot, street, road, highway, and freeway, a project over an acre, and a project located in an environmentally sensitive area.[106] Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.[107] Thus, municipal projects are built by cities or counties voluntarily, and their decision triggers the requirements to comply with the HMP. In *Kern High School Dist.*,[108] the California Supreme Court decided whether the state must reimburse the costs of school site councils and advisory committees complying with the Brown (Open Meetings) Act for schools who participate in various school-related education programs. The court determined that participation in the underlying school site council program was not legally compelled and so mandate reimbursement was not required for the downstream compliance with the Brown Act. The court said:

> 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 of funds-even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[109]

As with the voluntary programs in *Kern,* there is no requirement for municipalities to undertake any of the priority development projects described in the permit. Thus, the Commission finds that the costs of complying with the HMP in part D.1.g., is not a state mandate for priority development projects undertaken by a city or county.

Based on the mandatory language of the remainder of part D.1.g. of the permit (except part D.1.g.(2) and except for municipal projects), the Commission finds that it is a state mandate on the claimants to do the following:

---

[106] The County of San Diego, in its January 2010 comments on the draft staff analysis, raises the issue of its fee authority for municipal projects. The League of California Cities, in its January 2010 comments on the draft staff analysis, also discusses municipal projects, citing examples "where a city or county constructs a Priority Development Project for which no third party is available to assess a fee against."

[107] California Constitution, article XI, section 7. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

[108] *Kern High School Dist., supra,* 30 Cal.4th 727.

[109] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

Received
August 26, 2011
Commission on
State Mandates

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

Received
August 26, 2011
Commission on
State Mandates

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

[¶]…[¶]

(3) Section D.1.g.(1)(c) does not apply to Development Projects where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) <u>HMP Reporting</u>

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[110]

---

[110] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

Received
August 26, 2011
Commission on
State Mandates

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) The project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

(b) The project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) The project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

As to whether part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service, the claimants, in their February 2009 comments, assert that it is.

> The 2001 Permit only included general statements regarding the need to control downstream erosion with post construction BMPs. The 2007 Permit increased these requirements by requiring the copermittees to, among other things, draft and implement interim and long-term hydromodification plans, and impose specific, strict post construction BMPs on new development projects within their jurisdiction.

The State Board, in its October 2008 comments, argues that part D.1 "expands upon and makes more specific the hydromodification requirements in the 2001 Permit."

Finance argues, in its February 2010 comments on the draft staff analysis, that the entire permit is not a new program or higher level of service because additional activities, beyond those

Received
August 26, 2011
Commission on
State Mandates

required by the 2001 permit, are necessary for the claimants to continue to comply with the federal Clean Water Act and reduce pollutants to the Maximum Extent Practicable.

The Commission disagrees with Finance. This analysis measures the 2007 permit against the 2001 permit to determine which provisions are a new program or higher level of service. Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly. In *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[111]

The Regional Board prepared a Fact Sheet/Technical Report[112] for the permit that lists the federal authority and reasons the permit provisions were adopted. Regarding part D.1.g. of the permit, the Fact Sheet/Technical Report does not expressly mention the 2001 permit, but states:

> This section of the Order expands the requirements for control of hydromodification caused by changes in runoff resulting from development and urbanization. Expansion of these requirements is needed due to the current lack of a clear standard for controlling hydromodification resulting from modification. While the Model SUSMP[113] [adopted in 2002] developed by the Copermittees requires project proponents to control hydromodification, it provides no standard or performance criteria for how this is to be achieved.

The Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) with respect to private priority development projects is a new program or higher level of service. The Fact Sheet/Technical Report describes the section as an "expansion" of hydromodification control requirements. The 2001 permit (in part F.1.b.(2)(j)) included only the following on hydromodification:

> Downstream Erosion – As part of the model SUSMP [Standard Urban Storm Water Mitigation Plan] and the local SUSMPs, the Copermittees shall develop criteria to ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat. At a minimum, criteria shall be developed to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat. Storm water discharge volumes and durations should also be considered.

The requirements in the 2007 permit, however, are much more expansive and detailed, requiring development and implementation of a hydromodification management plan (HMP) to be approved by the Regional Board. And while the 2001 permit contained a broad description of

---

[111] *Building Industry Assoc. of San Diego County v. State Water Resources Control Board, supra,* 124 Cal.App.4th 866, 870.

[112] The Fact Sheet/Technical Report was attached to the test claim.

[113] According to the Fact Sheet/Technical Report, the Model SUSMP was completed and adopted in 2002.

Received
August 26, 2011
Commission on
State Mandates

the criteria required, part D.1.g. of the 2007 permit contains a detailed description of the contents of the HMP, including identifying standards for channel segments, using continuous simulation of the entire rainfall record to identify runoff flows, requiring priority development projects to implement hydrologic control measures, including other performance criteria for priority development projects to prevent urban runoff from the projects, and 9 other components to include in the HMP. Therefore, the Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service over the 2001 permit.

In sum, the Commission finds that part D.1.(g) of the permit (except for D.1.g.(2)) is a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the HMP for municipal priority development projects.

B. Low Impact Development (LID) and Standard Urban Storm Water Mitigation Plan (part D.1.d.): Also under part D.1 "Development Planning" is part D.1.d, which requires the copermittees to review and update their SUSMPs (Standard Urban Storm Water Mitigation Plans)[114]and (in paragraphs 7 and 8) add low impact development (LID) and source control BMP requirements for each priority development project, and to implement the updated SUSMP, as specified on pages 17-19 above. The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces (*Id.*)

According to the State Board's comments submitted in October 2008, the requirement in part D.1.d. is necessary to meet the minimum federal MEP standard, and is supported by 40 C.F.R. section 122.26 (d)(2)(iv)(A)-(D), part of which is quoted in the discussion of hydromodification above. Part (d)(2)(iv)(A)(2) of the regulation requires part of the permit application to include:

> (2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

The State Board asserts that these regulations "require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial and municipal land uses or activities." The Board cites a decision of the Washington Pollution Control Hearings Board that found that permit provisions to promote but not require low impact development "failed to satisfy the federal MEP standard and Washington state law because it … did not require LID at the parcel and subdivision level."

In their February 2009 rebuttal comments, the claimants assert: "while federal regulations require the large MS4 permits to include programs to reduce the discharge of pollutants from the

[114] The Permit defines the Standard Urban Storm Water Mitigation Plan as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

Received
August 26, 2011
Commission on
State Mandates

MS4 that originate in areas of new development, federal regulations do not require or even mention LID or LID principles." And "while requiring post-construction controls that limit pollutant discharges originating in areas of new development is clearly within the requirements of Section 122.26(d)(2)(iv)(A), the 2007 Permit's specific LID requirements are not." Claimants also address the Washington State Pollution Control Board decision by noting that the Board's decision "explicitly recognized that LID requirements are not federally mandated." The claimants also point out EPA-issued NPDES permits in Washington, D.C. and Albuquerque, New Mexico that make no reference to LID.

The Commission finds nothing in the federal regulation (40 C.F.R. § 122.26) that requires local agencies to collectively review and update the BMP requirements listed in their SUSMPs, or to develop, submit and implement "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the SUSMPs. Thus, the LID requirements in the permit "exceed the mandate in that federal law or regulation."[115] As in *Long Beach Unified School Dist. v. State of California*,[116] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[117] to impose these requirements. Thus, the Commission finds that part D.1.d. of the permit is not a federal mandate.

The Commission further finds that the LID requirements are not a state-mandated program for municipal projects for the same reason as discussed in the HMP discussion above: there is no requirement for cities or counties to build priority development projects, which would trigger the downstream requirement to comply with parts D.1.d.(7) and D.1.d.(8) of the permit, the LID portions of the permit.

As to non-municipal projects, however, because of the mandatory language on the face of the permit, the Commission finds that part D.1.d. of the permit is a state mandate for the claimants to do all of the following:

> <u>(7) Update of SUSMP BMP Requirements</u>
>
> The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP requirements that meet or exceed the requirements of sections D.1.d.(4) and D.1.d.(5), and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update shall include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

[115] Government Code section 17556, subdivision (c).

[116] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[117] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.[118]

ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.[119]

iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.[120]

iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.

v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.

vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.

vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

---

[118] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[119] Part D.1.d.(5) of the permit lists source control BMP requirements.

[120] Part D.1.d.(6) of the permit lists treatment control BMP requirements.

Received
August 26, 2011
Commission on
State Mandates

> (b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either (1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.
>
> (c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:
>
> i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).
>
> ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

The State Board, in its October 2008 comments on the test claim, argues that the requirements in part D.1.d.(7) of the permit are not a new program or higher level of service because they "merely add definition to the scope of the local SUSMP already required in the 2001 Permit (see Section F.1.b.(2))." As to part D.1.d.(8), the State Board asserts that it:

> [P]rovides a framework for the Copermittees to develop criteria to be used in the application of LID requirements to Priority Development Projects. The Copermittees must develop their LID programs through an update to the Model SUSMP, the document that guides (and guided the 2001 Permit cycle) post-construction BMP implementation at Priority Development Projects.

According to the State Board, these parts of the permit are not a new program or higher level of service because they merely add additional detail in implementing the same minimum federal MEP standard and add specificity to already existing BMPs.

The claimants, in their February 2009 comments, assert that by adding requirements and increasing the specificity of existing requirements, the 2007 LID permit requirements are a new program or higher level of service.

The Commission finds that part D.1.d.(7) is a new program or higher level of service because it calls for a collective review and update of BMP requirements listed in the claimants' SUSMPs (presumably those drafted under the 2001 permit) that was not required under the 2001 permit.

The Commission also finds that part D.1.d.(8) is a new program or higher level of service because it requires developing, submitting, and implementing "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the copermittees SUSMPs. Although the 2001 permit required adopting a Model SUSMP and local SUSMP, it

Received
August 26, 2011
Commission on
State Mandates

did not require developing and submitting an updated Model SUSMP with the specified LID BMP requirements.

In sum, the Commission finds that parts D.1.d.(7) and D.1.d.(8) of the 2007 permit constitute a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the LID requirements for municipal priority development projects.

C. Street sweeping and reporting (parts D.3.a.(5) & J.3.a(3)x-xv): Part D.3 is entitled "Existing Development." Part D.3.a.(5) requires regular street sweeping based on the amount of trash generated on the road, street, highway, or parking facility. Those identified as generating the highest volumes of trash are to be swept at least two times per month, those generating moderate volumes of trash are to be swept at least monthly, and those generating low volumes of trash are to be swept as necessary, but not less than once per year. The copermittees determine what constitutes high, moderate, and low trash generation.

In addition, section J.3.a.(3)(c) x-xv requires the copermittees, as part of their annual reporting, to identify the total distance of curb-miles of improved roads in each priority category, the total distance of curb-miles swept, the number of municipal parking lots and the number swept, the frequency of sweeping, and the tons of material collected from street and parking lot sweeping.

The State Board, in its comments submitted in October 2008, states that requiring minimum sweeping frequencies for streets determined by the copermittees to have high volumes of trash or debris is necessary to meet the minimum federal MEP standard. The State Board cites C.F.R. section 122.26(d)(2)(i)(B)-(C), (E) and (F) and 40 C.F.R. section 122.26(d)(2)(iv), and more specifically, section 122.26(d)(2)(iv)(A)(1), which states that the proposed management program include "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers." Also, section 122.26(d)(2)(iv)(A)(6) provides that the proposed management program include:

> [a] description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

The State Board also cites section 122.44(d)(1)(i), which states as follows regarding NPDES permits: "limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State Water quality standard, including narrative criteria for water quality." And section 122.26(d)(2)(iv)(A)(3) states that the proposed management program include "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities."

In their February 2009 rebuttal comments, the claimants point out that street sweeping as a BMP to control "floatables" is not required by federal law in that none of the federal regulations

Received
August 26, 2011
Commission on
State Mandates

specifically require street sweeping. The claimants quote the following from *Hayes v. Commission on State Mandates*:[121] "if the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate."

The Commission agrees with claimants. The permit requires activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[122] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[123]

Yet the more specific requirements in the permit include variable street sweeping schedules for areas impacted by different amounts of trash. They also require reporting on the amount of trash collected, which is not required by the federal regulations. These activities "exceed the mandate in that federal law or regulation."[124] As in *Long Beach Unified School Dist. v. State of California*,[125] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[126] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(5) and J.3.a.(3)(c)x-xv of the permit are not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission also finds part D.3.a(5) of the permit is a state mandate for the claimants to do all of the following:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

---

[121] *Hayes v. Commission on State Mandates, supra,* 11 Cal.App.4th 1564.

[122] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[123] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

[124] Government Code section 17556, subdivision (c).

[125] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[126] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

And as stated in part J.3.a(3)(c)x-xv (on p. 68) of the permit, the claimants report annually on:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xiii. Identification of the total distance of curb-miles swept.
>
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
>
> xv. Amount of material (tons) collected from street and parking lot sweeping.

The State Board, in its October 2008 comments, argues that requiring minimum street sweeping frequencies does not result in a new program or higher level of service. According to the State Board:

> The 2001 Permit required Copermittees to perform street sweeping, but did not specify minimum frequencies. While the minimum frequencies may exceed some Copermittees' existing programs, the Claimants acknowledge than many Copermittees meet or exceed the mandatory requirements on a voluntary basis. To the extent the frequencies are already being met and the Permit imposes the same MEP standard as its predecessor … the 2007 Permit does not impose a higher level of service.

In their February 2009 rebuttal comments, the claimants cite Government Code section 17565 to argue that whether or not they were sweeping streets at frequencies equal or more than the permit requires is not relevant. Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate." The claimants also state that the 2001 permit did not in fact require street sweeping, "[a]t best it only included general statements regarding the need to control pollutants in streets and other impervious areas and, in any event, minimum frequencies were not required."

The Regional Board's Fact Sheet/Technical Report on part D.3.a.(5) of the 2007 permit states that street sweeping "has been added to ensure that the Copermittees are implementing this effective BMP at all appropriate areas."

The Commission finds that the street sweeping provision (part D.3.a.(5)) in the permit is a new program or higher level of service. The Commission agrees that Government Code section 17565 makes it irrelevant (for purposes of mandate reimbursement) whether or not claimants

Received
August 26, 2011
Commission on
State Mandates

were performing the activity prior to the permit, since voluntary activities do not affect reimbursement of an activity that is subsequently mandated by the state.

The 2001 permit, in part F.3.a.(3) and (4) stated:

> (a) To establish priorities for oversight of municipal areas and activities required under this Order, each Copermittee shall prioritize each watershed inventory in F.3.a.2. above by threat to water quality and update annually. Each municipal area and activity shall be classified as high, medium, or low threat to water quality. In evaluating threat to water quality, each Copermittee shall consider (1) type of municipal area or activity; (2) materials used (3) wastes generated; (4) pollutant discharge potential; (5) non-storm water discharges; (6) size of facility or area; (7) proximity to receiving water bodies; (8) sensitivity of receiving water bodies; and (9) any other relevant factors.
>
> (b) At a minimum, the high priority municipal areas and activities shall include the following:
>
> (i) Roads, Streets, Highways, and Parking Facilities. [¶]...[¶]
>
> F.3.a.(4) BMP Implementation (Municipal)
>
> (a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality municipal areas and activities (as determined under section F.3.a.(3)).The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific as appropriate.

Street sweeping is not expressly required in this 2001 permit provision, nor does it specify any frequencies or required reporting. Thus, the Commission finds that part D.3.a.(5) of the 2007 permit that requires street sweeping, as specified, is a new program or higher level of service, as well as part J.3.a(3)x-xv that requires reporting on street-sweeping activities.

D. Conveyance system cleaning and reporting (parts D.3.a.(3) & J.3.a.(3)(c)(iv)-(viii)): Also under part D.3 "Existing Development," part D.3.a.(3) requires conveyance system cleaning, including the following:

- Verifying proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from the MS4s and related drainage structures.
- Cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Cleaning open channels of observed anthropogenic litter in a timely manner.

In J.3.a.(3)(c)(iv)-(viii), as part of the annual reporting requirements, copermittees shall provide a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned. In addition, copermittees must report by category tons of waste and litter removed from the facilities.

Received
August 26, 2011
Commission on
State Mandates

The State Board, in its comments submitted in October 2008, disagrees that the requirements exceed federal law, saying that "the same broad authorities applicable to the street sweeping requirement also apply to the conveyance system cleaning requirements." According to the State Board, specificity in inspection and cleaning requirements is consistent with and supported by U.S. EPA guidance. Also, to the extent that permit requirements are more specific than the federal regulations, the State Board asserts that the requirements are an appropriate exercise of the San Diego Water Board's discretion to define the MEP standard.

The claimants, in their February 2009 comments, state that "the requirements to inspect and perform maintenance to insure compliance with these standards is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards." Also, claimants note that the content and detail in the reporting is more than required by the 2001 permit. As to the MEP standard required by the federal regulations, claimants assert that the U.S. EPA documents cited by the State Board provide guidance, not mandates, and the permit Fact Sheet does not specifically set forth mandatory annual inspection and maintenance requirements. According to the claimants, the only mandatory requirement is that a maintenance program exist, and that the applicant provide an inspection schedule if maintenance depends on the results of inspections or occurs infrequently. Yet the 2007 permit includes "very specific requirements that go beyond the U.S. EPA guidance and are not included within the federal regulations." Finally, claimants note that the State Board has acknowledged that the 2007 permit requirements are more specific than federal regulations, and cites the *Long Beach Unified School District* case to conclude that the specificity makes the requirements state mandates.

The Commission agrees with claimants. Like street sweeping, the permit requires conveyance system cleaning activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[127] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[128]

Yet the permit requirements are more specific. Part D.3.a.(3) requires verifying proper operation of all municipal structural treatment controls, cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner, cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately, and cleaning open channels of observed anthropogenic litter in a timely manner. In addition, the reporting in part J requires a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned, and reporting by category tons of waste and litter removed from the facilities. These activities, "exceed[s] the mandate in that federal law or regulation."[129] As in *Long Beach*

[127] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[128] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

[129] Government Code section 17556, subdivision (c).

Received
August 26, 2011
Commission on
State Mandates

Unified School Dist. v. State of California,[130] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[131] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(3) and J.3.a.(3)(c)iv-viii of the permit are not a federal mandate.

Rather, the Commission finds that part D.3.a.(3) of the 2007 permit is a state mandate on the claimants to do the following:

> (a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
>
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
>
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.
>
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
>
> v. Proper disposal of waste removed pursuant to applicable laws.
>
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission also finds that part J.3.a.(3)(c) iv-viii is a state mandate to report the following information in the JURMP annual report:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
>
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

---

[130] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[131] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

As to whether these provisions are a new program or higher level of service, the State Board, in its October 2008 comments, states that the 2001 permit contained "*more* frequent inspection and removal requirements than required in the 2007 Permit. It also contained record keeping requirements to document the facilities cleaned and the quantities of waste removed." [Emphasis in original.]

Claimants, in their February 2009 comments, argue that the 2001 permit, in part F.3.a.(5) required each copermittee to 'implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges. By contrast, the 2007 permit requires each copermittee to 'implement a schedule of **inspection and** maintenance' and to '**verify proper operation of all municipal** structural controls…." [Emphasis in original.] Claimants also point out that the 2007 permit requires copermittees to:

- Clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Clean any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Clean open channels of observed anthropogenic litter in a timely manner.

According to claimants, these requirements were not included in the 2001 permit. Claimants also state that the requirement to inspect and perform maintenance "is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards."

As to reporting, claimants state that the language in part D.3.a.(3)(b)(iv),(v) and (vi) of the 2007 permit and part F.3.a.(5)(c)(iii), (iv) and (v) of the 2001 permit track each other, but part J.3.a.(3)(c) iv through viii detail the information that the reports must now contain that was not in the 2001 permit, such as identifying the number of catch basins and inlets, the number inspected, the number found with accumulated waste exceeding the cleaning criteria, the distance of the MS4 cleaned, and other detail.

In analyzing whether parts D.3.a.(3) and J.3.a.(3)(c)(iv) – (viii) are a new program or higher level of service, we compare those provisions to the prior permit and look at the Regional Board's Fact Sheet/Technical Report, which states why Part D.3.a.(3) was added:

> **Section D.3.a.(3)** … requires the Copermittees to inspect and remove waste from their MS4s prior to the rainy season. Additional wording has been added to clarify the intent of the requirements. The Copermittees will be required to inspect all storm drain inlets and catch basins. This change will assist the Copermittees in determining which basins/inlets need to be cleaned and at what

Received
August 26, 2011
Commission on
State Mandates

> priority. Removal of trash has been identified by the copermittees as a priority issue in their long-term effectiveness assessment. To address this issue, wording has been added to require the Copermittees, at a minimum, inspect [sic] and remove trash from all their open channels at least once a year.

The 2001 permit contained the following in part F.3.a.(5)(b) and (c):

> (b) Each Copermittee shall implement a schedule of maintenance activities for the municipal separate storm sewer system.
> (c) The maintenance activities must, at a minimum, include:
> i. Inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year;
> ii. Additional cleaning as necessary between October 1 and April 30 of each year;
> iii. Record keeping of cleaning and the overall quantity of waste removed;
> iv. Proper disposal of waste removed pursuant to applicable laws;
> v. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission finds that some provisions in the 2007 permit are the same as in the 2001 permit. Specifically, part D.3.a(3)(a) is not a new program or higher level of service because the 2001 permit also required maintenance and inspection in part F.3.a.(5)(b) and (c). The Commission also finds that part D.3.a.(3)(b)(i),(iv)- (vi) of the 2007 permit is the same as part F.3.a.(5)(c)(i)(iii) - (v) in the 2001 permit, both of which require:

- Annual inspection of MS4 facilities (D.3.a(3)(b)(i));
- Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a(3)(b)(iv));
- Proper disposal of waste removed pursuant to applicable laws (D.3.a(3)(b)(v)); and
- Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a(3)(b)(vi)).

Therefore, the Commission finds that these provisions are not a new program or higher level of service.

The Commission also finds that part D.3.a.(3)(b)(ii) is not a new program or higher level of service. It gives the claimants the flexibility, after two years of inspections, to inspect MS4 facilities that require inspection and cleaning less than annually, but not less than every other year. Part F.3.a.(5)(c)(i) of the 2001 permit stated: "The maintenance activities must, at a minimum, include: i. inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year." Potentially less frequent inspections under the 2007 permit is not a new program or higher level of service.

The Commission finds that part D.3.a.(3)(b)(iii) of the 2007 permit is a new program or higher level of service on claimants to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity.... Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely

Received
August 26, 2011
Commission on
State Mandates

manner." This part contains specificity, e.g., a standard of accumulation greater than 33% of design capacity, which was not in the 2001 permit.

Further, the Commission finds that the reporting in part J.3.a.(3)(c) (iv) – (viii) is a new program or higher level of service. The 2001 permit did not require this information in the content of the annual reports.

E. Educational component (part D.5): Part D.5 requires the copermittees to perform the activities on pages 25-28 above, which can be summarized as:

- Implement an educational program so that copermittees' planning and development review staffs (and planning board/elected officials, if applicable) understand certain laws and regulations related to water quality.
- Implement an educational program that includes annual training before the rainy season so that the copermittees' construction, building, code enforcement, and grading review staffs, inspectors, and others will understand certain specified topics.
- At least annually, train staff responsible for conducting stormwater compliance inspections and enforcement of industrial and commercial facilities on specified topics.
- Implement an education program so that municipal personnel and contractors performing activities that generate pollutants understand the activity specific BMPs for each activity to be performed.
- Implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and others relating to specified topics.

The State Board, in its October 2008 comments on the test claim, states that federal regulations authorize the inclusion of an education component, in that the proposed management program must "include a description of appropriate educational and training measures for construction site operations" (40 C.F.R. § 122.26(d)(2)(iv)(D)(4)) and a "description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors…(40 C.F.R. § 122.26(d)(2)(iv)(A)(6)). The federal regulations also require a "description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers" (40 C.F.R. § 122.26(d)(2)(iv)(B)(5)) and a "description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials." (40 C.F.R. § 122.26(d)(2)(iv)(B)(6)). The State Board also says that according to the U.S. EPA's Phase II stormwater regulations, the MEP standard requires the copermittees to implement public education programs. According to the State Board, the regulations apply to copermittees with less developed storm water programs, and require the programs to include a public education and outreach program (40 C.F.R. § 122.34(b)(1)) and a public involvement/participation program (40 C.F.R. § 122.26(b)(2)). To the extent the permit requirements are more specific than federal law, the State Board calls them an appropriate use of the Regional Board's discretion "to require more specificity in establishing the MEP standard."

Received
August 26, 2011
Commission on
State Mandates

Claimants, in their February 2009 comments, characterize the federal regulations as only requiring them "to describe educational, public information, and other appropriate activities associated with their jurisdictional, watershed or stormwater management programs." By contrast, under the permit claimants argue that they are required to "implement specific educational and training programs that achieve measurable increases in specific target community knowledge and to ensure a measurable change in the behavior of such target communities rather than simply report on the … educational programs on an annual basis." Claimants state that they are required to perform testing and surveys and "new program elements to secure the measureable changes in knowledge and behavior."

The Commission agrees with claimants. As quoted in the State Board's comments, the federal regulations require nonspecific descriptions of educational programs, for example, requiring the permit application to "include appropriate educational and training measures for construction site operations" and "controls such as educational activities." The permit, on the other hand, requires implementation of an educational program with target communities and specified topics. These requirements "exceed the mandate in that federal law or regulation."[132] As in *Long Beach Unified School Dist. v. State of California*,[133] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[134] to impose these requirements. Thus, the Commission finds that part D.5 of the permit is not federally mandated.

Based on the mandatory language on the face of the permit, the Commission finds that part D.5 of the permit constitutes a state mandate on the copermittees to do all of the following:

> Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:
>
> · Municipal Departments and Personnel
> · Construction Site Owners and Developers
> · Industrial Owners and Operators
> · Commercial Owners and Operators
> · Residential Community, General Public, and School Children
>
> a. GENERAL REQUIREMENTS
>
> (1) Each Copermittee shall educate each target community on the following topics where appropriate:

---

[132] Government Code section 17556, subdivision (c).

[133] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[134] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

Table 3. Education

Laws, Regulations, Permits, & Requirements	Best Management Practices
• Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board's General NPDES Permit for Ground Water Dewatering • Regional Board's 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	**Other Topics**
• Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections	• Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation •Alternative materials and designs to maintain peak runoff values •Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

Received
August 26, 2011
Commission on
State Mandates

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:
[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[135] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

[135] Attachment C of the permit defines grading as "the cutting and/or filling of the land surface to a desired slope or elevation."

Received
August 26, 2011
Commission on
State Mandates

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The State Board, in its October 2008 comments, states that the education requirement in part D.5. does not amount to a new program or higher level of service because the 2007 permit "includes education topics from the 2001 permit with minor wording and formatting changes. Additionally, the requirements were adopted to implement the same federal MEP standard as established in the CWA and in the 2001 Permit."

In their February 2009 comments, the claimants state that the 2001 permit did not require:

- Implementation of an education program so that the copermittee's planning and development review staff (and Planning Boards and Elected Officials, if applicable) understand certain specified laws and regulations related to water quality. (D.5.b.(1)(a).)
- Implementation of an education program that includes annual training prior to the rainy season so that the copermittee's construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of certain specified topics. (D.5.b.(1)(b).)
- Training of staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year relating to certain specified topics (D.5.b.(1)(c).)

Received
August 26, 2011
Commission on
State Mandates

- Implementation of an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed. (D.5.b.(1)(d).)
- Implementation of a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties relating to certain specified topics. (D.5.b.(2).)

This analysis of whether the permit is a new program or higher level of service is in the order presented in the permit. The Commission finds that nearly all of the educational topics in part D.5.a. are the same as those in the 2001 permit (part F.4). Both the 2001 and 2007 permits require the claimants to "educate" each specified target community on the following topics (Table 3 in the 2007 permit):

> **Laws, Regulations, Permits, & Requirements:** Federal, state, and local water quality laws and regulations; Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction); Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities; Regional Board's General NPDES Permit for Ground Water Dewatering; Regional Board's 401 Water Quality Certification Program; Statewide General NPDES Utility Vault Permit; Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits).
>
> **Best Management Practices:** Pollution prevention and safe alternatives; Good housekeeping (e.g., sweeping impervious surfaces instead of hosing); Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste); Non-storm water disposal alternatives (e.g., all wash waters); Methods to minimized the impact of land development and construction; Methods to reduce the impact of residential and charity car-washing; Preventive Maintenance; Equipment/vehicle maintenance and repair; Spill response, containment, and recovery; Recycling; BMP maintenance.
>
> **General Urban Runoff Concepts:** Impacts of urban runoff on receiving waters; Distinction between MS4s and sanitary sewers; Short-and long-term water , quality impacts associated with urbanization (e.g., land-use decisions, development, construction); How to conduct a storm water inspection.
>
> **Other Topics:** Public reporting mechanisms; Water quality awareness for Emergency/ First Responders; Illicit Discharge Detection and Elimination observations and follow-up during daily work activities; Potable water discharges to the MS4; Dechlorination techniques; Hydrostatic testing; Integrated pest management; Benefits of native vegetation; Water conservation; Alternative materials and designs to maintain peak runoff values; Traffic reduction, alternative fuel use.

Because the requirement to educate the target communities on these topics was in the 2001 permit, as well as the 2007 permit, the Commission finds that doing so, as required by part D.5.a(1), table 3, is not a new program or higher level of service.

Received
August 26, 2011
Commission on
State Mandates

Under the 2007 permit, the copermittees are required to "educate each target community" on the following educational topics that were not in the 2001 permit: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID [low-impact development], source control, and treatment control. Thus, the Commission finds that the part D.5.a.(1) is a new program or higher level of service to educate each target community on only the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control.

Part D.5.a.(2) states: "(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources." This provision was not in the 2001 permit, so the Commission finds that part D.5.a.(2) is a new program or higher level of service.

In part D.5.b.(1)(a) (Municipal Development Planning) the permit requires implementing an education program for "municipal planning and development review staffs (and Planning Board and Elected Officials, if applicable)" on specified topics. The 2001 permit required implementing an educational program for "Municipal Departments and Personnel" that would include planning and development review staffs, but not planning boards and elected officials. So the Commission finds that part D.5.b.(1)(a)(i) and (ii) is a new program or higher level of service for planning boards and elected officials.

Certain topics in part D.5.b.(1)(a) are a new program or higher level of service for both planning and development review staffs as well as planning boards and elected officials. Under both part F.4.a. of the 2001 permit, and D.5.b.(1)(a) of the 2007 permit, the copermittees are required to implement an educational program on the following topics:

> i. Federal, state, and local water quality laws and regulations applicable to Development Projects; [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); [The 2001 permit, in F.4.a (p. 35) calls this "Waters Quality Impacts associated with land development."]

Thus the Commission finds that implementing an educational program on these topics is not a new program or higher level of service for municipal departments, but is for planning boards and elected officials.

The following topics were not listed in the 2001 permit, so the Commission finds that part D.5.b.(1)(a) is a new program or higher level of service to implement these in an educational program for all target communities:

> (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements;
>
> (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and

Received
August 26, 2011
Commission on
State Mandates

> [6] Selection of the most effective treatment control BMPs for the pollutants of concern.

Part D.5.b.(1)(b) (Municipal Construction Activities) of the permit requires implementing an educational program for municipal "construction, building, code enforcement, and grading review staffs." Again, this is not a new program or higher level of service for those topics in which the 2001 permit also required an education program for "Municipal Departments and Personnel," such as:

> i. Federal, state, and local water quality laws and regulations applicable to construction and grading activities. [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment. [The 2001 permit, in F.4.a (p. 35) calls this "Water Quality Impacts associated with land development."]

The timing of the educational program specified in D.5.b.(1)(b) requires it to be implemented "prior to the rainy season." There is no evidence in the record, however, that this timing requirement is a new program or higher level of service compared with the 2001 permit. Thus the Commission finds that part D.5.b.(1)(b)(i) and (ii) are not a new program or higher level of service.

Municipal construction activity education topics were added to the 2007 permit, however, that were not in the 2001 permit, in paragraphs (iii) to (vi) as follows:

> (b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:
> [¶]...[¶] iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
> v. Current advancements in BMP technologies.
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

Thus, the Commission finds that part D.5.b.(1)(b)(iii) - (vi) of the 2007 permit is a new program or higher level of service.

Part D.5.b.(1)(c) of the 2007 permit (Municipal Industrial/Commercial Activities) requires the following:

> (c) Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at

Received
August 26, 2011
Commission on
State Mandates

> least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

The 2001 permit included (in F.4.b.) the topic "How to conduct a stormwater inspection" but did not specify that the training was to be annual, and did not require the training to cover inspection and enforcement procedures, BMP Implementation, or reviewing monitoring data. Thus, the Commission finds that part D.5.(b)(1)(c) is a new program or higher level of service.

Part D.5.b.(1)(d) of the 2007 permit requires the following:

> (d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

Regarding part D.5.b.(1)(d), the 2007 Fact Sheet/Technical Report states:

> A new requirement has also been added for education of activity specific BMPs for municipal personnel and contractors performing activities that generate pollutants. Education is required at all levels of municipal staff and contractors. Education is especially important for the staff in the field performing activities which might result in discharges of pollutants if proper BMPs are not used.

Because part D.5.b.(1)(d) was not in the 2001 permit, and because the Regional Board called it a "new requirement" the Commission finds that part D.5.(b)(1)(d) of the 2007 permit is a new program or higher level of service.

Part D.5.(b)(2) of the 2007 permit requires an education program for "project applicants, developers, contractors, property owners, community planning groups, and other responsible parties." Parts F.4.a and F4.b. of the 2001 permit required a similar education program for "construction site owners and developers." The Fact Sheet/Technical Report for the 2007 permit states:

> Different levels of training will be needed for planning groups, owners, developers, contractors, and construction workers, but everyone should get a general education of stormwater requirements. Education of all construction workers can prevent unintentional discharges, such as discharges by workers who are not aware that they are not allowed to wash things down the storm drains. Training for BMP installation workers is imperative because the BMPs will not fail if not properly installed and maintained. Training for field level workers can be formal or informal tail-gate format.

Thus, the Commission finds that part D.5.(b)(2) of the 2007 permit is a new program or higher level of service for project applicants, contractors, or community planning groups who are not developers or construction site owners.

The final part of the education programs in the 2007 permit is D.5.(b)(3) regarding "Residential, General Public, and School Children."

> Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers,

Received
August 26, 2011
Commission on
State Mandates

door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The 2001 permit (part F.4.c.) stated the following:

> In addition to the topics listed in F.4.a. above, the Residential, General Public, and School Children communities shall be educated on the following topics where applicable:
>
> - Public reporting information resources
> - Residential and charity car-washing
> - Community activities (e.g., "Adopt a Storm Drain, Watershed, or Highway" Programs, citizen monitoring, creek/beach cleanups, environmental protection organization activities, etc..

The 2001 permit did not require claimants to "collaboratively conduct or participate in development … of a plan to educate residential, general public, and school children target communities." The 2001 permit also did not require the plan to "evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods." Thus, the Commission finds that part D.5.(b)(3) of the 2007 permit is a new program or higher level of service.

In sum, as to part D.5 of the 2007 permit that requires implementing educational programs, the Commission finds that the following subparts are new programs or higher levels of service:

- D.5.a.(1): Each copermittee shall educate each target community, as specified, on the following topics: erosion prevention, nonstorm waters discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control.
- D.5.a.(2): Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.
- D.5.b.(1)(a): Implement an education program so that planning boards and elected officials, if applicable, have an understanding of: (i) Federal, state, and local water quality laws and regulations applicable to Development Projects; (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization).
- D.5.b.(1)(a): Implement an education program so that planning and development review staffs as well as planning boards and elected officials have an understanding of: (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements; (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and [6] Selection of the most effective treatment control BMPs for the pollutants of concern."
- D.5.b.(1)(b)(iii) - (vi): Implement an education program that includes annual training prior to the rainy season for its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an

Received
August 26, 2011
Commission on
State Mandates

understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows:

iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.

iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.

v. Current advancements in BMP technologies.

vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

- D.5.(b)(1)(c) and (d) as follows:

  Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

- Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

- D.5.(b)(2), As early in the planning and development process as possible and all through the permitting and construction process, to implement a program to educate project applicants, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) [Municipal Development Planning] and D.5.b.(1)(b) [Municipal construction Activities] above, as appropriate for the audience being educated. The education program shall also educate project applicants, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

- D.5.(b)(3), Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

II. Watershed Urban Runoff Management Program (Part E)

Part E of the permit is the Watershed Urban Runoff Management Program (WURMP). The permit (Table 4) divides the copermittees into nine watershed management areas (WMAs) by "major receiving water bodies." The 2001 permit also had a WURMP component (in part J).

A. Watershed Urban Runoff Management Program copermittee collaboration (parts E.2.f & E.2.g): These provisions require the copermittees to do the activities on pages 28-29 above, including the following:

Received
August 26, 2011
Commission on
State Mandates

- Collaborating with other copermittees within their watershed management areas (WMAs) to develop and implement an updated Watershed Urban Runoff Management Program for each watershed that prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards which at a minimum includes:
  - Identifying and implementing watershed activities that address the high priority water quality problems in the watershed management areas that include both watershed water quality activities[136] and watershed education activities.[137]
  - Creating a watershed activities list that includes certain specified information to be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter.
  - Implementing identified watershed activities within established schedules.
  - Collaborating to develop and implement the Watershed Urban Runoff Management Program, including frequent regularly scheduled meetings.[138]

In its October 2008 comments, the State Board asserts that the Watershed Urban Runoff Management Program activities are necessary to meet the minimum federal MEP standard. The State Board quotes the following federal regulations: "The Director may … issue distinct permits for appropriate categories of discharges … including, but not limited to … all discharges within a system that discharge to the same watershed…" (40 C.F.R. 122.26(a)(3)(ii).) The State Board also quotes more specific federal regulations:

> Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system. (40 C.F.R. § 122.26 (a)(3)(v).)
>
> The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, a

---

[136] Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of the permit (Part E.2.f).

[137] Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA (Part E.2.f).

[138] In their February 2009 comments, the claimants also list the following activities: (1) Annual review of WURMPs to identify needed modifications and improvements (part E.2.i);
(2) Develop and periodically update watershed maps (part E.2.b); (3) Develop and implement a program for encouraging collaborative watershed-based land-use planning (part E.2.d);
(4) Develop and implement a collective watershed strategy (part E.2.e). These parts of the permit, however, were not pled in the test claim so the Commission makes no findings on them.

Received
August 26, 2011
Commission on
State Mandates

> jurisdiction-wide basis, watershed basis, or other appropriate basis;" (40 C.F.R. § 122.26 (a)(5).)
>
> Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. (40 C.F.R. § 122.26 (d)(2)(iv).)

The State Board argues that the regional board "determined that the inclusion of the requirement to formalize the Watershed Water Qualities Activities List was appropriate to further the goal of the WURMPS in achieving compliance with federal law." Based on some reports it received, the Regional Board determined that "many of the watershed water quality activities had no clear connection to the high priority water quality problems in the area of implementation." The Board determined it was therefore necessary and appropriate to require development of an implementation strategy to maximize WURMP effectiveness.

Claimants, in their February 2009 comments, point out that while cooperative agreements may be required by 40 C.F.R. § 122.26(d)(2)(i)(D), "each copermittee is only responsible for their own systems." Claimants quote another federal regulation: "Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate." (40 C.F.R. § 122.26(a)(3)(vi).) Claimants argue that the 2007 permit:

> [R]equires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year.

Claimants also state that the permit "mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order." (part E.2.f.(1)(a).) According to what the claimants call these "dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work."

The Commission finds that the permit requirements in sections E.2.f and E.2.g. are not federal mandates. As with the other requirements in the permit, the federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional, watershed or other basis. These requirements "exceed the mandate in that federal law or regulation."[139] As in *Long Beach Unified School Dist. v. State of California*,[140] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[141] to impose these requirements.

Based on the mandatory language in the permit, the Commission finds that the following in part E are a state mandate on the copermittees:

---

[139] Government Code section 17556, subdivision (c).

[140] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[141] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) as in Table 4 [of the permit] to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]…[¶]

f. Watershed Activities[142]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

---

[142] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

Received
August 26, 2011
Commission on
State Mandates

(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

As to the issue of new program or higher level of service, the State Board, in its October 2008 comments, states:

> Although Section E.2.f. requires development and implementation of a list of Watershed Water Qualities Activities for potential implementation that was not specifically required in the 2001 Permit, the Copermittees were previously required to identify priority water quality issues and identify recommended activities to address the priority water quality problems (See 2001 Permit, section J.1 and J.2.d.)

The State Board asserts that Copermittees were already required to collaborate with other Copermittees, and that "Section E.2.g. merely adds effectiveness strategies to the collaboration requirements." … Other requirements challenged by the Claimants exist in the 2001 Permit, but with minor wording changes (e.g., the requirement to update watershed maps, which exists in both permits).

Claimants, in their February 2009 comments, assert that parts E.2.f. and E.2.g do impose a new program or higher level of service. According to the claimants:

> Under the 2001 Permit the watershed requirements were essentially limited to mapping, assessment and identification of short and long term issues. Collaboration included mapping (J.2.a.), assessment of receiving waters (J.2.b); identification and prioritization of water quality problems (J.2.c); implementation of time schedules (J.2.d) and identification of copermittee responsibilities for each recommended activity including a time schedule.
>
> [¶]…[¶]

Received
August 26, 2011
Commission on
State Mandates

> The 2007 Permit imposes standards far beyond those listed in … the 2001 Permit …. The 2007 Permit now requires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year. The two-activity watershed requirement is a condition of all copermittees regardless of whether the activity is within their jurisdictional authority or not.
>
> In addition, while the 2007 Permit states that activities can be implemented at a regional, watershed or jurisdictional level, it mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order. By reason of the dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work.

The Commission finds that E.2.f. and E.2.g of the permit are a new program or higher level of service.

As to watershed education in part E.2.f, the 2001 permit (in part J.2.g.) stated that the WURMP shall contain "A watershed based education program." The 2007 permit states that the WURMP shall include "watershed education activities" defined as "outreach and training activities that address high priority water quality problems in the WMA [Watershed Management Area(s)]." Moreover, in part E.f.(4), the 2007 permit states: "A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences." Because of this increased requirement for implementation of watershed education, the Commission finds that watershed education activities, as defined in part E.2.f, is a new program or higher level of service.

Additionally, the Commission finds that the rest of part E.2.f. is a new program or higher level of service because it includes elements not in the 2001 permit, such as:

- A definition of watershed water quality activities (part E.2.f.(1)(a)).
- Submission of a watershed activities list, with specified contents (part E.2.f.(2)).
- A detailed description of each activity on the watershed activities list, with seven specific components (part E.2.f.(3)).
- Implementation of watershed activities pursuant to established schedules, including definitions of when activities are in an active implementation phase (part E.2.f.(4)).

As to part E.2.g., although the 2001 (in parts J.1. & J.2.) and 2007 permits both require copermittee collaboration in developing and implementing the Watershed Urban Runoff Management Plan, copermittee collaboration is a new program or higher level of service because the WURMP is greatly expanded over the 2001 permit in part E.2.f as discussed above. This means that new collaboration is required to develop and implement the watershed activities in part E.2.f.

The 2007 permit (in part E.2.g) also states that "Watershed Copermittee collaboration shall include frequent regularly scheduled meetings." This requirement for meetings was not in the 2001 permit. The Fact Sheet/Technical Report states:

Received
August 26, 2011
Commission on
State Mandates

> The requirement for regularly scheduled meetings has been added based on Regional Board findings that watershed groups which hold regularly scheduled meetings (such as for San Diego Bay) typically produced better programs and work products than watershed groups that went for extended periods of time without scheduled meetings.[143]

Therefore, the Commission finds that part E.2.g. of the 2007 permit is a new program or higher level of service.

Regarding watershed water quality activities in part E.2.f, the Fact Sheet/Technical Report the Regional Board stated:

> This requirement developed over time while working with the Copermittees on their WURMP implementation under Order No. 2001-01. In October 2004 letters, the Regional Board recommended the Copermittees develop a list of Watershed Water Quality Activities for potential implementation. Following receipt of the Regional Board letters, the Copermittees created the Watershed Water Quality Activity lists. Although the Copermittees' lists needed improvement, the Regional Board found the lists to be useful planning tools that can be evaluated to identify effective and efficient Watershed Water Quality Activities. Because the lists are useful and have become a part of the WURMP implementation process, a requirement for their development has been written into the Order.

Thus, the Commission finds that part E.2.f. of the permit is a new program or higher level of service, in that it requires the following not required in the 2001 permit:

- Identification and implementation of watershed activities that address the high priority water quality problems in the WMA (Watershed Management Area), as specified (part E.2.f.(1)).
- Submission of a watershed activities list with each updated WURMP and updated annually thereafter, as specified (part E.2.f.(2)-(3)).
- Implementation of watershed activities pursuant to established schedules: no less than two watershed water quality activities and two watershed education activities in active implementation phase, as defined, per permit year (part E.2.f.(4)).

III. Regional Urban Runoff Management Program (Part F)

Part F of the permit describes the Regional Urban Runoff Management Program (RURMP). It was included because "some aspects of urban runoff management can be effectively addressed at a regional level. ... However, significant flexibility has been provided to the Copermittees for new regional requirements."[144]

---

[143] For an inexplicable reason, the Fact Sheet/Technical Report lists this collaboration activity under Section E.2.m of the permit rather than E.2.g.. The permit at issue has no section E.2.m.

[144] San Diego Regional Water Quality Control Board, "Fact Sheet/Technical Report for Order No. R9-2007-0001."

Received
August 26, 2011
Commission on
State Mandates

A. Copermittee collaboration – Regional Residential Education Program Development and Implementation (part F.1): Part F.1 requires the copermittees to develop and implement a Regional Residential Education Program, with specified contents (see p. 12 above). In the test claim the claimants discuss hiring a consultant to develop the educational program that "will generally educate residents on: 1) the difference between stormwater conveyance systems and sanitary sewer systems; 2) the connection of storm drains to local waterways; and 3) common residential sources of urban run-off." Claimants allege activities to comply with section F.1 of the permit that include, but are not limited to: "development of materials/branding, a regional website, regional outreach events, regional advertising and mass media, partnership development, and the development of marketing and research tools, including regional surveys to be conducted in FY 2008-09 and again in FY 2011-12."

In comments submitted in October 2008, the State Board asserts that the permit condition in section F.1. is necessary to meet the minimum federal MEP standard and that the requirement is supported by the Clean Water Act statutes and regulations. The State Board cites the following federal regulations:

> (v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.[145] [¶]...[¶]
>
> (5) The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.[146] [¶]...[¶]
>
> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[147]
>
> (iv) Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. ...[148]

In response, the claimants' February 2009 comments state that the Regional Residential Education Program is not necessary to meet the minimum federal MEP standard. The regional nature of the education program, according to the claimants, is duplicative because it imposes the

---

[145] 40 Code of Federal Regulations section 122.26 (a)(3(v).

[146] 40 Code of Federal Regulations section 122.26 (a)(5).

[147] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[148] 40 Code of Federal Regulations section 122.26 (d)(iv).

Received
August 26, 2011
Commission on
State Mandates

education requirements at the regional and jurisdictional levels concurrently, and it exceeds federal law.

The Commission finds that the requirements in part F.1 of the permit do not constitute a federal mandate. There is no federal requirement to provide a regional educational program, so the education program, "exceed[s] the mandate in that federal law or regulation."[149] As in *Long Beach Unified School Dist. v. State of California*, the permit "requires specific actions … [that are] required acts."[150] In adopting part F.1, the state has freely chosen[151] to impose these requirements. Thus, the Commission finds that part F.1. of the permit does not constitute a federal mandate.

Based on the mandatory language on the face of the permit, the Commission finds that the permit constitutes a state mandate on the claimants to do all the following in part F.1 of the permit:

> The Regional Urban Runoff Management Program shall, at a minimum:
>
> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a (p. 50.)

As to whether this is a new program or higher level of service, the State Board, in its October 2008 comments, states that it is not because the claimants were already implementing a residential education program at a regional level before the permit was adopted.

In claimants' February 2009 rebuttal comments, they assert that it is irrelevant whether or not the copermittees voluntarily met or exceeded the now mandatory requirements imposed by the 2007 permit because Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate."

The Commission finds that part F.1 of the permit is a new program or higher level of service. The 2001 permit required an educational component as part of the Jurisdictional Urban Runoff Management Program (part F.4) that contained a residential component, but not a Regional Residential Education Program, so the activities in this program are new. Also, the Commission agrees that whether or not claimants were engaged in an educational program is not relevant due to Government Code section 17565. The Regional Board, in requiring the regional educational program, leaves the local agencies with no choice but to comply.

---

[149] Government Code section 17556, subdivision (c).

[150] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[151] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

B. Copermittee collaboration (parts F.2 & F.3): Parts F.2 and F.3 (quoted on p. 11 above) require the copermittees to collaborate to develop, implement, and update as necessary a Regional Urban Runoff Management Program, to include developing the standardized fiscal analysis method required in permit part G (part F.2) and facilitating the assessment of the effectiveness of jurisdictional, watershed, and regional programs (part F.3).

In comments submitted in October 2008, the State Board asserts that the permit conditions in sections F.2 and F.3 are necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[152]

The State Board also quotes section 122.26 (a)(3)(v) of the federal regulations as follows:

> (v) Permits for all or a portion of all discharges from large[153] or medium[154] municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different

[152] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[153] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ..." [40 CFR § 122.26 (b)(4).]

[154] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ..." [40 CFR § 122.26 (b)(7).]

Received
August 26, 2011
Commission on
State Mandates

> management programs for different drainage areas which contribute storm water to the system.

The State Board also asserts:

> To the extent the Clean Water Act and federal regulations do not identify all of the specificity required in Sections F.2, F.3 …, the San Diego Water Board properly exercised its discretion under federal law to include specificity so that the federal MEP standard can be achieved. The San Diego Water Board exercised this duty under federal law and therefore the provisions of the 2007 Permit were adopted as federal requirements.

In the claimants' rebuttal comments submitted in February 2009, they state that "all of the authorities cited by the State merely acknowledge the State's authority to go beyond the federal regulations."

The Commission finds that the requirements in parts F.2 and F.3. of the permit do not constitute a federal mandate. There is no federal requirement to collaborate on, develop, or implement a Regional Urban Runoff Management Program (RURMP). The Commission finds that these RURMP activities "exceed the mandate in that federal law or regulation."[155] As in *Long Beach Unified School Dist. v. State of California*,[156] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[157] to impose these requirements. Thus, the Commission finds that parts F.2 and F.3 of the permit do not constitute federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts F.2 and F.3 of the permit constitutes a state mandate on the claimants to do all the following:

> Collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]
>
> (2) Develop the standardized fiscal analysis method required in section G of the permit, and,
>
> (3) Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

As to whether these activities are a new program or higher level of service, the claimants state in the test claim:

> "[W]hile the 2001 Permit required the copermittees to collaborate to address common issues and promote consistency among JURMPs and WURMPs and to

---

[155] Government Code section 17556, subdivision (c).

[156] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[157] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

establish a management structure for this purpose, it lacked the detail, specificity and level of effort now mandated by the 2007 Permit."

In their February 2009 rebuttal comments, claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

The State Board, in its October 2008 comments, states that the 2001 permit required that "the Copermittees enter into a formal agreement to provide, at a minimum, a management structure for designating joint responsibilities, decision making, watershed management, information management of data and reports" and other collaborative arrangements to comply with the permit.

According to the State Board, parts F.2 and F.3 are not a new program or higher level of service because the copermittees "were already conducting multiple efforts on a regional level under the 2001 permit. The inclusion of the RURMP is designed to organize these efforts into one framework to improve Copermittee and Regional Board tracking of regional efforts." The State Board also asserts that the requirements were intended to reduce redundant reporting and improve efficiency and streamline regional program implementation. The State Board describes the 2007 permit as merely elaborating on and refining the 2001 requirements.

The permit itself states: "This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards." [Emphasis added.] The permit also describes the Regional Urban Runoff Management Plan as new.

While the 2001 permit contained requirements for a fiscal analysis (part F.8) and an assessment of effectiveness (part F.7), it did so only as components of a Jurisdictional Urban Runoff Management Program. The Regional Urban Runoff Management Program, required in part F.2 of the 2007 permit, is new. The fiscal analysis in part G is incorporated by reference into part F.2, and the effectiveness assessment is incorporated into part F.3. Thus, the Commission finds that the requirements in parts F.2 and F.3 are a new program or higher level of service.

IV. Program Effectiveness Assessment (Part I)

Part I of the permit is called "Program Effectiveness Assessment" and includes subparts for Jurisdictional (I.1), Watershed (I.2) and Regional (I.3) assessment, in addition to a Long Term Effectiveness Assessment (I.5). Of these, claimants pled subparts I.1, I.2 and I.5.

A. Jurisdictional and Watershed Program effectiveness assessment (parts I.1 & I.2): As more specifically stated on pages 22-24 above, the permit requires the copermittees to do the following:

- Annually assess the effectiveness of the Jurisdictional Urban Runoff Management Program (JURMP) that includes specifically assessing the effectiveness of specified components of the JURMP and the effectiveness of the JURMP as a whole.
- Identify measureable targeted outcomes, assessment measures, and assessment methods for each jurisdictional activity/BMP implemented, each major JURMP component, and the JURMP as a whole.

Received
August 26, 2011
Commission on
State Mandates

- Development and implement a plan and schedule to address the identified modifications and improvements.
- Annually report on the effectiveness assessment as implemented under each of the specified requirements.
- As a watershed group of copermittees, annually assess the effectiveness of the Watershed Urban Runoff Management Program (WURMP) implementation, including each water quality activity and watershed education activity, and the program as a whole.
- Determine source load reductions resulting from WURMP implementation and utilize water quality monitoring results and data to determine whether implementation is resulting in changes to water quality.
- As with the JURMP, annually review WURMP jurisdictional activities or BMPs to identify modifications and improvements needed to maximize the program's effectiveness, develop and implement a plan and schedule to address the identified modifications and improvements to the programs, and annually report on the program's effectiveness assessment as implemented under each of the requirements.

Regarding parts I.1.a. and I.2.a. of the permit, the Fact Sheet/Technical Report states: "The section requires both specific activities and broader programs to be assessed since the effectiveness of jurisdictional [or watershed] efforts may be evident only when considered at different scales."[158]

The State Board, in its comments submitted in October 2008, cites section 402(p)(3(B)(ii)-(iii) of the Clean Water Act, as well as 40 C.F.R. sections 122.26(d)(2)(i)(B)-(C), (E) and (F) and subdivision (d)(2)(iv) of the same section to show the "broad federal authorities relied upon by the San Diego Water Board to support Section I … [that] … support inclusion of the JURMP and WURMP effectiveness assessments under federal law." The State Board also quotes section 122.26(d)(2)(v) that the copermittees must include in part 2 of their application for a permit:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

The State Board also says that "under 40 C.F.R. section 122.42(c), applicants must provide annual reports on the progress of their storm water management programs. The federal law behind the JURMP and WURMP effectiveness assessment requirements were discussed at great length in the 2001 Permit Fact Sheet."[159] The State Board quotes a lengthy portion of the 2001

[158] Fact Sheet/Technical Report for Order No. R9-2007-0001, Parts I.1.a. and I.2.a.. Two identical paragraphs describe the JURMP on page 319 and the WURMP on page 320.

[159] 40 C.F.R. section 122.42(c) states:

> *Municipal separate storm sewer systems.* The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under §122.26(a)(1)(v) of this part must

Received
August 26, 2011
Commission on
State Mandates

Fact Sheet, which states that the U.S. EPA requires applicants to submit estimated reductions in pollutant loads expected to result from implemented controls and describe known impacts of storm water controls on groundwater. The 2001 Fact Sheet also includes "Throughout the permit term, the municipality must submit refinements to its assessment or additional direct measurements of program effectiveness in its annual report." It also lists a number of U.S. EPA suggestions, recommendations, and encouraged actions.

The State Board also quotes at length from the 2007 Permit Fact Sheet/Technical Report regarding why the effectiveness assessments are required under the permit, including the need for them and the benefits of including them. According to the State Board, the federal authorities support including the effectiveness assessments, and the Regional Board appropriately exercised discretion under federal law to include them, finding them necessary to implement the MEP standard. Thus, the State Board asserts that sections I.1 and I.2 do not exceed federal law.

The claimants, in their February 2009 comments, state that neither the broad nor the specific legal authority cited in the permit Fact Sheet "contains the above-referenced mandates required under the 2007 Permit." Claimants characterize the federal regulations as only requiring "program descriptions, estimated reductions, known impacts, and an annual report on progress. Federal law does not mandate the specific activities mandated by the 2007 Permit." Claimants also argue that the permit requirements are not necessary to meet the federal MEP standard, and point out that the 2001 Permit Fact Sheet cited by the State Board describes actions recommended or encouraged by the U.S. EPA, but not required. As claimant says: "they simply authorize applicants to go beyond minimum federal requirements." Claimants also quote the State Board's comment on "the need for and benefits of assessment requirements," noting that needs and benefits "constitute an insufficient basis for the imposition of a mandated requirement without subvention."

Although the federal regulations require assessment of controls and annual reports, they do not require the detailed assessment in the 2007 permit. The regulations do not require, for example, assessments of the effectiveness of each significant jurisdictional activity/BMP or watershed

---

> submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include:
>
> (1) The status of implementing the components of the storm water management program that are established as permit conditions;
> (2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with §122.26(d)(2)(iii) of this part; and
> (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under §122.26(d)(2)(iv) and (d)(2)(v) of this part;
> (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year;
> (5) Annual expenditures and budget for year following each annual report;
> (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs;
> (7) Identification of water quality improvements or degradation.

Received
August 26, 2011
Commission on
State Mandates

quality activity, or of the implementation of each major component of the JURMP or WURMP, or identification of modifications and improvements to maximize the JURMP or WURMP effectiveness. These requirements, "exceed the mandate in that federal law or regulation."[160] As in *Long Beach Unified School Dist. v. State of California*,[161] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[162] to impose these requirements. Thus, the Commission finds that parts I.1 and I.2 of the permit are not federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts I.1 and I.2 of the permit are a state mandate on the copermittees to do all of the following:

> 1. Jurisdictional
>
> a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
>
> (1) Specifically assess the effectiveness of each of the following:
>
> (a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
> (b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[163] Detection and Elimination, and Education); and
> (c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
>
> (2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.
>
> (3) Utilize outcome levels 1-6[164] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (5) Utilize Implementation Assessment,[165] Water Quality Assessment,[166] and Integrated Assessment,[167] where applicable and feasible.

---

[160] Government Code section 17556, subdivision (c).

[161] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[162] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[163] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[164] See footnote 50, page 21.

Received
August 26, 2011
Commission on
State Mandates

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[168] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

---

[165] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[166] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[167] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[168] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

Received
August 26, 2011
Commission on
State Mandates

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[169] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

[169] Section A is "Prohibitions and Receiving Water Limitations."

Received
August 26, 2011
Commission on
State Mandates

The State Board, in its October 2008 comments, states that the program effectiveness assessment is not a new program or higher level of service because the 2001 permit included a JURMP (in part F.7) and WURMP (in part J) effectiveness assessment requirements.

The claimants, in their February 2009 comments, state as follows:

> The 2001 Permit only required the copermittees to develop a long term strategy for assessing the effectiveness of their individual JURMP using specific and indirect measurements to track the long term progress of their individual JURMPs towards achieving water quality. [part F.7.a. of the 2001 permit.] The 2001 Permit also only mandated that the long term strategy developed by the copermittees include an assessment of the effectiveness of their JURMP in an annual report using the direct and indirect assessment measurements and methods developed in the long-term strategy. [part F.7. of the 2001 permit.]

Part F.7 of the 2001 permit required developing the following on the topic of "Assessment of Jurisdictional URMP Effectiveness Component."

> a. As part of its individual Jurisdictional URMP, each Copermittee shall develop a long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that each Copermittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.
>
> b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy.

The 2007 permit requires more detail in its assessments than the 2001 permit. The 2007 permit requires annual assessments and using outcome levels, among other things, to assess the effectiveness of (a) each significant jurisdictional activity/BMP, (b) implementation of each major component of the JURMP, and (c) implementation of the JURMP as a whole. The 2001 permit did not require assessments at these three levels. And for example, outcome level 4 in the 2007 permit is required for measuring load reductions.[170] This is a higher level of service than "pollutant loading estimations" to be used as an effectiveness strategy in the 2001 permit.[171] Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

---

[170] There are six Effectiveness Assessments incorporated into part I.1.a.(3) of the permit and are defined in Attachment C. One of them is "Effectiveness Assessment Level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed."

[171] See Fact Sheet/Technical Report for Order No. R9-2007-0001.

Received
August 26, 2011
Commission on
State Mandates

The assessment provisions of the Watershed Urban Runoff Management Program are in part J.2 of the 2001 permit, which requires each copermittee to develop and implement a Watershed URMP that contains, among other things:

> b. An assessment of the water quality of all receiving waters in the watershed based upon (1) existing water quality data; and (2) annual watershed water quality monitoring that satisfies the watershed monitoring requirements of Attachment B.
>
> [¶]…[¶]
>
> i. Long-term strategy for assessing the effectiveness of the Watershed URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that will track the long-term progress of the Watershed URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.

As with the JURMP, the 2001 permit required a "long-term strategy for assessing the effectiveness of the Watershed URMP" whereas the 2007 permit requires the annual assessment of more specific criteria: (a) each Watershed Water Quality Activity implemented; (b) Each Watershed Education Activity implemented; and (c) Implementation of the Watershed Urban Runoff Management program as a whole. And the 2007 permit requires assessing these activities using the same six effectiveness outcome levels as for the JURMP (defined in Attachment C), that were not in the 2001 permit.[172]

---

[172] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

Received
August 26, 2011
Commission on
State Mandates

Therefore, the Commission finds that section I.2. of the permit (the Watershed URMP effectiveness assessment) is a new program or higher level of service.

B. Long Term Effectiveness Assessment (part I.5): As stated on pages 19-20 above, part I.5 requires the copermittees to collaborate to develop a Long Term Effectiveness Assessment (LTEA) that evaluates the copermittee programs on a jurisdictional, watershed, and regional level, and that emphasizes watershed assessment. The LTEA must build on the results of the August 2005 Baseline LTEA, and must be submitted to the Regional Board no later than 210 days before the permit expires. The LTEA must address the Regional objectives listed in part I.3 of the permit, as well as assess the effectiveness of the Receiving Waters Monitoring Program, and address outcome levels 1-6 as specified in attachment C of the permit.

In its October 2008 comments on the test claim, the State Board says that the LTEA requirement was imposed "so that the San Diego Water Board could properly evaluate the Copermittees' storm water program during the reapplication process." The State Board asserts that the LTEA provision is a federal mandate, citing 40 C.F.R. section 122.26, subdivisions (d)(2)(iv) and (v), in which (v) states that a permit application must include:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

According to the State Board, "Even if the requirements to develop an LTEA are not specifically required by the federal regulations, the general discussion of the federal MEP standard is applicable here and supports the San Diego Water Board's determination that the region-wide LTEAs are necessary to meet the federal MEP standard."

In their February 2009 rebuttal comments, the claimants state:

> The program effectiveness component of the 2007 Permit mandates Jurisdictional (I.1), Watershed (I.2), Regional (I.3), Total Maximum Daily Loads ("TMDL") and BMP Implementation (I.4) and Long-term Effectiveness Assessment (I.5) requirements. This Section mandates multiple layers of program assessment, review and reporting. Such duplicative and collaborative efforts were not required under the 2001 Permit and are not required by federal law.

Claimants assert that there is no federal authority that states that the regional, jurisdictional and watershed program effectiveness training requirements are required to meet the minimum federal MEP standards. Claimants also state that permits in other jurisdictions do not have LTEA requirements. According to the claimants, "while portions of the federal regulations cited by the State permit region-wide or watershed-wide cooperation, there is no mandatory requirement for multiple layers of program effectiveness assessment."

Although the federal regulations require assessment of controls, they do not require the detailed assessment in the 2007 permit. They do not require, for example, collaboration with other copermittees, addressing specified objectives or outcome levels, or addressing jurisdictional, watershed, and regional programs. These requirements "exceed the mandate in that federal law

Received
August 26, 2011
Commission on
State Mandates

or regulation."[173] As in *Long Beach Unified School Dist. v. State of California*,[174] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[175] to impose these requirements. Thus, the Commission finds that part I.5 of the permit is not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission finds that part I.5 of the permit is a state mandate for the claimants to do all of the following:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[176] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of

---

[173] Government Code section 17556, subdivision (c).

[174] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[175] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[176] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

Received
August 26, 2011
Commission on
State Mandates

> constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.
>
> e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The next issue is whether the LTEA (part I.5) is a new program or higher level of service. The State Board, in its October 2008 comments, state as follows:

> The LTEA does not impose a new program or higher level of service. Rather, it requires the Copermittees to conduct a long term effectiveness assessment prior to submitting an application for reissuance of the Order in the next permit term and is necessary to support proposed changes to the Copermittees' programs."

The claimants, in their February 2009 comments, argue that the LTEA requirement in part I.5 does impose a new program or higher level of service. According to the claimants:

> Section F.7 of the 2001 Permit only required individual copermittees to develop long term effectiveness assessments for their Jurisdictional Urban Runoff Management Plan ("JURMP"). … The 2001 Permit did not require the copermittees to collaborate to develop an overarching LTEA for regional, jurisdictional and watershed programs, and did not require the submission of a LTEA by a date certain in advance of the Permit expiration.

The Commission finds that the LTEA is a new program or higher level of service. The 2001 permit required JURMP assessment (in part F.7) and WURMP (in part J.2) as quoted above in the discussion on parts I.1 and I.2., but not an LTEA. The Fact Sheet/Technical Report for the 2007 permit states:

> Section I.5 (Long-Term Effectiveness Assessment) requires the Copermittees to conduct a Long-Term Effectiveness Assessment prior to their submittal of an application for reissuance of the Order. The Long-Term Effectiveness Assessment is necessary to provide support for the Copermittees' proposed changes to their programs in their ROWD. It can also serve as the basis for changes to the Order's requirements.

The Commission finds that the LTEA (part I.5) is a new program or higher level of service for three reasons. First, the scope of the assessment in the 2001 permit addresses only the JURMP and WURMP rather than "jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment" as in the 2007 permit (see the analysis of I.1 and I.2 above). Second, the 2001 permit did not require collaborating with all other copermittees on assessment. Third, the 2001 permit contains much less detail on what to include in the assessment, such as, for example, the eight regional objectives listed in I.3.a.(6), incorporated by reference in part I.5. Also, the LTEA must assess the "effectiveness of the Receiving Waters Monitoring Program … [and] shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods." These methods were not required under the 2001 permit.

<u>V. All Copermittee Collaboration (Part L)</u>

Part L, labeled "All Permittee Collaboration," requires the copermittees to collaborate to address common issues and plan and coordinate activities, including developing a Memorandum of

Received
August 26, 2011
Commission on
State Mandates

Understanding (MOU), as specified. The Copermittees entered into an MOU effective in January 2008, which is attached to the test claim. The Copermittees allege activities involved with working body support and working body participation.

In comments submitted in October 2008, the State Board asserts that the permit condition in part L is necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]…[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[177]

The Commission finds that there is no federal mandate to develop a management structure (memorandum of understanding, or MOU) as required in part L of the 2007 permit. The federal regulation most on point requires an applicant (claimant) to demonstrate adequate legal authority "which authorizes or enables the applicant at a minimum to: [¶]…[¶] (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;"[178] All the federal regulations address is authority to establish an interagency agreement or memorandum of understanding, but do not require it to be implemented or specify its contents beyond "controlling … the contribution of pollutants from one portion of the municipal system to another portion of the municipal system."

By contrast, part L of the permit requires the copermittees to collaborate, promote consistency among JURMP and WURMP and plan and coordinate activities required under the permit. It also requires joint execution and submission to the Regional Board an MOU with a minimum of seven specified requirements.

Thus, this permit activity "exceed[s] the mandate in that federal law or regulation."[179] As in *Long Beach Unified School Dist. v. State of California*,[180] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[181] to impose these requirements. Thus, the Commission finds that part L of the permit does not impose a federal mandate.

Based on the mandatory language in the permit, the Commission finds that part L of the permit is a state mandate on the claimants to do the following:

---

[177] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[178] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[179] Government Code section 17556, subdivision (c).

[180] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[181] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Received
August 26, 2011
Commission on
State Mandates

1. Collaborate with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

(a) Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum:

(1) Identifies and defines the responsibilities of the Principal Permittee[182] and Lead Watershed Permittees;[183]

(2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;

(3) Establishes a management structure to promote consistency and develop and implement regional activities;

(4) Establishes standards for conducting meetings, decisions-making, and cost-sharing;

(5) Provides guidelines for committee and workgroup structure and responsibilities;

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;

(7) Includes any and all other collaborative arrangements for compliance with this order.

The State Board, in its October 2008 comments, asserts that the management structure framework in part L of the 2007 permit is not a new program or higher level of service because:

> The 2001 permit required significant collaboration to address common issues and promote consistency across management programs [and] development of a management structure through execution of a formal agreement, meeting minimum specifications. It also required standardized reporting, including fiscal analysis.

The State Board also argues there is "minimal substantive difference" between the 2001 and 2007 permits in their requirements to establish "a formal cooperative arrangement and to implement regional urban runoff management activities. The 2007 Permit merely elaborates on and refines the 2001 requirements."

In its February 2009 rebuttal comments, the claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

---

[182] The Principal Permittee is the County of San Diego.

[183] According to the permit: "Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area]."

Received
August 26, 2011
Commission on
State Mandates

Part L.1 of the 2007 permit, the first paragraph in L requiring collaboration, is identical to part N of the 2001 permit. The Commission finds, however, that the collaboration is a new program or higher level of service because it now applies to all the activities that are found to be a new program or higher level of service in the analysis above (i.e, not in the 2001 permit) including the Regional Urban Runoff Management Program.

Part L.1.a, regarding the MOU or formal agreement, is similar but not identical to part N of the 2001 permit. Both permits require adoption of a "Memorandum of Understanding [MOU], Joint Powers Authority, or other instrument of formal agreement." The 2001 permit, in part N.1.a, required the MOU to provide a management structure with the following contents: "designation of joint responsibilities, decision making, watershed activities, information management of data and reports, including the requirements under this Order; and any and all other collaborative arrangements for compliance with this Order."

By contrast, the 2007 permit, requires the MOU to be submitted to the Regional Board within 180 days after adoption of the permit and requires that the MOU, at a minimum:

(1) Identifies and defines the responsibilities of the principal Permittee and Lead Watershed Permittees;

(2) Identifies Copermittees and defines their individual and joint responsibilities;

(3) Establishes a management structure to promote consistency and develop and implement regional activities;

(4) Establishes standards for conducting meetings, decision-making, and cost-sharing;

(5) Provides guidelines for committee and workgroup structure and responsibilities;

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement; and

(7) Includes any and all other collaborative arrangements for compliance with this order.

The contents of the MOU specified in the 2001 permit, although stated with less specificity, are the same as those in the 2007 permit for numbers (1)-(2) and (7) above. Both permits require the MOU to contain "designation of joint responsibilities" and "collaborative arrangements for compliance with this order." Thus, the Commission finds that jointly executing and submitting those parts of the MOU to the Regional Board is not a new program or higher level of service.

The Commission finds that part L.1.a of the permit is a new program or higher level of service for all copermittees to do the following:

- Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum: (3) Establishes a management structure to promote consistency and develop and implement regional activities; (4) Establishes standards for conducting meetings, decision-making, and cost-sharing; (5) Provides guidelines for

Received
August 26, 2011
Commission on
State Mandates

committee and workgroup structure and responsibilities; and (6) Lays out a process for addressing copermittee non-compliance with the formal agreement.

Summary of Issue 1: The Commission finds that the following parts of the 2007 permit are a state-mandated, new program or higher level of service.

I. Jurisdictional Urban Runoff Management Program and Reporting (Parts D & J)

- Collaborate with other copermittees to develop and implement a hydromodification management plan, as specified (D.1.g.), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Develop and submit an updated Model SUSMP that defines minimum Low-impact Development and other BMPs as specified (D.1.d.(7)-(8)), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Street sweeping (D.3.a.(5)) and reporting on street sweeping (J.3.a(3)x-xv);
- Conveyance system cleaning (D.3.a.(3)(b)(iii)) and reporting on conveyance system cleaning (J.3.a.(3)(c)(iv)-(viii));
- Educational component (D.5).
    - Educate each specified target community on the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control (D.5.a.(1));
    - Educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources (D.5.a.(2));
    - Implement an education program that includes annual training only for planning boards and elected officials, if applicable, to have an understanding of the topics in (i) and (ii) (D.5.b.(1)(a)(i) & (ii));
    - Implement an education program so that its planning and development review staffs (and Planning Boards and Election Officials, if applicable) have an understanding of the topics in (iii) and (iv) as specified (D.5.b.(1)(a)(iii) & (iv));
    - Implement an education program that includes annual training prior to the rainy season so that [the Copermittee's] construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: the topics in (iii) to (vi), as specified (D.5.b.(1)(b)(iii) & (iv));
        - Municipal Industrial/Commercial Activities (D.5.b.(1)(c));
        - Municipal Other Activities (D.5.b.(1)(d));
        - New Development and Construction Education (D.5.(b)(2));
        - Residential, General Public, and School Children Education (D.5.(b)(3)).

Received
August 26, 2011
Commission on
State Mandates

II. Watershed Urban Runoff Management Program (Parts E.2.f & E.2.g.)

- Identify and implement the Watershed activities as specified (E.2.f.).
- Collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings. (E.2.g.)

III. Regional Urban Runoff Management Program (Parts F.1, F.2 & F.3)

- Include developing and implementing a Regional Residential Education Program development and implementation in the RURMP, as specified (F.1.).
- Include developing the standardized fiscal analysis method required in permit part G in the RURMP (F.2.).
- Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs in the RURMP (F.3.).

IV. Program Effectiveness Assessment (Parts I.1, I.2 & I.5)

- Annually assess the effectiveness of each copermittee's JURMP, as specified (I.1.).
- Annually assess the effectiveness of each watershed group's WURMP (I.2.).
- Collaborate with the other copermittees to develop a Long-term Effectiveness Assessment, as specified, and submit it to the Regional Board as specified (I.5.).

V. All Permittee Collaboration (Part L)

- Collaborate with all other copermittees to address common issues, promote consistency among the JURMP and WURMP, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement as specified (L.1.a. (3)-(5)).

Any further reference to the test claim activities is limited to these parts of the permit found to be a new program or higher level of service.

Issue 2: Do the test claim activities impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the permit provisions impose costs mandated by the state,[184] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district 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.

[184] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

Received
August 26, 2011
Commission on
State Mandates

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement. In the test claim, the County of San Diego itemized the costs of complying with the permit conditions as follows:

Activity	Cost FY 2007-08
Regional Urban Runoff Management Program -Copermittee collaboration (F.2, F.3, L)	$260,031.09
Copermittee collaboration, Regional Residential Education, Program Development and Implementation (F.1)	$131,250.00
Jurisdictional Urban Runoff Management Program (JURMP) -hydromodification (D.1.g)	$630,000.00
JURMP Standard Urban Storm Water Mitigation Plans -low impact development (D.1.d)	$52,200.00
Long Term Effectiveness Assessment (I.5)	$210,000.00
Street Sweeping (D.3.a.(5) Equipment, Staffing, Contract	$3,477,190.00
Conveyance System Cleaning (D.3.a.(3)) and Reporting (J.2.a.(3)(c) iv – vii.	$3,456,087.00
Program Effectiveness Assessment (I.1 & I.2)	$392,363.00
Educational Surveys and Tests (D.5)	$62,617.00
Watershed Urban Runoff Management Program -Copermittee collaboration (E.2.f., E.2.g)	$1,632,893.00
Total	$10,304,631.09

Claimants submitted documentation in February 2010 that show the 2008-2009 cost for the permit activities is $18,014,213. These figures, along with those in the test-claim narrative and declarations submitted by the San Diego County and 18 cities,[185] illustrate that the costs to comply with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Claimants did not request the test claim activities within the meaning of Government Code section 17556, subdivision (a).

The first issue is whether the claimants requested or proposed the activities in the permit. The Department of Finance and the State Board both assert that claimants did so in their Report of

[185] The County and city declarations are attached to the test claim.

Received
August 26, 2011
Commission on
State Mandates

Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.[186]

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

> (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. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency … that requests authorization for that local agency … to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Claimants have fee authority under Government Code section 17556, subdivision (d), for the test claim activities that do not require voter approval under Proposition 218

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency … if, after a hearing, the commission finds any one of the following: [¶]…[¶] (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.

The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[187] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly

---

[186] Water Code section 13376; 40 Code of Federal Regulations, section 122.21 (a). The Federal regulation applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state-program provision) by reference. Also see the 2007 permit, page 2, part A.

[187] *County of Fresno v. State of California, supra,* 53 Cal.3d 482.

Received
August 26, 2011
Commission on
State Mandates

> declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[188]

In another case about subdivision (d) of section 17556, *Connell v. Superior Court,*[189] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[190]

---

[188] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487. Emphasis in original.

[189] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

[190] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 398-402.

Received
August 26, 2011
Commission on
State Mandates

1. Claimants' have regulatory fee authority (within the meaning of Gov. Code, § 17556, subd. (d)) under the police power sufficient to pay for the mandated activities that do not require voter approval under Proposition 218: the hydromodification plan and low-impact development.

In its October 2008 comments, the State Board asserted that the claimants have fee authority to pay for the permit activities. Although the Board recognizes "limitations on assessing fees and surcharges under California law … [concerning] the percentage of voters who must approve the assessment" the Board points to examples of local agencies (Cities of Los Angeles, San Clemente, and Palo Alto) that have successfully adopted an assessment. The State Board also argues that the cities' trash collection responsibilities may also include street sweeping and conveyance system cleaning for which the city could charge fees, and that developer fees could be charged for hydromodification and low impact development.

Claimants, in comments submitted in February 2009, state that they cannot unilaterally impose a fee to recover the cost to comply with the 2007 permit on water or sewer bills sent to residents because of *Howard Jarvis Taxpayer Assoc. v. City of Salinas,*[191] in which the court invalidated a stormwater management utility fee imposed by the city on all owners of developed parcels in the city. The court held that article XIII D (Proposition 218) of the California Constitution "required the city to subject the proposed storm drainage fee to a vote of the property owners or the voting residents of the affected area."[192] As to the argument that claimants can put the fee to a vote in their jurisdictions, claimants state as follows:

> Articles XIII C and XIII D, which were added to the Constitution by Proposition 218, regulate the imposition of general and special taxes as well as the imposition of special assessments and property related fees. In each of these cases the question of whether to impose a tax, special assessment or a property related fee must be submitted to and approved by the voters. And, in the case of a special tax, and in certain instances the imposition of a fee or charge, the tax or fee must be approved by a two-thirds vote of the resident voters. The State fails to cite any authority that requires the copermittees to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. Such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The issue of local fee authority for municipal stormwater permit activities in this permit cannot be answered without discussing regulatory fee authority under the police power and the limitations on that authority via the voter-approval requirement in article XIII D of the California Constitution (Proposition 218).

Case law has recognized three general categories of local agency fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.[193] The regulatory and development fees are discussed below in the context of

---

[191] *Howard Jarvis Taxpayers Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[192] *Id.* at page 1358-1359.

[193] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874.

Received
August 26, 2011
Commission on
State Mandates

XIII D (Proposition 218) that would allow the claimants to impose fees for the activities in the test claim related to development.

Regulatory fee authority under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Article XI, section 7, includes the authority to impose fees, and courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[194]

Water pollution prevention is also a valid exercise of government police power.[195]

In *Sinclair Paint v. State Board of Equalization*,[196] the California Supreme Court upheld a fee on manufacturers of paint that funded a child lead-poisoning program that provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The program was entirely supported by fees assessed on manufacturers or other persons contributing to environmental lead contamination. In upholding the fee, the court ruled that it was a regulatory fee imposed under the police power and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution. The court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[197] [Emphasis added.]

Regulatory fees also help to prevent or mitigate pollution, as the Court said: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[198] The court also recognized that regulatory fees do not depend on government-conferred benefits or privileges.[199]

---

[194] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662, in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors.

[195] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[196] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

[197] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 877.

[198] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 875-877.

[199] *Id.* at page 875.

Received
August 26, 2011
Commission on
State Mandates

Although the holding in *Sinclair Paint* applied to a state-wide fee, the court's language (treating "ordinances" the same as "statutes") recognizes that local agencies also have police power to impose regulatory fees, and it relied on local government police power cases in its analysis.[200]

Other cases have defined a regulatory fee as an imposition that funds a regulatory program[201] or that distributes the collective cost of a regulation"[202] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. ...the regulatory program is for the protection of the health and safety of the public."[203] Courts will uphold regulatory fees if they do not exceed the reasonable cost of providing services necessary to the activity on which the fee is based and are not levied for an unrelated revenue purpose.

In upholding regulatory fees for environmental review by the California Department of Fish and Game, the court of appeal summarized the following rules on regulatory fees:

> A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation. [Citations omitted.] Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, <u>administration</u>, maintenance of a system of supervision and enforcement. [Citations omitted.] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted.] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee.[204] [Emphasis added.]

In *Tahoe Keys Property Owner's Assoc. v. State Water Resources Control Board*,[205] the court refused to issue a preliminary injunction against collecting a pollution mitigation fee of $4000 for each lot developed in the Tahoe Keys subdivision of Lake Tahoe. The fees were to be used for mitigation projects designed to achieve a net reduction in nutrients generated by the Tahoe Keys development. The court said: "on the face of the regulation, there appears to be a sufficient

---

[200] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

[201] *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

[202] *Id.* at 952.

[203] *Ibid.*

[204] *California Assn. of Prof. Scientists v. Dept. of Fish and Game, supra,* 79 Cal.App.4th 935, 945.

[205] *Tahoe Keys Property Owner's Assn. v. State Water Resources Control Board* (1993) 23 Cal.App.4th 1459.

Received
August 26, 2011
Commission on
State Mandates

nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme [mitigation of pollution in Lake Tahoe]."[206]

A variety of local agency regulatory fees have been upheld for various programs, including: processing subdivision, zoning, and other land-use applications,[207] art in public places,[208] remedying substandard housing,[209] recycling,[210] administrative hearings under a rent-control ordinance,[211] signage,[212] air pollution mitigation,[213] and replacing converted residential hotel units.[214] Fees on developers for environmental mitigation under the California Environmental Quality Act have also been upheld.[215]

Given the variety of examples where regulatory fees have been upheld, and the broad range of costs to which they may be applied (including those for 'administration'), the claimants have fee authority under the police power to impose fees for the permit activities that are a state-mandated new program or higher level of service. But a determination as to whether the claimants' fee authority is sufficient, within the meaning of Government Code section 17556, subdivision (d), to pay for the mandated activities and deny the test claim, cannot be made without analysis of the limitations on the fee authority imposed by Proposition 218.

<u>Regulatory fee authority is limited by voter approval under Proposition 218</u>: With some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996. Article XIII D defines a fee as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service." It defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property [and] includes, but is not limited to, "special assessment,' 'benefit assessment,' 'maintenance assessment,' and 'special assessment tax.'"

Among other procedures, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (art. XIII D, § 6, subd. (c)). Assessments must also be approved by owners of the affected parcels (art. XIII D, § 4, subd.(d)). Expressly exempt from voter

---

[206] *Id.* at page 1480.

[207] *Mills v. County of Trinity, supra,* 108 Cal.App.3d 656, 662.

[208] *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886.

[209] *Apartment Assoc. of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830.

[210] *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264.

[211] *Pennell v. City of San Jose* (1986) 42 Cal.3d 365.

[212] *United Business Communications v. City of San Diego* (1979) 91 Cal.App.3d 156.

[213] *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120.

[214] *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892.

[215] *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018.

Received
August 26, 2011
Commission on
State Mandates

approval, however, are property-related fees for sewer, water, or refuse collection services (art. XIII D, § 6, subd. (c)).

In 2002, an appellate court in *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to charge stormwater fees if they are imposed "as an incident of property ownership."

The issue of whether a local agency has sufficient fee authority for the mandated activities under Government Code section 17556, subdivision (d), in light of the voter approval requirement for fees under article XIII D (Proposition 218) is one of first impression for the Commission.

The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "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." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.

Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "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."[216]

In its January 2010 comments on the draft staff analysis, the State Board disagrees that "the requirement to subject new or increased fees to these voting or protest requirements strips the claimants of 'fee authority' within the meaning of Government Code section 17556, subdivision (d)." The State Board cites *Connell v. Superior Court,*[217] in which the water districts argued that they lacked "sufficient" fee authority because it was not economically feasible for them to levy fees that were sufficient to pay the mandated costs. The *Connell* court determined that "the plain language of the statute [Gov. Code, § 17556, subd. (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program."[218] The State Board equates the Proposition 218 voting requirement with the economic impracticability faced by the water districts in *Connell.*

The claimants disagree, citing a lack of authority that requires them to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. According

---

[216] *County of San Diego, supra,* 15 Cal.4th 68, 81.

[217] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382.

[218] *Id.* at page 401.

Received
August 26, 2011
Commission on
State Mandates

to the claimants, such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The Commission disagrees with the State Board. The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell.* Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program."[219]

In fact, the fee at issue in the *Connell* case (Wat. Code, § 35470) was amended by the Legislature in 2007 to conform to Proposition 218. Specifically, the Water Code statute now requires compliance with "the "notice, protest, and hearing procedures in Section 53753 of the Government Code."[220] This Government Code statute implements Proposition 218.

For these reasons, the Commission finds that local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d) to deny the test claim for those activities that would condition the fee or assessment on voter or property-owner approval under Proposition 218 (article XIII D). The Commission finds that Proposition 218 applies to all the activities in this test claim (except for the hydromodification and LID activities that are related to priority development projects discussed below) so that they impose "costs mandated by the state" (within the meaning of Gov. Code, § 17556, subd. (d)). To the extent that property-owner or voter-approved fees or assessments are imposed to pay for any of the permit activities found above to be a state-mandated new program or higher level of service, the fee or assessment would be identified as offsetting revenue in the parameters and guidelines to offset the claimant's costs in performing those activities.

Fees imposed for two of the test-claim activities, however, i.e., for the hydromodification management plan and low-impact development, would not be subject to voter approval under Proposition 218, as discussed below.

<u>Fees as a condition of property development are not subject to Proposition 218:</u> Proposition 218 does not apply to development fees, including those imposed on activities in part D of the permit. Article XIII D expressly states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[221]

Moreover, the California Supreme Court has ruled that fees imposed "as an incident to property ownership" are subject to Proposition 218, but fees that result from the owner's voluntary

---

[219] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 401.

[220] Water Code section 35470, as amended by Statutes 2007, chapter 27. Section 53753 of the Government Code requires compliance with "the procedures and approval process set forth in Section 4 of Article XIII D of the California Constitution" for assessments.

[221] California Constitution, article XIII D, section 1, subdivision (b).

Received
August 26, 2011
Commission on
State Mandates

decision to seek a government benefit are not.[222] Thus, fees imposed as a result of the owner's voluntary decision to undertake a development project are not subject to Proposition 218, because they are not merely incident to property ownership.[223]

The final issue, therefore, is whether claimants may impose fees that are sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the activities in the permit related to development: the hydromodification management plan (part D.1.g), and low-impact development (part D.1.d.(7)&(8)). The Commission finds claimants have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d), and that these activities do not impose costs mandated by the state and are not reimbursable.

Hydromodification management plan: Part D.1 of the permit describes the development planning component of the JURMP. Part D.1.g. requires each copermittee to collaborate with other copermittees to develop and implement and report on developing a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, as specified. As discussed above, the HMP is a state-mandated new program or higher level of service for only private priority development projects. The purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

According to the permit, priority development projects are:

> a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

---

[222] In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, the court held that water service fees were subject to Proposition 218, but that water connection fees were not. In *Apartment Assoc. of Los Angeles County v.City of Los Angeles, supra,* 24 Cal.4th 830, 839-840, the court held that apartment inspection fees were not subject to Proposition 218 because they were not imposed on property owners as such, but in their capacity as landlords.

[223] A recent report by the Office of the Legislative Analyst concurs with this conclusion: "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners. Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56. [Emphasis added.] See: <http://www.lao.ca.gov/2008/rsrc/water_primer/ water_primer_102208.pdf> as of October 22, 2008.

Received
August 26, 2011
Commission on
State Mandates

The priority development project categories listed in part D.1.d.(2) are:

(a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments.

(b) Commercial developments greater than one acre. [as specified]

(c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.).

(d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except … hydromodification requirement D.1.g.

(f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

(h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

(j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

Received
August 26, 2011
Commission on
State Mandates

The Commission finds that claimants have authority to impose fees for complying with the HMP activities in permit part D.1.g. for priority development projects, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that the fee would not be subject to Proposition 218 voter approval. These activities involve collaborating with other copermittees to develop and implement a hydromodification management plan, and reporting on it. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on these priority development projects to pay for the costs of HMP, the Commission finds that permit part D.1.g. does not impose costs mandated by the state.

Low impact development: Low impact development is defined in Attachment C of the permit as a "storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions." The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces.

Part D.1.d.(7) requires updating the Standard Urban Storm Water Mitigation Plans (SUSMP) to include low impact development requirements, as specified, including BMP requirements that meet or exceed the requirements of sections D.1.d.(4)[224] and D.1.d.(5).[225] Both D.1.d.(4) and D.1.d.(5) are the LID requirement implemented at priority development projects.

Part D.1.d.(8) requires permittees to develop and submit an updated model SUSMP that defines minimum low impact development and other BMP requirements to incorporate into the permittees local SUSMPs for application to priority development projects.

The Commission finds that claimants have authority to impose fees for complying with the LID activities in parts D.1.d.(7) and D.1.d.(8) of the permit, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that they are not subject to Proposition 218 voter approval. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on the priority development projects to pay for the costs associated with LID, the Commission finds that permit parts D.1.d.(7) and D.1.d.(8) do not impose costs mandated by the state.

---

[224] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[225] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

Received
August 26, 2011
Commission on
State Mandates

2. Claimants also have fee authority regulated by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d)) to pay for the hydromodification and low-impact development permit activities.

Development fees are also an exercise of the local police power under article XI, section 7 of the California Constitution.[226] A fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relation to the development's probable costs to the community and benefits to the developer.[227] Development fees are not restricted by Proposition 218 as discussed above.

Fees on developers as conditions of permit approval are governed by the Mitigation Fee Act (Gov. Code, §§ 66000-66025) which defines a "fee" as:

> [A] monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include ... fees for processing applications for governmental regulatory actions or approvals ...."[228] [Emphasis added.]

Public facilities are defined in the Act as "public improvements, public services, and community amenities."[229]

When a local agency imposes or increases a fee as a condition of development approval, it must do all of the following: (1) Identify the purpose of the fee; (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and, (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project upon which the fee is imposed. (Gov. Code, § 66001, subd. (a),)

The city or county must also determine whether there is a reasonable relationship between the specific amount of the fee and the costs of building, expanding, or upgrading public facilities. These determinations, known as nexus studies, are in writing and must be updated whenever new fees are imposed or existing fees are increased.[230] A fee imposed "as a condition of approval of

---

[226] *California Building Industry Assoc. v. Governing Board* (1988) 206 Cal.App.3d 212, 234.

[227] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

[228] Government Code section 66000, subdivision (b).

[229] Government Code section 66000, subdivision (d).

[230] Government Code section 66001, subdivision (b). The Act also requires cities to segregate fee revenues from other municipal funds and to refund them if they are not spent within five years. Any person may request an audit to determine whether any fee or charge levied by the city or county exceeds the amount reasonably necessary to cover the cost of the service provided (Gov. Code, §66006, subd. (d)). Under Government Code section 66014, fees charged for zoning changes, use permits, building permits, and similar processing fees are subject to the same nexus requirements as development fees. Lastly, under California Government Code

Received
August 26, 2011
Commission on
State Mandates

a proposed development or development project" is limited to the estimated reasonable cost of providing the service or facility.[231] This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.[232]

The Mitigation Fee Act defines a "development project" as "any project undertaken for the purpose of development ... includ[ing] a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate." (Gov. Code, § 66000, subd. (a).)

A fee does not become a development fee simply because it is made in connection with a development project. Approval of the development must be conditioned on the payment of the fee. The Mitigation Fee Act is limited to situations where the fee or exaction is imposed as a condition of approval of a development project.[233]

Because local agencies may make development of priority development projects conditional on the payment of a fee, the Commission finds that the claimants have fee authority, governed by the Mitigation Fee Act, that is sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the hydromodification management plan and low-impact development activities. As discussed below, HMP and LID are "public facilities," which the Mitigation Fee Act defines as "public improvements, public services, and community amenities."[234]

The County of San Diego, in its January 2010 comments on the draft staff analysis, disagrees that it can impose a fee for the hydromodification plan (HMP) activities in the permit, stating that development and implementation of the HMP does not constitute a "public facility."

The Commission disagrees. The purpose of the permit is to prevent or abate pollution in waterways and beaches in San Diego County. More specifically, the purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

All these stated purposes of the HMP provide public services or improvements, or community amenities within the meaning of the Act.[235] Moreover, the California Supreme Court stated that the Act "concerns itself with development fees; that is, fees imposed on development projects in

---

section 66020, agencies collecting fees must provide project applicants with a statement of the amounts and purposes of all fees at the time of fee imposition or project approval.

[231] Government Code section 66005, subdivision (a).

[232] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

[233] *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th, 130, 131.

[234] Government Code section 66000, subdivision (d).

[235] Government Code section 66000, subdivision (d).

Received
August 26, 2011
Commission on
State Mandates

order to finance public improvements <u>or programs</u> that bear a 'reasonable relationship' to the development at issue."[236] The HMP is such a program.

Similarly, the purposes of LID are to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff from priority development projects. These activities are public services or improvements that fall within the Act's definition of public facility.

The County also argues that under the Mitigation Fee Act, the local agency must determine that there is "a reasonable relationship between the fee's use and the type of development project on which the fee is imposed." The County argues that there is no reasonable relationship between the costs incurred by claimants to develop and implement the HMP and a particular development project on which the fee might be imposed.

Again, the Commission disagrees. Every time a developer proposes a project that falls within one of the "priority development project" categories listed above, and the developer has "not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences," the local agency may impose a fee subject to the Mitigation Fee Act. The fee would be for the costs of developing and implementing the HMP to "manage increases in runoff discharge rates and durations from all Priority Development Projects [that] cause ... impacts to beneficial uses and stream habitat due to increased erosive force." The local agency may also impose a fee on priority development projects to comply with LID, the purpose of which is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff.

Finally, the County argues that assessing fees on a private developer who submits a project for approval to recover the costs of reviewing and approving a particular project is "specifically excluded from the definition of 'fee' under the Act." The definition of fee in the Act states that it "does not include ... fees for processing applications for governmental regulatory actions or approvals ...." (Gov. Code, § 66000, subd. (b).)

The Commission disagrees that an HMP fee would be for "processing applications for governmental regulatory actions or approvals." Rather, it would be for permit approval of priority development projects, and used to implement the HMP and LID requirements. In *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 698, the California Supreme Court distinguished between regulatory fees that implement state and local building safety standards under the Health and Safety Code and developer fees subject to the Mitigation Fee Act by stating: "These regulatory fees fund a program that supervises how, not whether, a developer may build." Thus, the Commission finds that the developer fees may be imposed for permit approval for priority development projects if the permit is conditional on payment of the fee, and the fee is used for HMP and LID compliance.

In sum, the Commission finds that the claimants have fee authority governed by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d), to pay for the following parts of the permit that are related to development: the hydromodification management plan (part D.1.g) and updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (part D.1.d.(7)&(8)).

---

[236] *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1191.

Received
August 26, 2011
Commission on
State Mandates

3. Claimants' fee authority under Public Resources Code section 40059, or via benefit assessments, is not sufficient to pay for street sweeping, and Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping.

Street sweeping is one test claim activity that is typically funded by local agency fees or assessments. Fees and assessments are both governed by Proposition 218.

The permit (in part D.3.a.5) requires a program to sweep "improved (possessing a curb and gutter) municipal roads, streets, highways, and paring facilities" at intervals depending on whether they are identified as consistently generating the highest volumes, moderate volumes, or low volumes of trash and/or debris. Reporting on street sweeping, such as curb-miles swept and tons of material collected, is also required (part J.3.a.(3)(c)x-xv).

Some local agencies collect fees for street sweeping for their refuse fund, such as the City of Pasadena.[237] Other local agencies, e.g., the County of Fresno[238] and the City of La Quinta,[239] collect an assessment for street sweeping as a street maintenance activity. Both approaches are discussed below in light of the procedural requirements under Proposition 218.

Fees for street sweeping as refuse collection/solid waste handling: Article XI, section 7 of the California Constitution states: "A county or city may make and enforce within its limits all local, police, sanitary or other ordinances and regulations not in conflict with general laws." Local agency fees for refuse collection are authorized by Public Resources Code section 40059, which states:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:
>
> (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services. [Emphasis added.]

"Solid waste" is defined in Public Resources Code section 40191 as:

> [A]ll putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge

---

[237] City of Pasadena, Agenda Report, Resolution Nos. 8942 and 8943, April 27, 2009, "Public Hearing: Amendment to the General Fee Schedule to Increase the Residential Refuse Collection Fees and Solid Waste Franchise Fees." One of the findings in the resolution is: "Whereas, street sweeping is a refuse collection service involving solely the collection, removal and disposal of solid waste from public rights of way, and is, therefore, properly allocated to the Refuse Fund."

[238] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[239] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

Received
August 26, 2011
Commission on
State Mandates

> which is not hazardous waste, manure, vegetable or animal solid and semisolid wastes and other discarded solid and semisolid wastes.[240]

"Solid waste handling" is defined in Public Resources Code section 40195 as "the collection, transportation, storage, transfer, or processing of solid wastes." Given the nature of material swept from city streets, street sweeping falls under the rubric of 'solid waste handling.'

Under Proposition 218, "refuse collection" is expressly exempted from the voter-approval requirement (article XIII D, § 6, subd. (c).). Although "refuse collection" has no definition in article XIII D, the plain meaning of refuse[241] collection is the same as solid waste handling, as the dictionary definition of "refuse" and the statutory definition of "solid waste" both refer to rubbish and trash as synonyms. Refuse is collected via solid waste handling.

To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)). In addition, revenues are: (1) not to exceed the funds required to provide the service, (2) shall not be used for any other purpose than to provide the property-related service, and the amount of the fee on a parcel shall not exceed the proportional cost of the service attributable to the parcel. And the service must be actually used by or immediately available to the property owner (article XIII D, § 6, subd. (b)).

Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "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." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.

Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XIII B, section 6, which is to "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."[242]

Thus, the Commission finds that fee authority under Public Resources Code section 40059 is not sufficient to pay for the mandated program or increased level of service in permit parts D.3.a.5 (street sweeping). Therefore, the Commission finds that street sweeping imposes costs mandated by the state and is reimbursable.

---

[240] This definition also excludes hazardous waste, radioactive waste and medical waste, as defined.

[241] "Refuse" is defined as " Items or material discarded or rejected as useless or worthless; trash or rubbish." <http://dictionary.reference.com/browse/refuse> as of November 23, 2009.

[242] *County of San Diego, supra,* 15 Cal.4th 68, 81.

Received
August 26, 2011
Commission on
State Mandates

Any proposed fees that are not blocked by a majority of parcel owners for street sweeping must be identified as offsetting revenue in the parameters and guidelines.

Fees for street sweeping reports: Proposition 218 does not contain an express exemption on voter approval for reporting on street sweeping, only for "refuse collection." Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the street sweeping reports be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping, so that part J.3.a.(3)(c)x-xv of the permit imposes costs mandated by the state and is reimbursable.

Assessments for street operation and maintenance: As mentioned above, some local agencies collect an assessment for street sweeping, e.g., the County of Fresno[243] and the City of La Quinta.[244] Assessments are defined as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property. 'Assessment' includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment' and 'special assessment tax.'" (article XIII D, § 2, subd. (b).) The terms "maintenance and operation" of "streets" and "drainage systems," although used in article XIII D, are not defined in it. The plain meaning of maintenance of streets and drainage systems, however, would include street sweeping because "maintenance" means "the work of keeping something in proper condition; upkeep."[245] Clean streets are used not only for transportation, but for conveying storm water to storm drains.

The Supreme Court defined special assessments as follows:

> A special assessment is a "'compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein....' " [Citation.]' [Citation.] In this regard, a special assessment is 'levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.' [Citation.] 'The rationale of special assessment[s] is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.[246]

The Supreme Court summarized the constitutional procedures for creating an assessment district.

> Under Proposition 218's procedures, local agencies must give the record owners of all assessed parcels written notice of the proposed assessment, a voting ballot, and a statement disclosing that a majority protest will prevent the assessment's

---

[243] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[244] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

[245] <http://dictionary.reference.com/browse/maintenance> as of December 7, 2009.

[246] *Silicon Valley Taxpayers Ass'n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 442.

Received
August 26, 2011
Commission on
State Mandates

> passage. (Art. XIII D, § 4, subds. (c), (d).) The proposed assessment must be "supported by a detailed engineer's report." (Art. XIII D, § 4, subd. (b).) At a noticed public hearing, the agencies must consider all protests, and they "shall not impose an assessment if there is a majority protest." (Art. XIII D, § 4, subd. (e).) Voting must be weighted "according to the proportional financial obligation of the affected property." (*Ibid.*)[247]

Proposition 218 dictated that as of July 1, 1997, existing assessments were to comply with its procedural requirements, but an exception was created for "any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control." (art. XIII D, § 5, subd. (a), emphasis added.) This means that the procedural requirements of Proposition 218 apply only to increases in assessments for street sweeping that were imposed after Proposition 218 was enacted.[248]

Absent any evidence in the record that assessments imposed before July 1, 1997 for street sweeping are sufficient to pay for the street sweeping specified in part D.3.a. of the permit, the Commission cannot find that assessments imposed before that date would pay for the costs mandated by the state for street sweeping within the meaning of Government Code section 17556, subdivision (d).

Should a local agency determine that its existing assessments are not sufficient to pay for the mandated street sweeping, it can raise assessments by following the article XIII D (Proposition 218) procedures detailed above. Those procedures, however, include an election and a protest, both of which were found above to extinguish local fee authority sufficient to pay for the mandate and to block the application of Government Code section 17556, subdivision (d).

Thus, to the extent that the claimants impose or increase assessments to pay for the street sweeping, they would be identified as offsetting revenue in the parameters and guidelines.

4. Claimants' fee or assessment authority under Health and Safety Code section 5471 is not sufficient to pay for conveyance-system cleaning, and Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning

Conveyance-system cleaning for operation and maintenance of the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.) is required in the permit (part D.3.a.(3)). Specifically, claimants are required to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity.... Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner." Claimants are also required to report on the number of catch basins and inlets inspected and cleaned (J.3.a.(3)(c)iv-viii).

---

[247] *Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Authority, supra,* 44 Cal.4th 431, 438.

[248] See also *Howard Jarvis Taxpayers Ass'n. v. City of Riverside* (1999) 73 Cal.App.4th, 679, holding that a preexisting streetlighting assessment is 'exempt under Proposition 218.'

Received
August 26, 2011
Commission on
State Mandates

Local agencies have fee authority under Health and Safety Code section 5471 to charge fees for storm drainage maintenance and operation as follows:

> [A]ny entity[249] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, <u>storm drainage</u>, or sewerage system. ... Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, <u>maintenance, and operation</u> of water systems and sanitation, <u>storm drainage</u>, or sewerage facilities .... [Emphasis added.]

This plain meaning of this statutory fee for storm drain operation and maintenance would include conveyance-system cleaning as required in the permit (part D.3.a.(3)(iii)), which the permit specifies as cleaning "catch basins or storm drain inlets." This cleaning is within the operation and maintenance of the storm drains.

The statutory fee, adopted in 1953, is now subject to the procedural requirements of Proposition 218. As it states in subdivision (d) of Health and Safety Code section 5471:

> If the procedures set forth in this section as it read at the time a standby charge was established were followed, the entity may, by ordinance adopted by a two-thirds vote of the members of the legislative body thereof, continue the charge pursuant to this section in successive years at the same rate. If new, increased, or extended assessments are proposed, the entity shall comply with the notice, protest, and hearing procedures in Section 53753 of the Government Code [the codification of the Proposition 218 procedural requirements].

Proposition 218 does not exempt from voting requirements fees for storm drain maintenance like it does for "water, sewer, and refuse collection" in section 6 (c) of article XIII D. In fact, in *Howard Jarvis Taxpayers Ass'n. v. City of Salinas* (2002) 98 Cal.App.4th 1351, the court invalidated a local storm drain fee and held that the exemption from an election for sewer fees does not include storm drainage fees. As to new or increased assessments imposed for storm drainage operation and maintenance, they would be subject to the same election requirement of Proposition 218 (art. XIII D, § 4, subd. (e)) as for other assessments.

Therefore, the Commission finds that local agencies do not have sufficient authority under section 5471 of the Health and Safety Code to impose fees or assessments (under Gov. Code § 17556, subd. (d)) for conveyance system cleaning as required by part D.3.a.(3)(iii) of the permit or reporting as required by part J.3.a.(3)(c)iv-viii of the permit.

<u>Fees or assessments for conveyance-system reports</u>: The Commission also finds that local agencies do not have fee or assessment authority for reporting on conveyance-system (in part J.3.a.(3)(c)iv-viii) on the number of catch basins and inlets inspected and cleaned. Fees or

---

[249] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

Received
August 26, 2011
Commission on
State Mandates

assessments imposed for this reporting would be subject to a vote of parcel owners. Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the reports on conveyance- system cleaning be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning, and that part J.3.a.(3)(c)iv-viii of the permit imposes costs mandated by the state within the meaning of Government Code section 17556, subdivision (d), and is reimbursable.

Any revenue from existing assessments, or assessments obtained after voter approval, for conveyance system cleaning would be included in the parameters and guidelines as offsets to reimbursement.

C. Claimants have potential fee authority and offsetting revenue if they comply with the requirements of Senate Bill 310 (Stats. 2009, ch. 577)

Effective January 2010, Senate Bill 310 (Stats. 2009, ch. 577) was enacted to add Water Code provisions authorizing local agencies to adopt watershed improvement plans.

SB 310 is intended to establish multiple watershed-based pilot programs.[250] The bill creates the California Watershed Improvement Act of 2009 (commencing with Wat. Code, § 16000). Pursuant to Water Code section 16101, each county, city, or special district that is a copermittee under a NPDES permit ***may*** develop either individually or jointly a watershed improvement plan. The process for developing a watershed improvement plan is to be conducted consistent with all applicable open meeting laws. Each county, city, or special district, or combination thereof, is to notify the appropriate Regional Board of its intention to develop a watershed improvement plan.

The watershed improvement plan is voluntary – it is not necessarily the same watershed activities required by the permit in the test claim.

SB 310 includes the following local agency fee authority:

> 16103. (a) In addition to making use of other financing mechanisms that are available to local agencies to fund watershed improvement plans and plan measures and facilities, a county, city, special district, or combination thereof may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution, to pay the costs of the preparation of a watershed improvement plan, and the implementation of a watershed improvement plan if all of the following requirements are met:
>
> (1) The Regional Board has approved the watershed improvement plan.
>
> (2) The entity or entities that develop the watershed improvement plan make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities of the feepayer. "Activities," for the purposes of this paragraph,

[250] Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill 310 (2009-2010 Reg. Sess.) as amended August 31, 2009, page 4.

Received
August 26, 2011
Commission on
State Mandates

means the operations and existing structures and improvements subject to regulation under an NPDES permit for municipal separate storm sewer systems.

(3) The fee is not imposed solely as an incident of property ownership.

(b) A county, city, special district, or combination thereof may plan, design, implement, construct, operate, and maintain controls and facilities to improve water quality, including controls and facilities related to the infiltration, retention and reuse, diversion, interception, filtration, or collection of surface runoff, including urban runoff, stormwater, and other forms of runoff, the treatment of pollutants in runoff or other waters subject to water quality regulatory requirements, the return of diverted and treated waters to receiving water bodies, the enhance-ment of beneficial uses of waters of the state, or the beneficial use or reuse of diverted waters.

(c) The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.

However, Water Code section 16102, subdivision (d), states: "A regional board may, if it deems appropriate, utilize provisions of the approved watershed improvement plan (approved under this new act) to promote compliance with one of more of the regional board's regulatory plans or programs." Subdivision (e) states "Unless a regional board incorporates the provisions of the watershed improvement plan into waste discharge requirements issued to a permittee, the implementation of a watershed improvement plan by a permittee shall not be deemed to be in compliance with those waste discharge requirements."

Therefore, the Commission finds that Water Code section 16103 may only provide offsetting revenue for this test claim to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

D. The holding in *San Diego Unified School Dist. v. Commission on State Mandates* does not apply to the test claim activities.

The State Board's January 2010 comments on the draft staff analysis cite *San Diego Unified v. Commission on States Mandates,*[251] arguing that the permit in this test claim, like the pupil expulsion hearings, are intended to implement a federal law, and has costs that are, in context, de minimis. In *San Diego Unified School District,* the California Supreme Court held costs for hearing procedures and notice are not reimbursable for pupil expulsions that are discretionary under state law. The court found that these hearing procedures are incidental to federal due process requirements and the costs are de minimis, and thus not reimbursable.

The Commission disagrees. The permit in this case does not meet the criteria in the *San Diego Unified School District* case. Unlike the discretionary expulsions in *San Diego Unified School District,* the permit imposes state-mandated activities. And although the permit is intended to implement the federal Clean Water Act, there is no evidence or indication that its costs are de minimis. Claimants submitted declarations of costs totaling over $10 million for fiscal year

[251] *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

Received
August 26, 2011
Commission on
State Mandates

2007-2008 alone.[252] Claimants further submitted documentation of 2008-2009 costs of over $18 million. The State Board offers no evidence or argument to refute these cost declarations, so the Commission finds that permit activities (except for LID and HMP discussed above) impose costs mandated by the state that are not de minimis.

Summary: To recap fee authority under issue 2, the Commission finds that, due to the fee authority under the police power generally, and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

---

[252] The County and city declarations are attached to the test claim.

Received
August 26, 2011
Commission on
State Mandates

CONCLUSION

For the reasons discussed above, the Commission finds that parts of 2007 permit issued by the California Regional Quality Control Board, San Diego Region (Order No. R9-2007-001, NPDES No. CAS0108758), are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the claimants to perform the following activities.

The term of the permit is from January 24, 2007 – January 23, 2012.[253] The permit terms and conditions are automatically continued, however, pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits are complied with.[254]

I. Jurisdictional Urban Runoff Management Program and Reporting (parts D & J)

Street sweeping (part D.3.a.(5)): Sweeping of Municipal Areas

> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Street sweeping reporting (J.3.a.(3)(c)x-xv): Report annually on the following:

---

[253] According to attachment B of the permit: "*Effective Date.* This Order shall become effective on the date of its adoption provided the USEPA has no objection…." "(q) *Expiration.* This Order expires five years after adoption."

[254] According to attachment B of the permit: "(r) *Continuation of Expired Order* [23 CCR 2235.4]. After this Order expires, the terms and conditions of this Order are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits (40 CFR 122.6) are complied with."

Received
August 26, 2011
Commission on
State Mandates

x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xiii. Identification of the total distance of curb-miles swept.
xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
xv. Amount of material (tons) collected from street and parking lot sweeping.

Conveyance system cleaning (D.3.a.(3)):

(a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.

(b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include: [¶]…[¶]

iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.

Conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii)): Update and revise the copermittees' JURMPs to contain:

iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.

v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

Received
August 26, 2011
Commission on
State Mandates

viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

Educational component (part D.5): To implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

- Municipal Departments and Personnel
- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children

a.(1) Each Copermittee shall educate each target community on the following topics where appropriate: (i) Erosion prevention, (ii) Non storm water discharge prohibitions, and (iii) BMP types: facility or activity specific, LID,-source control, and treatment control.

a.(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its Planning Boards and Elected Officials, if applicable, have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

Received
August 26, 2011
Commission on
State Mandates

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year [except for staff who solely inspect new development]. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

II. Watershed Urban Runoff Management Program (parts E.2.f & E.2.g.)

Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 [of the permit] to develop and

Received
August 26, 2011
Commission on
State Mandates

implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]...[¶]

[Paragraphs (a) through (e) were not part of the test claim.]

f. Watershed Activities

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;

(b) A time schedule for implementation of the activity, including key milestones;

(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;

(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

(e) A description of how the activity is consistent with the collective watershed strategy;

(f) A description of the expected benefits of implementing the activity; and

Received
August 26, 2011
Commission on
State Mandates

(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

III. Regional Urban Runoff Management Program (parts F.1, F.2 & F.3)

The Regional Urban Runoff Management Program shall, at a minimum:

Each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]

1. Develop and implement a Regional Residential Education Program. The program shall include:

a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.

b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

2. Develop the standardized fiscal analysis method required in section G of the permit, and,

3. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

IV. Program Effectiveness Assessment (parts I.1 & I.2)

1. Jurisdictional

Received
August 26, 2011
Commission on
State Mandates

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[255] Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[256] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

---

[255] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[256] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

Received
August 26, 2011
Commission on
State Mandates

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[257] Water Quality Assessment,[258] and Integrated Assessment,[259] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[260] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

---

[257] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[258] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[259] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[260] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

Received
August 26, 2011
Commission on
State Mandates

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;

(b) Each Watershed Education Activity implemented; and

(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[261] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

[261] Section A is "Prohibitions and Receiving Water Limitations."

Received
August 26, 2011
Commission on
State Mandates

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Long Term Effectiveness Assessment (I.5):

a. Collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[262] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

1. Collaborate with all other Copermittees regulated under the permit to address common issues, promote consistency among Jurisdictional Urban Runoff

---

[262] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

Received
August 26, 2011
Commission on
State Mandates

Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

V. All Copermittee Collaboration (part L)

(a) Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.

Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum: [¶]...[¶]

3. Establishes a management structure to promote consistency and develop and implement regional activities;
4. Establishes standards for conducting meetings, decisions-making, and cost-sharing.
5. Provides guidelines for committee and workgroup structure and responsibilities;
6. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

The Commission finds that due to the fee authority under the police power (Cal. Const. art. XI, § 7) and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code

Received
August 26, 2011
Commission on
State Mandates

section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;

- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

Received
August 26, 2011
Commission on
State Mandates

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 3

TAB 3

Received
August 26, 2011
Commission on
State Mandates

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001- 15

In the Matter of the Petitions of

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY AND WESTERN STATES PETROLEUM ASSOCIATION

For Review Of Waste Discharge Requirements Order No. 2001-01
for Urban Runoff from San Diego County
[NPDES No. CAS0108758]
Issued by the
California Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1362, A-1362(a)

BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.[1]

[1] NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.

Received
August 26, 2011
Commission on
State Mandates

The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.[2]

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).[3] The petitions are legally and factually related, and have therefore been consolidated for purposes of review.[4] None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

I. BACKGROUND

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits "shall require controls to reduce the discharge of

---

[2] For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

[3] On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are "joining in" the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

[4] Cal. Code of Regs., tit. 23, section 2054.

Received
August 26, 2011
Commission on
State Mandates

pollutants to the maximum extent practicable [MEP]." States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.[5] We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.[6]

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.[7] In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,[8] and we will not reiterate our findings and conclusions from that decision.[9]

---

[5] Board Order WQ 2000-11.

[6] As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

[7] The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

[8] Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

[9] BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

Received
August 26, 2011
Commission on
State Mandates

The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.[10] But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.[11]

---

[10] On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a "supplemental brief" that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit's inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to "discretionary" approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term "discharge" in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

[11] On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a "Request for Entry of Documents into the Administrative Record." BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made "prior to or during the workshop meeting." The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board's record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA's objection is not timely.

Received
August 26, 2011
Commission on
State Mandates

II. CONTENTIONS AND FINDINGS[12]

Contention: BIA contends that the discharge prohibitions contained in the permit are "absolute" and "inflexible," are not consistent with the standard of "maximum extent practicable" (MEP), and financially cannot be met.

Finding: The gist of BIA's contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: "Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited." BIA generally contends that this prohibition amounts to an inflexible "zero contribution" requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters. The language in the permit in Receiving

[12] This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

Received
August 26, 2011
Commission on
State Mandates

Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.[13]

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require "strict compliance" with water quality standards.[14] (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.[15] The court determined that: "Instead, [the provision for municipal storm water permits] *replaces* the requirements of [section 301] with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants'." (191 F.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated

[13] In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited." Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

[14] "Water quality objectives" generally refers to criteria adopted by the state, while "water quality standards" generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

[15] Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

Received
August 26, 2011
Commission on
State Mandates

that U.S. EPA had the authority either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we

Received
August 26, 2011
Commission on
State Mandates

must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.[16] The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.[17]

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of

[16] Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

[17] While BIA argues that the permit requires "zero contribution" of pollutants in runoff, and "in effect" contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

Received
August 26, 2011
Commission on
State Mandates

water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.[18]

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited."[19] An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States.[20] (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly

[18] The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

[19] Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs "in waters of the state." Therefore, it is interpreted to apply only to discharges to receiving waters.

[20] Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States." In general, the inclusion of "waters (footnote continued)

Received
August 26, 2011
Commission on
State Mandates

true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.[21] It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

Contention: State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

Finding: This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated

of the state" allows the protection of groundwater, which is generally not considered to be "waters of the United States."

[21] There are other provisions in the permit that refer to restrictions "into" the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program "to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . . ." (40 C.F.R. § 122.26(d)(2)(iv)(D).)

Received
August 26, 2011
Commission on
State Mandates

Received
August 26, 2011
Commission on
State Mandates

Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Wat. Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.[22] Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

Contention: BIA contends that the permit improperly classifies urban runoff as "waste" within the meaning of the Water Code.

Finding: BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a "discharge of pollutants from a point source" under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports

[22] These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations "is a major problem that needs to be addressed," as claimed in BIA's Points and Authorities, at page 18.

Received
August 26, 2011
Commission on
State Mandates

its position that "waste" should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of "waste," this document discusses its broad application to "current drainage, flow, or seepage into waters of the state of harmful concentrations" of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains "waste" within the meaning of Water Code section 13050(d), and that the federal regulations define "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself.[23] The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of "waste" in certain circumstances. (See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

Contention: BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

[23] The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

Received
August 26, 2011
Commission on
State Mandates

Finding: As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.[24] BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting "any waste discharge requirement" pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).[25] BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board's view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA's argument.

Contention: WSPA contends that the Regional Water Board did not follow this Board's precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

Finding: In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs

[24] Water Code section 13389; see, e.g., Board Order WQ 2000-11.

[25] The exemption does have an exception for permits for "new sources" as defined in the Clean Water Act, which is not applicable here.

Received
August 26, 2011
Commission on
State Mandates

employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for "Priority Development Project Categories," including "retail gasoline outlets." While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: "Retail Gasoline Outlet is defined as any facility engaged in selling gasoline."[26]

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute

[26] Permit at F.1.b(2)(a)(x).

Received
August 26, 2011
Commission on
State Mandates

pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.[27] The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.[28] The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the "Draft Fact Sheet," but the fact sheet has not been finalized.[29] In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

---

[27] See "Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11)."

[28] See 40 C.F.R. sections 124.6(e) and 124.8.

[29] U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

Received
August 26, 2011
Commission on
State Mandates

III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system, and for discharges "to" waters of the United States, but not for discharges "into" the sewer system.

2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.

3. The Regional Water Board inappropriately defined urban runoff as "waste."

4. The Regional Water Board did not violate the California Environmental Quality Act.

5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

Received
August 26, 2011
Commission on
State Mandates

1. Part A.3: The words "into and" are deleted.

2. Part C.2: Throughout the first paragraph, the words ", Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A" shall be inserted following "Part C.1."

3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS "WASTE" AND "POLLUTANTS"**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.

4. Part F.1.b(2)(a): Delete section "x."

In all other respects the petitions are dismissed.

CERTIFICATION

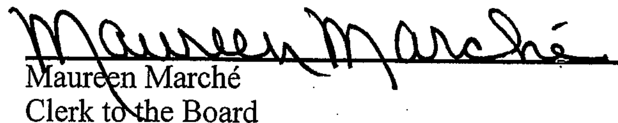
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Clerk to the Board

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 3

TAB 4

Received
August 26, 2011
Commission on
State Mandates

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
IMPLEMENTATION AGREEMENT
VENTURA COUNTYWIDE STORMWATER QUALITY MANAGEMENT PROGRAM

This AGREEMENT is between the County of Ventura hereinafter referred to as COUNTY, the Ventura County Watershed Protection District hereinafter referred to as DISTRICT and the Cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura, Santa Paula, Simi Valley and Thousand Oaks, hereinafter collectively referred to as CITIES, with respect to the following matters:

RECITALS

Whereas, Congress in 1987 amended Section 402 of the Federal Clean Water Act [33 U.S.C.A. 1342(p)] to require the federal Environmental Protection Agency (EPA) to promulgate regulations for stormwater discharges; and

Whereas, these regulations require the control of pollutants for stormwater discharges by requiring a National Pollutant Discharge Elimination System ("NPDES") permit for the discharge of stormwater into waters of the United States; and

Whereas, the CITIES, the COUNTY and the DISTRICT entered into a series of agreements beginning in 1992 ("Implementation Agreements") to fund and develop an integrated stormwater discharge management program with the objective of protecting and improving water quality in Ventura County; and

Whereas, pursuant to the Implementation Agreements, the CITIES, the COUNTY, and the DISTRICT jointly filed an application with the Los Angeles Regional Water Quality Control Board (Regional Board) for a NPDES permit; and

Whereas, the Regional Board in 1994 adopted Order No. 94-082 which regulated stormwater discharges in Ventura County; and

Whereas, the Regional Board in 2000 replaced Order No. 94-082 with Order No. 00-108; and

Whereas, the Regional Board on May 7, 2009 replaced Order No. 00-108 with Order No. 09-0057; and

Whereas, the Regional Board on July 8, 2010 adopted Order No. 2010-0108 (PERMIT), which designates the CITIES, the COUNTY and the DISTRICT as "Co-Permittees" and designates the DISTRICT as the "Principal Permittee;" and

Whereas, the Implementation Agreements provide, among other things, for the funding of NPDES program requirements through the DISTRICT's Benefit Assessment Program; and

Received
August 26, 2011
Commission on
State Mandates

Whereas, the CITIES, the COUNTY, and the DISTRICT have approved annual extensions of the Implementation Agreements in order to provide annual funding for NPDES program requirements; and

Whereas, the latest extension of the Implementation Agreements will expire on June 30, 2010; and

Whereas, the CITIES, the COUNTY, and the DISTIRCT mutually desire to modify, among other things, the cost share provisions under the Implementation Agreement in accordance with changes to the NPDES Program while preserving the Benefit Assessment Program as a source of funding for the program; and

Whereas, cooperation among the CITIES, the COUNTY and the DISTRICT to jointly implement a Countywide NPDES Stormwater Program is in the best interests of the CITIES, the COUNTY and the DISTRICT; and

Whereas, the CITIES, COUNTY and DISTRICT also operate municipal storm drain systems and discharge stormwater and urban runoff pursuant to the PERMIT; and

Whereas, the CITIES, COUNTY and DISTRICT as Co-Permittees have obtained, renewed and complied with the PERMIT; and

Whereas, the PERMIT requires the Co-Permittees to coordinate the development and implementation of a stormwater quality management program.

NOW, THEREFORE, the parties do mutually agree as follows:

1. PURPOSE: This AGREEMENT establishes the rights and responsibilities of each party with respect to funding and compliance with the PERMIT.

2. CONDUCT OF VENTURE: The responsibilities of the CITIES, COUNTY and DISTRICT are as described in the PERMIT and as described below:

   A. Each Co-Permittee is independently responsible for complying with the requirements of the PERMIT within its own jurisdiction and complying with any individual enforcement actions pertaining to permit violations issued by the Regional Board.

   B. The Ventura Countywide Stormwater Quality Management Program (PROGRAM) will be managed by a Management Committee (COMMITTEE). The COMMITTEE will be composed of twelve (12) members; one representative of each of the CITIES, COUNTY, and the DISTRICT. The COMMITTEE will be the principal forum for directing the activities of PROGRAM. The COMMITTEE will be chaired by the representative of the Principal Permittee named in the PERMIT.

   C. Each member of the COMMITTEE will have one vote for any motion. Any budgetary motion must be approved by a 2/3 majority vote of the COMMITTEE (8 of 12), and any non-budgetary motion must be approved by majority vote.

Received
August 26, 2011
Commission on
State Mandates

D. Rules governing the efficient operation of the PROGRAM (Appendix A) and COMMITTEE (Appendix B), including the definition of Co-permittee activities, Principal Permittee activities (Administration, Reporting, Monitoring, Countywide Outreach), as defined by the COMMITTEE are incorporated herein and attached as appendices. The Public Works Directors Committee (DIRECTORS) will be composed of 12 members; the Public Works Director of each of the ten CITIES, the County's Public Works Director, and the District's Director, or their designees.

E. The DISTRICT, in addition to being a Co-Permittee, performs the services of the Principal Permittee. If there should be a transition of any Principal Permittee service(s) to another service provider, it is the intent of the Co-Permittees that a reasonable time period be required to enable a smooth transition of those services that minimizes the DISTRICT's loss in either infrastructure or staff levels. For external expenses of tasks over $50,000, Co-Permittees have the option of directing the Principal Permittee to go through a competitive process for choosing the method of delivery of services.

F. DISPUTE RESOLUTION: Any COMMITTEE member may appeal any formal decision of the COMMITTEE to the DIRECTORS.

All appeals brought to the DIRECTORS must be decided by a 2/3 majority vote of the DIRECTORS.

3. FINANCIAL RESPONSIBILITIES: COMMITTEE-approved activities performed by the Principal Permittee benefit all of the Co-Permittees. By pooling resources, the Co-Permittees benefit from cost sharing and better coordination of permit-required activities. Each of the Co-Permittees has a responsibility to fund a portion of the budget for services performed by the Principal Permittee. Principal Permittee activities, in general, consist of the following: program administration/coordination, reporting, monitoring and public outreach. In addition, those activities not included in the annually approved Principal Permittee budget (for instance, those activities specific to one party) are not the responsibility of the Co-Permittees.

A. Principal Permittee Costs – The DISTRICT will pay 50% of the Principal Permittee cost, annually, with one exception: for Fiscal Year (July 1 through June 30; FY) 2010-2011, the DISTRICT will contribute 50% up to, but not exceeding, one million dollars ($1,000,000). If the Principal Permittee costs for FY 2010-2011 exceed two million dollars ($2,000,000), those excess costs will be shared among the CITIES and COUNTY, as described in subsection 3.B.i.

B. Co-Permittee Costs

i. CITIES and COUNTY will pay the cost for approved Principal Permittee expenses, less the DISTRICT's cost share, per subsection 3.A., proportional to the current Benefit Assessment Unit (BAU) ratios. The BAU ratios are updated annually according to the County Assessor's records.

Received
August 26, 2011
Commission on
State Mandates

ii. All Co-Permittees will pay their own costs for Co-Permittee activities not assigned to the Principal Permittee.

iii. The CITIES and COUNTY will investigate alternatives to the BAU cost-sharing method and, in good faith, discuss and try to reach consensus, on maintaining the current method for cost-sharing, or amending this AGREEMENT to initiate an alternative cost-sharing method. The investigation and discussion will take place in FY 2010-2011 with the goal to reach a consensus by April 1, 2011, so an amendment, if necessary, can be prepared to be approved by all the Co-Permittees and implemented on July 1, 2011, for FY 2011-2012 and beyond.

4. FUNDING SOURCES

A. Co-Permittees may continue to fund requirements described in Section 3 through the DISTRICT's Benefit Assessment Program in accordance with annual requests submitted to the DISTRICT. Each annual request must be supported by a program description, budget, and such other information reasonably requested by the DISTRICT. The Co-Permittees' share of the Principal Permittee budget may be deducted from the proceeds of the Benefit Assessment Program or by payment to DISTRICT. Co-permittees must notify DISTRICT by February 1 of each year of their preferred method.

B. The Co-Permittees will collaborate with the DISTRICT, and invite them to participate in additional funding source(s) for activities to comply with Order No. 2010-0108.

5. RECORDS AND ACCOUNTING: By February 1st of each year, the Principal Permittee must prepare a projected detailed annual budget by activity, including but not limited to, labor and fixed costs for COMMITTEE review and approval for the following fiscal year.

A. The Principal Permittee must implement accounting tracking mechanisms in order to report and describe contributions and expenditures annually.

B. Each year Principal Permittee expenditures will be reconciled against the approved budget. Any unexpended Principal Permittee funds will be refunded to the Co-Permittees in the subsequent year.

C. The Principal Permittee will retain all permit-required documents and fiscal records for five years, and make available for review by any Co-Permittee, the Regional Board and/or the USEPA.

6. FINANCIAL IMPLEMENTATION DATE: The financial aspects of this AGREEMENT will take effect on July 1, 2010.

7. AMENDMENTS TO AGREEMENT: This AGREEMENT will be re-evaluated with each new NPDES permit and prior to the finalization of any new major PROGRAM funding source. This AGREEMENT may be amended by written consent of the Co-

Received
August 26, 2011
Commission on
State Mandates

Permittees, signed and approved by the governing body of each Co-permittee. Any amendment must comply with the requirements and regulations set forth by the Regional Board. Should, during the AGREEMENT term, Order No. 2010-0108 be revised, the parties will have the right to call for renegotiating the financial terms described in this AGREEMENT. Revision of Order No. 2010-0108 through a TMDL reopener process (incorporation of newly adopted TMDLs into the Order) are not considered for these purposes a call for renegotiation.

8. NON-COMPLIANCE WITH PERMIT: Any Co-permittee or Principal Permittee not in compliance with the PERMIT within its jurisdiction or scope of responsibility will be solely responsible for any lawfully assessed penalties.

9. APPENDAGE OF AGREEMENT: Any Co-permittee may negotiate a separate AGREEMENT with other Co-Permittees or with all Co-Permittees regarding stormwater/urban runoff discharge management issues. Such agreements will not be appended to this AGREEMENT however, they may reference this AGREEMENT.

10. WITHDRAWAL FROM THE AGREEMENT: A Co-Permittee may withdraw from this AGREEMENT after giving at least 180 days' written notice of withdrawal to the Principal Permittee and the Regional Board. The Principal Permittee must notify the remaining Co-Permittees within ten (10) business days of receipt of such notice.

    A. The withdrawing Co-Permittee must obtain a separate Stormwater NPDES permit prior to withdrawal and comply with all permit requirements established by the Regional Board. Any withdrawing Co-permittee will be responsible for its share of Principal Permittee and shared costs for the remainder of the budget year of withdrawal.

    B. The withdrawing Co-Permittee will be solely responsible for all lawfully assessed penalties as a consequence of withdrawal. The cost allocations to the remaining Co-Permittees will be recalculated in the following budget year.

12. EXECUTION IN COUNTERPARTS: This AGREEMENT may be executed and delivered in any number of counterparts or copies by the parties. When each party has signed and delivered at least one counterpart to the other parties, each counterpart will be deemed an original, and taken together, will constitute one and the same AGREEMENT, which will be binding and effective as to all the parties.

13. FEDERAL AND STATE GUIDELINES: This AGREEMENT is meant to be consistent with the terms of all applicable Federal and State permit regulations or guidelines as presently written and as may be amended during the term of this AGREEMENT. If any provision of this AGREEMENT conflicts with any Federal or State permit regulation or guideline, the guideline will take precedence. All provisions, which remain consistent, will remain in force and effect.

14. TERM: This AGREEMENT will become effective upon approval of all 12 Co-Permittees and will continue in effect until the term of the Permit issued by the Board on July 8, 2010 (Order No. 2010-0108) expires, or until terminated in the manner provided for in this AGREEMENT.

Received
August 26, 2011
Commission on
State Mandates

15. TERMINATION OF AGREEMENT: A 2/3 majority (8 of 12) of the Co-Permittees may terminate this AGREEMENT by mutual written consent.

16. NOTICES: All notices and correspondence will be deemed duly given, if (a) sent by certified U.S. mail; (b) delivered by hand; (c) deposited in the U.S. mail, postage prepaid and notice to the addresses of such mailing by phone immediately after deposit in the U.S. mail; (d) emailed and notice to the recipient by phone immediately after sending the email; or (e) faxed to the Principal Permittee and confirmation by phone immediately after sending the fax. All notices and correspondence must be sent or delivered to the following respective addresses or phone numbers of the parties:

Ventura County Watershed Protection District
800 South Victoria Avenue
Ventura, CA 93009
Attn: Director of Watershed Protection District
Phone: (805) 654-2040; Fax (805) 654-3350

County of Ventura
800 South Victoria Avenue
Ventura, CA 93009
Attn: Director of Public Works
Phone: (805) 654-2073; Fax (805) 654-3952

City of Camarillo
601 Carmen Drive
Camarillo, CA 93010
Attn: Director of Public Works
Phone: (805) 388-5307; Fax (805) 388-5318

City of Fillmore
250 Central Avenue
Fillmore, CA 93015
Attn: Director of Public Works
Phone: (805) 524-3701; Fax (805) 524-5707

City of Moorpark
799 Moorpark Avenue
Moorpark, CA 93021
Attn: City Engineer/Public Works Director
Phone: (805) 517-6255; Fax (805) 532-2555

City of Ojai
401 South Ventura Street
Ojai, CA 93023
Attn: Director of Public Works
Phone: (805) 640-2560; Fax (805) 640-2571

Received
August 26, 2011
Commission on
State Mandates

City of Oxnard
305 West Third Street
Oxnard, CA 93030
Attn: Director of Public Works
Phone: (805) 385-8280; Fax (805) 385-7907

City of Port Hueneme
250 North Ventura Road
Port Hueneme, CA 93041
Attn: Director of Public Works
Phone: (805) 986-6568; Fax (805) 986-6660

City San Buenaventura
501 Poli Street
Ventura, CA 93001
Attn: Director of Public Works
Phone: (805) 654-7800; Fax: (805) 652-0865

City of Santa Paula
P.O. Box 569
Santa Paula, CA 93061-0569
Attn: Director of Public Works
Phone: (805) 933-4212; Fax (805) 525-3742

City of Simi Valley
2929 Tapo Canyon Road
Simi Valley, CA 93063
Attn: Director of Public Works
Phone: (805) 583-6786; Fax (805) 583-6300

City of Thousand Oaks
2100 Thousand Oaks Blvd.
Thousand Oaks, CA 91362
Attn: Director of Public Works
Phone: (805) 449-2457; Fax (805) 449-2475

17. ENTIRE AGREEMENT: This AGREEMENT contains the entire understanding of the Co-Permittees with respect to the matters contained herein, and supersedes any prior agreement or understanding, oral or written.

18. ASSIGNMENT: Each Co-Permittee has the right to assign its rights and obligations under this AGREEMENT only with the written consent of every other Co-Permittee, which consent may not be unreasonably withheld.

19. SUCCESSORS IN INTEREST: Except as otherwise provided, this AGREEMENT will inure to the benefit of and be binding upon the successors and assigns of the parties. Except as expressly set forth herein, this AGREEMENT is not intended to benefit any person or entity not a party to this AGREEMENT.

Received
August 26, 2011
Commission on
State Mandates

20. SECTION HEADINGS: Headings at the beginning of each numbered section of this AGREEMENT are solely for the convenience of the parties and are not a part of this AGREEMENT.

21. SEVERABILITY: The invalidity in whole or in part of any provision of this AGREEMENT will not void or affect the validity of the other provisions of this AGREEMENT.

22. INTERPRETATION: The language in all parts of this AGREEMENT will be construed under the laws of the State of California according to its normal and usual meaning, and not strictly for or against any party. Exclusive venue for any action involving this AGREEMENT is in Ventura County. In the event of litigation in a United States District Court, exclusive venue is the Central District of California.

23. NO AGENCY CREATED: Nothing in this AGREEMENT is intended to create a separate entity or agency and no party to this AGREEMENT is the agent of any other party and nothing in this AGREEMENT will be construed as permitting or authorizing any party to this AGREEMENT to act in any capacity as an agent of the other except as expressly provided herein. Notwithstanding the foregoing, the parties acknowledge that they are entering into this AGREEMENT for their mutual benefit, and the parties agree to execute such further agreements and documents and take such further actions as may be reasonably necessary to implement this AGREEMENT.

24. AUTHORITY TO EXECUTE AGREEMENT: Each party covenants that each individual executing this AGREEMENT on behalf of such party is a person duly authorized and empowered to execute agreements for such party.

Received
August 26, 2011
Commission on
State Mandates

APPENDIX A: GUIDELINES FOR DETERMINING PRINCIPAL PERMITTEE ACTIVITIES

Definition of Program Activities: Program Activities are permit required activities.

Administration

Convene, chair, provide agenda & minutes at Management and Sub-committee meetings
Provide technical and administrative support necessary to implement the Permit.
Prepare and track annual budget
Serve as liaison between the Co-permittees and the RWQCB; • Set time schedules for the performance of activities; • Forward Co-permittee information to the RWQCB; • Arrange for public review, when needed; • Update Co-permittees on RWQCB and EPA regulations
Distribute common information
Membership and participation in SCCWRP and CASQA
Secure services of consultants
Benefit Assessment Program coordination
Provide technical leadership
Prepare regulatory response/comment letters
Prepare and update special agreements

Reporting

Prepare annual and monitoring reports
File annual Co-permittee self-audits
Prepare ROWD
Seek Co-permittee review
Prepare regulatory response letters for annual reports

Monitoring

Implement county-wide monitoring

Countywide Public Outreach

Meet minimum Permit required PO elements

Received
August 26, 2011
Commission on
State Mandates

APPENDIX B: COUNTYWIDE STORMWATER PROGRAM MANAGEMENT COMMITTEE

The NPDES Management Committee (COMMITTEE) is the principal forum for directing the countywide stormwater quality management program (PROGRAM) and is composed of twelve (12) members, one representative for each of the CITIES, COUNTY, and the DISTRICT.

1. The COMMITTEE is chaired by the Principal Co-permittee and meets as needed (at least quarterly) to achieve permit requirements and assure PROGRAM continuity.

2. COMMITTEE members and designated alternates shall be senior level and appointed by their Agency.

3. The COMMITTEE shall direct and guide the Program and review and approve the Program budget, comment letters, and report submittals to various agencies (i.e., monitoring reports, annual reports and comment letters sent to Los Angeles Regional Water Quality Control Board. The COMMITTEE shall consider permit compliance, including benefit as a primary objective in approving program tasks and corresponding budgets.

4. The COMMITTEE will review materials developed by the subcommittees, provide comments, and approve or reject program activities.

5. The LARWQCB may appoint a non-voting representative and alternate to the Management Committee.

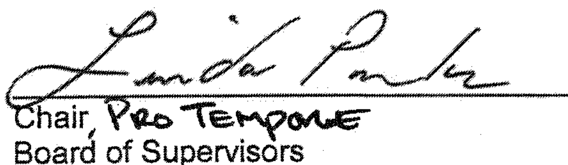
Received
August 26, 2011
Commission on
State Mandates

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
AMENDMENT TO IMPLEMENTATION AGREEMENT
VENTURA COUTYWIDE
STORMWATER QUALITY MANAGEMENT PROGRAM

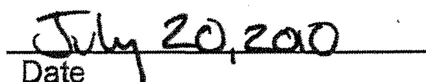
County of Ventura Signature Page

IN WITNESS WHEREOF, the Parties hereto have executed this Amendment on the day and date below written.

COUNTY OF VENTURA



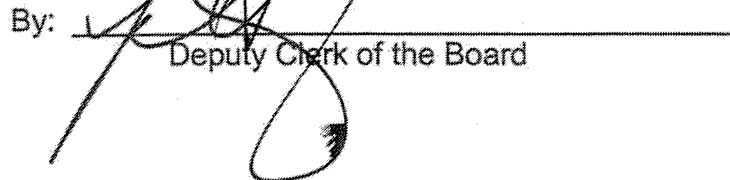
Chair, PRO TEMPORE
Board of Supervisors



Date

ATTEST:

Marty Robinson
Clerk of the Board of Supervisors
County of Ventura
State of California



By: ______________________
Deputy Clerk of the Board

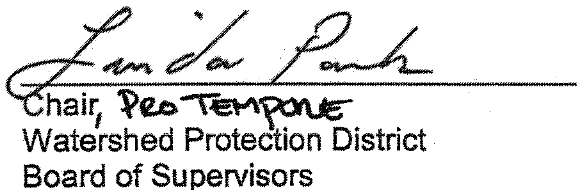
Received
August 26, 2011
Commission on
State Mandates

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
AMENDMENT TO IMPLEMENTATION AGREEMENT
VENTURA COUTYWIDE
STORMWATER QUALITY MANAGEMENT PROGRAM

Ventura County Watershed Protection District Signature Page

IN WITNESS WHEREOF, the Parties hereto have executed this Amendment on the day and date below written.

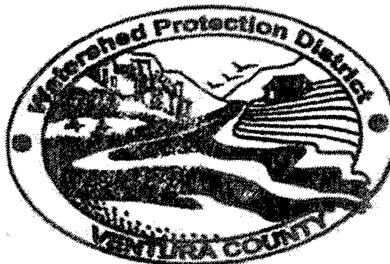
VENTURA COUNTY WATERSHED PROTECTION DISTRICT



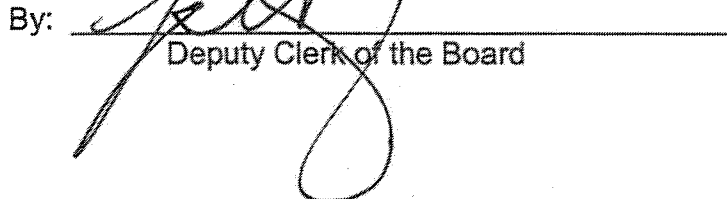
July 20, 2010
Date

Chair, Pro Tempore
Watershed Protection District
Board of Supervisors

ATTEST:



Marty Robinson
Clerk of the Board of Supervisors
County of Ventura
State of California

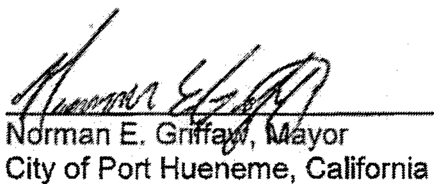


By: ______________________
Deputy Clerk of the Board

Received
August 26, 2011
Commission on
State Mandates

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
IMPLEMENTATION AGREEMENT
VENTURA COUNTYWIDE
STORMWATER QUALITY MANAGEMENT PROGRAM**

City of Port Hueneme Signature Page



Norman E. Griffay, Mayor
City of Port Hueneme, California

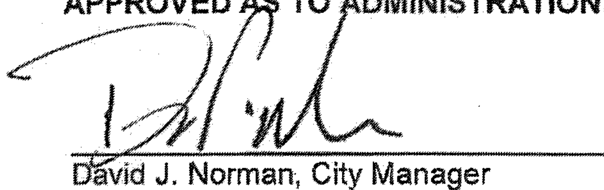
ATTEST:

Michelle Ascencion, Deputy City Clerk

APPROVED AS TO FORM:

Mark Hensley, City Attorney

APPROVED AS TO ADMINISTRATION:



David J. Norman, City Manager

Received
August 26, 2011
Commission on
State Mandates

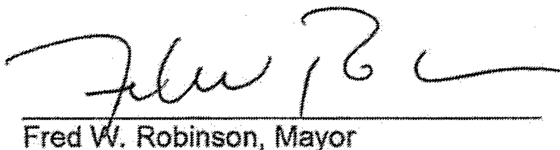
Appendix A January 12, 2011 Version

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
AMENDMENT TO IMPLEMENTATION AGREEMENT
VENTURA COUTYWIDE
STORMWATER QUALITY MANAGEMENT PROGRAM

City of Santa Paula Signature Page

IN WITNESS WHEREOF, the Parties hereto have executed this Amendment on the day and date below written.

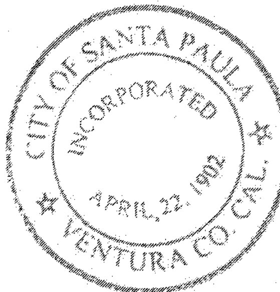
CITY OF SANTA PAULA



Fred W. Robinson, Mayor

ATTEST:

Judy Rice, City Clerk



APPROVED AS TO FORM:

Karl H. Berger, City Attorney

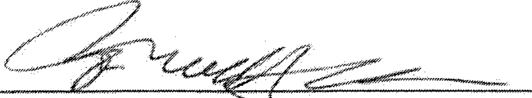
APPROVED AS TO CONTENT:

Jaime M. Fontes, City Manager

Received
August 26, 2011
Commission on
State Mandates

Agreement No. A-7357

CITY OF OXNARD

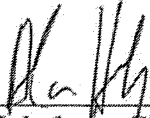


Dr. Thomas E. Holden, Mayor

ATTEST:

Daniel Martinez, City Clerk

APPROVED AS TO FORM:



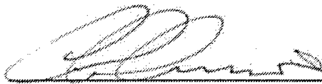
Alan Holmberg, City Attorney

APPROVED AS TO INSURANCE

James Cameron, Chief Financial Officer

APPROVED AS TO CONTENT:

Rob Roshanian, Interim Public Works Director



Anthony Emmert, Water Resources Manager

Received
August 26, 2011
Commission on
State Mandates

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM IMPLEMENTATION AGREEMENT VENTURA COUNTYWIDE STORMWATER QUALITY MANAGEMENT PROGRAM

City of Camarillo Signature Page

Sept. 9, 2010
Date

Jerry Bankston, City Manager
City of Camarillo, California

ATTEST:

Jeffrie Madland, City Clerk

APPROVED AS TO FORM:
Office of City Attorney

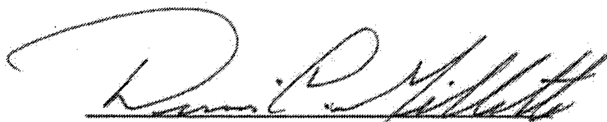
Brian Pierik, City Attorney

Agreement No. 2010-58

Received
August 26, 2011
Commission on
State Mandates

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
IMPLEMENTATION AGREEMENT
VENTURA COUNTYWIDE
STORMWATER QUALITY MANAGEMENT PROGRAM**

City of Thousand Oaks Signature Page



Dennis C. Gillette
City of Thousand Oaks, California

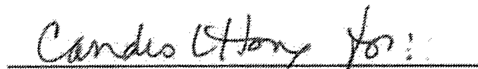
ATTEST:

Linda D. Lawrence, City Clerk

APPROVED AS TO FORM:
Office of City Attorney

Christopher G. Norman, Assistant City Attorney

APPROVED AS TO ADMINISTRATION:



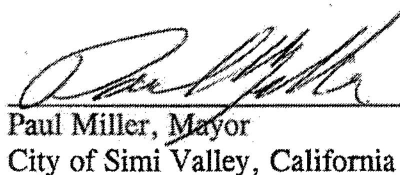
Scott Mitnick, City Manager

City Council: 09/07/2010
Contract No. 9447-2010

Received
August 26, 2011
Commission on
State Mandates

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
IMPLEMENTATION AGREEMENT
VENTURA COUNTYWIDE
STORMWATER IMPLEMENTATION PROGRAM**

City of Simi Valley Signature Page



Paul Miller, Mayor
City of Simi Valley, California

ATTEST:

Wendy K. Green, Assistant City Clerk

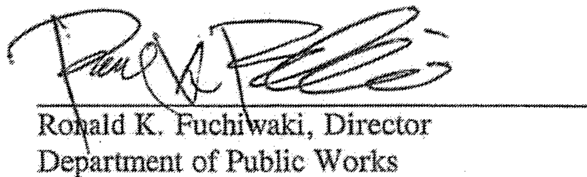
APPROVED AS TO FORM:

Office of City Attorney

Tracy M. Noonan, City Attorney

APPROVED AS TO CONTENT:

Mike Sedell, City Manager



Ronald K. Fuchiwaki, Director
Department of Public Works

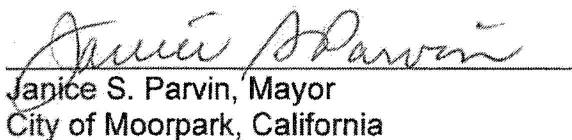
Received
August 26, 2011
Commission on
State Mandates

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
IMPLEMENTATION AGREEMENT
VENTURA COUNTYWIDE
STORMWATER QUALITY MANAGEMENT PROGRAM

City of Moorpark Signature Page

IN WITNESS WHEREOF, the parties hereto have executed this Amendment on the day and date first above written.

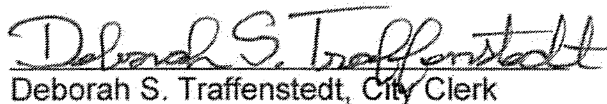
CITY OF MOORPARK



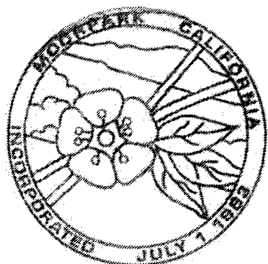
Janice S. Parvin, Mayor
City of Moorpark, California

10.13.2010
Date

ATTEST:



Deborah S. Traffenstedt, City Clerk

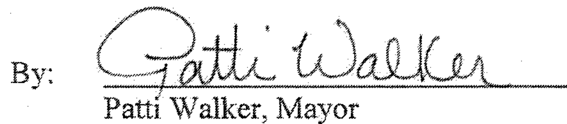


Received
August 26, 2011
Commission on
State Mandates

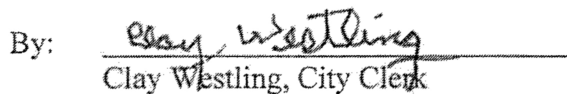
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
IMPLEMENTATION AGREEMENT
VENTURA COUNTYWIDE STORMWATER QUALITY MANAGEMENT PROGRAM

SIGNATURE PAGE

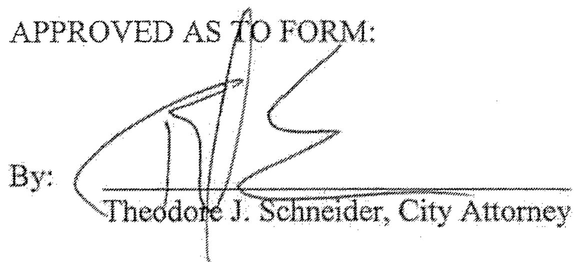
CITY OF FILLMORE,

By: 
Patti Walker, Mayor

ATTEST:

By: 
Clay Westling, City Clerk

APPROVED AS TO FORM:

By: 
Theodore J. Schneider, City Attorney

Received
August 26, 2011
Commission on
State Mandates

City of San Buenaventura Signature Page

CITY OF SAN BUENAVENTURA

Rick Cole, City Manager

APPROVED AS TO FORM

Ariel Pierre Calonne
City Attorney

Received
August 26, 2011
Commission on
State Mandates

20. SECTION HEADINGS: Headings at the beginning of each numbered section of this AGREEMENT are solely for the convenience of the parties and are not a part of this AGREEMENT.

21. SEVERABILITY: The invalidity in whole or in part of any provision of this AGREEMENT will not void or affect the validity of the other provisions of this AGREEMENT.

22. INTERPRETATION: The language in all parts of this AGREEMENT will be construed under the laws of the State of California according to its normal and usual meaning, and not strictly for or against any party. Exclusive venue for any action involving this AGREEMENT is in Ventura County. In the event of litigation in a United States District Court, exclusive venue is the Central District of California.

23. NO AGENCY CREATED: Nothing in this AGREEMENT is intended to create a separate entity or agency and no party to this AGREEMENT is the agent of any other party and nothing in this AGREEMENT will be construed as permitting or authorizing any party to this AGREEMENT to act in any capacity as an agent of the other except as expressly provided herein. Notwithstanding the foregoing, the parties acknowledge that they are entering into this AGREEMENT for their mutual benefit, and the parties agree to execute such further agreements and documents and take such further actions as may be reasonably necessary to implement this AGREEMENT.

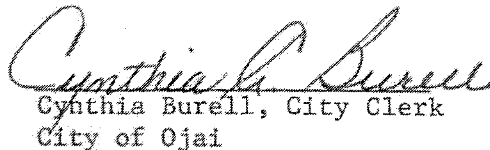
24. AUTHORITY TO EXECUTE AGREEMENT: Each party covenants that each individual executing this AGREEMENT on behalf of such party is a person duly authorized and empowered to execute agreements for such party.

[An executed signature page must be provided by each signatory.]

City of Ojai

John Baker, Interim City Manager

ATTEST:



Cynthia Burell, City Clerk
City of Ojai

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 3

TAB 5

Received
August 26, 2011
Commission on
State Mandates

NPDES MEMORANDUM OF AGREEMENT BETWEEN THE U.S. ENVIRONMENTAL PROTECTION AGENCY AND THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

I. PREFACE

A. Introduction

The State Water Resources Control Board (State Board) is the State water pollution control agency for all purposes of the Clean Water Act pursuant to Section 13160 of the California Water Code. The State Board has been authorized by the U.S. Environmental Protection Agency (EPA), pursuant to Section 402 of the Clean Water Act (CWA), to administer the National Pollutant Discharge Elimination System (NPDES) program in California since 1973.

The Chairman of the State Board and the Regional Administrator of EPA, Region 9 hereby affirm that the State Board and the Regional Boards have primary authority for the issuance, compliance monitoring, and enforcement of all NPDES permits in California including NPDES general permits and permits for federal facilities; and implementation and enforcement of National Pretreatment Program requirements except for NPDES permits incorporating variances granted under Sections 301(h) or 301(m), and permits to dischargers for which EPA has assumed direct responsibility pursuant to 40 CFR 123.44. The State may apply separate requirements to these facilities under its own authority.

This Memorandum of Agreement (MOA) redefines the working relationship between the State and EPA pursuant to the Federal regulatory amendments that have been promulgated since 1973, and supersedes:

1. THE MEMORANDUM OF UNDERSTANDING REGARDING PERMIT AND ENFORCEMENT PROGRAMS BETWEEN THE STATE WATER RESOURCES CONTROL BOARD AND THE REGIONAL ADMINISTRATOR, REGION IX, ENVIRONMENTAL PROTECTION AGENCY, signed March 26, 1973; and

2. The STATE/EPA COMPLIANCE AND ENFORCEMENT AGREEMENT, dated October 31, 1986. The State's standard operating procedures for the NPDES and pretreatment programs are described in the State's Administrative Procedures Manual (APM).

Received
August 26, 2011
Commission on
State Mandates

The State shall implement the provision of this MOA through the APM. The State's annual workplan, which is prepared pursuant to Section 106 of the CWA, will establish priorities, activities and outputs for the implementation of specific components of the NPDES and pretreatment programs. The basic requirements of this MOA shall override any other State/EPA agreements as required by 40 CFR 123.24(c). EPA shall implement the provisions of this MOA through written EPA policy guidance and the annual State/EPA 106 agreement.

B. Definitions

The following definitions are provided to clarify the provisions of this MOA.

1. "The APM" means the State's Administrative Procedures Manual. The APM describes standard operating requirements, procedures, and guidance for internal management of the State Board and Regional Boards in the administration of the NPDES and pretreatment programs. The APM is kept current through periodic updates.

2. "Comments" means recommendations made by EPA or another party, either orally or in writing, about a draft permit.

3. "Compliance monitoring" means the review of monitoring reports, progress reports, and other reports furnished by members of the regulated community. It also means the various types of inspection activities conducted at the facilities of the regulated community.

4. "CWA" means the Clean Water Act [33 USC 1251 et. seq.].

5. "Days" mean calendar days unless specified otherwise.

6. "Prenotice draft permit" is the document reviewed by EPA, other agencies, and the applicant prior to public review.

7. "Draft permit" is the document reviewed by EPA and the public.

Received
August 26, 2011
Commission on
State Mandates

8. "Enforcement" means all activities that may be undertaken by the Regional Boards, the State Board, or EPA to achieve compliance with NPDES and pretreatment program requirements.

9. "EPA" means the U.S. Environmental Protection Agency (EPA) Region 9, unless otherwise stated.

10. "Formal enforcement action" means an action, order or referral to achieve compliance with NPDES and pretreatment program requirements that: (a) specifies a deadline for compliance; (b) is independently enforceable without having to prove the original violation; and (c) subjects the defendant to adverse legal consequences for failure to obey the order (see footnote #6, p.19, National Guidance for Oversight of NPDES Programs, FFY 1986, dated January 20, 1985). Time Schedule Orders, Administrative Civil Liability Orders, Cease and Desist Orders, Cleanup and Abatement Orders, and referrals to the Attorney General meet these criteria. Effective January 1, 1988, the State and Regional Boards will have authority to impose administrative civil liability, consistent with the requirements of 40 CFR 123.27(a)(3)(i), for all NPDES and pretreatment program violations.

11. "Issuance" means the issuance, reissuance, or modification of NPDES permits through the adoption of an order by a Regional Board or the State Board.

12. "Objections" means EPA objections to applications, prenotice draft permits, draft permits, or proposed permits that are based on federal law or regulation, which are filed as "objections", and which must be resolved before a NPDES permit can be issued, or reissued or modified thereto. "Objection" and "formal objection" mean the same thing.

13. "Proposed permit" means a permit adopted by the State after the close of the public comment period which may then be sent to EPA for review before final issuance by the State. The State's common terminology of "adopted permit" is equivalent to the term "proposed permit" as used at 40 CFR 122.2.

Received
August 26, 2011
Commission on
State Mandates

14. Quality Assurance" means all activities undertaken by the State or EPA to determine the accuracy of the sampling data reported on Discharge Monitoring Reports (DMRs), inspection reports, and other reports.

15. "State" means the staff and members of the Regional Boards and the State Board collectively.

16. "106 Workplan" means the annual agreement that is negotiated between the State and EPA.

C. Roles and Responsibilities

1. EPA Responsibilities

EPA is responsible for:

a. Providing financial, technical, and other forms of assistance to the State;

b. Providing the State Board with copies of all proposed, revised, promulgated, remanded, withdrawn, and suspended federal regulations and guidelines;

c. Advising the State Board of new case law pertaining to the NPDES and pretreatment programs;

d. Providing the State Board with draft and final national policy and guidance documents;

e. Monitoring the NPDES and pretreatment programs in California to assure that the program is administered in conformance with federal legislation, regulations, and policy;

f. Intervening as necessary in specific situations (such as development of draft permits, or permit violations) to maintain program consistency throughout all states and over time;

g. Administering the program directly to the following classes of facilities:

Received
August 26, 2011
Commission on
State Mandates

(1) Dischargers granted variances under Sections 301(h) or 301(m) of the CWA; and

(2) Dischargers which EPA has assumed direct responsibility for pursuant to 40 CFR 123.44, and

2. <u>State Board Responsibilities</u>

The State Board is responsible for supporting and overseeing the Regional Board's management of the NPDES and pretreatment programs in California. This responsibility includes:

a. Evaluating Regional Board performance in the areas of permit content, procedure, compliance, monitoring and surveillance, quality assurance of sample analyses, and program enforcement;

b. Acting on its own motion as necessary to assure that the program is administered in conformance with Federal and State legislation, regulations, policy, this MOA, and the State annual 106 Workplan;

c. Providing technical assistance to the Regional Boards;

d. Developing and implementing regulations, policies, and guidelines as needed to maintain consistency between State and federal policy and program operations, and to maintain consistency of program implementation throughout all nine regions and over time;

e. Reviewing decisions of the Regional Boards upon petition from aggrieved persons or upon its own motion;

f. Assisting the Regional Boards in the implementation of federal program revisions through the development of policies and procedures; and

g. Performing any of the functions and responsibilities ascribed to the Regional Boards.

Received
August 26, 2011
Commission on
State Mandates

h. California Pretreatment Program responsibilities as listed in Section III.B. of this MOA.

3. Regional Board Responsibilities

The following responsibilities for managing the NPDES and pretreatment programs in California have been assigned to the Regional Boards. These responsibilities include:

a. Regulating all discharges subject to the NPDES and pretreatment programs, except those reserved to EPA, in conformance with Federal and State law, regulations, and policy;

b. Maintaining technical expertise, administrative procedures and management control, such that implementation of the NPDES and pretreatment programs consistently conforms to State laws, regulations, and policies;

c. Implementing federal program revisions;

d. Providing technical assistance to the regulated community to encourage voluntary compliance with program requirements;

e. Assuring that no one realizes an economic advantage from noncompliance;

f. Maintaining an adequate public file at the appropriate Regional Board Office for each permittee. Such files must, at a minimum, include copies of: permit application, issued permit, public notice and fact sheet, discharge monitoring reports, all inspection reports, all enforcement actions, and other pertinent information and correspondence;

g. Comprehensively evaluating and assessing compliance with schedules, effluent limitations, and other conditions in permits;

h. Taking timely and appropriate enforcement actions in accordance with the CWA, applicable Federal regulations, and State Law; and

Received
August 26, 2011
Commission on
State Mandates

i. California Pretreatment Program responsibilities as listed in Section III. B of this MOA.

D. Program Coordination

In order to reinforce the State Board's program policy and overview roles, EPA will normally arrange its meetings with Regional Board staff through appropriate staff of the State Board. In all cases, the State Board will be notified of any EPA meetings with Regional Boards.

E. Conflict Resolution

Disputes shall be resolved in accordance with the Agreement on a Conflict Resolution Process Between Regional Administrator, EPA, Region 9 and Chairman, State Water Resources Control Board.

II. PERMIT REVIEW, ISSUANCE, AND OBJECTIONS

A. General

The State Board and Regional Boards have primary authority for the issuance of NPDES permits. EPA may comment upon or object to the issuance of a permit or the terms or conditions therein. Neither the State Board nor the Regional Boards shall adopt or issue a NPDES permit until all objections made by EPA have been resolved pursuant to 40 CFR 123.44 and this MOA. The following procedures describe EPA permit review, comment, and objection options that may delay the permit process. These options present the longest periods allowed by 40 CFR 123.44. However, the process should normally require far less time.

The State Board, Regional Boards, and EPA agree to coordinate permit review through frequent telephone contact. Most differences over permit content should be resolved through telephone liaison. Therefore, permit review by the State and EPA should not delay issuing NPDES permits. However, if this review process causes significant delays, the Chief, Division of Water Quality (DWQ) of the State Board (or his or her designee), and the Director, Water Management Division (WMD) of EPA (or his or her designee) agree to review the circumstances of the delays. The State Board and EPA shall determine the reasons for the delays and take corrective action.

Received
August 26, 2011
Commission on
State Mandates

To the extent possible, all expiring NPDES permits shall be reissued on or before their expiration. If timely reissuance is not possible, the State Board will notify the Regional Administrator of the reasons for the delay. In no event will permits continued administratively beyond their expiration date be modified or revised.

In the case of the development of a general permit, the Regional Board will collect sufficient data to develop effluent limitations and prepare and draft the general permit. The Regional Board will issue and administer NPDES general permits in accordance with the California Water Code, Division 7 and federal regulations 40 CFR 122.28.

1. <u>EPA Waiver of Review</u>

   a. EPA waives the right to routinely review, object to, or comment upon State-issued permits under Section 402 of the CWA for all categories of discharges except those identified under II.A.2. below.

   b. Notwithstanding this waiver, the State Board and the Regional Boards shall furnish EPA with copies of any file material within 30 days of an EPA request for the material.

   c. The Regional Administrator of EPA, Region 9 may terminate this waiver at any time, in whole or in part, by sending the State Board a written notice of termination.

   d. The State shall supply EPA with copies of final permits.

2. <u>Permits Subject to Review</u>

   a. The Regional Boards shall send EPA copies of applications, prenotice draft permits, draft permits, adopted (proposed) permits, and associated Fact Sheets and Statements of Basis for the following categories of discharges.

      (1) Discharges from a "major" facility as defined by the current major discharger list;

Received
August 26, 2011
Commission on
State Mandates

(2) Discharges to territorial seas;

(3) Discharges from facilities within any of the industrial categories described under 40 CFR Part 122, Appendix A;

(4) Discharges which may affect the water quality of another state;

(5) Discharges to be regulated by a General Permit (excludes applications since they are not part of the General Permit process);

(6) Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons;

(7) Discharges from any other source which exceeds a daily average discharge of 0.5 million gallons; and

(8) Other categories of discharges EPA may designate which may have an environmental impact or public visibility. The Regional Boards or the State Board will consult with EPA regarding other significant discharges.

B. Applications

The provisions for EPA review of applications do not apply to General Permits, because applications are not part of the General Permit Process.

1. Initial Applications

a. The Regional Boards shall forward a complete copy of each NPDES application to EPA and the State Board within 15 days of its receipt.

Received
August 26, 2011
Commission on
State Mandates

b. EPA shall have 30 days* from receipt of the application to comment upon or object to its completeness.

(1) EPA shall initially express its comments and objections to the Regional Board through staff telephone liaison.

(2) EPA shall send a copy of comments or objections to an application to the Regional Board, the State Board, and the applicant.

(3) If EPA fails to send written comments or objections to an application within 30 days of receipt, EPA waives its right to comment or object.

c. An EPA objection to an application shall specify in writing:

(1) The nature of the objection;

(2) The sections of the CWA or the NPDES regulations that support the objection; and

(3) The information required to eliminate the objection.

2. State Agreement with EPA Objections and Revised Applications

a. If the State agrees with EPA's objections, the Regional Board shall forward a complete copy of the revised application to EPA within 10 days of its arrival at the Regional Board offices.

---

*COMPUTATION OF TIME: Pursuant to 40 CFR 124.20(d), three(3) days shall be allowed for transit of documents by mail. Therefore, the State must allow at least 36 days, from the postmark date on the application for receipt of an EPA response. If the State Board or a Regional Board delivers a document to EPA within less than three days, the number of days saved by such delivery may be subtracted from the 36 days. All of the timeframes mentioned in this MOA are in calendar days.

Received
August 26, 2011
Commission on
State Mandates

b. Another 30-day review period shall begin upon EPA's receipt of the revised application; and

c. This application review process shall be repeated until the application complies with all NPDES regulations.

d. When EPA has no objections pursuant to 40 CFR 123.44, the Regional Board may complete development of a prenotice draft NPDES permit.

e. If an objection is filed, EPA shall advise the State Board and the Regional Board in writing when the application is complete.

f. The Regional Board will be responsible for notifying the applicant.

3. State Disagreement with EPA Objections and Draft Permits

If the Regional Board or the State Board disagrees with EPA's assertion that an application is incomplete, they may issue a prenotice draft permit, provided that:

a. The Regional Board or the State Board states in a transmittal letter that the prenotice draft permit has been issued an EPA objection to the application;

b. EPA may add comments upon or objections to the prenotice draft permit including a reiteration of its objection to the application;

c. Objections to an application will be subject to the same procedures as an EPA objection to the prenotice draft permit, as described below except that the State shall not issue a public notice for a draft permit for which there is an unresolved EPA objection.

C. Prenotice Draft Permits

1. EPA Review of Individual Prenotice Draft Permits

a. It is the intent of the Regional Boards, or the State Board whenever it undertakes the issuance of an NPDES permit, to issue aprenotice draft NPDES permit. A copy of

Received
August 26, 2011
Commission on
State Mandates

associated Statement of Basis or Fact Sheet shall be sent to EPA. As a matter of urgency the Regional Board or the State Board may decide not to issue a prenotice draft NPDES permit.

b. EPA shall have 30 days from its receipt to send comments upon, or an initial objection to, the prenotice draft permit to the Regional Board and State Board.

(1) If EPA mails an initial objection pursuant to 40 CFR 23.44 within 30 days from its receipt of a prenotice draft permit, EPA shall have 90 days from its receipt of the prenotice draft permit to mail a formal objection.

(2) If EPA requests additional information on a prenotice raft permit, a new 30-day review shall begin upon EPA's receipt of the additional information.

(3) If EPA mails an initial objection pursuant to 40 CFR 123.44 within 30 days from its receipt of additional information, EPA shall have 90 days from its receipt of the additional information to mail a formal objection.

c. If a prenotice draft permit is not issued, the procedures and schedules for EPA review, comment, and objections to a prenotice draft permit, described in Section II.C.4, shall apply to the draft permit.

2. <u>EPA Review of Prenotice Draft General Permits</u>

a. The Regional Boards, or the State Board whenever it undertakes the issuance of an NPDES General Permit, shall mail a copy of each prenotice draft Generalmit and Fact Permit Sheet, except for those for stormwater point sources, to:

Received
August 26, 2011
Commission on
State Mandates

(1) Director
Office of Water Enforcement and Permits (EN 335)
U.S. Environmental Protection Agency
401 M Street S.W.
Washington, D.C. 20460; and

(2) EPA, Region 9.

b. EPA, Region 9, and the Director of the Office of Water Enforcement and Permits, EPA Headquarters, shall have 90 days from their receipt of the prenotice draft General Permit to send comments upon or objections to the State Board and Regional Board.

c. If a prenotice draft general permit is issued, the procedures and schedules for EPA review, comment, and objections to a prenotice draft permit, described in Section II.C.4 shall apply to the draft general permit.

3. <u>EPA Comments</u>

a. The Regional Boards and State Board shall treat any comments made by EPA upon a prenotice draft individual permit or upon a prenotice draft General Permit as they would comments from any authoritative source.

b. The Regional Boards or the State Board shall prepare a written response to each significant comment made by EPA that they do not accommodate by revising the draft permit.

4. <u>EPA Objections</u>

The discussion below describes the procedures the Regional Boards and State Board may pursue if EPA issues an objection to a prenotice draft permit. NPDES regulations restrict the resolution of an EPA objection to three alternatives, or a combination thereof: (a) the Regional Board or the State Board changes the permit, (b) EPA withdraws the objection, or (c) EPA acquires exclusive NPDES jurisdiction over the discharge.

RECEIVED BY
JAN 7 1992
OFFICE OF THE
CHIEF COUNSEL
SWRCB

Received
August 26, 2011
Commission on
State Mandates

a. Timing of EPA Objections

(1) If the Regional Board or the State Board receives an initial objection from EPA within 36 days of the postmark on the prenotice draft permit sent to EPA, the Regional Board or the State Board shall delay issuance of the public notice until one of the following events occur:

(a) The Regional Board has received EPA's formal objection;

(b) EPA withdraws the initial objection; or

(c) Ninety-six (96) days have passed from the postmark on the prenotice draft (See Section II.C.2 for timing of EPA objections to prenotice general permits).

(2) Whenever EPA files an initial objection to a prenotice draft permit, EPA shall expedite its effort to file the formal objection, in order to avoid undue delay of the permit's final issuance.

(3) EPA may not make an initial objection to the prenotice draft permit once its 30-day review period has lapsed.

(4) EPA may not make a formal objection to the prenotice draft permit, if it failed to make an initial objection within the 30-day period.

(5) EPA may not make a formal objection to the Preenotice draft permit once the 90-day objection period has lapsed.

(6) EPA may not modify the objection, after the 90-day formal objection period, to require more change to the prenotice draft permit than was required under the original objection.

Received
August 26, 2011
Commission on
State Mandates

(7) EPA may revise the objection within its allotted 90-day objection period to require additional changes to the prenotice draft permit than were required under its original objection. Such a change to an objection by EPA shall cause the State's allotted 90 day response period to restart upon the State's eceipt of the revised objection.

(8) If the Regional Board receives an EPA formal objection within the 96 days specified above, the State Board or the Regional Board may exercise one of the options described under II.C.4.c. and II.C.4.d. below.

b. Content of EPA Objections

(1) For initial objections that must be filed within 30 days, EPA may simply identify:

(a) The name of the facility and its NPDES umber; and

(b) The general nature of the objection.

(2) For formal objections that must be filed within 90 days, EPA shall specify:

(a) The reasons for the objections;

(b) The section of the CWA, the regulations or the guidelines which support the objection; and

(c) The changes to the permit that are required as a condition to elimination of the objection.

(3) Every EPA objection shall be based upon one or more of the grounds for objection described under 40 CFR 123.44(c). EPA shall:

(a) Cite each of the grounds which applies to the objection; and

Received
August 26, 2011
Commission on
State Mandates

(b) Explain how each citation applies to a deficiency of the prenotice draft permit.

(4) Correspondence from EPA which objects to a prenotice draft permit, but which fails to meet the substantive criteria of this part (II.C.4.b) does not constitute an objection and may be treated by the State as comments.

c. State Board Options

(1) If EPA and a Regional Board are unable to resolve a disagreement over provisions of a prenotice draft permit to which EPA has filed a formal objection, the State Board may mediate the disagreement to a resolution that is satisfactory to EPA and to the Regional Board.

(2) If the disagreement proves intractable, the State Board may:

(a) Revise and resubmit the prenotice draft permit in accordance with the required by the EPA objection (The State Board would then be obliged to continue the issuance process and adopt the permit if the Regional Board declines todo so);

(b) Request a public hearing pursuant to 40 CFR 123.44(e); or

(c) Hold a public hearing on the EPA objection.

d. Regional Board Options

(1) If the Regional Board changes the prenotice draft permit to eliminate the basis of the EPA formal objection within 90 days of the Regional Board's receipt of that objection, the permit will remain within the

Received
August 26, 2011
Commission on
State Mandates

Regional Board's jurisdiction (see 40 CFR 123.44(h)). The Regional Board may then continue on to the public notice of the permit.

(2) If EPA and a Regional Board are unable to resolve a disagreement over provisions of a prenotice draft permit to which EPA has filed a formal objection, the Regional Board may:

(a) Request that EPA conduct a public hearing, pursuant to 40 CFR 123.44(e); or

(b) Hold a public hearing on the EPA objection.

e. The State Board or a Regional Board Holds a Public Hearing

(1) If either the State Board or a Regional Board decide to hold a public hearing on an EPA objection, that Board shall:

(a) Prepare a written rebuttal describing the legal and environmental reasons why each each provision of the prenotice draft permit should not be changed to accomodate the objection.

(b) Issue a public notice in accordance with 40 CFR 124.10 and 40 CFR 124.57(a) to open the public comment period and announce the public hearing;

(c) Make available for public review:

- The permit application;
- The draft permit;
- The Fact Sheet or Statement of Basis;
- All comments received upon the draft permit;

Received
August 26, 2011
Commission on
State Mandates

- o The EPA objections; and
- o The Regional Board's rebuttal;

(d) Conduct the hearing in accordance with 40 CFR 124.11 and 124.12; and

(e) Decide whether to accommodate the EPA objection.

(2) A representative of EPA shall attend the hearing to explain EPA's objection.

f. State Board and Regional Board Failure to Respond within 90 days (see 40 CFR 123.44(h))

EPA shall acquire exclusive NPDES authority over the discharge pursuant to 40 CFR 123.44(h)(3), if within 90 days of their receipt of an EPA formal objection:

(1) Neither the State Board nor the Regional Board changes the permit to eliminate the basis of the EPA objection;

(2) Neither the State Board nor the Regional Board requests EPA to hold a public hearing pursuant to 40 CFR 123.44(e); and

(3) EPA does not withdraw the objection.

This applies whether or not the State Board or a Regional Board holds a public hearing on the EPA objection.

g. EPA Public Hearing of an EPA Objection

(1) If the State Board or a Regional Board requests a public hearing pursuant to 40 CFR 123.44(e) within the 90-day response period, EPA shall hold a public hearing in accordance with the procedures of 40 CFR Part 124.

(a) If the State Board or Regional Board withdraws its request for

Received
August 26, 2011
Commission on
State Mandates

a public hearing before EPA has issued the public notice, EPA shall cancelthe hearing unless third party interest otherwise warrants a hearing pursuant to 40 CFR 123.44(e).

(b) If the State Board or Regional Board withdraws its request for a public hearing after EPA has issued the public notice of the hearing, and EPA determines that there is not sufficient third party interest pursuant to 40 CFR 123.44(e), the State Board or Regional Board shall publish a public notice and send a cancellation to everyone on the EPA mailing list.

(2) Within 30 days after the EPA public hearing, EPA shall:

(a) Reaffirm, withdraw, or modify the original objection; and

(b) Send notice of its action to:

- o The State Board;
- o The Regional Board;
- o The applicant; and
- o Each party who submitted comments at the hearing.

(3) If EPA does not withdraw the objection, the State Board or Regional Board shall have 30 days from its receipt of the EPA notice to change the permit to eliminate the basis of the objection.

(4) If EPA modifies the objection to require less change to the prenotice draft permit than was required under the original objection, the State Board or Regional Board shall have 30 days from its receipt of the EPA notice to change the permit to eliminate the basis of the objection.

Received
August 26, 2011
Commission on
State Mandates

(5) EPA may not modify the objection to require more change to the prenotice draft permit than was required by the original objection.

(6) If the State Board or Regional Board fails to send a revised draft permit to EPA within 30 days of its receipt of the EPA notification, EPA acquires exclusive NPDES authority over the discharge pursuant to 40 CFR 123.44(h)(3).

h. Resolved Objections

(1) Whenever EPA has filed a formal objection to a prenotice draft permit and the State Board or Regional Board has changed the permit to eliminate the basis of the objection, or EPA has withdrawn the objection, EPA shall send notice to:

(a) The State Board;

(b) The Regional Board;

(c) The applicant; and

(d) Every other party who has submitted comments upon the EPA objection.

(2) EPA shall send the notice within 30 days of its receipt of the revised State permit, or upon its withdrawal of the objection.

D. <u>Public Notice</u>

1. If the State Board or Regional Board does not receive an EPA initial objection within 36 days of the postmark on the individual prenotice draft permit or within 96 days of the postmark of the prenotice draft general permit, the State Board or Regional Board may proceed with the public notice process.

2. The State Board or Regional Board shall issue the public notice and conduct all public

Received
August 26, 2011
Commission on
State Mandates

participation activities for NPDES permits in accordance with the provisions of 40 CFR Part 124 applicable to State Programs.

(a) The Regional Boards and State Board shall make electronic or stenographic recordings of each of the EIR public hearings, pursuant to 23 California Administrative Code Section 847.4(a).

(b) The Regional Board or the State Board shall make a copy of all comments, including tapes or transcripts of oral comments presented at Board Hearings, and the Board's written responses to the comments, available to EPA and the public upon request, pursuant to 40 CFR 124.17(a) and (c).

3. All EPA comments upon and objections to a prenotice draft permit, draft permit or both, and all correspondence, public comments and other documents associated with any EPA objections shall become part of the administrative record/permit file and shall be available for public review.

E. Draft Permits

1. The State Board and Regional Boards shall send a copy of each draft permit and its Statement of Basis or Fact Sheet to EPA as part of the public notice process. A copy of each draft general permit, and accompanying fact sheet except those for stormwater point sources, shall be sent to EPA and:

Director
Office of Water Enforcement
and Permits (EN 335)
U.S. Environmental Protection Agency
401 M Street SW
Washington, DC 20460

2. EPA may not object to a draft permit which it had an opportunity to review as a prenotice draft permit, except to the extent that it includes changes to the prenotice draft permit, or the bases of the objection were not reasonably ascertainable during the prior review period (e.g., because of new facts, new science, or new law).

Received
August 26, 2011
Commission on
State Mandates

3. If EPA issues an objection to a draft permit, the procedures described under II.C.4. shall apply.

F. Final Permits

1. Final Permits Become Effective Upon Adoption

NPDES permits other than general permits, adopted by the State Board or Regional Boards shall become effective upon the adoption date only when:

a. EPA has made no objections to the permit;

b. There has been no significant public comment;

c. There have been no changes made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments); and

d. The State Board or Regional Board does not specify a different effective date at the time of adoption.

2. Permit Becomes Effective 50 Days after Adoption

NPDES permits, other than general permits, adopted by the State Board or Regional Board shall become effective on the 50th day after the date of adoption, if EPA has made no objection to the permit; if:

a. There has been significant public comment; or

b. Changes have been made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments).

3. Permit Becomes Effective 100 days after Adoption

General permits adopted by the State Board or the Regional Boards shall become effective on the 100th day after the date of adoption, if EPA has made no objection to the permit, if:

Received
August 26, 2011
Commission on
State Mandates

a. There has been significant public comment; or

b. Changes have been made to the latest version of thet draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments).

4. <u>EPA Review of Adopted Permits</u>

a. Transmittal of Adopted Permits to EPA

The Regional Boards shall send copies of the following documents to EPA and the State Board, upon adoption of each NPDES permit identified under II.A.2:

(1) Each significant comment made upon the draft permit, including a transcript or tape of all comments made at public hearings;

(2) The response to each significant comment made upon the draft permit;

(3) Recommendations of any other affected states, including any written comments prepared by this State te explaining the reasons for rejecting any other states' written recommendations.

(4) The Executive Officer (or State Board Executive Director) summary sheet;

(5) The Fact Sheet or Statement of Basis, if it has been changed; and

(6) The final permit.

For general permits, except those for stormwater point sources, the State Board also shall send copies of these documents to:

Director
Office of Water Enforcement
and Permits (EN 335)
U.S. Environmental Protection Agency
401 M Street SW
Washington, DC 20460

Received
August 26, 2011
Commission on
State Mandates

b. EPA Review Period

EPA shall have 30 days from its receipt of these materials to review and comment upon or object to an NPDES permit which becomes effective 50 days after the date of adoption under II.F.2.

EPA shall have 90 days from its receipt of these materials to review and comment upon or object to a general permit which becomes effective 100 days after the date of adoption under II.F.2.

c. EPA Comments upon Adopted Permits

If EPA comments upon an adopted permit pursuant to II.F.3.b. above, the State Board or Regional Board must either change the permit to accommodate the comments, or respond to the comments as follows:

(1) If, the State Board or Regional Board changes the permit, the permit will have to be readopted unless the only changes fall within the definition of minor modifications under 40 CFR 122.63, in which case the permit may take effect as originally scheduled (at least 50 days after the date of adoption); or

(2) If the State Board or Regional Board responds to the EPA comment instead of changing the permit, the permit may take effect as originally scheduled (at least 50 days after the date of adoption).

d. EPA Objection to Adopted Permits

If EPA mails an initial objection to an adopted permit within 30 days of its receipt pursuant to II.F.3.b., the full objection process will have begun, as described under II.C.4. and the permit effective date shall be stayed until the basis of the EPA objection has been eliminated.

Received
August 26, 2011
Commission on
State Mandates

e. Restrictions upon EPA Comments and Objections

(1) EPA shall use this review period to make objections which pertain only:

(a) To changes made to the draft permit;

(b) To comments made upon the permit;

(c) To new information that was not reasonably ascertainable during the initial review period; or

(d) To objections made by EPA to the draft permit.

(2) EPA shall not use this review period to file comments or objections which it neglected to file during the prenotice comment period or during the public notice comment period.

G. Permit Modification

1. When a Regional Board or State Board decides to modify an NPDES permit, a prenotice draft permit shall be given public notice and issued in accordance with NPDES regulations.

2. Whenever a Regional Board or State Board decides to modify an NPDES permit, the Regional Board or State Board shall follow the EPA review procedures for prenotice draft permits described under II.C. through II.F.

3. Minor permit modifications (not the same as modifications to minor permits) as described under 40 CFR 122.63 may be accomplished by letter, and are not subject to public review prior to their issuance under NPDES. However, they are subject to notice and review provisions under State law The following protocol shall apply to "minor permit modifications":

a. The Regional Boards or State Board, as appropriate, shall send a copy of each

Received
August 26, 2011
Commission on
State Mandates

minor permit modification to EPA and the State Board.

b. If EPA or the State Board notice that a minor modification has been issued (by either a Regional Board or the State Board) which does not conform to the criteria of 40 CFR 122.63, the State Board shall notify the permittee and the Regional Board that the minor modification was improper. The State should initiate promptly any proceedings necessary to void or rescind the modification. The Regional Board or State Board may then initiate a formal permit modification that is subject to public review as specified by NPDES regulations.

4. No NPDES permit shall be modified to extend beyond the maximum term allowed by NPDES regulations. If a Regional Board or State Board decides to extend a permit expiration date to a date more than five years from the date of issuance of the permit, the Board shall revoke and reissue the permit in accordance with NPDES regulations.

H. Administrative or Court Action

If the terms of any permit, including any permit for which review has been waived pursuant to Part II.A.1. above, are affected in any manner by administrative or court action, the Regional Board or State Board shall immediately transmit a copy of the permit, with changes identified, to EPA and shall allow 30 days for EPA to make written objections to the changed permit pursuant to Section 402(d)(2) of the CWA.

I. Variance Requests

1. State Variance Authority

a. The State may approve applications for the following variances, subject to EPA objections under Section C.4 above:

(1) Compliance extension based on delay of a publicly owned treatment works (POTW), under Section 301(i) of the CWA;

Received
August 26, 2011
Commission on
State Mandates

(2) Compliance extension based upon the use of innovative technology, under Section 301(k) of the CWA; and

(3) Variances from thermal pollution requirements, under Section 316(a) of the CWA.

b. Unless the State denies the variance application, the State shall adopt approved modifications as either formal modifications to active permits or as provisions of reissued permits.

2. <u>State/EPA Shared Variance Authority</u>

a. The State may deny or forward to EPA, with or without recommendations, applications for the following variances:

(1) Variances based upon the presence of fundamentally different factors (FDF), under Section 301(n) of the CWA;

(2) Variances based upon the economic capabilities of the applicant, under Section 301(c) of the CWA;

(3) Variances based upon water quality factors, under Section 301(g) of the CWA; and

(4) Variances based on economic and social costs or upon the economic capabilities of the applicant for achieving EPA promulgated water quality related effluent limitations, under Section 302(b)(2) of the CWA.

b. Unless the State denies the variance application at the outset, the State will subsequently issue an NPDES permit based upon EPA's final decision.

3. <u>Certification and Concurrence in EPA Variance Decisions under Sections 301(h) and 301(m)</u>

a. The State may deny or forward to EPA, with or without recommendations, applications for the following variances:

Received
August 26, 2011
Commission on
State Mandates

(1) Variances based upon the quality of coastal marine waters under Section 301(h) of the CWA (these are addressed by a separate agreement.); and

(2) Variances based upon the energy and environmental costs of meeting requirements for wood processing waste discharged to the marine waters of Humboldt Bay, under Section 301(m) of the CWA.

b. If EPA decides to prepare a draft permit on the application for a variance, the State will issue or deny waste discharge requirements under its own authority as part of the concurrence process.

(1) The State's decision on issuance of waste discharge requirements shall constitute the State's decision on concurrence in the variance. Any amendment or rescission of the waste discharge requirements, and any State Board order finding that a Regional Board's action in issuing the waste discharge requirements was inappropriate or improper, shall constitute a modification of the State's concurrence if the amendment, rescission, or State Board order is issued before EPA issues a final permit authorizing the variance.

(2) Waste discharge requirements issued by the State shall require compliance with any condition EPA imposes in the final permit. Any authorization made by the waste discharge requirements to discharge under a variance will be contingent upon issuance of a permit by EPA authorizing the variance.

(3) EPA will not issue a final permit until the State issues waste discharge requirements. If the waste discharge requirements are issued by a Regional Board, EPA will not issue a final permit until at least 31 days after the Regional Board's decision.

Received
August 26, 2011
Commission on
State Mandates

While any timely petition is still pending before the State Board, EPA will not issue a final permit until after 10 months have passed without State Board action on the petition. After 10 months have passed without State Board action on the petition EPA may issue a 301(h) permit provided that the permit includes a reopener clause allowing EPA to revise the permit consistent with the State Board's order on the petition for review. If the State Board initiates action on the petition within 10 months, by notifying the parties involved that the petition is complete, EPA will not issue a 301 (h) permit until after the state Board has issued an order on the petition for review.

(4) A permit issued by EPA shall incorporate any condition of the State's concurrence, including any provisions of the waste discharge requirements issued to the discharge, unless EPA substitutes a more stringent requirement.

III. PRETREATMENT PROGRAM

A. General

This Section defines the State Board, the Regional Boards, and EPA responsibilities for the establishment, implementation, and enforcement of the National Pretreatment Program pursuant to Sections 307 and 402(b) of the CWA, and as described in Section VI of the "NPDES Program Description, January 1988".

B. Roles and Responsibilities

EPA will oversee California Pretreatment Program operations consistent with the requirements of 40 CFR Part 403, this Section of the MOA, and Section VI of the "NPDES Program Description, January 1988".

Consistent with State and federal law, and the State Clean Water Strategy, the State will administer the California Pretreatment Program.

Received
August 26, 2011
Commission on
State Mandates

The State Board will have primary responsibility for:

1. Developing, implementing, and overseeing the California Pretreatment Program;

2. Providing technical and legal assistance to the Regional Boards, publicly owned treatment works (POTWs), and industrial users;

3. Developing and maintaining a data management system;

4. Providing information to EPA or other organizations as required and/or requested; and

5. Reviewing and ruling on petitions for review of Regional Board decisions.

The Regional Boards, with the assistance and oversight of the State Board, will have primary responsibility for:

1. Enforcing the National pretreatment standards: prohibited discharges, established in 40 CFR 403.5;

2. Enforcing the National categorical pretreatment standards established by the EPA in accordance with Section 307 (b) and (c) of the CWA, and promulgated in 40 CFR Subchapter N, Effluent Guidelines and Standards;

3. Review, approval, or denial of POTW Pretreatment Programs in accordance with the procedures discussed in 40 CFR 403.8, 403.9, and 403.11;

4. Requiring a Pretreatment Program as an enforceable condition in NPDES permits or waste discharge requirements issued to POTWs as required in 40 CFR 403.8, and as provided in Section 402(b)(8) of the CWA;

5. Requiring POTWs to develop and enforce local limits as set forth in 40 CFR 403.5(c);

6. Review and, as appropriate, approval of POTW requests for authority to modify categorical pretreatment standards to reflect removal of pollutants by a POTW in accordance with 40 CFR

Received
August 26, 2011
Commission on
State Mandates

403.7, 403.9, and 403.11, and enforcing related conditions in the POTW's NPDES permit or waste discharge requirements;

7. Overseeing POTW Pretreatment Programs to ensure compliance with requirements specified in 40 CFR 403.8, and in the POTW's NPDES permit or waste discharge requirements;

8. Performing inspection, surveillance, and monitoring activities which will determine, independent of information supplied by the POTW, compliance or noncompliance by the POTW with pretreatment requirements incorporated into the POTW permit;

9. Providing the State Board and EPA, upon request, copies of all notices received from POTWs that relate to a new or changed introduction of pollutants to the POTW; and

10. Applying and enforcing all other pretreatment regulations as required by 40 CFR Part 403.

C. <u>POTW Pretreatment Program and Removal Credits Approval</u>

Each Regional Board shall review and approve POTW applications for POTW pretreatment program authority and POTW applications to revise discharge limits for industrial users who are, or may in the future be, subject to categorical pretreatment standards. It shall submit its findings together with the application and supporting information to the State Board and EPA for review. No POTW Pretreatment Program or request for revised discharge limits shall be approved by the Regional Boards if the State Board or EPA objects in writing to the approval of such submission in accordance with 40 CFR 403.11(d).

Note: No removal credits can be approved until EPA promulgates sludge regulations under Section 405 of the Clean Water Act.

D. <u>Requests for Categorical Determination</u>

Each Regional Board shall review requests for determinations of whether an industrial user does or does not fall within a particular industrial category or subcategory. The Regional Boards will make a written determination for each request

Received
August 26, 2011
Commission on
State Mandates

stating the reasons for the determinations. The Regional Board shall then forward its findings, together with a copy of the request and any necessary supporting information, to the State Board and EPA for concurrence. If the State Board or EPA does not modify the Regional Board's decision within 60 days after receipt thereof, the Regional Board finding is final. A copy of the final determination shall be sent to the requestor, the State Board, and EPA Region 9.

E. Variances From Categorical Standards For Fundamentally Different Factors

Each Regional Board shall make an initial finding on all requests from industrial users for fundamentally different factors variances from the applicable categorical pretreatment standard. If the Regional Board determines that the variance request should be denied, the Regional Board will so notify the applicant and provide reasons for its determination in writing. Where the Regional Board's initial finding is to approve the request, the finding, together with the request and supporting information, shall be forwarded to the State Board. If the State Board concurs with the Regional Board's finding, it will submit it to EPA for a final determination. The Regional Board may deny but not approve and implement the fundamentally different factor(s) variance request until written approval has been received from EPA.

If EPA finds that fundamentally different factors do exist, a variance reflecting this determination shall be granted. If EPA determines that fundamentally different factors do not exist, the variance request shall be denied and the Regional Board shall so notify the applicant and provide EPA's reasons for the denial in writing.

F. Net/Gross Adjustments to Categorical Standards

If the Regional Board receives a request for a net/gross adjustment of applicable categorical pretreatment standards in accordance with 40 CFR 403.15, the Regional Board shall forward the application to EPA for a determination. A copy of the application will be provided to the State Board. Once this determination has been made, EPA shall

Received
August 26, 2011
Commission on
State Mandates

notify the applicant, the applicant's POTW, the Regional Board, and State Board and provide reasons for the determination and any additional monitoring requirements the EPA deems necessary, in writing.

G. Miscellaneous

The State Board, with the assistance of the Regional Boards, will submit to the EPA a list of POTWs which are required to develop their own pretreatment program or are under investigation by a Regional Board for the possible need for a local pretreatment program. The State will document its reasons for all deletions from this list. Before deleting any POTW with a design flow greater than five-million gallons per day (mgd), the State will obtain an industrial survey from the POTW and determine: (1) that the POTW is not experiencing pass through or interference problems; and (2) that there are no industrial users of the POTW that are subject either to categorical pretreatment standards or specific limits developed pursuant to 40 CFR 403.5(c). The State will document all such determinations and provide copies to EPA. For deletions of POTWs with flows less than 5 mgd, the State will first determine (with appropriate documentation) that the POTW is not experiencing treatment process upsets, violations of POTW effluent limitations, or contamination of municipal sludge due to industrial users. The State will also maintain documentation on the total design flow and the nature and amount of industrial wastes received by the POTW.

The State Board and EPA will communicate, through the Section 106 Workplan process, commitments and priorities for program implementation including commitments for inspection of POTWs and industrial users. The Section 106 Workplan will contain, at a minimum, the following: (1) a list of NPDES permits or waste discharge requirements to be issued by the Regional Boards to POTWs subject to pretreatment requirements; and (2) the number of POTWs to be audited or inspected on a quarterly basis.

H. Other Provisions

Nothing in this agreement is intended to affect any pretreatment requirement, including any standards or prohibitions established by State or local law, as long as the State or local requirements are not less stringent than any set forth in the National Pretreatment Program, or other requirements or

Received
August 26, 2011
Commission on
State Mandates

prohibitions established under the CWA or Federal regulations. Nothing in this MOA shall be construed to limit the authority of the EPA to take action pursuant to Sections 204, 208, 301, 304, 306, 307, 308, 309, 311, 402, 404, 405, 501, or other Sections of the CWA (33 U.S.C. Section 1251 et seq).

IV. COMPLIANCE MONITORING AND ENFORCEMENT

This Section constitutes the State/EPA Enforcement Agreement. The State Board and EPA will review this section of the MOA each year.

A. Enforcement Management Systems (EMS)

The State Board will maintain compliance monitoring and enforcement procedures in the APM which are consistent with the seven principles of the EPA Enforcement Management System Guide (listed below), and this MOA. The APM shall constitute the State Enforcement Management System for the NPDES program, and shall describe criteria for:

1. Maintaining a source inventory (of information about discharges subject to NPDES permits) that is complete and accurate;

2. Processing and assessing the flow of information available on a systematic and timely basis;

3. Completing a preenforcement screening (of compliance-related information coming into the inventory) by reviewing the information as soon as possible after it is received;

4. Performing a more formal enforcement evaluation (of the same information) where appropriate;

5. Instituting formal enforcement action and follow-up wherever necessary;

6. Initiating field investigations based upon a systematic plan; and

7. Using internal management controls to provide adequate enforcement information to all levels of the organization.

These compliance and enforcement-related provisions of the APM shall constitute the framework (within which the circumstances of

Received
August 26, 2011
Commission on
State Mandates

noncompliance are reviewed) for making NPDES enforcement decisions, and evaluation of those decisions by others.

B. Inspections

1. State Inspections

a. The Regional Boards shall conduct compliance inspections to determine the status of compliance with permit requirements, including sampling and non-sampling inspections.

b. The State Board will maintain up-to-date procedures in the APM for conducting compliance inspections, which conform to NPDES regulations.

c. The State is responsible for inspecting annually all major dischargers. To enable this goal to be accomplished EPA may assist the State by inspecting some dischargers. The 106 workplan will specify the number of sampling inspections and the number of reconnaissance inspections to be conducted by the State each year.

2. EPA Inspections

a. EPA retains the authority to perform compliance inspections of any permittee at any time.

b. For those inspections scheduled more than 15 days in advance, EPA will notify the appropriate Regional Board and the State Board within 15 days in advance. For inspections scheduled less than 15 days in advance, EPA will provide as much advance notice as possible.

c. EPA will send copies of inspection reports to the Regional Board and State Board within 30 days of the inspection if there are no effluent samples to be analyzed. EPA will usually send copies of inspection results to the State within 60 days of the inspection if there are effluent samples to be analyzed.

Received
August 26, 2011
Commission on
State Mandates

3. Inspection Assistance

   a. EPA and the State Board will provide technical assistance to the Regional Boards in their inspection programs whenever staff are available. This assistance may be requestedat any time by the Regional Boards.

   b. If neither EPA nor the State Board are able to provide such assistance when it is requested, the State Board shall schedule the assistance at the earliest possible date, and so notify the Regional Board and EPA.

C. Discharger Reports

1. Review of Reports

   The Regional Boards shall require each NPDES permittee to send copies of its Discharge Monitoring Reports (DMRs) to EPA and the Regional Boards for review.

   a. Whenever a Regional Board cannot complete the review of DMRs and other compliance reports within 30 days of their arrival, the Regional Board shall follow the "exception procedures" in the APM.

   b. For auditing and reporting purposes Regional Boards (or the State Board if it should undertake DMR review) shall track and document the date of receipt, the date of review, and the review results (i.e., compliance status) of each DMR and compliance report.

2. Quality Assurance Reviews

   EPA routinely conducts technical studies of the accuracy of the reported effluent data from NPDES permittees. EPA send check samples to selected permittees for analysis as part of these studies. The permittees are required to return the results to EPA.

   a. Delinquent Permittees

      (1) EPA will send the State Board a list of permittees who declined to return

Received
August 26, 2011
Commission on
State Mandates

the analytical results of the check samples.

(2) The State Board shall transmit the list to the Regional Boards and assure that they require the permittee to participate in all subsequent studies.

(3) The State Board or Regional Board shall take other appropriate enforcement action against NPDES permittees that have failed to return the anlytical results of the sample.

b. Unacceptable Quality of Analysis

(1) EPA will send the State Board and Regional Boards a list of permittees who failed the analysis study.

(2) The Regional Boards will determine whether the causes of failure are due to clerical errors in report preparation or procedural errors in sample analysis.

(a) If the problem is due to clerical errors, the Regional Board will clarify the reporting procedures.

(b) If the problem is due to analytical errors, the Regional Board will assure that the problems are corrected immediately or that the permittee begins using another laboratory.

(c) If the permittee is using in-house laboratory facility, the Regional Board staff shall take action to assure compliance with NPDES requirements.

c. EPA Technical Assistance

Within the constraints of available staff time, EPA will provide technical assistance and guidance concerning acceptable analytical procedures.

Received
August 26, 2011
Commission on
State Mandates

D. Public Complaints

1. Telephone Complaints

a. Telephone complaints received by EPA or the State Board pertaining to a discharge to water of the United States will be referred to the appropriate Regional Board.

b. The Regional Boards shall maintain written documentation of each telephone complaint and its disposition.

2. Written Complaints

a. Written complaints pertaining toa discharge to waters of the United States may be responded to by telephone or by letter. All telephone responses shall be documented by memo.

b. Copies of each response prepared by EPA or the State Board shall be sent to the appropriate Regional Board.

c. The Regional Boards shall retain documentation of each written complaint and its disposition.

3. Complaint Resolution

a. The Regional Boards will investigate complaints and inform the complainant of the investigation results.

b. The Regional Boards shall place a copy of each NPDES-related complaint and a memo of recorddescribing the investigation results thereof into the permit file or compliance file of the appropriate facility.

E. State Enforcement

1. Basis of EPA/State Relationship

a. The Regional Boards pursue enforcement of NPDES permit requirements, and of all other provisions of the NPDES program under State authority.

Received
August 26, 2011
Commission on
State Mandates

b. The State Board shall assure that enforcement of the NPDES program is exercised aggressively, fairly, and consistently by all nine Regional Boards. The staff of the State Board will review enforcement practices and inform the Regional Board is not taking appropriate enforcement actions.

(1) The State Board will assure that Federal facilities are treated the same as other NPDES facilities within the constraints of Section 313 of the Clean Water Act.

(2) The State Board will keep a record of all penalties assessed and all penalties collected in NPDES enforcement cases.

c. EPA shall monitor the State's performance, and may take enforcement action under Section 309 of the CWA, whenever the State does not take timely and appropriate enforcement action.

d. EPA shall coordinate its enforcement actions with the State Board and with the appropriate Regional Board as described below.

e. The State Board and EPA will meet periodically to discuss the status of pending and adopted enforcement actions as well as other issues of concern.

2. <u>State Notice to EPA of Enforcement Actions</u>

The State shall send copies of proposed and final enforcement actions, settlements, and amendments thereto, against NPDES facilities to EPA within five working days after the date of signature.

F. <u>EPA Enforcement</u>

1. <u>EPA Initiation of Enforcement Action</u>

EPA will initiate enforcement action:

a. At the request of the State;

Received
August 26, 2011
Commission on
State Mandates

b. If the State response to the violation is not consistent with the APM and EPA policy or is otherwise determined by EPA not to be timely and appropriate; or

c. If there is an overriding federal interest.

2. EPA Deferral of Enforcement Action

EPA shall defer formal enforcement action whenever the State initiates an enforcement action determined by EPA to be timely and appropriate for the violation, except when there is an overriding federal interest.

G. Enforcement Procedures

If circumstnaces require EPA to pursue formal enforcement, EPA, and the State shall observe the following procedures:

1. Enforcement Based on the Quarterly Noncompliance Report

a. EPA shall notify the State Board and the appropriate Regional Boards by letter, of the facilities (the name and NPDES number) for which for which EPA policy requires formal enforcement action.

b. The State Board shall respond to EPA by letter within 30 days of its receipt of the EPA notice.

c. The response shall include:

(1) The name and NPDES number of:

(a) Each facility which has returned to compliance;

(b) Each facility for which the Regional Boards have scheduled formal enforcement actions;

(c) Each facility for which a Regional Board or the State Board has taken a formal enforcement action, if the

Received
August 26, 2011
Commission on
State Mandates

enforcement action was not shown on the QNCR as part of the response to the violation; and

(d) Each facility against which the State Board will pursue formal enforcement.

(2) Identification of the type of each formal enforcement action;

(3) A description of how each Regional Board plans to address the violations which have not been corrected by the faciilities, and for which they are not pursuing formal enforcement; and

(4) A description of the enforcement action State Board staff will recommend to take against any facility.

e. EPA shall notify the State Board either that the State response to the violation is sufficient to defer a formal action by EPA, or that EPA will proceed with a formal enforcement action pursuant to Section 309 of the CWA.

2. <u>Enforcement Based on Information Other than the Quarterly Noncompliance Report</u>

a. EPA shall notify the State Board and the appropriate Regional Board of each violation against which EPA intends to pursue formal enforcement. This notice shall include:

(1) The name and NPDES number of the facility;

(2) An identification of the violations which warrant formal enforcement;

(3) The reasons why EPA believes formal enforcement is necessary; and

(4) The reasons why past or pending State responses are insufficient.

b. Within ten working days of the notification by EPA, and after

Received
August 26, 2011
Commission on
State Mandates

consultation with the appropriate Regional Boards, the State Board will respond to the EPA notice. The State Board's response will include:

(1) A discussion of the circumstances of the identified violations;

(2) A description of the substance and timing of any past, pending, or planned responses to the violations by the Regional Board or the State Board; including identification of the office and staff responsible for the action;

(3) The amounts of any penalties sought or collected; and

(4) Whether or not the State Board believes the responses are appropriate and why.

c. EPA shall notify the State Board either that the State response to the violation is sufficient to defer a formal action by EPA, or that EPA will proceed with a formal enforcement action pursuant to Section 309 of the CWA.

d. Normal enforcement action until ten working days from the date of the EPA notice have passed.

3. Overriding Federal Interest:

a. For the purposes of this MOA, an overriding federal interest exists when:

(1) EPA enforcement can reasonably be expected to expedite the discharger's return to full compliance;

(2) EPA enforcement can reasonably be expected to increase program credibility; or

(3) The violation has significant implications for the success of the NPDES program beyond the borders of California;

Received
August 26, 2011
Commission on
State Mandates

b. EPA shall notify the State Board and the appropriate Regional Board when there is an overriding federal interest;

c. Within ten working days of the EPA notice, the State Board will inform EPA of any coordination between the federal action and a State action that the State believes to be appropriate;

d. EPA shall either:

(1) Contact the Regional Board and the State Board to work out the details of coordinating the State and federal enforcement actions. Usually, such coordination will entail the exchange of draft enforcement actions for review. Comments can usually be exchanged by telephone, or in a staff meeting at the Regional Board depending upon the complexity of the enforcement action; or

(2) Inform the State Board that such coordination is infeasible;

e. EPA shall not proceed with its enforcement action until ten working days after the date of the EPA notice; and

f. In any instance of overriding federal interest and upon request by the State, EPA shall send the State Board and the appropriate Regional Board a brief, written explanation of the reasons for overriding federal interest or the reasons for infeasibility of enforcement coordination.

4. <u>Recovery of Additional Penalties</u>

Nothing in this MOA shall be construed to limit EPA's authority to take direct enforcement action for the recovery of additional penalties, whenever the penalties recovered by the State are less than those prescribed by the EPA penalty policy.

Received
August 26, 2011
Commission on
State Mandates

5. <u>EPA Enforcement Without Notice to the State</u>

Not withstanding the provisions above for prior notification to the State of federal enforcement actions, nothing in this MOA limits EPA's authority to take enforcement action without any prior notice to the State. If EPA does take such an action, it shall send copies of its correspondence with the affected facility to the State Board and the appropriate Regional Board.

V. STATE REPORTING

A. The State will submit the following to EPA:

Item	Description	Frequency of Submission
1	A copy of all permit applications except those for which EPA has waived review	Within 5 days of receipt
2	Copies of all draft NPDES permits and permit modifications including fact sheets except those for which EPA has waived review	When placed on public notice
3	Copies of all public notices	As issued
4	A copy of all issued, draft NPDES permits and permit modifications	As issued
5	A copy of settlements and decisions in permit appeals	As issued

Item	Description	Frequency of Submission
6	A list of major facilities of the scheduled for compliance inspections	With submission annual program
7	Proposed revisions to the scheduled compliance inspections	As needed

Received
August 26, 2011
Commission on
State Mandates

Item	Description	Frequency of Submission
8	A list of compliance inspections performed during the previous quarter	Quarterly
9	Copies of all compliance inspection reports and data and transmittal letters to major permittees	Within 30 days of inspection
10	Copies of all compliance inspection reports and data transmittal letters to all other permittees	As requested
11	For major dischargers, a quarterly noncompliance report as specified in 40 CFR 123.45(a) and further qualified in EPA guidance	Quarterly, as specified in 40 CFR 123.45(c)
12	For minor dischargers, an annual noncompliance report as specified in 40 CFR 123.45(b)	Within 60 days of the end of the calendar as specified in 40 CFR 123.45(c)
13	Copies of all enforcement actions against NPDES violators (including letters, notices of violation, administrative orders, initial determinations, and referrals to the Attorney General)	As issued

Item	Description	Frequency of Submission
14	Copies of correspondence required to carry out the pretreatment program	As issued or received
15	Copies of Discharge Monitoring Report (DMR) and non-	Within 10 days of receipt

Received
August 26, 2011
Commission on
State Mandates

compliance notification from major permittees

B. Major Discharger List

The State annually shall submit to EPA an updated "major dischargers" list. The list shall include those dischargers mutually defined by the State Board and EPA as major dischargers plus any additional dischargers that in the opinion of the State or EPA, have a high potential for violation of water quality standards. The major discharger list for Federal facilities shall be jointly determined by EPA and the State. The schedule for submittal of the major discharger list shall be included in the 106 workplan.

C. Emergency Notification

1. The Regional Board shall telephone, or otherwise contact, EPA and the State Board immediately if it discovers a NPDES permit violation or threatening violation:

   a. That has significantly damaged or is likely to significantly damage the environment or the public health; or

   b. That has or is likely to cause significant public alarm.

2. The Regional Board will describe the circumstances and magnitude of the violation

VI. CONFIDENTIALITY OF INFORMATION

A. All information obtained or used by the State in the administration of the NPDES program shall be available to EPA upon request without restriction, and information in EPA's files which the State needs to implement its program shall be made available to the State upon request without restriction.

B. Whenever either party furnishes information to the other that has been claimed as confidential, the party furnishing the information will also furnish the confidentiality claim and the results of any legal review of the claim.

Received
August 26, 2011
Commission on
State Mandates

C. The party receiving the confidential information will treat it in accordance with the provisions of 40 CFR Part 2.

D. The State and EPA will deny all claims of confidentiality for effluent data, permit applications, permits, and the name and address of any permittee.

VII. PROGRAM REVIEW

A. To fulfill its responsibility for assuring the NPDES program requirements are met, EPA shall:

1. Review the information submitted by the State;

2. Meet with State officials from time to time todiscuss and observe the data handling, permit processing, and enforcement procedures, including both manual and automated processes;

3. Examine the files and documents of the State regarding selected facilities to determine: (a) whether permits are processed and issued consistent with federal requirements; (b) whether the State is able to discover permit violations when they occur; (c) whether State reviews are timely; and (d) whether State selection of enforcement actions is appropriate and effective. EPA shall notify the State in advance of any examination under this paragraph so that appropriate State officials may be available to discuss individual circumstances and problems.

   EPA need not reveal to the State in advance the files and documents to be examined. A copy of the examination report shall be transmitted to the State when available;

4. Review, from time to time, the legal authority upon which the State's program is based, including State statutes and regulations;

5. When appropriate, hold public hearings on the State's NPDES program; and

6. Review the State's public participation policies, practices and procedures.

Received
August 26, 2011
Commission on
State Mandates

B. Prior to taking any action to propose or effect any substantial amendment, recision, or repeal of any statute, regulations, or form which has been approved by EPA, and prior to the adoption of any statute, regulations, or form, the State shall notify the Regional Administrator and shall transmit the text of any such change or new form to the Regional Administrator (see 40 CFR 123.62 which provides that the change may trigger a program revision, which will not become effective until approved by EPA).

C. If an amendment, recision, or repeal of any statute, regulations, or form described in paragraph (B) above shall occur for any reason, including action by the State legislature or a court, the State shall within ten days of such event, notify the Regional Administrator and shall transmit a copy of the text of such revision to the Regional Administrator.

D. Prior to the approval of any test method as an alternative to those specified as required for NPDES permitting, the State shall obtain the approval of the Regional Administrator.

VIII. TERM OF THE MOA

A. This MOA shall become effective upon the date of signature of the Regional Administrator and of the Chair of the State Water Resources Control Board after State Board approval. If it is signed by the two parties on different days, the latter date shall be the effective date.

B. This MOA shall be reviewed by EPA and the State, and revised as appropriate within five (5) years of its effective date.

C. Either EPA or the State may initiate action to change this MOA at any time.

1. No change to this MOA shall become effective without the concurrence of both agencies.

2. The STATE REPORTING (V) portion may be changed by the written consent of the Chief, Division of Water Quality, SWRCB, and the Director, Water Management Division, EPA, Region 9. The Director of Permits Division (EN-336) must consent to all substantial changes.

Received
August 26, 2011
Commission on
State Mandates

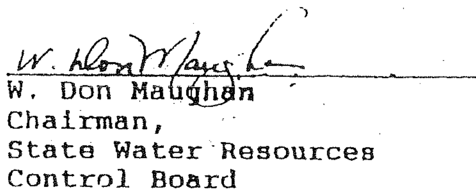
10/90

3. All other changes to this MOA must be approved by the State Board and approved by the Regional Administrator, with the prior concurrence of the Director of the Office of Water Enforcement and Permits (EN-335)and the Associate General Counsel for Water for all substantial changes. The Director of the Office of Water Enforcement and Permits and Associate General Counsel for Water shall also determine whether changes should be deemed substantial.

4. All changes to this MOA determined by EPA to be substantial shall be subject to public notice and comment in accordance with the requirements of 40 CFR 123.62 before being approved.

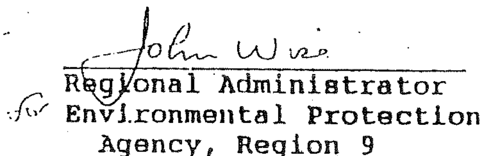
D. Either party may terminate this MOA upon notice to other party pursuant to 40 CFR 123.64.

E. In witness thereof, the parties execute this agreement.



W. Don Maughan
Chairman,
State Water Resources
Control Board

Dated: JUN - 8 1989



for Regional Administrator
Environmental Protection
Agency, Region 9

Dated: 22 SEP 1989

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 3

TAB 6

Received
August 26, 2011
Commission on
State Mandates

State Water Resources Control Board

Linda S. Adams
Secretary for Environmental Protection

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ http://www.waterboards.ca.gov

Arnold Schwarzenegger
Governor

March 10, 2010

[via U.S. mail & email]
Ms. Tracy Egoscue
Executive Officer
Los Angeles Regional Water Quality
Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013
tegoscue@waterboards.ca.gov

[via U.S. mail & email]
Andrew R. Henderson, Esq.
Building Industry Legal Defense
Foundation
1330 South Valley Vista Drive
Diamond Bar, CA 91765
Andrew@biasc.org

Mr. Michael Lewis **[via U.S. mail only]**
Construction Industry Coalition on
Water Quality
2149 E. Garvey Avenue North, Suite A-11
West Covina, CA 91791

Dear Ms. Egoscue and Mssrs. Henderson and Lewis:

PETITION OF BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, CONSTRUCTION INDUSTRY COALITION ON WATER QUALITY, AND BUILDING INDUSTRY ASSOCATION OF SOUTHERN CALIFORNIA, INC. (WASTE DISCHARGE REQUIREMENTS ORDER NO. R4-2009-0057 [NPDES NO. CAS004002] FOR STORM WATER (WET WEATHER) AND NON-STORM WATER (DRY WEATHER) DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS WITHIN THE VENTURA COUNTY WATERSHED PROTECTION DISTRICT, COUNTY OF VENTURA AND THE INCORPORATED CITIES THEREIN), LOS ANGELES WATER BOARD: REQUEST FOR VOLUNTARY REMAND AND ABEYANCE
SWRCB/OCC FILE A-2023

The purpose of this letter is to request that the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) agree to voluntary remand of Order No. R4-2009-0057 (Ventura MS4 permit) and that the Building Industry Legal Defense Foundation, Construction Industry Coalition on Water Quality and Building Industry Association of Southern California, Inc. (Petitioners) agree to place the above petition in abeyance. As explained more fully below, in light of apparent irregularities and confusion in this matter, the State Water Resources Control Board (State Water Board) cannot complete its review of the petition prior to the deadline for completion.

On July 2, 2009, the State Water Board Office of Chief Counsel issued a Notice of Complete Petition in the above-referenced matter, requesting that the Los Angeles Water Board submit the administrative record and that it and other interested persons file any responses to the petition within thirty (30) days. Pursuant to California Code of Regulations, title 23, section 2050.5, subdivision (b), the State Water Board must review and act on the petition within two-hundred seventy (270) days of the mailing date of that letter. If formal disposition of the matter

Received
August 26, 2011
Commission on
State Mandates

is not made within this time limit, the petition is deemed denied. (*Ibid.*) The regulations allow extension of the deadline for sixty (60) days with written agreement from the petitioner. (*Ibid.*). Further, if a petition is placed in abeyance, abeyance tolls the 270-day deadline. (*Id.*, subd. (d).) The State Water Board's resolution deadline for this matter is March 29, 2010.

The Los Angeles Water Board adopted the Ventura MS4 Permit on May 7, 2009. It appears that the Los Angeles Water Board initially circulated the adopted permit on June 2, 2009. Petitioners filed a timely challenge to the Ventura MS4 Permit on June 8, 2009. On or before August 3, 2009, the Los Angeles Water Board transmitted to the State Water Board's Office of Chief Counsel the June 2, 2009 version of the permit, a supporting administrative record, and a response to the petition.

On February 23, 2010, the State Water Board staff reviewing the petition became aware of major corrections to the Ventura MS4 Permit that had been made subsequent to the Los Angeles Water Board's June 2, 2009 issuance of the permit and that were not reflected in the version of the Ventura MS4 Permit under review. Apparently, these corrections to the Ventura MS4 were made public in January 2010, nearly eight months after the Los Angeles Water Board circulated the adopted permit. About the same time, the State Water Board became aware of a significant number of documents that may have been omitted from the administrative record transmitted to the State Water Board.

Previous procedural questions were raised at the outset of State Water Board review, including a request from the Los Angeles Water Board in its response to the petition, asking that the State Water Board correct a finding in the Permit. In addition, Petitioners have argued that the approved version of the Permit should have been recirculated prior to adoption because of alleged irregularities in the hearing.

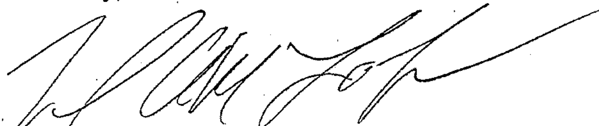
In light of the substantial new information submitted, confusion regarding the record, and other procedural irregularities, we request that the Los Angeles Water Board agree to a voluntary remand of the matter in order to address these issues. Without making a determination on whether a further hearing is necessary, we note that the Los Angeles Water Board may decide to hold a new evidentiary hearing. Final resolution of the merits of the petition by the State Water Board would be extremely difficult in light of the various issues outstanding, either by March 29, or by May 28, if the deadline were extended 60 days. We therefore request that Petitioners agree to place the matter into abeyance pending Los Angeles Water Board reconsideration. Because the State Water Board's resolution deadline for this matter is imminent, please respond no later than **March 18, 2010.**

Because of the likelihood that additional time may be necessary for the Los Angeles Water Board and the Petitioners, and other interested persons, to respond to this request, we further ask that Petitioners agree to a 60-day extension of the State Water Board's petition resolution deadline, in accordance with California Code of Regulations, title 23, section 2050.5, subdivision (b). Should we receive from the Petitioners a written agreement to place the petition in abeyance and/or to extend the deadline for resolution by 60 days, we will consider any requests for a brief extension of the March 18 deadline for responding to this letter.

Received
August 26, 2011
Commission on
State Mandates

If you should have any questions regarding this matter, please contact Marleigh Wood of my staff, at (916) 341-5169.

Sincerely,



Michael A.M. Lauffer
Chief Counsel

cc: See next page

Received
August 26, 2011
Commission on
State Mandates

cc: **[via U.S. mail & email]**
Mr. Noah Garrison
Natural Resources Defense Council
Los Angeles Office
1314 Second Street
Santa Monica, CA 90401
moakley@nrdc.org

[via U.S. mail only]
Theresa A. Dunham, Esq.
Somach, Simmons, & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814

Ms. Deborah Smith **[via email only]**
Assistant Executive Officer
Los Angeles Regional Water Quality
Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013
dsmith@waterboards.ca.gov

Samuel Unger **[via email only]**
Assistant Executive Officer
Los Angeles Regional Water Quality
Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013
sunger@waterboards.ca.gov

[via email only]
Elizabeth Miller Jennings, Esq.
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
bjennings@waterboards.ca.gov

Lyris List **[via email only]**

Interested Persons List

Mr. Doug Eberhardt, Chief **[via email only]**
Permits Office
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105
eberhardt.doug@epa.gov

Ms. Tracy Woods **[via email only]**
Environmental Scientist III
Los Angeles Regional Water Quality
Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013
twoods@waterboards.ca.gov

Michael J. Levy, Esq. **[via email only]**
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
mlevy@waterboards.ca.gov

Jennifer L. Fordyce, Esq. **[via email only]**
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
jfordyce@waterboards.ca.gov

Jeffery M. Ogata, Esq. **[via email only]**
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
jogata@waterboards.ca.gov

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 3

TAB 7

Received
August 26, 2011
Commission on
State Mandates

California Regional Water Quality Control Board

Los Angeles Region

Linda S. Adams
Secretary for Environmental Protection

320 West Fourth Street, Suite 200, Los Angeles, California 90013
(213) 576-6600 • Fax (213) 576-6640
http://www.waterboards.ca.gov/losangeles

Arnold Schwarzenegger
Governor

March 11, 2010

[via email only]
Michael A.M. Lauffer, Chief Counsel
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
mlauffer@waterboards.ca.gov

Dear Mr. Lauffer:

PETITION OF BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, CONSTRUCTION INDUSTRY COALITION ON WATER QUALITY, AND BUILDING INDUSTRY ASSOCATION OF SOUTHERN CALIFORNIA, INC. (WASTE DISCHARGE REQUIREMENTS ORDER NO. R4-2009-0057): LOS ANGELES WATER BOARD AGREEMENT TO VOLUNTARY REMAND
SWRCB/OCC FILE A-2023

The Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) received your letter yesterday requesting that we agree to a voluntary remand of Order No. R4-2009-0057 (Ventura MS4 Permit) in order to address perceived procedural issues.

The Los Angeles Water Board hereby agrees to a voluntary remand. At this time, we intend to hold a hearing on the Ventura MS4 Permit at the Los Angeles Water Board's regularly scheduled meeting on July 8, 2010. Parties and interested persons will be notified of the exact time and place of the hearing at a later date.

Please contact me should you have any questions regarding this matter.

Sincerely,

Tracy J. Egoscue
Executive Officer

cc: See next page

Received
August 26, 2011
Commission on
State Mandates

cc: **[via email only]**
Andrew R. Henderson, Esq.
Building Industry Legal Defense Foundation
1330 South Valley Vista Drive
Diamond Bar, CA 91765
Andrew@biasc.org

[via email only]
Noah Garrison
Natural Resources Defense Council
Los Angeles Office
1314 Second Street
Santa Monica, CA 90401
Moakley@nrdc.org

[via email only]
Theresa A. Dunham, Esq.
Somach, Simmons, & Dunn
500 Capitol Mall, Suite 100
Sacramento, CA 95814
tdunham@somachlaw.com

[via email only]
Marleigh Wood, Esq.
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
mwood@waterboards.ca.gov

[via U.S. mail only]
Michael Lewis
Construction Industry Coalition on Water Quality
2149 E. Garvey Avenue North, Suite A-11
West Covina, CA 91791

[via email only]
Mr. Doug Eberhardt, Chief Permits Office
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105
eberhardt.doug@epa.gov

[via email only]
Elizabeth Miller Jennings, Esq.
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
bjennings@waterboards.ca.gov

Received
August 26, 2011
Commission on
State Mandates

Test Claim Title: Joint Test Claims of Ventura County Watershed Protection District and County of Ventura re RWQCB Los Angeles Region's Order No. R4-2010-0108 (NPDES No. CAS004002)

Claimants: County of Ventura and Ventura County Watershed Protection District

SECTION 7 – DOCUMENTATION

VOLUME 3

TAB 8

Received
August 26, 2011
Commission on
State Mandates

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

320 W. 4th Street, Suite 200
Los Angeles, California 90013
(213) 576-6600

Public Notice No. 10-035
NPDES No. CAS004002

NOTICE OF PUBLIC HEARING

RECONSIDERATION OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR THE COUNTY OF VENTURA WATERSHED PROTECTION DISTRICT, THE COUNTY OF VENTURA, AND INCORPORATED CITIES THEREIN (Municipal Separate Storm Sewer System)

The County of Ventura Watershed Protection District, the County of Ventura, and the Incorporated Cities Therein (hereinafter Permittees) discharge waste from their Municipal Separate Storm Sewer Systems under waste discharge requirements, which serve as an NPDES permit, contained in Order No. 09-0057, adopted by the Los Angeles Regional Water Quality Control Board (Regional Board) on May 7, 2009 (NPDES Permit No. CAS004002).

Prior to adoption of Order No. 09-0057, via a letter dated April 10, 2009, the Permittees, Natural Resources Defense Council (NRDC), and Heal the Bay presented an agreement to the Regional Board proposing new development/redevelopment performance criteria, including on-site retention requirements, a 5% Effective Impervious Area (EIA) limitation, infeasibility criteria, a 30% EIA cap, and off-site mitigation provisions; the elimination of Municipal Action Levels (MALs); and weekly, year-round beach water quality monitoring at 10 sites (hereafter, the "Agreement"). At the Regional Board hearing on May 7, 2009, the Permittees, NRDC, and Heal the Bay reiterated their support for the Agreement and advocated that the Agreement be incorporated into the permit verbatim in its entirety. The Agreement, which was not publicly noticed or circulated for public comment prior to the hearing, was incorporated into Order No. 09-0057 at the May 7, 2009 hearing.

On June 8, 2009, the Building Industry Legal Defense Foundation, Construction Industry Coalition on Water Quality, and the Building Industry Association of Southern California, Inc. (collectively, "BIA") submitted a petition to the State Water Resources Control Board (State Water Board) seeking State Water Board review of Order No. 09-0057. On March 10, 2010, the Chief Counsel of the State Water Board requested that the Regional Board agree to voluntary remand of Order No. 09-0057 in order to address perceived procedural issues in connection with adoption of Order No. 09-0057. Specifically, the March 10 letter noted four procedural issues: (1) corrections were made to the permit after the adopted permit was circulated; (2) a significant number of documents were inadvertently omitted from the administrative record that was transmitted to the State Water Board; (3) the Regional Board in its response to the petition asked the State Water Board to correct a finding in the permit; and (4) BIA had argued that the approved version of the permit should have been recirculated prior to adoption because of alleged irregularities at the hearing. On March 11, 2010, the Regional Board agreed to voluntary remand of Order No. 09-0057 in order to address these concerns.

Received
August 26, 2011
Commission on
State Mandates

Accordingly, the Regional Board proposes to reconsider adoption of Order No. 09-0057 to address the perceived procedural concerns related to incorporation of the Agreement into the adopted permit. As such, the scope of this hearing is narrow, and the Regional Board will accept only limited comments and evidence as described below in Section II (Scope of Hearing).

This notice sets forth the procedures and processes the Regional Board will use at this hearing.

I. HEARING DATE AND LOCATION

The Regional Board is scheduled to hold a public hearing to consider this matter at its regularly scheduled board meeting on:

Date: July 8, 2010
Time: 9:00 a.m.
Place: Ventura County Board of Supervisors Meeting Room
800 S. Victoria Ave.
Ventura, California 93009

Please check the Regional Board's website (http://www.waterboards.ca.gov/losangeles/) for the most up-to-date public hearing location as it is subject to change. If there should not be a quorum on the scheduled date of this hearing, all items will be automatically continued to the next scheduled meeting. A continuance of this item will not automatically extend any deadlines set forth herein.

II. SCOPE OF HEARING

The Regional Board will consider whether to affirm Order No. 09-0057 that was previously adopted on May 7, 2009. Because the majority of the provisions of Order No. 09-0057 were previously subject to public comment, the Regional Board is providing an opportunity for parties and interested persons to comment and submit evidence only on the portions of the proposed permit that were not previously subject to a notice and comment period outside of the public hearing. These portions include provisions that incorporated the Agreement into the permit, as well as new or revised findings and evidence proposed by staff that support the incorporation of the Agreement into the permit. In a few instances, additional minor modifications are also proposed by staff to be made to the permit to correct typographical errors, or to provide greater clarification on non-Agreement related provisions. Since neither the Agreement provisions nor the staff proposed modifications to Order No. 09-0057 have previously been circulated by the Regional Board as drafts for public comment, the Regional Board is taking this opportunity to circulate them and allow an opportunity for parties and interested persons to comment and submit evidence related to them.

The Agreement provisions and all staff-proposed modifications made to the Tentative Waste Discharge Requirements and Tentative Monitoring and Reporting Programs are identified in either an underline or strikethrough format. Insertions are identified by underlining and deletions are identified by ~~strikethrough~~. Regional Board staff is also circulating a tentative Administrative Record Index for this proceeding that lists all of the new evidence relied upon by Regional Board staff in proposing these modifications, as well as several documents timely submitted by

Received
August 26, 2011
Commission on
State Mandates

NRDC and Heal the Bay prior to the May 7, 2009 hearing that were inadvertently omitted from the administrative record that was transmitted to the State Water Board. Any written or oral comments, or evidence, relating to reconsideration of Order No. 09-0057 are limited only to the portions of the permit identified by underline and strikeout format, and the new evidence identified in the tentative Administrative Record Index. Any comments or evidence relating to other portions of the permit that are not shown in underline or strikethrough format will not be accepted into the Administrative Record in this matter.

Parties and interested persons are also advised that, in lieu of affirming Order No. 09-0057 with staff's proposed modifications, the Regional Board may adopt the draft permit originally presented to the Regional Board at the May 7, 2009 hearing. . Since the entire original draft permit, including the provisions relating to Municipal Action Levels (MALs) and the planning and land development program and their associated supporting findings, was already subject to a full public notice and comment period, the Regional Board may choose to adopt that draft permit (or certain of its provisions). Moreover, since the entire original draft permit already received full notice and comment, the Regional Board will not accept new comments or evidence on the provisions of the original draft permit that did not change from the original staff proposal to the adopted permit, or on the provisions of the currently noticed permit that the Regional Board did not adopt (i.e., the provisions relating to MALs and the planning and land development program). The comments and evidence previously submitted for the May 7, 2009 hearing that were included in the Regional Board's May 7, 2009 agenda binder will be recirculated to the Regional Board Members.

III. NATURE OF HEARING

This proceeding will be a formal adjudicatory proceeding pursuant to section 648 *et seq.* of Title 23 of the California Code of Regulations. Chapter 5 of the California Administrative Procedure Act (commencing with section 11500 of the Government Code) relating to formal adjudicative hearings does not apply to adjudicative hearings before the Regional Board, except as otherwise specified in the above-referenced regulations.

IV. AVAILABILITY OF DOCUMENTS

The Tentative Waste Discharge Requirements, Tentative Monitoring and Reporting Programs, Fact Sheet, Administrative Record Index, and other information and documents relied upon are posted on the Regional Board's website at:
www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/index.shtml.
These documents are also available for inspection and copying between the hours of 8:00 a.m. and 4:30 p.m. at the following address:

California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Arrangements for file review and/or obtaining copies of documents in the Administrative Record may be made by calling the Los Angeles Regional Board at (213) 576-6600. Responses to

Received
August 26, 2011
Commission on
State Mandates

comments and other subsequent relevant documents will be available online as they are generated.

All the materials identified in the Administrative Record Index will be included in the Administrative Record of this proceeding, irrespective of whether individual documents are specifically referenced during the hearing or contained in the agenda packet. However, the entire Administrative Record may not be present at the hearing. Should any parties or interested persons desire Regional Board staff to bring to the hearing any particular documents in the Administrative Record they must submit a written or electronic request to the Regional Board staff member identified in section X. below no later than **5:00 pm on June 17, 2010**. The request must identify the documents with enough specificity for Regional Board staff to locate them.

V. PARTICIPANTS TO THIS HEARING

Participants in this proceeding are identified as either "Parties" or "Interested Persons." Designation as a Party is not necessary to participate in this proceeding. Both Interested Persons and Parties will have the opportunity to present written and/or oral comments about the proposed modifications to the Ventura County MS4 Permit. Both Interested Persons and Parties may be asked to respond to clarifying questions from the Regional Board, staff or others, at the discretion of the Regional Board.

A. Interested Persons

Interested persons include any person or organization that is interested in the outcome of the hearing, but who has not been designated as a party. Interested persons may present written and/or oral comments, as provided in Section VI. below, but they may not present evidence. Interested persons are not subject to cross-examination and may not cross-examine witnesses.

B. Parties

Parties are those persons or organizations anticipated to have the greatest interest in the outcome of the hearing. They are generally expected to take a leadership role in presenting any evidence or argument about the nature of the matter under consideration. Parties to the hearing may submit written evidence, summarize their evidence orally at the hearing, or cross-examine other parties' witnesses (if any are called). Parties are subject to cross-examination about any evidence they present.

The following are the parties to this proceeding:

1. The County of Ventura Watershed Protection District
2. The County of Ventura
3. Cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley and Thousand Oaks
4. NRDC and Heal the Bay[1]

---

[1] NRDC and Heal the Bay are hereby included as parties to this proceeding since both organizations were designated as additional parties to the May 7, 2009 proceeding whereby the Regional Board adopted the Ventura County MS4 Permit that is being reconsidered in this proceeding.

Received
August 26, 2011
Commission on
State Mandates

Any other persons or organizations who wish to participate in the hearing as a party shall request party status by submitting a written or electronic request to the Regional Board (as provided in Section X. below) no later than **5:00 pm on June 7, 2010**. All requests for designation as a party shall include the name, phone number, and email address of the person who is designated to receive notices about this proceeding. The request shall also include a statement explaining the reasons for their request (e.g., how the issues to be addressed in the hearing and the potential actions by the Regional Board affect the person), and a statement explaining why the parties designated above do not adequately represent the person's interest. Determinations will be based on whether their participation as a party will further the development of the issues before the Regional Board. Those submitting requests for party status will be notified before the hearing whether the request is granted or denied. All parties will be notified if other parties are designated.

C. Regional Board Staff

Regional Board staff is not a party to this proceeding. This is a proceeding to reconsider adoption of a permit, which does not involve investigative, prosecutorial, or advocacy functions. Staff's proposals, recommendations, and their participation in this proceeding exist for the purpose of advising and assisting the Regional Board. Likewise, attorneys for the Regional Board will advise and assist the Regional Board, which includes the board members and its entire staff. Given the nature of this proceeding and the limited facts in dispute, assigning a separate staff to "advocate" on behalf of a particular position would not further the development of the issues before the Regional Board.

VI. PUBLIC COMMENTS AND SUBMITTAL OF EVIDENCE

Persons wishing to comment on the underline and strikeout provisions of the proposed Ventura County MS4 permit, or submit evidence for the Regional Board to consider, are invited to submit them in writing. To be evaluated and responded to by Regional Board staff, included in the Regional Board's agenda binder, and fully considered by the Regional Board members in advance of the hearing, all written comments and evidence must be submitted to the Regional Board, as provided in Section X. below, and received at the Regional Board office no later than **5:00 pm on June 7, 2010**. Written comments submitted through email are requested to be transmitted in Microsoft Word format.

Pursuant to section 648.4, Title 23 of the California Code of Regulations, untimely submittal of written comments or evidence will not be allowed or accepted into the Administrative Record without a showing of good cause for the delay, and in no event if any party would be unduly prejudiced by the late submittal or if staff or the Regional Board would not have an adequate opportunity to review, consider, and respond to the comments or evidence.

VII. *EX PARTE* COMMUNICATIONS PROHIBITED

Parties and interested persons are forbidden from engaging in *ex parte* communications regarding this matter with members of the Regional Board. An *ex parte* communication is a communication not authorized in the California Government Code, to a Regional Board member from any person, about a pending matter, that occurs in the absence of other parties and

Received
August 26, 2011
Commission on
State Mandates

without notice and opportunity for the parties to respond. The California Government Code generally prohibits the board members from engaging in *ex parte* communications during permitting, enforcement, or other "quasi-adjudicatory" matters. As a permitting proceeding, Regional Board members may not discuss the subject of this hearing with any person, except during the public hearing itself, except in the limited circumstances and manner described in this notice.

VIII. HEARING PROCEDURES

Adjudicative proceedings before the Regional Board generally will be conducted in the following order:

Administration of oath to persons who intend to testify
Regional Board staff presentation
Interested persons' comments
Designated parties' presentation
Questions from the Regional Board to parties
Questions from the Regional Board to Staff
Deliberations (in open or closed session)
Regional Board decision

While this is a formal administrative proceeding, the Regional Board does not generally require the cross examination of witnesses, or other procedures not specified in this notice, that might typically be expected of parties in a courtroom. Each party will be advised after the receipt of public comments, but prior to the date of the hearing, of the amount of time the party will be allocated for its presentations. That decision will be based upon the complexity and the number of issues under consideration, the extent to which the parties have coordinated, the number of parties and interested persons anticipated, and the time available for the hearing. The parties should contact the Regional Board staff, as provided in section X. below, not later than **5:00 pm on June 10, 2010** to state how much time they believe is necessary for their presentations. It is the Regional Board's intent that reasonable requests be accommodated.

Interested persons are invited to attend the hearing and present oral comments. Oral comments may be limited to 3 to 5 minutes each for their comments, in the discretion of the Chair, depending on the number of persons wishing to be heard. Parties and interested persons with similar concerns or opinions are encouraged to choose one representative to speak, and are encouraged to coordinate their presentations with each other. Repetitive comments will not be allowed. The Regional Board will include in the Administrative Record written transcriptions of oral testimony or comments that are made at the hearing.

IX. OBJECTIONS TO MANNER OF HEARING

Parties or interested persons with procedural requests different from or outside of the scope of this notice should contact the Regional Board staff member identified in section X. below no later than **5:00 pm on June 10, 2010**. The Regional Board will endeavor to accommodate reasonable requests.

Received
August 26, 2011
Commission on
State Mandates

Objections to (a) any procedure to be used or not used during the hearing, (b) any document or evidence in the administrative record, or (c) any other matter set forth in this notice, must be submitted in writing and received by the Regional Board staff member identified in section X. below no later than **5:00 pm on June 7, 2010**. Any objections related to the amount of time allocated for parties' presentations must be submitted within two business days of notice thereof.

Untimely objections will be deemed waived. Procedural objections about the matters contained in this notice will be addressed prior to and will not be entertained at the hearing. Further, except as otherwise stipulated, any procedure not specified in this hearing notice will be deemed waived pursuant to section 648(d) of Title 23 of the California Code of Regulations, unless a timely objection is filed.

X. REGIONAL BOARD STAFF CONTACTS

Any communications with the Regional Board prior to the hearing should be directed to:

Mr. Ivar Ridgeway
320 W. 4th Street, Suite 200
Los Angeles, CA 90013
(213) 620-2150
iridgeway@waterboards.ca.gov

Please submit electronic comments to: July082010VCMS4@waterboards.ca.gov.

Date: May 5, 2010

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento 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 May 26, 2017, I served the:

- **Notice of Complete Joint Test Claim Filing, Removal From Inactive Status, Schedule for Comments, Renaming of Matter, Request for Administrative Record, and Notice of Tentative Hearing Date issued May 26, 2017**
- **Claimants' Response to the Notice of Incomplete Joint Test Claim Filing filed May 17, 2017**
- **Joint Test Claim filed by County of Ventura, et al., on August 26, 2011 revised on May 17, 2017**

  California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108, 11-TC-01.
  County of Ventura and Ventura County Watershed Protection District, 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 May 26, 2017 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/26/17

Claim Number: 11-TC-01

Matter: California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108

Claimants: County of Ventura
Ventura County Watershed Protection District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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, § 1181.3.)

Arne Anselm, *Ventura County Watershed Protection District*
800 S Victoria Ave, Ventura, CA 93009
Phone: (805) 662-6882
arne.anselm@ventura.org

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Harmeet Barkschat, *Mandate Resource Services,LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Shanda Beltran, General Counsel, *Building Industry Legal Defense Foundation*
Building Association of Southern California, 17744 Sky Park Circle, Suite 170, Irvine, CA 92614
Phone: (949) 553-9500
sbeltran@biasc.org

Cindy Black, City Clerk, *City of St. Helena*
1480 Main Street, St. Helena, CA 94574
Phone: (707) 968-2742
cityclerk@cityofsthelena.org

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646
Bburgess@mgtamer.com

Jeffrey Burgh, Auditor Controller, *County of Ventura*
Ventura County Watershet Protection District, 800 S. Victoria Avenue, 800 S. Victoria Avenue, Ventura, CA 93009-1540
Phone: (805) 654-3151
jeff.burgh@ventura.org

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

Daniel Carrigg, Deputy Executive Director/Legislative Director, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8222
Dcarrigg@cacities.org

Annette Chinn, *Cost Recovery Systems,Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinncrs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legal Analyst's Office*
925 L Street, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Michael Coleman, *Coleman Advisory Services*
2217 Isle Royale Lane, Davis, CA 95616
Phone: (530) 758-3952
coleman@muni1.com

Anita Dagan, Manager, Local Reimbursement Section, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-4112
Adagan@sco.ca.gov

Marieta Delfin, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-4320
mdelfin@sco.ca.gov

Theresa Dunham, *Somach Simmons & Dunn*
Claimant Representative
500 Capitol Mall, Suite 1000, Sacramento, CA 95814
Phone: (916) 446-7979
tdunham@somachlaw.com

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Jennifer Fordyce, *State Water Resources Control Board*
1001 I Street, 22nd floor, Sacramento, CA 95814
Phone: (916) 324-6682
jfordyce@waterboards.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Dillon Gibbons, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
dillong@csda.net

Catherine George Hagan, Senior Staff Counsel, *State Water Resources Control Board*
c/o San Diego Regional Water Quality Control Board, 2375 Northside Drive, Suite 100, San Diego, CA 92108
Phone: (619) 521-3012
catherine.hagan@waterboards.ca.gov

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Sunny Han, Project Manager, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5907
Sunny.han@surfcity-hb.org

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Dorothy Holzem, Legislative Representative, *California State Association of Counties*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
dholzem@counties.org

Justyn Howard, Program Budget Manager, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-1546
justyn.howard@dof.ca.gov

Thomas Howard, Executive Director, *State Water Resources Control Board*
P.O. Box 2815, Sacramento, CA 95812-2815
Phone: (916) 341-5599
thoward@waterboards.ca.gov

Mark Ibele, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814

Phone: (916) 651-4103
Mark.Ibele@sen.ca.gov

Edward Jewik, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-8564
ejewik@auditor.lacounty.gov

Jill Kanemasu, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-9891
jkanemasu@sco.ca.gov

Anne Kato, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-5919
akato@sco.ca.gov

Anita Kerezsi, *AK & Company*
3531 Kersey Lane, Sacramento, CA 95864
Phone: (916) 972-1666
akcompany@um.att.com

Michael Lauffer, Chief Counsel, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
mlauffer@waterboards.ca.gov

Hortensia Mato, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3000
hmato@newportbeachca.gov

Frances McChesney, *State Water Resources Control Board*
1001 I Street, 22nd floor, Sacramento, CA 95814
Phone: (916) 341-5174
fmcchesney@waterboards.ca.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Meredith Miller, Director of SB90 Services, *MAXIMUS*
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670
Phone: (972) 490-9990
meredithcmiller@maximus.com

Geoffrey Neill, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
gneill@counties.org

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Adriana Nunez, Staff Counsel, *State Water Resources Control Board*
P.O. Box 100, Sacramento, CA 95812
Phone: (916) 322-3313
Adriana.nunez@waterboards.ca.gov

Lori Okun, Assistant Chief Counsel, *State Water Resources Control Board*
Regional Water Board Legal Services, 1001 I Street, Sacramento, CA 95814
Phone: (916) 341-5165
Lori.Okun@waterboards.ca.gov

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Steven Pavlov, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Steven.Pavlov@dof.ca.gov

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@atc.sbcounty.gov

Jeff Pratt, *County of Ventura*
800 S. Victoria Avenue, Ventura, CA 93009-1600
Phone: (805) 654-3952
jeff.pratt@ventura.org

Renee Purdy, *Los Angeles Regional Water Quality Control Board*
320 West 4th Street, Suite 200, Los Angeles, CA 90013-2343
Phone: (213) 576-6686
rpurdy@waterboards.ca.gov

Mark Rewolinski, *MAXIMUS*
808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (949) 440-0845
markrewolinski@maximus.com

David Rice, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 341-5161
davidrice@waterboards.ca.gov

Ivar Ridgeway, *Los Angeles Regional Water Quality Control Board*
320 West 4th Street, Suite 200, Los Angeles, CA 90013-2343
Phone: (213) 576-6686
iridgeway@waterboards.ca.gov

Nick Romo, Policy Analyst, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8254
nromo@cacities.org

Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814

Phone: (916) 323-3562
camille.shelton@csm.ca.gov

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 327-6490
carla.shelton@csm.ca.gov

Glenn Shephard, Director, *Ventura County Watershed Protection District*
800 S Victoria Ave, Ventura, CA 93009
Phone: (805) 662-6882
glenn.sheppard@ventura.org

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Tracy Sullivan, Legislative Analyst, *California State Association of Counties (CSAC)*
Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 650-8124
tsullivan@counties.org

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 443-411
jolene_tollenaar@mgtamer.com

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Samuel Unger, *Los Angeles Regional Water Quality Control Board*
320 West 4th Street, Suite 200, Los Angeles, CA 90013-2343
Phone: (213) 576-6605
sunger@waterboards.ca.gov

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Jennifer Whiting, Assistant Legislative Director, *League of California Cities*
1400 K Street, Suite 400, Sacramento , CA 95814
Phone: (916) 658-8249
jwhiting@cacities.org

Patrick Whitnell, General Counsel, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8281
pwhitnell@cacities.org

Hasmik Yaghobyan, *County of Los Angeles*

Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-9653
hyaghobyan@auditor.lacounty.gov