Hearing Date: October 9, 2026

ITEM 5

PROPOSED STATEWIDE COST ESTIMATE

$8,292,692 - $23,067,532
Initial Claim Period

(January 24, 2007 through December 31, 2017)

San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6)

07-TC-09-R

TABLE OF CONTENTS

Exhibit A

STATE *of* CALIFORNIA
COMMISSION ON STATE MANDATES

May 26, 2023

Mr. Kris Cook
Department of Finance
915 L Street, 10th Floor
Sacramento, CA 95814

Mr. Thomas Deak
County of San Diego
Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Amended Decision on Remand
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, 07-TC-09-R
On Remand Pursuant to *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS
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

Dear Mr. Cook and Mr. Deak:

On May 26, 2023, the Commission on State Mandates adopted the Amended Decision on Remand on the above-captioned matter.

Sincerely,

Heather Halsey
Executive Director

J:\MANDATES\2007\TC\07-TC-09 (Discharge of Stormwater Runoff)\07-TC-09-R\Correspondence\decisiontrans.docx

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON REMAND: 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-R *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* AMENDED DECISION ON REMAND PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. On Remand from *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535; Judgment and Administrative Writ of Mandate Issued by Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS *(Adopted March 26, 2010)* *(Amended on Remand on May 26, 2023*) *(Served on May 26, 2023*)

TEST CLAIM ON REMAND

The Commission on State Mandates adopted the Amended Decision on Remand on May 26, 2023.

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON REMAND:

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-R

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

AMENDED DECISION ON REMAND PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

On Remand from *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535; Judgment and Administrative Writ of Mandate Issued by Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS

(Adopted March 26, 2010)

(Amended on Remand on May 26, 2023)

(Served on May 26, 2023)

AMENDED DECISION ON REMAND

The Commission on State Mandates ("Commission") originally 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.

The Commission heard and decided this Amended Decision on Remand during a regularly scheduled hearing on May 26, 2023. Catherine Hagan appeared on behalf of the State Water Resources Control Board and the San Diego Regional Water Quality Control Board. Donna Ferebee appeared on behalf of the Department of Finance. Shawn Haggerty, of Best Best & Krieger, LLC provided public comment.

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 sections 17500 et seq., and related case law.

The Commission adopted the Proposed Amended Decision on Remand to approve the amendments by a vote of 7 to 0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Jennifer Holman, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Renee Nash, School District Board Member	Yes
Sarah Olsen, Public Member	Yes
Lynn Paquin, Representative of the State Controller, Vice Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

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.

In 2017, the Third District Court of Appeal issued a published opinion in *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, finding that the contested permit provisions are mandated by the state and not be federal law, affirming the Commission's findings on that issue. On October 24, 2022, the Third District Court of Appeal issued its published opinion in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, affirming the Commission's findings on the remaining issues, except for the finding that the permittees do not have sufficient authority to levy a fee for the street sweeping condition in part D.3.a.(5) of the test claim permit within the meaning of Government Code section 17556(d).[1] On that issue, the Court of Appeal reversed the Commission's Decision, finding that the street sweeping condition expressly requires permittees to collect refuse. Thus, a fee for collecting refuse and charged pursuant to Public Resources Code section 40059 is exempt from article XIII D's voter approval requirement, and only the voter protest provisions apply.[2] Consistent with its ruling in *Paradise Irrigation Dist*., the court concluded that the permittees have sufficient authority to levy a fee for the street sweeping condition in part D.3.a.(5) of the test claim permit within the meaning of Government Code section 17556(d) and, thus, there are no costs mandated by the state.[3] As a result, the street sweeping condition does not trigger the subvention requirement under article XIII B, section 6 of the California Constitution.[4] On May 11, 2023, the Sacramento County Superior Court issued a judgment and writ directing the Commission to "amend its decision in Test Claim 07-TC-09, addressing the underlying San Diego Permit, Order No. R9-2007-0001, with respect to part D.3.a.(5) (street sweeping) in order to make it consistent with the Court of Appeal's decision and the amended judgment."[5]

Accordingly, 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:

- 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);

---

[1] Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595.

[2] Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583.

[3] Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595; *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

[4] Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 595.

[5] Exhibit B, Amended Judgment, Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS; Exhibit C, Writ of Administrative Mandate, Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS.

- 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[6] have fee authority sufficient (within the meaning of Gov. Code § 17556, subd. (d)) to pay for them: street sweeping (part D.3.a.(5)), 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- 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.

Municipal Stormwater

[6] 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.

The purpose of the permit is to specify "requirements necessary for the copermittees[7] 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),[8] through which it discharges urban runoff into waters of the United States within the San Diego region."

Stormwater[9] 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.[10]

---

[7] "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).)

[8] 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).)

[9] Storm water means "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26 (b)(13).)

[10] *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832, 840-841.

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:

> 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).[11]
>
> 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.)[12]

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.

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[11] *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

[12] *Id.* at page 621. State and regional board permits allowing discharges into state waters are called "waste discharge requirements." (Wat. Code, § 13263).

Federal Law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[13] from point sources[14] to waters of the United States, since discharges of pollutants are illegal except under a permit.[15] 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[16] 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

[13] 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.)

[14] 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).

[15] 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.

[16] *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.)

> boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[17]

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* than required by federal law-from taking into account the economic effects of doing so.[18]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[19]

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:

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[17] *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).

[18] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 627-628.

[19] 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.)

> 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.[20]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[21] 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.[22]

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.[23]

<u>General State-Wide Permits</u>

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[20] *Environmental Defense Center, Inc. v. U.S. E.P.A., supra,* 344 F.3d 832, 841-842.

[21] 33 USCA section 1342 (p)(2)(C).

[22] 33 USCA section 1342 (p)(3)(B).

[23] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[24] 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.[25]

<u>The Regional Board Permit (Order No. R9-2007-001, Permit CAS0108758)</u>

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 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."[26]

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.

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[24] 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.)

[25] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

[26] California Code of Regulations, title 23, section 2235.4.

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.[27] 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.[28]

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 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

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[27] *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880.

[28] *Id.* at page 870.

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[29] from the MS4 to the MEP, and prevent urban runoff[30] discharges from the MS4 from causing or contributing to a violation of water quality standards.[31] The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]
>
> 2. Develop the standardized fiscal analysis method required in section G of this Order.[32]
>
> 3. Facilitate the assessment of the effectiveness of jurisdictional, watershed,[33] and regional programs.

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

[29] 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."

[30] 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).

[31] 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.

[32] 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).

[33] 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)."

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[34] and Lead Watershed Permittees;[35]
(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.

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[34] The Principal Permittee is the County of San Diego.

[35] According to the permit: "Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area]."

Claimants stated that the Copermittees' costs to comply with this activity was $131,250 in fiscal year 2007-2008.

C. Hydromodification[36]

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,[37] where such increased rates and durations are

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[36] 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 .

[37] 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 likely to cause increased erosion[38] of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses[39] and stream

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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 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.

[38] 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.”

[39] 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

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][40] 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[41] shall not exceed pre-project runoff flow rates and durations,[42] 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[43] that produces the critical shear

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goals. … "Beneficial Uses" are equivalent to "Designated Uses" under federal law." (Wat. Code, § 13050, subd. (f).)

[40] 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."

[41] 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.

[42] 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."

[43] 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

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.

(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.

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of channel banks. When measuring Qc [critical channel flow], it should be based on the weakest boundary material – either bed or bank."

(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[44] 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.[45]

(5) <u>HMP Implementation</u>

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

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[44] 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."

[45] 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.

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%).

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[46] ("LID") and Standard Urban Storm Water Mitigation Plan ("SMUSP")

[46] 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."

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:

> <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[47] requirements that meet or exceed the requirements of sections D.1.d.(4)[48] and D.1.d.(5),[49] 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.[50] In addition, the update shall include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.
>
> <u>(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements</u>
>
> (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

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[47] 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."

[48] 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."

[49] 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.

[50] 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, filtration, biological uptake, media absorption or any other physical, biological, or chemical process."

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.

(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).[51]
>
> 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.

II. Jurisdictional Urban Runoff Management Program

A. Street Sweeping

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[51] See footnote 50, page 21.

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.

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[52] 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[53] 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.

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[52] According to Attachment C of the permit, May 1 through September 30 is the dry season.

[53] Attachment C of the permit defines “anthropogenic litter” as “trash generated from human activities, not including sediment.”

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.
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[54] 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.

[54] 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)]."

(3) Utilize outcome levels 1-6[55] 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,[56] Water Quality Assessment,[57] and Integrated Assessment,[58] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to

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[55] 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.

[56] 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."

[57] 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."

[58] 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."

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)[59] 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.

[59] 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.

(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.[60] 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.

[60] Section A is "Prohibitions and Receiving Water Limitations."

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:

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	• 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

• Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• 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.

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[61] 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.

(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

[61] Attachment C of the permit defines grading as "the cutting and/or filling of the land surface to a desired slope or elevation."

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: [¶]…[¶]

f. Watershed Activities[62]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA.

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[62] 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.

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 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,[63] which held that if participation in the

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[63] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727.

underlying program is voluntary, the resulting new consequential requirements are not reimbursable 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.

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[64] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[65] "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."[66] 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.[67]

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.[68]

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.[69] 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

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[64] 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.

[65] *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

[66] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

[67] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[68] *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*).

[69] *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.)

immediately before the enactment of the test claim legislation.[70] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[71]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[72]

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.[73] 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."[74]

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."[75]

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[70] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[71] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[72] *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.

[73] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[74] *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.

[75] 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

The California Regional Water Board, San Diego Region, is a state agency.[76] 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, 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.[77]

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

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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.

[76] Water Code section 13200 et seq.

[77] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

NPDES permit application in the form of a Report of Waste Discharge. [78] Submitting it is not discretionary, as shown in the following federal regulation:

> a) *Duty to apply.* (1) Any person[79] 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.[80]

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 …"[81] Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.

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."[82]

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).

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[78] The Report of Waste Discharge is attachment 36 of the State Water Resources Control Board comments submitted October 2008.

[79] *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

[80] 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.

[81] Water Code section 13376.

[82] The 2001 Permit is attached to the State Water Resources Control Board, comments submitted October 2008, Attachment 25.

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.[83]

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."

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"[84] 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.

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[83] *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.)

[84] 33 U.S.C. § 1342(p)(3).

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[85] 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."[86] 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. [87] 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."

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?

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[85] 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.

[86] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.

[87] 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.

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."[88]

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.[89]

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.[90] 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."[91]

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*,[92] 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 elements, and taking mandatory steps to involve the community including public hearings. The state argued that its Executive Order did not

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[88] *San Diego Unified School Dist. v. Commission on State Mandates, supra,* 33 Cal.4th 859, 879-880, emphasis in original.

[89] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[90] *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).

[91] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1594.

[92] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

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.[93] 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."[94]

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.[95] 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.[96]

<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</u>

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[93] *Id.* at 173.

[94] *Ibid.*

[95] 33 U.S.C. section 1370.

[96] *City of Burbank v. State Water Resources Control Board, supra,* 35 Cal.4th 613, 618, 628.

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 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[97] 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[98] 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.

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[97] 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."

[98] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

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:

> 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.[99]

The Commission disagrees. As discussed above, the federal Clean Water Act[100] 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.[101] Those state measures that may constitute a state mandate if they "exceed the mandate in … federal law."[102] 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

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[99] State Board comments submitted January 2010.

[100] 33 U.S.C. sections 1370 and 1342 (p)(3)(B)(iii).

[101] *City of Burbank v. State Water Resources Control Board, supra,* 35 Cal.4th 613, 618, 628.

[102] Government Code section 17556, subdivision (b). *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

(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[103] 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.

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."[104] Priority

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[103] Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative. (40 CFR § 122.2.)

[104] 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;

development projects can include both private projects, and municipal (city or county) 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

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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 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.

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."[105]

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:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[106] of a discharge[107] from a large or

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[105] 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.

[106] "*Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2)

[107] "*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.)

> 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: [¶]…[¶]
>
> (*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."[108] As in *Long Beach Unified School Dist. v. State of California*,[109] 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[110] to 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

[108] Government Code section 17556, subdivision (c).

[109] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[110] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

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.[111] Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.[112] 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.*,[113] 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.[114]

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:

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[111] 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."

[112] 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."

[113] *Kern High School Dist., supra,* 30 Cal.4th 727.

[114] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

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.

(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) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[115]

(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

[115] 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.

(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 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.[116]

The Regional Board prepared a Fact Sheet/Technical Report[117] 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

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[116] *Building Industry Assoc. of San Diego County v. State Water Resources Control Board, supra,* 124 Cal.App.4th 866, 870.

[117] The Fact Sheet/Technical Report was attached to the test claim.

> from modification. While the Model SUSMP[118] [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 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

[118] According to the Fact Sheet/Technical Report, the Model SUSMP was completed and adopted in 2002.

Water Mitigation Plans)[119] 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 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.

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[119] 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."

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."[120] As in *Long Beach Unified School Dist. v. State of California*,[121] 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[122] 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.
>
> <u>(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements</u>
>
> (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

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[120] Government Code section 17556, subdivision (c).

[121] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[122] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

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.[123]

ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.[124]

iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.[125]

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)

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[123] 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."

[124] Part D.1.d.(5) of the permit lists source control BMP requirements.

[125] Part D.1.d.(6) of the permit lists treatment control BMP requirements.

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 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 specifically require street sweeping. The claimants quote the following from *Hayes v. Commission on State Mandates*:[126] "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."[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 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."[129] As in *Long Beach 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.(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

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[126] *Hayes v. Commission on State Mandates, supra,* 11 Cal.App.4th 1564.

[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).

[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.

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.

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 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) <u>BMP Implementation (Municipal)</u>
>
> (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.

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."[132] 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…"[133]

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."[134] As in *Long Beach Unified School Dist. v. State of California*,[135] 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[136] 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.

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[132] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[133] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

[134] Government Code section 17556, subdivision (c).

[135] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[136] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

(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.

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 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 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."

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."[137] As in *Long Beach Unified School Dist. v. State of California*,[138] 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[139] 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:

[137] Government Code section 17556, subdivision (c).

[138] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[139] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

· 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:

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)	• 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

• Non-storm water discharge prohibitions • How to conduct a storm water inspections	• 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.

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[140] 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.

(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

[140] Attachment C of the permit defines grading as "the cutting and/or filling of the land surface to a desired slope or elevation."

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).)
- 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.

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 [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 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, 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 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:

- 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[141] and watershed education activities.[142]
    - 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.[143]

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[141] 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).

[142] Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA (Part E.2.f).

[143] 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.

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 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."[144] As in *Long Beach Unified School Dist. v. State of California*,[145] 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[146] 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:

> 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[147]
>
> (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.

[144] Government Code section 17556, subdivision (c).

[145] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[146] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[147] 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.

(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 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.
>
> [¶]…[¶]
>
> 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:

> 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.[148]

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

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[148] 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.

effectively addressed at a regional level. … However, significant flexibility has been provided to the Copermittees for new regional requirements."[149]

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.[150] [¶]…[¶]
>
> (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.[151] [¶]…[¶]
>
> (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: [¶]…[¶]

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149 San Diego Regional Water Quality Control Board, "Fact Sheet/Technical Report for Order No. R9-2007-0001."

150 40 Code of Federal Regulations section 122.26 (a)(3(v).

151 40 Code of Federal Regulations section 122.26 (a)(5).

(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]

(iv) Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. …[153]

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 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."[154] As in *Long Beach Unified School Dist. v. State of California*, the permit "requires specific actions … [that are] required acts."[155] In adopting part F.1, the state has freely chosen[156] 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

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[152] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[153] 40 Code of Federal Regulations section 122.26 (d)(iv).

[154] Government Code section 17556, subdivision (c).

[155] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[156] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

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.

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;[157]

The State Board also quotes section 122.26 (a)(3)(v) of the federal regulations as follows:

[157] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

(v) Permits for all or a portion of all discharges from large[158] or medium[159] 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.

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

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[158] "(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).]

[159] "(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).]

Commission finds that these RURMP activities "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 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 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.

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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.

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.
- 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."[163]

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."[164] The

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[163] 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.

[164] 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 submit an annual report by the

State Board quotes a lengthy portion of the 2001 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,"

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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.

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 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.”[165] As in *Long Beach Unified School Dist. v. State of California*,[166] 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[167] 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[168] Detection and Elimination, and Education); and
> (c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

[165] Government Code section 17556, subdivision (c).

[166] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[167] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[168] 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)].”

(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[169] 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,[170] Water Quality Assessment,[171] and Integrated Assessment,[172] 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.

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[169] See footnote 50, page 21.

[170] 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."

[171] 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."

[172] 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."

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[173] 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

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[173] 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.

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.[174] 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.

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

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[174] Section A is "Prohibitions and Receiving Water Limitations."

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.[175] This is a higher level of service than "pollutant loading estimations" to be used as an effectiveness strategy in the 2001 permit.[176] Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

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

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[175] 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."

[176] See Fact Sheet/Technical Report for Order No. R9-2007-0001.

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.[177]

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

[177] 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.

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 or regulation."[178] As in *Long Beach Unified*

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[178] Government Code section 17556, subdivision (c).

School Dist. v. State of California,[179] 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[180] 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)[181] 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

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[179] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[180] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[181] 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.

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 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.

V. All Copermittee Collaboration (Part L)

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 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;[182]

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;”[183] 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.

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[182] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[183] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

Thus, this permit activity "exceed[s] the mandate in that federal law or regulation."[184] As in *Long Beach Unified School Dist. v. State of California*,[185] 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[186] 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:

> 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[187] and Lead Watershed Permittees;[188]
>
> (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;

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[184] Government Code section 17556, subdivision (c).

[185] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[186] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[187] The Principal Permittee is the County of San Diego.

[188] According to the permit: "Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area]."

(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.

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 committee and workgroup structure and responsibilities; and (6) Lays out a process for addressing copermittee non-compliance with the formal agreement.

<u>Summary of Issue 1:</u> 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)).

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,[189] 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.

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

[189] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

Activity	Cost FY 2007-08
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,[190] 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 Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.[191]

[190] The County and city declarations are attached to the test claim.

[191] 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.

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.*[192] 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 declares that the

[192] *County of Fresno v. State of California, supra,* 53 Cal.3d 482.

> "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.[193]

In another case about subdivision (d) of section 17556, *Connell v. Superior Court,*[194] 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.[195]

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[193] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487. Emphasis in original.

[194] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

[195] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 398-402.

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,*[196] 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."[197] 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

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[196] *Howard Jarvis Taxpayers Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[197] *Id.* at page 1358-1359.

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.[198] The regulatory and development fees are discussed below in the context of XIII D (Proposition 218) that would allow the claimants to impose fees for the activities in the test claim related to development.

<u>Regulatory fee authority under the police power:</u> 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."[199]

Water pollution prevention is also a valid exercise of government police power.[200]

In *Sinclair Paint v. State Board of Equalization*,[201] 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.

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[198] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874.

[199] *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.

[200] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[201] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

> 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.[202] [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.”[203] The court also recognized that regulatory fees do not depend on government-conferred benefits or privileges.[204]

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.[205]

Other cases have defined a regulatory fee as an imposition that funds a regulatory program[206] or that distributes the collective cost of a regulation”[207] 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.”[208] 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

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[202] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 877.

[203] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 875-877.

[204] *Id.* at page 875.

[205] *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.”

[206] *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

[207] *Id.* at 952.

[208] *Ibid.*

> of the regulation. [Citations omitted.] Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, 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.[209] [Emphasis added.]

In *Tahoe Keys Property Owner's Assoc. v. State Water Resources Control Board*,[210] 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 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]."[211]

A variety of local agency regulatory fees have been upheld for various programs, including: processing subdivision, zoning, and other land-use applications,[212] art in public places,[213] remedying substandard housing,[214] recycling,[215] administrative hearings under a rent-control ordinance,[216] signage,[217] air pollution mitigation,[218] and

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[209] *California Assn. of Prof. Scientists v. Dept. of Fish and Game, supra,* 79 Cal.App.4th 935, 945.

[210] *Tahoe Keys Property Owner's Assn. v. State Water Resources Control Board* (1993) 23 Cal.App.4th 1459.

[211] *Id.* at page 1480.

[212] *Mills v. County of Trinity, supra,*108 Cal.App.3d 656, 662.

[213] *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886.

[214] *Apartment Assoc. of Los Angeles County v.City of Los Angeles* (2001) 24 Cal.4th 830.

[215] *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264.

[216] *Pennell v. City of San Jose* (1986) 42 Cal.3d 365.

[217] *United Business Communications v. City of San Diego* (1979) 91 Cal.App.3d 156.

[218] *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120.

replacing converted residential hotel units.[219] Fees on developers for environmental mitigation under the California Environmental Quality Act have also been upheld.[220]

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 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.

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219 *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892.

220 *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018.

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 <u>authority</u> 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."[221]

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*,[222] 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."[223] 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 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

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[221] *County of San Diego, supra,* 15 Cal.4th 68, 81.

[222] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382.

[223] *Id.* at page 401.

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."[224]

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."[225] 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."[226]

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 decision to seek a government benefit are not.[227] Thus, fees imposed as a

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[224] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 401.

[225] 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.

[226] California Constitution, article XIII D, section 1, subdivision (b).

[227] 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,*

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.[228]

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

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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.

[228] 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.

surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

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.

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)[229] and D.1.d.(5).[230] Both D.1.d.(4) and D.1.d.(5) are the LID requirement implemented at priority development projects.

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[229] 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."

[230] 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

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.

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.[231] 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.[232] 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 ...."[233] [Emphasis added.]

"Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

[231] *California Building Industry Assoc. v. Governing Board* (1988) 206 Cal.App.3d 212, 234.

[232] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

[233] Government Code section 66000, subdivision (b).

Public facilities are defined in the Act as "public improvements, public services, and community amenities."[234]

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.[235] A fee imposed "as a condition of approval of a proposed development or development project" is limited to the estimated reasonable cost of providing the service or facility.[236] This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.[237]

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

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[234] Government Code section 66000, subdivision (d).

[235] 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 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.

[236] Government Code section 66005, subdivision (a).

[237] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

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.[238]

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."[239]

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.[240] Moreover, the California Supreme Court stated that the Act "concerns itself with development fees; that is, fees imposed on development projects in order to finance public improvements or programs that bear a 'reasonable relationship' to the development at issue."[241] 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

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[238] *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th, 130, 131.

[239] Government Code section 66000, subdivision (d).

[240] Government Code section 66000, subdivision (d).

[241] *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1191.

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)).

3. Claimants' fee authority under Public Resources Code section 40059 is sufficient within the meaning of Government Code section 17556(d) to pay for street sweeping; however, 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.[242] Other local agencies, e.g., the County of Fresno[243] and the City of La Quinta,[244] 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.

<u>Fees for street sweeping as refuse collection/solid waste handling</u>: 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 which is not hazardous waste, manure,

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[242] 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."

[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.

vegetable or animal solid and semisolid wastes and other discarded solid and semisolid wastes.[245]

"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[246] 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)).

The Third District Court of Appeal in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, found that the street sweeping condition expressly requires permittees to collect refuse. Thus, a fee for collecting refuse and charged pursuant to Public Resources Code section 40059 is exempt from article XIII D's voter approval requirement, and only the voter protest provisions apply.[247] Consistent with its ruling in *Paradise Irrigation Dist*., the court concluded that the permittees have the right, power, and authority sufficient to levy a fee for the street sweeping condition in part D.3.a.(5) of the test claim permit within the meaning of

[245] This definition also excludes hazardous waste, radioactive waste and medical waste, as defined.

[246] "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.

[247] Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583.

Government Code section 17556(d) and thus, there are no costs mandated by the state for the street sweeping condition.[248] The court held as follows:

> We agree the State has the burden of establishing that permittees have fee authority, but that burden does not require the State also to prove permittees as a matter of law and fact are able to promulgate a fee that satisfies article XIII D's substantive requirements. The sole issue before us is whether permittees have "the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program." (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, 69 Cal.Rptr.2d 231.) The inquiry is an issue of law, not a question of fact. (*Ibid.*)
>
> [¶]
>
> The State has established that permittees have the right or power to levy a fee for the street cleaning condition pursuant to Public Resources Code section 40059.[249]

As a result, the street sweeping condition does not trigger the subvention requirement under article XIII B, section 6 of the California Constitution.[250]

Fees for street sweeping reports: However, 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.

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

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[248] Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595; *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

[249] Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 584-585.

[250] Exhibit A, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595.

(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).

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[251] 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 …. [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

[251] 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).

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.

Fees or assessments for conveyance-system reports: 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 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.[252] 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.

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[252] Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill 310 (2009-2010 Reg. Sess.) as amended August 31, 2009, page 4.

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, 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,*[253] 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 2007-2008 alone.[254] 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 Public Resources Code section 40059 and 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));
- Street Sweeping (part D.3.a.(5)).

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:

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[253] *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

[254] The County and city declarations are attached to the test claim.

- The fee authority in Public Resources Code section 40059 for part 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- 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.

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.[255] 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.[256]

I. Jurisdictional Urban Runoff Management Program and Reporting (parts D & J)

Street sweeping reporting (J.3.a.(3)(c)x-xv): Report annually on the following:

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[255] 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."

[256] 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."

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.

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.
(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 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

(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

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[257] Detection and Elimination, and Education); and

[257] 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)]."

(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[258] 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.

[258] 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.

(5) Utilize Implementation Assessment,[259] Water Quality Assessment,[260] and Integrated Assessment,[261] 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)[262] shall annually assess the effectiveness of its Watershed Urban Runoff

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[259] 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."

[260] 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."

[261] 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."

[262] 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.

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 necessary to achieve compliance with section A of this Order.[263] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education

[263] Section A is "Prohibitions and Receiving Water Limitations."

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.

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)[264] 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).

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[264] 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.

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 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 Public Resources Code section 40059 and 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));
- Street Sweeping (part D.3.a.(5)).

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 part 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- 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.

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, 2023, I served the:

- **Amended Decision on Remand adopted May 26, 2023**

  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, 07-TC-09-R On Remand Pursuant to *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2010-80000604-CU-WM-GDS, Issued May 11, 2023

  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

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, 2023 at Sacramento, California.

Jill Magee

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: 5/17/23

Claim Number: 07-TC-09-R

Matter: 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.

Claimants: City of Carlsbad
City of Chula Vista
City of Del Mar
City of Encinitas
City of Escondido
City of Imperial Beach
City of La Mesa
City of Lemon Grove
City of National City
City of Oceanside
City of Poway
City of San Diego
City of San Marcos
City of Santee
City of Solana Beach
City of Vista

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.)

Adaoha Agu, *County of San Diego Auditor & Controller Department*
Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego, CA 92123
Phone: (858) 694-2129
Adaoha.Agu@sdcounty.ca.gov

Tiffany Allen, Treasury Manager, *City of Chula Vista*
Claimant Contact
Finance Department, 276 Fourth Avenue, Chula Vista, CA 91910
Phone: (619) 691-5250
tallen@chulavistaca.gov

Rebecca Andrews, Partner, *Best Best & Krieger, LLP*
655 West Broadway, 15th Floor, San Diego, CA 92101
Phone: (619) 525-1300
Rebecca.Andrews@bbklaw.com

Rachelle Anema, Division Chief, *County of Los Angeles*
Accounting Division, 500 W. Temple Street, Los Angeles, CA 90012
Phone: (213) 974-8321
RANEMA@auditor.lacounty.gov

Lili Apgar, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-0254
lapgar@sco.ca.gov

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

Aaron Avery, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
Aarona@csda.net

Cindy Black, City Clerk, *City of St. Helena*
1480 Main Street, St. Helena, CA 94574
Phone: (707) 968-2742
ctzafopoulos@cityofsthelena.org

Molly Brennan, Director of Finance, *City of National City*
Claimant Contact
1243 National City Blvd., National City, CA 91950
Phone: (619) 336-4330
finance@nationalcityca.gov

Guy Burdick, Consultant, *MGT Consulting*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 833-7775
gburdick@mgtconsulting.com

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

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, *Legislative Analyst's Office*
925 L Street, Suite 1000, 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

Kris Cook, Assistant Program Budget Manager, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Kris.Cook@dof.ca.gov

Erika Cortez, Administrative Services Director, *City of Imperial Beach*
Claimant Contact
825 Imperial Beach Boulevard, Imperial Beach, CA 91932
Phone: (619) 423-8303
ecortez@imperialbeachca.gov

Brian Cote, Senior Government Finance & Administration Analyst, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 650-8184
bcote@counties.org

Eric Dargan, Chief Operating Officer, *City of San Diego*
Claimant Contact
City Hall, 202 C Street, Suite 901A, San Diego, CA 92101
Phone: (858) 236-5587
Edargan@sandiego.gov

Thomas Deak, Senior Deputy, *County of San Diego*
Claimant Representative
Office of County Counsel, 1600 Pacific Highway, Room 355, San Diego, CA 92101
Phone: (619) 531-4810
Thomas.Deak@sdcounty.ca.gov

Kalyn Dean, Senior Legislative Analyst, *California State Association of Counties (CSAC)*
Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
kdean@counties.org

Ted Doan, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Ted.Doan@dof.ca.gov

Tracy Drager, Auditor and Controller, *County of San Diego*
Claimant Contact
1600 Pacific Highway, Room 166, San Diego, CA 92101
Phone: (619) 531-5413
tracy.drager@sdcounty.ca.gov

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814

Phone: (916) 445-8918
donna.ferebee@dof.ca.gov

Tim Flanagan, Office Coordinator, *Solano County*
Register of Voters, 678 Texas Street, Suite 2600, Fairfield, CA 94533
Phone: (707) 784-3359
Elections@solanocounty.com

Jennifer Fordyce, Assistant Chief Counsel, *State Water Resources Control Board*
Office of Chief Counsel, 1001 I Street, 22nd floor, Sacramento, CA 95814
Phone: (916) 324-6682
Jennifer.Fordyce@waterboards.ca.gov

Lisa Fowler, Finance Director, *City of San Marcos*
Claimant Contact
1 Civic Center Drive, San Marcos, CA 92069
Phone: (760) 744-1050
lfowler@san-marcos.net

David Gibson, Executive Officer, *San Diego Regional Water Quality Control Board*
9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340
Phone: (858) 467-2952
dgibson@waterboards.ca.gov

Rodney Greek, Finance Director/Treasurer, *City of Solana Beach*
Claimant Contact
635 South Highway 101, Solana Beach, CA 92075
Phone: (858) 720-2460
rgreek@cosb.org

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

Shawn Hagerty, *Best Best & Krieger, LLP*
San Diego Office, 655 West Broadway, 15th Floor, San Diego, CA 92101
Phone: (619) 525-1300
Shawn.Hagerty@bbklaw.com

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, Acting Chief Financial Officer, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5630
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

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740,

Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

Christina Holmes, Director of Finance, *City of Escondido*
Claimant Contact
201 North Broadway, Escondido, CA 92025
Phone: (760) 839-4676
cholmes@escondido.org

Jason Jennings, Director, *Maximus Consulting*
Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (804) 323-3535
SB90@maximus.com

Heather Jennings, Director of Finance, *City of Santee*
Claimant Contact
10601 Magnolia Avenue, Building #3, Santee, CA 92071
Phone: (619) 258-4100
hjennings@cityofsanteeca.gov

Angelo Joseph, Supervisor, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
AJoseph@sco.ca.gov

Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Joanne Kessler, Fiscal Specialist, *City of Newport Beach*
Revenue Division, 100 Civic Center Drive , Newport Beach, CA 90266
Phone: (949) 644-3199
jkessler@newportbeachca.gov

Zach Korach, Finance Director, *City of Carlsbad*
Claimant Contact
1635 Faraday Ave., Carlsbad, CA 92008
Phone: (442) 339-2127
zach.korach@carlsbadca.gov

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Michael Lauffer, Chief Counsel, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
michael.lauffer@waterboards.ca.gov

Kim-Anh Le, Deputy Controller, *County of San Mateo*
555 County Center, 4th Floor, Redwood City, CA 94063
Phone: (650) 599-1104
kle@smcgov.org

Alison Leary, Deputy General Counsel, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8200
aleary@cacities.org

Fernando Lemus, Principal Accountant - Auditor, *County of Los Angeles*
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-0324
flemus@auditor.lacounty.gov

Erika Li, Chief Deputy Director, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
erika.li@dof.ca.gov

Diego Lopez, Consultant, *Senate Budget and Fiscal Review Committee*
1020 N Street, Room 502, Sacramento, CA 95814
Phone: (916) 651-4103
Diego.Lopez@sen.ca.gov

Everett Luc, Accounting Administrator I, Specialist, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0766
ELuc@sco.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Corrie Manning, Assistant General Counsel, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8200
cmanning@cacities.org

Darryl Mar, Manager, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
DMar@sco.ca.gov

Tim McDermott, Director of Finance, *City of Poway*
13325 Civic Center Drive, Poway, CA 92064
Phone: (858) 668-4411
tmcdermott@poway.org

Jane McPherson, Financial Services Director, *City of Oceanside*
300 North Coast Highway, Oceanside, CA 92054
Phone: (760) 435-3055
JmcPherson@oceansideca.org

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Monica Molina, Finance Manager/Treasurer, *City of Del Mar*
Claimant Contact
1050 Camino Del Mar, Del Mar, CA 92014

Phone: (858) 755-9354
mmolina@delmar.ca.us

Lourdes Morales, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8320
Lourdes.Morales@LAO.CA.GOV

Marilyn Munoz, Senior Staff Counsel, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-8918
Marilyn.Munoz@dof.ca.gov

Tim Nash, Director of Finance, *City of Encinitas*
Claimant Contact
505 S Vulcan Avenue, Encinitas, CA 92054
Phone: N/A
finmail@encinitasca.gov

Kaleb Neufeld, Assistant Controller, *City of Fresno*
2600 Fresno Street, Fresno, CA 93721
Phone: (559) 621-2489
Kaleb.Neufeld@fresno.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Dale Nielsen, Director of Finance/Treasurer, *City of Vista*
Claimant Contact
Finance Department, 200 Civic Center Drive, Vista, CA 92084
Phone: (760) 726-1340
dnielsen@ci.vista.ca.us

Adriana Nunez, Staff Counsel, *State Water Resources Control Board*
Los Angeles Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 322-3313
Adriana.Nunez@waterboards.ca.gov

Frederick Ortlieb, Senior Deputy City Attorney, *City of San Diego*
1200 Third Avenue, 11th Floor, San Diego, CA 92101
Phone: (619) 236-6318
fortlieb@sandiego.gov

Patricia Pacot, Accountant Auditor I, *County of Colusa*
Office of Auditor-Controller, 546 Jay Street, Suite #202 , Colusa, CA 95932
Phone: (530) 458-0424
ppacot@countyofcolusa.org

Arthur Palkowitz, *Law Offices of Arthur M. Palkowitz*
12807 Calle de la Siena, San Diego, CA 92130
Phone: (858) 259-1055
law@artpalk.onmicrosoft.com

Kirsten Pangilinan, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: (916) 322-2446
KPangilinan@sco.ca.gov

Helen Holmes Peak, *Lounsbery Ferguson Altona & Peak, LLP*
960 Canterbury Place, Ste. 300, Escondido, CA 92025
Phone: (760) 743-1201
hhp@lfap.com

Brian Pierik, *Burke,Williams & Sorensen,LLP*
2310 East Ponderosa Drive, Suite 25, Camarillo, CA 93010-4747
Phone: (805) 987-3468
bpierik@bwslaw.com

Johnnie Pina, Legislative Policy Analyst, *League of Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8214
jpina@cacities.org

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@sbcountyatc.gov

Jonathan Quan, Associate Accountant, *County of San Diego*
Projects, Revenue, and Grants Accounting, 5530 Overland Ave, Suite 410, San Diego, CA 92123
Phone: 6198768518
Jonathan.Quan@sdcounty.ca.gov

Roberta Raper, Director of Finance, *City of West Sacramento*
1110 West Capitol Ave, West Sacramento, CA 95691
Phone: (916) 617-4509
robertar@cityofwestsacramento.org

David Rice, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 341-5161
david.rice@waterboards.ca.gov

Tammi Royales, Director of Finance, *City of La Mesa*
Claimant Contact
8130 Allison Avenue, PO Box 937, La Mesa, CA 91944-0937
Phone: (619) 463-6611
findir@cityoflamesa.us

Alex Sauerwein, Attorney, *State Water Resources Control Board*
San Diego Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 327-8581
Alex.Sauerwein@waterboards.ca.gov

Cindy Sconce, Director, *MGT*
Performance Solutions Group, 3600 American River Drive, Suite 150, Sacramento, CA 95864
Phone: (916) 276-8807
csconce@mgtconsulting.com

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) 323-3562
carla.shelton@csm.ca.gov

Wayne Shimabukuro, *County of San Bernardino*
Auditor/Controller-Recorder-Treasurer-Tax Collector, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8850
wayne.shimabukuro@atc.sbcounty.gov

Natalie Sidarous, Chief, *State Controller's Office*
Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: 916-445-8717
NSidarous@sco.ca.gov

Michelle Skaggs Lawrence, City Manager, *City of Oceanside*
Claimant Contact
300 North Coast Highway, Oceanside, CA 92054
Phone: (760) 435-3055
citymanager@oceansideca.org

Eileen Sobeck, Executive Director, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
Eileen.Sobeck@waterboards.ca.gov

Jolene Tollenaar, *MGT Consulting Group*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Brian Uhler, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
Brian.Uhler@LAO.CA.GOV

Antonio Velasco, Revenue Auditor, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3143
avelasco@newportbeachca.gov

Matthew Vespi, Chief Financial Officer, *City of San Diego*
202 C Street, 9th Floor, San Diego, CA 92101
Phone: (619) 236-6218
mvespi@sandiego.gov

Vincent Vu, Attorney, *State Water Resources Control Board*
San Diego Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 323-5669
Vincent.Vu@waterboards.ca.gov

Emel Wadhwani, Senior Staff Counsel, *State Water Resources Control Board*
Office of Chief Counsel, 1001 I Street, Sacramento, CA 95814
Phone: (916) 322-3622
emel.wadhwani@waterboards.ca.gov

Ada Waelder, Legislative Analyst, Government Finance and Administration, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
awaelder@counties.org

Joe Ware, Finance Director, *City of Lemon Grove*
Claimant Contact
3232 Main Street, Lemon Grove, CA 91945
Phone: (619) 825-3803
jware@lemongrove.ca.gov

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Colleen Winchester, Senior Deputy City Attorney, *City of San Jose*
200 East Santa Clara Street, 16th Floor, San Jose, CA 95113
Phone: (408) 535-1987
Colleen.Winchester@sanjoseca.gov

R. Matthew Wise, Supervising Deputy Attorney General, *Department of Justice*
Attorney General's Office, 1300 I Street, Suite 125, PO Box 944255, Sacramento, CA 94244-2550
Phone: (916) 210-6046
Matthew.Wise@doj.ca.gov

Jacqueline Wong-Hernandez, Deputy Executive Director for Legislative Affairs, *California State Association of Counties (CSAC)*
1100 K Street, Sacramento, CA 95814
Phone: (916) 650-8104
jwong-hernandez@counties.org

Elisa Wynne, Staff Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
elisa.wynne@sen.ca.gov

Helmholst Zinser-Watkins, Associate Governmental Program Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-7876
HZinser-watkins@sco.ca.gov

Exhibit B

STATE of CALIFORNIA
COMMISSION ON STATE
MANDATES

December 5, 2025

Mr. Thomas Deak
County of San Diego
Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

Ms. Anne Kato
State Controller's Office
Local Government Programs and
Services Division
3301 C Street, Suite 740
Sacramento, CA 95816

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Decision and Parameters and Guidelines
San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6), 07-TC-09-R
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

Dear Mr. Deak and Ms. Kato:

On December 5, 2025 the Commission on State Mandates adopted the Decision and Parameters and Guidelines on the above-captioned matter.

Very truly yours,

Juliana F. Gmur

Juliana F. Gmur
Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES	Case No.: 07-TC-09-R
San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6) The period of reimbursement is January 24, 2007 through December 31, 2017.	*San Diego Regional Water Quality Control Board Order No. R9-2007-0001* *Permit CAS0108758,* *Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6)* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 5, 2025*) (*Served December 10, 2025*)

PARAMETERS AND GUIDELINES

The Commission on State Mandates adopted the attached Decision and Parameters and Guidelines on December 5, 2025.

Juliana F. Gmur

Juliana F. Gmur, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6) The period of reimbursement is January 24, 2007 through December 31, 2017.	Case No.: 07-TC-09-R *San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6)* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 5, 2025*) (*Served December 10, 2025*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Decision and Parameters and Guidelines during a regularly scheduled hearing on December 5, 2025. Anya Kwan and John Quenzer appeared on behalf of the claimants. Marilyn Munoz and Viet-Long Nguyen appeared on behalf of the Department of Finance. Jennifer Fordyce, Ben Neill, and Erica Ryan appeared on behalf of the State Water Resources Control Board and San Diego Regional Water Quality Control Board.

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 sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision and Parameters and Guidelines by a vote of 6-0, as follows:

Member	Vote
Lee Adams, County Supervisor	Yes
Karen Greene Ross, Public Member	Yes
Renee Nash, School District Board Member	Absent
David Oppenheim, Representative of the State Controller, Vice Chairperson	Yes
William Pahland, Representative of the State Treasurer	Yes
Michele Perrault, Representative of the Director of the Department of Finance, Chairperson	Yes
Alexander Powell, Representative of the Director of the Governor's Office of Land Use and Climate Innovation	Yes

I. Summary of the Mandate

On March 26, 2010, the Commission on State Mandates (Commission) adopted the Test Claim Decision. The parties litigated the Decision and, in 2017 and 2022, the court affirmed the Commission's Decision, except for the street sweeping requirement in part D.3.a.(5) of the test claim permit, finding the claimants have sufficient authority to levy a fee for street sweeping within the meaning of Government Code section 17556(d), so it imposes no costs mandated by the state.[1]

On May 26, 2023, the Commission adopted the Amended Decision on Remand consistent with the court's judgment and writ.[2] The Commission partially approved the Test Claim for the following reimbursable activities:

- Reporting on street sweeping and conveyance system cleaning (Part J.3.a.(3)(c)(iv)-(viii), (x)-(xv));
- Conveyance system cleaning (Part D.3.a.(3)(b)(iii));
- Educational component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), 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);

[1] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 574, 585-586, 595.

[2] Exhibit A, Amended Test Claim Decision on Remand, pages 4-6.

- 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)).[3]

The Commission also found that street sweeping (part D.3.a.(5)), hydromodification management plan (part D.1.g), and low-impact development (parts D.1.d.(7) & D.1.d.(8)) are not reimbursable because the copermittees have fee authority sufficient (within the meaning of Gov. Code § 17556(d)) to pay for them.[4]

Further, the Commission found that 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- 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.[5]

II. Procedural History

On March 26, 2010, the Commission adopted the original Test Claim Decision and served it on March 30, 2010. The claimants filed Proposed Parameters and Guidelines on June 28, 2010.[6] The Department of Finance (Finance) filed comments on the Proposed Parameters and Guidelines on September 3, 2010.[7] The State Water Resources Control Board and San Diego Regional Water Quality Control Board (Water Boards) filed joint comments on the Proposed Parameters and Guidelines on

[3] Exhibit A, Amended Test Claim Decision on Remand, pages 5-6.

[4] Exhibit A, Amended Test Claim Decision on Remand, page 6.

[5] Exhibit A, Amended Test Claim Decision on Remand, page 6.

[6] Exhibit B, Claimants' Proposed Parameters and Guidelines.

[7] Exhibit C, Finance's Comments on the Proposed Parameters and Guidelines, page 1.

September 16, 2010.[8] The claimants filed rebuttal comments and the Revised Proposed Parameters and Guidelines on November 16, 2010.[9]

On July 20, 2010, Finance and the Water Boards filed a petition for a writ of mandate, requesting to set aside the Commission's Decision. On October 11, 2010, the claimants filed a cross petition for writ of mandate and complaint for declaratory relief. In 2017, the Third District Court of Appeal agreed with the Commission that the contested permit provisions are mandated by the state and not by federal law.[10] In 2022, the Third District Court of Appeal affirmed the remaining portion of the Commission's Decision, except for street sweeping (Permit Part D.3.a.(5)), which does not impose costs mandated by the state pursuant to the copermittees' fee authority under Government Code section 17556(d).[11] On May 26, 2023, the Commission amended the Decision consistent with the Court of Appeal's decision pursuant to the judgment and writ.[12]

Pursuant to section 1183.13(a) of the Commission's regulations, Commission staff issued the Draft Proposed Decision and Parameters and Guidelines on July 27, 2023.[13]

The claimants filed comments on the Draft Proposed Decision and Parameters and Guidelines on February 16, 2024, regarding whether the special districts are eligible claimants,[14] and again on February 20, 2024, to propose reasonable reimbursement methodologies (RRMs) and address reasonably necessary activities in the Draft Proposed Decision and Parameters and Guidelines.[15]

Finance filed comments on the Draft Proposed Decision and Parameters and Guidelines and opposition to the proposed RRMs on October 14, 2024.[16] The State

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[8] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines.

[9] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines.

[10] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661.

[11] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581-586. See also, *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th at 192-195.

[12] Exhibit A, Amended Test Claim Decision on Remand.

[13] Exhibit F, Draft Proposed Decision and Parameters and Guidelines.

[14] Exhibit G, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines.

[15] Exhibit H, Claimant's Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs.

[16] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs.

Controller's Office (Controller) filed a statement of no comment on the Draft Proposed Decision and Parameters and Guidelines on October 14, 2024.[17] The Water Boards filed comments on the Draft Proposed Decision and Parameters and Guidelines and opposition to the proposed RRMs on October 14, 2024.[18] The claimants filed rebuttal comments on December 16, 2024.[19] The Water Board filed late comments on the claimants' rebuttal on March 18, 2025.[20]

Commission staff issued the Revised Draft Proposed Decision and Parameters and Guidelines on March 20, 2025.[21] On April 3, 2025, the claimants requested an extension of time to file comments and a postponement of hearing, which was partially granted. On April 9, 2025, the Water Boards requested an extension of time to file comments, which was granted. On April 10, 2025, the Department of Finance and the State Controller's Office filed comments on the Revised Draft Proposed Decision and Parameters and Guidelines.[22] On May 16, 2025, San Diego Unified Port District and San Diego County Regional Airport Authority, the Water Boards, and the claimants filed comments on the Revised Draft Proposed Decision and Parameters and Guidelines.[23] On July 9, 2025, the claimants filed a Request for Postponement of the hearing, which was granted for good cause on July 11, 2025.

III. Positions of the Parties

A. County of San Diego and Cities, Claimants

The claimants' comments are organized by the following issues and requests raised in their pleadings.

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[17] Exhibit K, State Controller's Comments on the Draft Proposed Decision and Parameters and Guidelines.

[18] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs.

[19] Exhibit M, Claimants' Rebuttal Comments.

[20] Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal.

[21] Exhibit O, Revised Draft Proposed Decision and Parameters and Guidelines.

[22] Exhibit P, Finance's Comments on the Revised Draft Proposed Decision and Parameters and Guidelines. Exhibit Q, Controller's Comments on the Revised Draft Proposed Decision and Parameters and Guidelines.

[23] Exhibit R, San Diego Unified Port District and San Diego County Regional Airport Authority Comments on the Revised Draft Proposed Decision and Parameters and Guidelines. Exhibit S, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines. Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines.

1. **The Claimants Contend that San Diego County Regional Airport Authority and the San Diego Unified Port District Be Considered Eligible Claimants.**

The claimants argue that the San Diego County Regional Airport Authority and the San Diego Unified Port District, which are funded with fees and assessments, should be eligible to claim reimbursement for this program on the ground that section 8(d) of article XIII B expressly defines local governments to include "special district, authority or other political subdivision of or within the State" and that definition governs the interpretation of eligibility under article XIII B, section 6.[24] Their specific arguments on this issue are addressed in the analysis.

2. **The Claimants Request Reimbursement for Proposed Reasonably Necessary Activities and Costs to Comply with the Mandate.**

In their originally submitted Proposed Parameters and Guidelines filed June 28, 2010, the claimants proposed reasonably necessary costs for each category of activities the Commission approved, which are summarized in the Discussion.[25]

3. **The Claimants Request the Parameters and Guidelines Delete References to Senate Bill 231.**

The claimants contend that Senate Bill 231, which exempted stormwater property related fees from the voter approval requirement in Proposition 218, is not relevant to these Parameters and Guidelines as follows:

> As the Commission and two Courts of Appeal have determined, the Municipal Claimants are entitled to subvention for the unfunded mandates required by the 2007 Permit. The Municipal Claimants performed the mandates contained in the 2007 Permit from 2007 until the end of fiscal year ("FY") 2014/2015, by which time the mandates of the 2013 Permit were in full force. In this reimbursement process, the Municipal Claimants are entitled to and seek reimbursement only for the state mandates during this period from 2007 until the end of FY 2014/2015 when they were required by the 2007 Permit. The Municipal Claimants will seek reimbursement for the mandates performed under the 2013 Permit, including, but not limited to, mandates that were in the 2007 Permit but were continued in the 2013 Permit, in that separate action. The Municipal Claimants therefore reserve all rights regarding mandates in the 2013 Permit.
>
> For this reason, the Municipal Claimants object to and disagree with the portions of the Proposed Decision that improperly seek to address an

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[24] Exhibit G, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines, pages 2-6.

[25] Exhibit B, Claimants' Proposed Parameters and Guidelines, pages 16-28.

issue that is not currently before the Commission— the possible impact of Senate Bill 231 ("SB 231"). The Municipal Claimants contend that the Commission must delete these portions of the Proposed Decision for multiple reasons. First, SB 231 is not at issue in this Test Claim because the mandated activities under the 2007 Permit were all completed prior to the time SB 231 was enacted in 2017 and before it became effective in 2018. SB 231 is therefore not relevant to this Test Claim, as the most recent Court of Appeal opinion in this matter concluded. [Citation omitted.] Since SB 231 has no application to this Test Claim, the Proposed Decision should not address it. Whatever its relevance to future matters, it has no place in this proceeding.

Second, the Municipal Claimants contend that the Commission's analysis regarding SB 231 is inconsistent with *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535 and *City of Salinas* (2002) 98 Cal.App.4th 1351. Although it is irrelevant to this proceeding and should not be addressed at all by the Commission here, the Municipal Claimants reserve all rights regarding the applicability of SB 231 and its constitutionality. The Municipal Claimants believe that even if SB 231 were applicable, which it is not, the appropriate approach for the Commission to take regarding SB 231 would be to wait until a court of competent jurisdiction resolves the constitutionality of SB 231 in the context of an actual fee enacted under its provisions. Since SB 231 is irrelevant here, the Commission should just delete all references to it in the Proposed Decision.[26]

4. The Claimants Request Reimbursement for Interest, Legal, and Expert Costs to Process the Test Claim.

The claimants also request reimbursement for any owed interest from the reimbursements, as well as recoverable legal and expert costs to process the Test Claim.[27]

5. The Claimants Propose Several RRMs in the Form of Unit Costs and Formulae in lieu of Providing Documentation of Actual Costs for the Controller's Review and Audit.

All eligible claimants request the Commission adopt several RRMs in the form of unit costs and formulae pursuant to Government Code section 17518.5 in lieu of providing

[26] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 3.

[27] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 11; Exhibit M, Claimants' Rebuttal Comments, pages 15, 20.

detailed documentation of actual costs mandated by the state for the Controller's review and audit in order "to allow for the timely and efficient reimbursement of the mandated activities previously approved by the Commission and confirmed in two Courts of Appeal decisions."[28] The claimants retained a consultant, John Quenzer, a principal scientist at D-Max Engineering, Inc., to review documentation maintained by the County of San Diego and to develop proposed RRMs.

In 2023, the County of San Diego, Cites of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, El Cajon, Encinitas, Escondido, La Mesa, National City, Oceanside, San Diego, and Vista (collectively, "Municipal Claimants") retained me and D-Max to assist in developing a reasonable reimbursement methodology.[29]According to the claimants, the initial unit costs and formulae proposed would reimburse the claimants an estimated $252,762,732 in "total reimbursement."[30] The claimants have since modified their proposals and reduced some of the proposed unit costs, as explained below.[31]

The claimants argue that an RRM is proper in this case since providing receipts going back to 2007, when the test claim permit was adopted, is not reasonable:

> The activities required by the 2007 Permit that are challenged in the Test Claim occurred starting in 2007. The State Responses indicate that the only reasonable way to handle the reimbursement is through receipts. The Municipal Claimants wish to remind the Commission that due to the State's decision to contest all possible legal issues through years of unnecessary litigation, fourteen years have passed since the 2007 Permit and its unfunded mandates were adopted. Requiring Municipal Claimants to come up with receipts fourteen years after the work began is unreasonable in light of the RRM and improperly incentivizes the state to continue challenging unfunded mandates. The total cost of the 2007 Permit's mandated activities does not change the fact that these activities were required and that the Municipal Claimants were not properly reimbursed for these activities. Using the RRM process would be a fair

[28] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 1.

[29] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 15 (2025 Quenzer Declaration).

[30] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 48.

[31] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines.

way to finally provide the Municipal Claimants with reimbursement for funds that the State required them to expend years ago.[32]

If the Commission does not adopt the proposed RRMs, claimants request that the Commission include in the Parameters and Guidelines all activities they contend are reasonably necessary to implement the state mandated activities, as described in their February 20, 2024 comments.[33]

The claimants' *revised* proposed RRMs are identified in Exhibit T, are summarized below, and are supported by 14 volumes of documentation that contain over 80,000 pages and several declarations.

a. RRM Proposal for Reporting on Street Sweeping and Conveyance System Cleaning (Part J.3.a.(3)(c) (iv)-(viii), (x)-(xv))

The claimants propose an RRM where each eligible claimant would be entitled to claim an estimated unit cost identified, adjusted annually by the Consumer Price Index (CPI).

The proposed unit cost RRM for reporting on the conveyance system cleaning and inspections data is based on the median of the permittees' average annual reporting costs in fiscal years 2007-2008 to 2009-2010, with the following unit cost options provided:

1. Fifty (50) percent of the median cost ($5,801.67), which represents the average reporting costs for conveyance system reporting from fiscal year 2007-2008 through 2009-2010 for the 12 co-permittees that responded to surveys, or $2900.83 per year for each eligible claimant.
2. If the average costs for fiscal year 2007-2008 are excluded, then the unit cost would be 50 percent of $5,887.00, or $2,943.50 per year for each eligible claimant.
3. If the 2011 survey data is excluded, then the unit cost is revised to $8,604.67, which is 50 percent of the median of the data set identified in the declarations (which identified average annual costs of $115,275.67, $17,209.33, $3,172.00, and $940.33, as stated in the table above).
4. If the 2011 survey data and the fiscal year 2007-2008 costs are excluded, then the unit cost is $8.731.25, which is 50 percent of the median 2007-2008 data excluded ($17,462.50).[34]

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[32] Exhibit M, Claimants' Rebuttal Comments, pages 4-5.

[33] Exhibit M, Claimants' Rebuttal Comments, page 20.

[34] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 32-33.

The claimants are willing to accept there is some overlap with the conveyance system cleaning data tracking required under the 2001 Permit and what was required under the 2007 Permit" and thus the claimants reduced their original proposal by 50 percent.[35]

For reporting the street sweeping data, the claimants propose the following unit costs RRM options:

1. The median unit cost of $6,143.67, the same as originally proposed, is based on the co-permittee declarations from the cities of Chula Vista, Coronado, Escondido, and National City for the average costs from fiscal year 2007-2008 through 2009-2010. The average costs were the same as reported in the 2011 surveys.
2. If fiscal year 2007-2008 data is excluded, then the median unit cost proposal is $6,234.00.
3. If the 2011 survey responses are excluded, then the median unit cost, based on the 2025 declarations, is revised to $3,596.33.
4. If the 2011 survey data and the 2007-2008 costs are excluded, then the median unit cost is $3,649.25.[36]

The period of reimbursement for the reporting activities "is from March 24, 2008, which is the date that Co-Permittees were required to begin implementing their JURMP developed per the 2007 Permit requirements, to, June 26, 2013, which is the day before the effective date of the 2013 Permit."[37] However, "[d]ata tracking is the reason why the proposed RRM states that costs in 2007-2008 should be reimbursable. While the first JURMP annual report that contained the new street sweeping and catch basin cleaning requirements was not due until September 2008, which is in fiscal year 2008-2009, the September 2008 report was a report on data from 2007-2008. Therefore, data collection and recording were needed in 2007-2008 to successfully report on 2007-2008 data in the report due September 2008."[38] The claimant further explains that

> The 2007/2008 reporting cost claimed should be 27.05% of the standard unit cost for reporting. This reflects that 99 days of the 366 days in fiscal year 2007/2008 were on or after March 24, 2008. The 2012/2013 reporting cost claimed should be 98.90% of the standard unit cost for reporting. This

[35] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 32.

[36] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 33-34.

[37] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 29.

[38] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 29.

reflects that 361 of the 365 days in fiscal year 2012/2013 were on or before June 26, 2013.[39]

b. RRM Proposal for Conveyance System Cleaning (Part D.3.a.(3)(b)(iii))

The claimants propose a unit cost of $162.32 per storm drain inlet or catch basin (increased from $150.66 as originally proposed), which is the median cost based on data from fiscal years 2007-2008 through 2009-2010, with the costs of training excluded, and adjusted annually by the Consumer Price Index. If the 2007-2008 costs are removed, the unit cost is $154.68. If the 2011 survey data is removed, the unit cost is $89.64. If the 2011 survey data and the 2007-2008 costs are removed, the unit cost is $88.94.[40]

For linear MS4 cleaning, the claimants propose a single, combined unit cost for both channels and pipes at $3.02 per linear foot (compared to the original proposal of one linear foot of pipe at $6.77/ft., and one linear foot of the channel at $8.52/ft.), based on fiscal year 2007-2008 cost data from the cities of Carlsbad, Chula Vista, and Imperial Beach (three of the 19 eligible claimants).[41] The proposed unit cost is based on the following:

- The approach subtracts the total catch basin cleaning and inspection costs from the overall conveyance system cleaning costs, with the remainder being the linear MS4 cleaning costs. "Conveyance system cleaning programs generally consist of these three activities, so it is reasonable to estimate linear cleaning costs by subtracting the costs of catch basin inspections and cleaning."
- The calculation uses each co-permittee's own cleaning and inspection program costs, rather than relying on an overall average.
- The total linear cleaning costs were then divided by the linear distance of pipe or channel cleaned to get a unit cost per linear foot cleaned.
- The proposed unit cost is the median cost per linear foot cleaned by the cities of Carlsbad, Chula Vista, and Imperial Beach in fiscal year 2007-2008.

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[39] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 30.

[40] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 39.

[41] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 40, 69 (Table 10 to 2025 Quenzer declaration).

- The cities of Escondido and Vista had previously been included in the calculation but were removed after further review due to lack of applicable data needed to calculate linear MS4 cleaning.[42]

The period of reimbursement is from March 24, 2008, which is the date that co-permittees were required to begin implementing JURMP developed under the test claim permit, to June 26, 2015, which is the day before the claimants were required to submit and begin implementing JRMPs that reflected requirements of the 2013 Permit. The claimant explains the following:

> In accordance with the above reimbursement period, the following conservative adjustments are proposed to the conveyance system cleaning for the 2007/2008 and 2012/2013 fiscal years. The 2007/2008 reporting cost claimed should be 27.05% of the standard unit cost. This reflects that 99 days of the 366 days in fiscal year 2007/2008 were on or after March 24, 2008. The 2014/2015 cost claimed should be 98.90% of the standard unit cost. This reflects that 361 of the 365 days in fiscal year 2014/2015 were on or before June 26, 2015.[43]

c. <u>RRM Proposal for JURMP Educational Component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3)).</u>

The proposed RRMs are intended to reimburse claimants for the residential education program development and implementation and the jurisdictional education programs.

The proposed RRM for the residential education program multiplies the actual annual shared costs for developing and implementing the program (called "County Education Costs") of $914,828.20, times the claimant's proportional share of cost based on applicable MOUs.[44] The claimants explain that the work was performed by their Education and Regional Sources Workgroup, which elected to contract with a consultant to develop the program.[45] The proposed RRM covers the period from January 24, 2007 (the effective date of the test claim permit and beginning of the period of reimbursement) to June 26, 2013, which is the day before the effective date of the

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[42] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 39-40.

[43] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 34-35.

[44] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 41-42.

[45] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 41-42 (2025 Quenzer declaration).

2013 permit. The claimants started developing the program in 2006-2007, to ensure they could implement it on time.[46]

The proposed RRM for the jurisdictional education programs is calculated using the average percentage of the stormwater budget spent on yearly education costs between fiscal year 2007-2008 and fiscal year 2014-2015 times the "municipal claimants'" total stormwater expenditures each fiscal year. The proposal does not define "municipal claimants," but presumably it means the local agency claimants that are eligible to claim reimbursement for this program. As originally proposed, the average percentage of the stormwater budget spent on yearly education costs between fiscal year 2007-2008 and fiscal year 2014-2015 was 2.16 percent. The claimants have reduced that percentage to 0.39 percent of total costs, which is the difference between the median value for education costs as a percentage of total stormwater program costs (jurisdictional component) under the 2001 permit and the median value for education costs as a percentage of total stormwater program costs (jurisdictional component) under 2007 test claim permit.[47] The proposed RRM covers the period from March 24, 2008 (which is when they began implementing the JURMP under the test claim permit) until June 26, 2015 (which is the day before the JURMP under the next permit went into effect).[48]

d. RRM Proposal for Watershed Activities and Collaboration in the WURMP (Part E.2.f & E.2.g)

There are three proposed RRMs in this section: jurisdictional watershed activities; regional watershed activities; and watershed workgroup meetings. The claimants also allege costs for the watershed workgroup cost share contributions, but state they will submit reimbursement claims based on actual costs for these expenses.[49]

The claimants revised their proposed RRM for performing the watershed activities on a jurisdictional basis, which multiplies the median unit cost of 71 watershed activities ($5,000 per jurisdictional activity adjusted annually by the Consumer Price Index), times four (the minimum number of activities each year), times the number of watersheds

[46] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 41 (2025 Quenzer declaration).

[47] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 44.

[48] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 43.

[49] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 15, 45.

each co-permittee is located, from March 24, 2008, through June 26, 2013 (the day before the effective date of the 2013 permit) for each eligible claimant.[50]

The proposed RRM for the regional watershed activities reimburses the claimants for the proportional share of costs under the MOU for the Regional WURMP Working Group costs of $6.025.14 to develop and maintain the Regional Watershed Activities Database from March 24, 2008, through June 26, 2013.[51]

The proposed RRM for the watershed workgroup meetings reimburses the claimants from January 24, 2007, to June 26, 2013, for attending meetings, calculated by multiplying the average cost of an employee to attend a meeting by the number of attendees the claimant had attend the meeting by the number of meetings per year as follows:

- For meetings that occurred between the 2007 Permit effective date and the WURMP update submittal in March 2008, the RRM unit cost per attending meetings is reduced by 50%, from $262.88 to $131.44. While most of the discussion during those meetings is believed to have related to 2007 Permit requirements, this reduction accounts for discussion of other topics during those meetings.
- For meetings that occurred after the WURMP update submittal in March 2008, the RRM unit cost is reduced by 90%, from $262.88 to $26.29.[52]

The number of meetings each year was identified in the claimants' original proposal as follows:

FY 2007/2008	369
FY 2008-2009	312
FY 2009-2010	334
FY 2010-2011	338
FY 2011-2012	355
FY 2012-2013	320[53]

[50] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 45-46, 80-85 (Table 17).

[51] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 47, 86 (Table 19).

[52] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 49.

[53] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 43.

e. RRM Proposal for the Regional Urban Runoff Management Program (Parts F.1., F.2. & F.3).

The proposed RRM is a claimant's proportional share of costs based on the applicable MOUs for fiscal year 2006-2007 through fiscal year 2012-2013, multiplied by the actual annual costs invoiced by the County for the Regional Urban Runoff Management Plan (RURMP) reporting, and the claimants have not changed this proposal.[54] Based on the County Watershed Workgroup Expenditure Records, the annual costs are as follows:

FY 2008/2009 $2,928.91

FY 2009/2010 $5,230.98

FY 2010/2011 $1,926.50[55]

This results in total reimbursement of $10,086.39.[56]

f. RRM Proposal for the Program Effectiveness Assessment of the JURMP and WURMP (Parts I.1 and I.2).

The proposed RRM for the Jurisdictional Program Effectiveness Assessment is based on the percentage of the total stormwater budget all copermittees spent assessing the effectiveness of the jurisdiction program (which has been revised from 3.72% to 0.28% to account for the potential overlap with the requirements of the prior permit) times the "municipal claimants'" total stormwater budget, from March 24, 2008, through June 26, 2013.[57]

The proposed RRM for the "Regional Fiscal, Reporting, and Assessment Workgroup is the proportional share of costs based on MOUs times the total shared costs for developing and implementing the Regional Fiscal, Report, and Assessment Workgroup of $53,173.37 (reduced from $129,873.60 originally proposed), from January 24, 2007,

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[54] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 43; Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 49, 74-75.

[55] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 43; Exhibit M, Claimants' Rebuttal Comments, page 75.

[56] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 44.

[57] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 44; Exhibit M, Claimants' Rebuttal Comments, page 77; Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 50-51, 87-88 (Table 20).

to June 26, 2013, the day before the effective date of the 2013 permit.[58] The claimants state the workgroup was formed to develop a standardized fiscal analysis method and to facilitate program effectiveness assessments (which as explained herein, are requirements addressed under the Regional Urban Runoff Management Program (RURMP)).[59]

g. RRM Proposal for Long-term Effectiveness Assessment (Part I.5).

The proposed formula for reimbursement for the long-term effectiveness assessment is the proportional share of costs based on applicable MOUs multiplied by the "actual annual costs of the contractors needed to assess the long term effectiveness of the projects reported by [the] County," which totals $344,539.21 from fiscal year 2007-2008 through fiscal year 2012-2013.[60]

h. RRM Proposal for All Permittee Collaboration (Part L.1.).

The proposed RRM contains two formulas to reimburse eligible claimants to collaborate on the educational component of the JURMP.[61]

The proposed RRM for "Support for Regional Workgroup Meetings" is the proportional share of costs based on applicable MOUs to the actual costs of $5,886.02 to support the Educational and Residential Sources Workgroup from January 24, 2007, through June 26, 2013.[62]

The proposed RRM for "Regional Workgroup Meetings" equals the number of employees from a Municipal Claimant that attended a meeting of the Educational and

[58] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 45; Exhibit M, Claimants' Rebuttal Comments, page 78; Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 53-54.

[59] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 53-54.

[60] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs pages 10, 45-46; Exhibit M, Claimants' Rebuttal Comments, page 80; Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 55.

[61] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 55 (2025 Quenzer Declaration).

[62] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 56, 86 (Table 18).

Residential Sources Workgroup, times the average costs to attend one meeting of $262.88, times the number of meetings attended.[63] The claimants explain that,

> The formula sets a unit cost for attending a meeting. When submitting a claim, each Co-Permittee will supply the number of meetings its staff attended and supporting documentation to demonstrate the meetings were in fact attended.[64]

The claimants are no longer proposing an RRM for the Regional Workgroup Expenditures. The claimants state the following: "Given that the Commission had directed that only certain collaboration among workgroups is reimbursable, and this RRM was developed to include collaboration among all workgroups, the Co-Permittees no longer propose an RRM for this category."[65]

B. <u>San Diego Unified Port District and San Diego County Regional Airport Authority</u>

San Diego Unified Port District and San Diego County Regional Airport Authority filed separate comments on the Revised Draft Proposed Decision and Parameters and Guidelines, arguing they are eligible to claim reimbursement for the costs of this program as follows:

- Both districts have and maintain stormwater systems and are permittees under the test claim permit.[66]
- They are eligible for reimbursement under article XIII B, section 6 because section 6 involves "local governments" and the special districts satisfy the definition of "local governments" as defined by section 8 of article XIII B.[67]

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[63] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 57. See prior proposal in Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 11, 47; and Exhibit M, Claimants' Rebuttal Comments, page 82.

[64] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 57.

[65] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 59.

[66] Exhibit R, San Diego Unified Port District and San Diego County Regional Airport Authority Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 1-2.

[67] Exhibit R, San Diego Unified Port District and San Diego County Regional Airport Authority Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 2-3.

- Section 6 does not include any reference to "appropriations subject to limitation." Had the drafters of article XIII B intended section 9's exclusions for appropriations subject to limitation to apply to reimbursements made under section 6, they could have clearly done so.[68]
- Government Code section 7901(e), in its definition of "local agency" subject to article XIII B, section 6, is inconsistent with Government Code section 17518.[69]

C. <u>Department of Finance</u>

Finance argues the Commission should reject the proposed RRMs because they fail to meet the statutory requirements for adoption of an RRM and would result in more reimbursement than required by law for the following reasons:[70]

- All of the permit's required activities have already been performed, and claimants know the costs that have actually been incurred to implement the permit activities. Only reliance on claimed costs supported by source documents created at or near the time the actual costs were incurred, together with corroborating evidence, will ensure that reimbursement is not in excess of what is required by law.[71]
- The evidence shows that claimants may have additional offsetting revenues that must be accounted for. The differences in revenues and costs among the various claimants are reason enough to reject a one-size-fits-all approach to reimbursement. The claimants must submit actual costs claims identifying all offsetting revenues and deduct those revenues from the costs submitted for reimbursement.[72]
- The requirements for adoption of a reasonable reimbursement methodology have not been met.

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[68] Exhibit R, San Diego Unified Port District and San Diego County Regional Airport Authority Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 3.

[69] Exhibit R, San Diego Unified Port District and San Diego County Regional Airport Authority Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 4-5.

[70] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 2-4.

[71] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 2.

[72] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 2.

The claimants do not identify which individual claimants make up a representative sample of eligible claimants and the claimants vary widely in their size, populations, and other characteristics, which results in a wide variation in costs.

In addition, the proposed RRMs do not consider the variation in costs among local agencies and make no specific references to how this variation is accounted for. For example, many of the proposed RRMs' components are based on an individual claimant's percentage share of a "total stormwater budget." There is nothing in the supporting documentation to validate that the proposed percentage share of a total stormwater budget "is even generally representative of any historic annual expenditures from any claimant, which could otherwise be determined if actual historic expenditures were provided." Further, the activities included in the category "total stormwater budgets" can vary widely among claimants as to what costs are included or not included, and there is no identification and analysis provided for how the RRMs consider that variation.[73]

- Although the claimants submitted 14 volumes and 80,000 pages of supporting documents, they did not include sufficient and complete information on the datasets, calculations, and methodologies used to develop the proposed RRMs. Finance was unable to determine which information in the supporting documents was used to develop or inform the RRMs, or which information was excluded and why it was excluded.[74]
- The proposed RRMs do not demonstrate that they limit reimbursement to the activities determined to be reimbursable by the Commission.[75]

Finance also argues that SB 231 is relevant and should not be deleted from the analysis of the claimants' costs mandated by the state.[76]

Finance agrees with the Draft Proposed Decision that reimbursement for the claimants' proposed reasonably necessary activities, such as developing policies and procedures to report street sweeping and conveyance system cleaning, and developing educational

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[73] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 3.

[74] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 4.

[75] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 4.

[76] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 2, 4.

programs, should be denied because there is no substantial evidence in the record to support these requests.[77]

Finance further contends that the Commission has no authority to approve reimbursement for interest, or for any legal and expert costs to process the Test Claim, as requested by the claimants.[78]

Finally, Finance supports the finding in the Draft Proposed Decision that the Port District and Airport Authority special district are not eligible to claim mandate reimbursement because they are not subject to the taxing and spending restrictions in the California Constitution.[79]

Finance filed comments agreeing with the Revised Draft Proposed Decision and Parameters and Guidelines, as follows:

> Finance concurs with the staff analysis and conclusion in the Revised Draft Proposed Decision that Claimants' proposed Reasonable Reimbursement Methodologies (RRMs) are overbroad, not limited to the mandated activities, and do not reasonably represent eligible costs. Finance agrees with the staff recommendation to deny the proposed RRMs and instead require Claimants to submit claims based only on actual costs, traceable and supported by source documents, for the activities found reimbursable by the Commission.[80]

D. <u>State Water Resources Control Board and Regional Water Quality Control Board</u>

In comments submitted on September 16, 2010, the Water Boards specifically comment on and oppose each of the claimants' requests for reimbursement of proposed reasonably necessary activities as discussed in the analysis below.[81]

In their October 14, 2024 comments, the Water Boards request the Parameters and Guidelines be modified to change the beginning period of reimbursement from January 24, 2007 (the effective date of the test claim permit) to March 24, 2008, based

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[77] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 5-6.

[78] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 5.

[79] Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition Proposed RRMs, page 2.

[80] Exhibit P, Finance's Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 1.

[81] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 4-6, 16.

on several permit provisions requiring implementation “no later than 365 days after adoption of” the test claim permit, and a permit Addendum adopted by the Regional Board delaying that implementation another 60 days due to San Diego County wildfires in October 2007 for which the Governor proclaimed a regional disaster, for a total delay of 425 days.[82]

Except for the proposed change to the period of reimbursement, the Water Boards urge the Commission to adopt the Draft Proposed Decision and Parameters and Guidelines issued July 27, 2023, and reject the claimants’ proposed RRMs for the following reasons:[83]

- The Water Boards argue the claimants’ proposed RRMs fail to satisfy the statutory requirements and are not supported by substantial evidence in the record.[84] The claimants do not show that their RRMs conform to Government Code section 17518.5(b) because they are not based “on a representative sample of eligible claimants” nor identify which claimants constitute a representative sample so the parties cannot verify whether the purported sample of eligible claimants and costs are representative.[85]
- The RRMs do not comply with section 17518.5(c) regarding the variation in costs among local agencies. The claimants’ declaration does not specify whether costs of all or a subset of claimants were considered, and if a subset, which claimants make up the subset. Nor do the RRMs propose to implement the mandate in a cost-effective manner in that variations in costs are not identified,

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[82] Exhibit L, Water Boards’ Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 3, footnote 2, and 33 (technical analysis) and 38; Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

[83] Exhibit L, Water Boards’ Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 3. Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, pages 1-20.

[84] Exhibit L, Water Boards’ Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 2. Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, pages 2-5.

[85] Exhibit L, Water Boards’ Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 5. Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, pages 4-5.

nor are the costs necessarily confined to those the Commission determined were reimbursable or reasonably necessary to comply with the mandate.[86]

- The RRMs do not comply with section 17518.5(d), which requires RRMs to be based on “general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state, rather than detailed documentation of actual local costs.” According to the Water Boards:

  > Claimants do not identify or explain the documentation or assumptions relied upon to develop each of the proposed RRMs. Moreover, claimants fail to demonstrate that the RRMs exclude, or are capable of excluding, costs for activities that are not reasonably necessary to implementing the mandated activities and are therefore not reimbursable. Likewise, claimants fail to demonstrate if, or how, the proposed RRMs can be adjusted to ensure that they result in reimbursement only for the allowable time periods in which the mandated activities are required to be performed and, further, that they are amenable to adjustments for any that [sic] offsetting revenues that reduce an individual claimant’s reimbursement amount.[87]

- The claimants’ reliance on the 2005 state survey to validate values in the proposed RRMs is inappropriate because that survey’s costs were not isolated to only the mandated activities and the survey is not representative because it included six permittees, only one of which (Encinitas) is an eligible claimant under this claim. In addition, the 2005 survey involved compliance with a 2001 San Diego County permit rather than the test claim permit.[88] Further, the 2005 survey’s purpose was not to approximate local costs of permit implementation but primarily to understand costs per household associated with permit implementation, and one of the survey’s conclusions was that stormwater budgets that vary with local operations make it challenging to isolate, and are unreliable to determine, expenses for specific permit activities.[89]

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[86] Exhibit L, Water Boards’ Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 6. Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, page 4.

[87] Exhibit L, Water Boards’ Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 7. See also Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, page 6, 16-17 (Technical Analysis).

[88] Exhibit L, Water Boards’ Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 8.

[89] Exhibit L, Water Boards’ Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 8-9.

- The 2011 county copermittee survey is also not reliable because it "does not support an accurate or verifiable approximation of local costs" because individual claimants responded to the surveys with different types of inputs based on subjective determinations, so the survey data are not comparable and cannot be used to develop a reliable, accurate, or verifiable methodology.[90]
- Reliance on stormwater budgets is inherently inaccurate because it is unclear whether the budgets are proposed budgets, locally approved budgets, reconciled budgets or those submitted to the Regional Board for permit reporting, or what years' budgets are used. According to the Water Boards, "[u]se of a percentage of a stormwater budget that was developed to support implementation of a claimant's comprehensive stormwater program for the limited purpose of supporting an RRM for a discrete permit activity cannot and does not yield an approximate cost to perform that discrete activity."[91]
- The proposed RRMs are exceedingly complex and incapable of reproduction, objective evaluation, and validation, the Water Boards note:

> Claimants proposed a total of 18 separate proposed formulas comprised of 34 independent factors as a methodology for reimbursement costs. Further, each of the 34 independent factors within the 18 formulas has its own specific criteria as proposed by the claimants for the RRM to describe a reimbursement cost for a mandated activity. The criteria are a complex mix of timeframes of reimbursement and unique mandated activity equation factors. The 34 unique factors within each formula are further complicated across each of the proposed RRM equations and formulas with the application of budgets, agreements, percent of budgets or agreements, actual costs, CPI adjustment factors, or time frames of reimbursement used by the claimant to describe the mandated activity.
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> [¶] . . . [¶]
>
> For each of the 34 factors that comprise the proposed RRM methodology, . . . no documentation was provided to identify the location of the specific data used for each equation factor, which data

[90] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed, page 9.

[91] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 9. See also Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, page 7.

were used, or how each factor was calculated for the proposed RRM . . ..[92]

- The proposed RRMs rely on time periods that may reimburse the claimants before the effective date of the permit (or before the implementation that delayed by 365 days implementing permit parts D., E., and F, and another 60-day delay due to a December 12, 2007 Addendum to the permit) until March 24, 2008, so the RRMs may provide reimbursement under the preceding 2001 MS4 permit during the transitional period.[93]
- The claimants' formula descriptions and summary table are internally inconsistent. And the formulas do not reflect or allow for prorating the costs to compare the prior (2001) permit.[94]
- The proposed RRMs fail to balance simplicity with accuracy and ignore accuracy, although it can be achieved.[95] Rejecting the proposed RRMs in favor of reimbursement based on fully known costs "is the only practical approach to reimburse eligible claimants for implementing activities mandated in the varied and complex MS4 permit context."[96] According to the Water Boards, "the level of effort to implement [MS4-related] mandated activities is not consistent across claimants and does not lend itself to a single methodology, unit cost or otherwise, per mandated activity."[97]

[92] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 10-11, 23 (Ryan Declaration).

[93] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 12. See also Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, pages 6-7.

[94] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 12.

[95] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 2, 13.

[96] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 2-3, 14-15.

[97] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 15.

- The proposed RRMs do not account for "offsetting revenues on a claimant-by-claimant basis to assure that claimants are only reimbursed for mandated activities actually performed."[98]
- The claimants' contention that it is unreasonable to expect them to have retained actual cost information to support reimbursement is not a legal or recognized basis to approve an RRM. That eight RRMs purport to be based on actual costs, and two more based on a combination of actual and approximation of costs, makes it reasonable to conclude that claimants have retained cost information. In addition, if the claimants retained documentation of the specific reimbursable activities they performed during the reimbursement period, they should also have retained associated cost information.[99]
- The claimants have not provided a supportable rationale or legal justification for a CPI annual adjustment factor to all unit costs in the RRM formulas for recovery of wholly past expenditures, nor have they provided a legal basis for recovering interest due to the passage of time or legal or expert fees to compensate them for engaging in the test claim process.[100]
- The claimants' RRM for all permittee collaboration seeks reimbursement not only for revising the cost-sharing MOU development, which was required as a one-time activity early in the permit term, but also for activities the Commission has not determined are reasonably necessary to implement this MOU development mandate. This would improperly reimburse the claimants for activities that are proposed for reimbursement through other RRM formulas.[101]
- The claimants' Appendix A Guidelines in their rebuttal comments that provide summary tables for claimants to fill out for each activity by fiscal year relies on claimants to manually make the proposed percent reductions for each mandated activity for the correct fiscal year and apply each footnote for each table with the narrative in the Quenzer declaration. But the tables provide no narrative guidance to ensure that the claimants' submitted information excludes activities that are not eligible for reimbursement or for activities conducted outside of the

[98] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 15. Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, page 8.

[99] Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, pages 5-6.

[100] Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, pages 5-6.

[101] Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, pages 7-8.

correct time period of reimbursement. These and other errors in the tables result in reimbursement to which the claimants are not entitled.[102]

The Water Boards also submitted a declaration from Erica Ryan, a Water Resource Control Engineer at the San Diego Regional Water Quality Control Board since 2015, who prepared a technical analysis of each proposed RRM formula.[103]

The Water Boards contrast the proposed RRMs with one the Commission adopted in 2015 (14-PGA-01) that was supported by a declaration from the Controller that two years of data relied on was true and correct, and a school district declaration regarding how the data was obtained and how the methodology was formulated based on the data.[104] The Commission found the RRM was based on a representative statistical analysis of various school districts constituting a representative state sample that considered the variation in costs that was tied to the number of students.[105] As the Water Boards note:

> The methodology approved in 2015 was accurate, verifiable, and capable of reproduction. The reader was able to understand from the declaration which school districts' data were considered, which were not considered, and why. Here, it is impossible to ascertain what specific information claimants' expert either considered or relied on to develop his opinion of what is a reasonable cost for a given mandated activity. The lack of specificity in claimants' comments and declarations renders the RRMs here incapable of a determination that the proposed RRMs are supported by substantial evidence.[106]

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[102] Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, pages 18-19 (Technical Analysis).

[103] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed, pages 20 et seq. Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, pages 16-20.

[104] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed, pages 12-13. Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, page 8.

[105] See Commission on State Mandates, Parameters and Guidelines Amendment on *Immunization Records – Pertussis* 14-PGA-01 (11-TC-02), adopted September 25, 2015, https://csm.ca.gov/decisions/doc25.pdf (accessed on October 24, 2024), pages 8-25.

[106] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 13. Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, page 8.

The Water Boards filed comments agreeing with the Revised Draft Proposed Decision and Parameters and Guidelines as follows:

> The Water Boards agree with the Commission staff's conclusion that the "claimants' proposed RRMs are overbroad and not limited to the mandated activities, and there is no evidence that the proposed unit costs reasonably represent the costs mandated by the state for all eligible claimants for only to comply with the higher levels of service activities the Commission approved for reimbursement." (Revised Draft, p. 26.) The Commission staff explain: "An RRM, as defined in Government Code section 17518.5, is generally a formula or unit cost adopted by the Commission for the reimbursement of an approved activity, so that the claimants do not need to provide detailed documentation of the actual costs to the State Controller's Office for its review and audit of the claimants' reimbursement claims. Rather the Controller simply reviews the claimant's application of the RRM to the costs claimed." (Revised Draft, pp. 25-26.)
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> In the Revised Draft, the Commission staff further explain that the time period for reimbursement in this matter begins with the January 24, 2007 test claim permit effective date. It further recognizes that the San Diego Water Board allowed individual claimants to postpone implementation of numerous mandated permit provisions until March 24, 2008. (Revised Draft, p. 60.) Under the general approach to reimbursement, claimants would be required to submit documentation of actual costs to the State Controller's Office for review and audit, thereby ensuring reimbursement only for actual performance of reasonably necessary activities to implement mandated permit provisions. In contrast, under the RRM approach described above, reliance upon the permit effective date to initiate the time period for reimbursement here results in the likelihood that *all* claimants could receive reimbursement beginning January 24, 2007, even if *not a single* claimant commenced implementation of any reasonably necessary activities to perform mandated permit provisions until March 24, 2008.
>
> As the Water Boards have previously pointed out, the numerous flaws with the proposed RRMs underscore that the alternative RRM approach is not well-suited to reasonably reimburse Claimants for implementation of the mandated permit provisions. The prospect that the proposed RRMs, if approved, would unreasonably reimburse claimants for a period of up to 425 days from the permit effective date, regardless of whether they actually performed any mandated activities during this period, further illustrates that the RRM approach is unsupported and inappropriate in this context.

> For the above reasons and the reasons stated in prior comments, the Water Boards urge the Commission to adopt the Revised Draft without revision and require claimants to submit documentation of actual costs for review and audit by the Stale Controller's Office.[107]

E. State Controller's Office

The Controller's Office states it reviewed the Draft Proposed Decision and Parameters and Guidelines and Revised Draft Proposed Decision and Parameters and Guidelines, and has no comments.[108]

IV. Discussion

A. Eligible Claimants (Section II. of the Parameters and Guidelines)

The following copermittees are eligible to claim reimbursement, provided they are subject to the taxing restrictions of articles XIII A and XIII C of the California Constitution, and the spending limits of article XIII B of the California Constitution, and incur increased costs as a result of this mandate that are paid from their local proceeds of taxes:

> The County of San Diego and the Cities of 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.[109]

The San Diego County Regional Airport Authority and the San Diego Unified Port District are also copermittees,[110] and both were on the claimants' proposed list of eligible claimants.[111] However, neither are eligible to claim reimbursement under article XIII B, section 6 because their revenues are not proceeds of taxes subject to the appropriations limit.

Adopted by the voters in 1979, article XIII B, section 6 of the California Constitution was specifically designed to protect the tax revenues of local governments from state mandates that would require spending those revenues. The purpose is to prevent "the state from shifting financial responsibility for carrying out governmental functions to local

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[107] Exhibit S, Water Boards' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 2-3. Footnote omitted.

[108] Exhibit K, Controller's Comments on the Draft Proposed Decision and Parameters and Guidelines; Exhibit Q, Controller's Comments on the Revised Draft Proposed Decision and Parameters and Guidelines.

[109] Exhibit A, Amended Test Claim Decision on Remand, page 4, footnote 6.

[110] Exhibit A, Amended Test Claim Decision on Remand, page 4, footnote 6.

[111] Exhibit B, Claimants' Proposed Parameters and Guidelines, page 14.

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."[112]

Article XIII B does not reach beyond taxation and does not restrict the growth in appropriations financed from nontax sources, such as bond funds, user fees based on reasonable costs, or revenues from local assessments, fees, and charges.[113] Local agencies funded by revenues other than "proceeds of taxes" cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[114]

Article XIII B and the statutes that implement it also expressly state that special districts that are funded entirely by "other than proceeds of taxes" (such as from bond funds, fees or assessments) are not subject to the appropriations limit. Article XIII B, section 9(c) provides, "appropriations subject to limitation" do *not* include those appropriations of any special district that existed on January 1, 1978, and did not levy ad valorem property taxes as of the 1977-1978 fiscal year:

> Appropriations subject to limitation" for each entity of government do not include: [¶] . . . [¶]
>
> (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 12 $^1/_2$ 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.

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112 *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763, quoting *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185, holding that reimbursement under article XIII B, section 6 is only required when a mandated new program or higher level of service forces local government to incur "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit."

113 *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

114 *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282; *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986.

Government Code section 7901(e) implements article XIII B,[115] and clarifies that special districts that existed on January 1, 1978, and did not levy a property tax in excess of 12 ½ cents per $100 of assessed value in 1977-1978, are not "local agencies" for purposes of article XIII B:

> The term "special district" [as part of the definition of "local agency"] shall not include any district which (1) existed on January 1, 1978, and did not possess the power to levy a property tax at that time or did not levy or have levied on its behalf, an ad valorem property tax rate on all taxable property in the district on the secured roll in excess of 12 ½ cents per one hundred dollars ($100) of assessed value for the 1977-78 fiscal year, or (2) existed on January 1, 1978, or was thereafter created by a vote of the people, and is totally funded by revenues other than the proceeds of taxes as defined in subdivision (c) of Section 8 of Article XIII B of the California Constitution.[116]

Therefore, a special district is not a "local agency" eligible for reimbursement for purposes of article XIII(B), section 6 if it: (1) existed on January 1, 1978, and did not possess the power to levy a property tax at that time or did not levy or have levied on its behalf, an ad valorem property tax rate on all taxable property in the district on the secured roll in excess of 12 ½ cents per one hundred dollars ($100) of assessed value for the 1977-78 fiscal year, or (2) existed on January 1, 1978, or was thereafter created by a vote of the people, and is totally funded by revenues other than the proceeds of taxes as defined in subdivision (c) of Section 8 of Article XIII B of the California Constitution, because it is not subject to the taxing and spending limitations of article XIII A and B of the California Constitution.[117]

The San Diego County Regional Airport Authority was formed in 2001 pursuant to the Public Utilities Code, Division 17, commencing with section 170000, which does not

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[115] Government Code section 7900(a) states: "The Legislature finds and declares that the purpose of this division is to provide for the effective and efficient implementation of Article XIII B of the California Constitution."

[116] Article XIII B, section 8(c) states: "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."

[117] Government Code section 7901(e), California Code of Regulations, title 2, sections 1183.1(g) and 1187.14.

permit the Authority to levy taxes.[118] Rather, its sources of revenue include those "attributable to airport operations," and "imposing fees, rents, or other charges for facilities, services, the repayment of bonded indebtedness," as well as "revenues generated from enterprises" on the Authority's property.[119] It also has authority to levy special benefit assessments.[120] Pursuant to Government Code section 7901(e), the Authority is not a "local agency" for purposes of article XIII, section B. This comports with the Authority's financial report for fiscal years 2021 and 2022 that states it is not funded by tax revenues.[121] Therefore, the Airport Authority's revenues are not subject to the taxing and spending limitations of articles XIII A and B, so it is not an eligible claimant.

The San Diego Unified Port District was formed in 1962 pursuant to Appendix 1 of the Harbors and Navigation Code, which *does* authorize the District to impose taxes.[122] However, its most recent financial report indicates the District has not levied taxes since 1970:

> The District's maritime, real estate, and parking operations generate billions of dollars for the region's economy and allow the District to operate without the benefit of tax dollars. The District has the authority to levy a tax but has not done so since 1970.[123]

As a special district that has not levied taxes since 1970 (and absent any evidence it levied tax dollars in fiscal year 1977-1978 or after), the District is not subject to an appropriations limit because it existed on January 1, 1978 and did not levy a property tax in excess of 12 ½ cents per $100 of assessed value in fiscal year 1977-1978. Additionally, it is totally funded by revenues other than the proceeds of taxes.[124]

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[118] Public Utilities Code, section 17000, et seq. (Stats. 2001, ch. 946).

[119] Public Utilities Code, section 170064 (a)-(c).

[120] Public Utilities Code section 170072.

[121] Exhibit U (10), San Diego County Regional Airport Authority, Annual Comprehensive Financial Report, Fiscal Year Ended June 30, 2022, https://www.san.org/DesktopModules/Bring2mind/DMX/API/Entries/Download?EntryId=16004&Command=Core_Download&language=en-US&PortalId=0&TabId=197 (accessed on June 15, 2023), page 14.

[122] Harbors and Navigation Code, Appendix 1, sections 43-45.

[123] Exhibit U (11), San Diego Unified Port District, Annual Comprehensive Financial Report, 2021, 2022, https://pantheonstorage.blob.core.windows.net/administration/2022-ACFR-final.pdf (accessed on June 15, 2023), page 8.

[124] California Constitution, article XIII B, section 9(c). Government Code section 7901(e).

Therefore, the San Diego Unified Port District is not subject to the appropriations limit of article XIII B and is not an eligible claimant.

The claimants, however, argue that the special districts should be able to claim reimbursement under article XIII B, section 6 because section 8(d) of article XIII B expressly defines local governments to include "special district, authority or other political subdivision of or within the State" and is a specific definition that governs the interpretation of eligibility under article XIII B, section 6.[125] The claimants also assert that the taxation requirements in Government Code section 7901's definition of local agency do not apply to section 6 of article XIII B.[126] The claimants further argue recovery should be granted because special districts are subject to a vote requirement before they can levy any taxes or fees.[127] In addition, the Airport Authority has the power to levy assessments.[128] Finally, the claimants argue that equity requires that special districts receive the same reimbursement as municipalities.[129]

Section 8(d) of article XIII B defines local government to include "special district, authority or other political subdivision of or within the State" as does Government Code section 17518.[130] However, not all special districts are funded with proceeds of taxes subject to the appropriations limit, as shown by article XIII B, section 9(c) and Government Code section 7901. Those special districts funded by *other* than proceeds of taxes cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[131]

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[125] Exhibit G, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines, page 2.

[126] Exhibit G, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines, pages 3-4.

[127] Exhibit G, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines, pages 2-4.

[128] Exhibit G, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines, page 4.

[129] Exhibit G, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines, page 5.

[130] "Local agency" is defined in Government Code section 17518 as "any city, county, special district, authority, or other political subdivision of the state." According to Government Code section 17500, "It is the intent of the Legislature in enacting this part [Gov. Code, § 17500 et seq.] to provide for the implementation of Section 6 of Article XIII B of the California Constitution."

[131] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282;

Despite the claimants' arguments to the contrary, Government Code section 7901(e) directly applies to article XIII B, section 6, and must be considered in interpreting the Constitution because Government Code section 7900(a) states the division (§ 7900 et seq.) of which section 7901 is a part, "is to provide for the effective and efficient implementation of Article XIII B of the California Constitution." In addition, a specific definition only governs a general one if they are inconsistent,[132] but there is no inconsistency between article XIII B, section 8's definition of local agency and section 7901(e), which defines local agencies consistent with section 9(c) of article XIII B to include special districts subject to the appropriations limit *except those* "that existed on January 1, 1978, and did not levy ad valorem property taxes as of the 1977-1978 fiscal year" or that "existed on January 1, 1978, or was thereafter created by a vote of the people, and is totally funded by revenues other than the proceeds of taxes." The Commission is required to read the constitutional and statutory provisions together so they are "construed in a manner that gives effect to each, yet does not lead to disharmony with the others."[133]

In addition, the San Diego Unified Port District and the San Diego County Regional Airport Authority urge the Commission to not rely on Government Code section 7901(e), on the ground that its definition of "local agency" is inconsistent with Government Code section 17518, which broadly defines "local agency" to mean "any city, county, special district, authority, or other political subdivision of the state."[134] However, under the rules of statutory construction, the code sections must be read together and harmonized.[135]

Government Code sections 7901(e) and 17518 are not inconsistent and can be read together and harmonized. If a special district has the statutory authority to levy a tax, is funded by proceeds of taxes, and is subject to the taxing and spending limitations of articles XIII A and XIII B, the special district may be eligible to claim reimbursement

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Redevelopment Agency of the City of San Marcos v. Commission on State Mandates (1997) 55 Cal.App.4th 976, 986.

[132] Code of Civil Procedure section 1859.

[133] *Lacy v. City and County of San Francisco* (2023) 94 Cal.App.5th 238, 251. Code of Civil Procedure section 1859.

[134] Exhibit R, San Diego Unified Port District and San Diego County Regional Airport Authority Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 2-3.

[135] *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955; *Tan v. Superior Court of San Mateo County* (2022) 76 Cal.App.5th 130, 137-138 ["Thus, when two codes are to be construed, they "must be regarded as blending into each other and forming a single statute." [Citation.] Accordingly, they "must be read together and so construed as to give effect, when possible, to all the provisions thereof."].

under article XIII B, section 6.[136] The Commission has consistently held that special districts or other local governments funded by *other* than proceeds of taxes that are not subject to the appropriations limit, are not eligible to claim reimbursement under article XIII B, section 6 of the California Constitution.[137]

The claimants also maintain that the Airport Authority has taxing authority under the Public Utilities Code that authorizes it to levy special benefit assessments.[138] According to the claimants, "both [taxes and benefit assessments] are relevant to the purposes of purpose of Article XIII B to protect local property owners from funding unfunded state mandates."[139]

The claimants are incorrect. Since 1980, courts have held that local special assessments for public improvements are not "proceeds of taxes" subject to the article XIII B appropriations limit.[140] Under article XIII B, section 6, assessments are treated the same as fees and other non-tax revenue.[141] This is why the Commission is prohibited by statute from finding that a local government incurs costs mandated by the

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[136] See for example, Commission on State Mandates, Test Claim Decision on *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, Only as They Relate to the Reporting Checklist, Section K.3.a., and Attachment D, Adopted December 16, 2009*, 10-TC-11, adopted October 27, 2023, https://www.csm.ca.gov/decisions/10-TC-11-103123.pdf (accessed on July 3, 2025), pages 59-60, which found that the Orange County Flood Control District has the statutory authority to levy taxes and adopted an appropriations limit and was, therefore, an eligible claimant to claim reimbursement under article XIII B, section 6.

[137] See for example, Commission on State Mandates, Test Claim Decision on *SANDAG: Independent Performance Auditor*, 19-TC-03, adopted September 25, 2020 (https://www.csm.ca.gov/decisions/19tc03-decision.pdf (accessed on July 3, 2025); and Test Claim Decision on *Floodplain Restoration Condition (no. 12) of Water Quality Certification for Turlock Irrigation District and Modesto Irrigation District – Don Pedro Hydroelectric and La Grange Hydroelectric Project*, 21-TC-02, adopted July 22, 2022, https://www.csm.ca.gov/decisions/072622-21tc02.pdf (accessed on July 3, 2025).

[138] Public Utilities Code section 170072.

[139] Exhibit G, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines, page 4.

[140] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 451.

[141] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486-487.

state if it "has the authority to levy service charges, fees, or *assessments* sufficient to pay for the mandated program or increased level of service."[142]

Finally, the Commission does not have the authority to provide equitable remedies to these special districts as asserted by the claimants.[143] The reimbursement requirement of article XIII B, section 6 is a question of law,[144] and the courts have held, "there is no basis for applying section 6 [of article XIII B] as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[145]

Accordingly, the San Diego County Regional Airport Authority and the San Diego Unified Port District are not eligible to claim reimbursement under article XIII B, section 6.

B. Period of Reimbursement (Section III. of the Parameters and Guidelines)

1. The Period of Reimbursement Begins January 24, 2007, and the Operative Date for Some Mandated Activities May Be Delayed by a Claimant 425 days After the Effective Date, or until March 24, 2008.

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim on June 20, 2008,[146] establishing eligibility for fiscal year 2006-2007. However, since the permit has a later effective date, the period of reimbursement begins on the permit's effective date of January 24, 2007.[147]

The Water Boards assert the reimbursement period for most of the mandated activities starts March 24, 2008, rather than January 24, 2007, based on permit provisions applicable to Parts D., E., and F. requiring implementation "no later than 365 days after adoption of" the test claim permit and an Addendum adopted by the Regional Board delaying implementation another 60 days due to San Diego County wildfires in October 2007 for which the Governor proclaimed a regional disaster, for a total delay of 425 days.[148] The Addendum was adopted December 12, 2007, and modified the following relevant test claim provisions:

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[142] Government Code section 17556(d), emphasis added.

[143] Exhibit G, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines, page 5.

[144] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[145] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281.

[146] Exhibit U (13), Test Claim, page 3.

[147] Exhibit U (13), Test Claim, page 331 (Order No. R9-2007-0001).

[148] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 3, footnote 5, and 33 and 38

a. Jurisdictional Urban Runoff Management Program, Section D, . . . "Each Copermittee shall implement all requirements of section D of this Order no later than ~~365~~ **<u>425</u>** days after adoption of the Order, unless otherwise specified in this Order. Prior to ~~365~~ **<u>425</u>** days after adoption of the Order each Copermittee shall at a minimum implement is Jurisdictional URMP document, as the document was developed and amended to comply with the requirements of Order No. 2001-01."

[¶]

c. Watershed Urban Runoff Management Program, Section E.1, . . . "Each Copermittee shall implement all requirements of section E of this Order no later than ~~365~~ **425** days after adoption of this Order, unless otherwise specified in this Order. Prior to ~~365~~ **425** days after adoption of this Order, each Copermittee shall collaborate with the other Copermittees within its Watershed Management Area(s) (WMA) to at a minimum implement its Watershed URMP document, as the document was developed and amended to comply with the requirements of Order No. 2001-01."

d. Regional Urban Runoff Management Program, Section F, . . . "The Copermittees shall implement all requirements of section F of this Order no later than ~~365~~ **425** days after adoption of this Order, unless otherwise specified in this Order." [149]

The Addendum affects the following mandated activities:

- Conveyance System Cleaning (Part D.3.a.(3)(b)(iii)).
- Educational Component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3).
- Watershed Urban Runoff Management Program (WURMP) activities (Parts E.2.f. and E.2.g.).
- Regional Urban Runoff Management Program (Parts F.1-F.3).

An analysis of the delayed effective date and the various due dates is in the discussion of the reimbursable activities in the next section below.

However, the Water Boards' request to change the period of reimbursement conflicts with the plain language of the test claim permit and the Addendum.

(technical analysis); Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

[149] Exhibit U (13), Test Claim, pages 112, 143, 147 (Order No. R9-2007-0001). Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

The test claim permit is an executive order and requires interpretation like a statute.[150] When interpreting a statute, "our fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plan and commonsense meaning…. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend."[151] The California Supreme Court said:

> Our office is simply to ascertain and declare what the statute [or permit] contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does. We may not rewrite the statute [or permit] to conform to an assumed intention that does not appear in its language."[152]

Instead of the permit language to "implement all requirements . . . no later than 425 days after adoption of the Order,"[153] the Water Boards urge an opposite interpretation of "no earlier than" 425 days after permit adoption. However, the courts have interpreted "no later than" to mean "on or before".[154] This is consistent with Webster's Dictionary definition of "no later than" to mean "by (a specified time): at, in, on, or before (a specified time)."[155] Thus, the "no later than" language functions as a delayed operative date for those affected activities, but it does not change the effective date of the test claim permit. The California Supreme Court explained the difference between effective and operative dates:

> [T]he postponement of the operative date of the legislation . . . does not mean that the Legislature intended to limit its application to transactions occurring after that date. (Stats.1993, ch. 887, § 5, p. 4831.) "The effective date [of a statute] is ... the date upon which the statute came into being as an existing law." (*People v. McCaskey* (1985) 170 Cal.App.3d 411, 416, 216 Cal.Rptr. 54.) "[T]he operative date is the date upon which the

[150] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 920. *KB Salt Lake III, LLC v. Fitness Internat., LLC* (2023) 95 Cal.App.5th. 1032, 1048. The permit is an "executive order" as defined in Government Code section 17516(c).

[151] *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-166.

[152] *Vazquez v. State of California* (2023) 45 Cal.4th. 243, 253.

[153] Exhibit U (13), Test Claim, pages 112, 143, 147 (Order No. R9-2007-0001). Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

[154] *City of Pasadena v. A.T & T Communications of California, Inc*. (2002) 103 Cal.App.4th 981, 986 ("no later than" means "on or before."); see also, *Blue Shield Life and Health Insurance v. Superior Court* (2011) 192 Cal.App.4th 727, 736-738.

[155] Exhibit U (6), Merriam-Webster Dictionary, no/not later than, https://www.merriam-webster.com/dictionary/no%20later%20than (accessed February 18, 2025).

> directives of the statute may be actually implemented." (*Ibid.*) Although the effective and operative dates of a statute are often the same, the Legislature may "postpone the operation of certain statutes until a later time." (*People v. Henderson* (1980) 107 Cal.App.3d 475, 488, 166 Cal.Rptr. 20.) The Legislature may do so for reasons other than an intent to give the statute prospective effect. For example, the Legislature may delay the operation of a statute to allow "persons and agencies affected by it to become aware of its existence and to comply with its terms." (*People v. Palomar* (1985) 171 Cal.App.3d 131, 134-135, 214 Cal.Rptr. 785.) In addition, the Legislature may wish "to give lead time to the governmental authorities to establish machinery for the operation of or implementation of the new law." (*Estate of Rountree* (1983) 141 Cal.App.3d 976, 980, fn. 3, 192 Cal.Rptr. 152.)[156]

The test claim permit was adopted on January 24, 2007, and became effective as law that day.[157] With the adoption of the Addendum on December 12, 2007, a claimant may delay implementation of the affected activities until 425 days after January 24, 2007, or until March 24, 2008. If a claimant delays implementation, then the claimant "shall at a minimum" implement the requirements of the prior 2001 permit.[158] Reimbursement is not required to comply with the prior 2001 permit, but the date when costs were first incurred to implement the affected activities may vary by claimant, since implementation is required to occur "on or before" the 425th day after January 24, 2007. The language of the Addendum has been included in Section IV. Reimbursable Activities, where relevant. However, the period of reimbursement for this claim begins with the effective date of the test claim order on January 24, 2007.

2. The Period of Reimbursement Ends December 31, 2017, and Reimbursement for the State-mandated Activities Is Required Until that Date as Long as the Activities Remain Reimbursable State-Mandated Activities.

The claimants' Proposed Parameters and Guidelines state that the permit term ends January 23, 2012.[159] However, reimbursement under article XIII B, section 6, for all

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[156] *Preston v. State Board of Equalization* (2001) 25 Cal.4th. 197, 224.

[157] Exhibit U (13), Test Claim, page 331 (Order No. R9-2007-0001).

[158] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007. Exhibit U (13), Test Claim, page 269.

[159] Exhibit B, Claimants' Proposed Parameters and Guidelines, page 16. Exhibit U (13), Test Claim, page 174 (Order No. R9-2007-0001).

programs continues to be required for each fiscal year that local agencies incur actual increased costs to comply with the reimbursable state-mandated program.[160]

Under the Clean Water Act, the term of an NPDES permit is five years.[161] However, states authorized to administer the NPDES program may continue the state-issued permit until the effective date of a new permit, if state law allows.[162] California's regulations provide that the terms and conditions of an expired permit are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on continuation of expired permits have been complied with.[163] This comports with Attachment B of the test claim permit that states the permit expires five years after adoption, but is automatically continued pending issuance of a new permit.[164]

On May 8, 2013, the San Diego Regional Water Quality Control Board adopted a new permit, which, by its terms, became effective June 27, 2013 (Order No. R9-2013-0001). The state-mandated requirements imposed by the test claim permit may continue uninterrupted under the 2013 permit, so reimbursement for those requirements continues until the activity is no longer mandated by the state or an exception to reimbursement becomes applicable.[165] However, any *new* activities required by Order R9-2013-0001 are not reimbursable under this test claim permit and will not become reimbursable unless they are the subject of a later-approved test claim decision on that permit.

Beginning January 1, 2018, based on Government Code sections 57350 and 57351 as amended by Statutes 2017, chapter 536 (SB 231, which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351), there are no costs mandated by the state within the meaning of Government Code section 17556(d) for the reimbursable activities because the claimants' have the legal authority to impose a stormwater fee on property owners subject only to the voter protest provisions of article XIII D. Senate Bill 231 amended the Government Code's definition of "sewer" to include stormwater sewers within the meaning of article XIII D, thereby allowing local governments to use their constitutional police powers to impose stormwater fees on property owners without having to first seek the voter's approval of the fee and making

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[160] California Constitution, article XIII B, section 6; Government Code sections 17514, 17560, 17561.

[161] United States Code, title 33, section 1342(b).

[162] Code of Federal Regulations, title 40, section 122.6(d).

[163] California Code of Regulations, title 23, section 2235.4.

[164] Exhibit U (13), Test Claim, page 185 (Order No. R9-2007-0001).

[165] The 2013 permit is at issue in a pending Test Claim, *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001*, 14-TC-03.

the fee subject only to the voter protest provisions of article XIII D.[166] As the court in *Paradise Irrigation Dist.* held, there are no costs mandated by the state within the meaning of Government Code section 17556(d) when local government's fee authority is subject only to a voter protest.[167] Under these circumstances, the claimant has "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program, and reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical or undesirable.[168] Therefore, reimbursement for this state-mandated program ends on December 31, 2017.

The claimants contend, however, that SB 231 is not at issue and is not relevant since the mandated activities were all completed before SB 231 was enacted in 2017, and in any event they reserve their right to argue that SB 231 is unconstitutional as follows:

> First, SB 231 is not at issue in this Test Claim because the mandated activities under the 2007 Permit were all completed prior to the time SB 231 was enacted in 2017 and before it became effective in 2018. SB 231 is therefore not relevant to this Test Claim, as the most recent Court of Appeal opinion in this matter concluded. [Footnote omitted.] Since SB 231 has no application to this Test Claim, the Proposed Decision should not address it. Whatever its relevance to future matters, it has no place in this proceeding.
>
> Second, the Municipal Claimants contend that the Commission's analysis regarding SB 231 is inconsistent with *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535 and *City of Salinas* (2002) 98 Cal.App.4th 1351. Although it is irrelevant to this proceeding and should not be addressed at all by the Commission here, the Municipal Claimants reserve all rights regarding the applicability of SB 231 and its constitutionality. The Municipal Claimants believe that even if SB 231 were applicable, which it is not, the appropriate approach for the Commission to take regarding SB 231 would be to wait until a court of

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[166] Government Code sections 53750; 53751 (Stats. 2017, ch. 536); see also *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408, holding that water pollution prevention is a valid exercise of government police power.

[167] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195. See also *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 577, holding that SB 231 does not apply retroactively.

[168] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

> competent jurisdiction resolves the constitutionality of SB 231 in the context of an actual fee enacted under its provisions.[169]

First, there is no evidence in this record that the reimbursable activities, most of which are ongoing, were completed and no longer mandated by the state as of January 1, 2018, the effective date of SB 231. That determination requires an analysis of the 2013 permit when the Commission hears and determines the Test Claim in *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001*, 14-TC-03. Thus, the state-mandated requirements imposed by the 2007 test claim permit may continue uninterrupted in the 2013 permit, and remain reimbursable under article XIII B, section 6, *as part of these Parameters and Guidelines* each fiscal year that local agencies incur actual increased costs to comply with the reimbursable state-mandated program.[170]

In addition, although the claimants allege that SB 231 is unconstitutional, the Commission is required to presume that SB 231 is valid and constitutional. The California Constitution prohibits administrative agencies, including the Commission, from refusing to enforce or declaring a statute unconstitutional.[171]

Accordingly, the Parameters and Guidelines identify the period of reimbursement from January 24, 2007, through December 31, 2017, the day before the effective date of SB 231.

C. Reimbursable Activities (Section IV. of the Parameters and Guidelines)

According to Government Code section 17557(a) and section 1183.7 of the Commission's regulations, the Parameters and Guidelines must identify the activities mandated by the state and "may include proposed reimbursable activities that are reasonably necessary for the performance of the state-mandated program." As the Commission's regulation states:

> (d) Reimbursable Activities. A description of the specific costs and types of costs that are reimbursable, including one-time costs and on-going costs, and reasonably necessary activities required to comply with the mandate. "Reasonably necessary activities" are those activities necessary to comply with the statutes, regulations and other executive orders found to impose a state-mandated program. Activities required by statutes, regulations and other executive orders that were not pled in the test claim may only be used to define reasonably necessary activities to the extent that compliance with the approved state-mandated activities would not

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169 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 3.

170 California Constitution, article XIII B, section 6; Government Code sections 17514, 17560, 17561.

171 California Constitution, article III, section 3.5.

otherwise be possible. Whether an activity is reasonably necessary is a mixed question of law and fact. All representations of fact to support any proposed reasonably necessary activities shall be supported by documentary evidence in accordance with section 1187.5 of these regulations.[172]

In accordance with the Government Code and the Commission's regulations, any proposed reasonably necessary activity must be supported by substantial evidence in the record explaining why the activity is necessary to perform the state-mandate.[173] In addition, the Commission's regulations require that oral or written representations of fact shall be under oath or affirmation, and all written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so.[174]

1. All Copermittee Collaboration (Section IV.A and B. of the Parameters and Guidelines)

The Commission found that Part L.1.a.3.-6. of the test claim permit, addressing copermittee collaboration, mandated new requirements that are reimbursable. These activities are analyzed out of the order listed in the permit and Test Claim Decision to help explain the Commission-approved activities, as well as the reasonably necessary activities the claimants propose. The Commission approved the following two activities:

- 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, as required by the first sentence in Part L.1.
- 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 committee and workgroup structure and responsibilities; and (6) Lays out a process for addressing copermittee non-compliance with the formal agreement, as required by Part L.1.a.3.-6.[175]

Reimbursement to "collaborate with the other copermittees to address common issues" and to "plan and coordinate activities required under the permit" is limited to what the

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[172] California Code of Regulations, title 2, section 1183.7(d).

[173] Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d), 1187.5.

[174] California Code of Regulations, title 2, section 1187.5.

[175] Exhibit A, Amended Test Claim Decision on Remand, pages 109-112, 150.

Commission approved in its Decision. Reimbursement is not required for activities or requirements not pled in the Test Claim, imposed by the prior (2001) permit, or expressly denied by the Commission (e.g., collaboration with the other copermittees to develop and implement a Hydromodification Management Plan or developing urban runoff activities related to municipal activities, like low impact development (LID) BMPs (Best Management Practices) and plans).[176] The Commission found the prior permit also required the parties to enter into a Memorandum of Understanding (MOU) and expressly limited reimbursement for collaboration to the new activities found to mandate a new program or higher level of service.[177] Thus, collaboration required by the first sentence in Part L.1. is an ongoing reimbursable activity and is identified in the Parameters and Guidelines for other approved sections of the test claim permit where collaboration is expressly required (i.e., the Educational Component of the Jurisdictional Urban Runoff Management Program, the requirement to update the Watershed Urban Runoff Management Program, the Regional Urban Runoff Management Program, and the Long Term Effectiveness Assessment).

By contrast, the requirement to execute and submit an MOU or formal agreement to the Regional Board no later than 180 days after adopting the permit, as required by Part L.1.a.3.-6., is a one-time activity and is limited to the four items specifically listed above. The Commission found that under the MOU required by the prior permit, identifying and defining the responsibilities of the principal permittee, copermittees, and lead watershed copermittees, and including in the MOU any other collaborative arrangement to which the parties agreed to comply with the prior permit were not reimbursable because they were not new.[178]

In compliance with Part L.1.a.3.-6. of the permit, the copermittees entered into a new MOU dated November 16, 2007.[179] The MOU establishes a regional management committee, a regional planning subcommittee, and nine regional workgroups or sub-workgroups to support the regional coordination of programs.[180] The MOU also

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[176] Exhibit A, Amended Test Claim Decision on Remand, pages 111-112, 118-126.

[177] Exhibit A, Amended Test Claim Decision on Remand, pages 111-112. The Decision states: "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."

[178] Exhibit A, Amended Test Claim Decision on Remand, page 111.

[179] Exhibit U (13), Test Claim, filed June 20, 2008, pages 495 -579 (MOU).

[180] Exhibit U (13), Test Claim, pages 517-525, 535. The MOU's nine regional workgroups or sub-workgroups include: fiscal, reporting, and assessment workgroup; education and residential sources workgroup; regional monitoring workgroup and two

includes the copermittees' fiscal and cost sharing responsibilities[181] a management structure for regional activities;[182] and a dispute resolution process for non-compliance.[183]

Thus, Section IV.A.1. of the Parameters and Guidelines identifies the following one-time activity eligible for reimbursement:

1. 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 (Part L.1.a.3.-6) that:
   - Establishes a management structure to promote consistency and develop and implement regional activities;
   - Establishes standards for conducting meetings, decision-making, and cost-sharing;
   - Provides guidelines for committee and workgroup structure and responsibilities;
   - Lays out a process for addressing Copermittee non-compliance with the formal agreement.

Reimbursement is limited to the pro rata costs to execute and submit an MOU or formal agreement on only the four topics identified above. Executing and submitting a full MOU, JPA, or other formal agreement is not reimbursable.[184]

2. Jurisdictional Urban Runoff Management Program and Reporting

a. JURMP Reporting on Street Sweeping and Conveyance System Cleaning (Section IV.B.1.a. of the Parameters and Guidelines)

The Commission found that reporting on street sweeping (Part J.3.a.(3)(c)(x.-xv.) and on conveyance system cleaning (Part J.3.a.(3)(c)(iv.-viii.)) are reimbursable. Specifically, the Commission approved reimbursement to include the following street-sweeping information in the Jurisdictional Urban Runoff Management Program (JURMP) annual report:

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sub-workgroups for dry weather and coastal monitoring; regional watershed URMP workgroup; land development workgroup; municipal activities workgroup; and industrial and commercial sources workgroup.

181 Exhibit U (13), Test Claim, pages 501-507 (MOU).

182 Exhibit U (13), Test Claim, pages 507-521 (MOU).

183 Exhibit U (13), Test Claim, pages 529-531 (MOU).

184 Exhibit A, Amended Test Claim Decision on Remand, page 111.

- 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.
- 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.
- 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.
- Identification of the total distance of curb-miles swept.
- Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
- Amount of material (tons) collected from street and parking lot sweeping.[185]

The Commission also approved reimbursement to include in the JURMP annual report the following conveyance system cleaning information:

- 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.
- Identification of the total distance (miles) of the MS4 [Municipal Separate Storm Sewer System], 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.
- 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.
- Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

[185] Exhibit A, Amended Test Claim Decision on Remand, pages 64-67.

- Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.[186]

Part J.3.a.2. explains that the principal permittee (which is the County of San Diego) is required to submit the "unified" JURMP annual report by September 30 of each year, *beginning September 30, 2008*, and that the report shall contain the individual annual reports from the copermittees required to be provided under Part J.3.a.1. to the principal permittee by a date specified by the principal permittee.[187]

Part J.3.a. of test claim permit explains that "Each Jurisdictional Urban Runoff Management Program Annual Report shall contain a comprehensive description of all activities conducted by the Copermittee to meet all requirements of section D. The reporting period for these annual reports shall be the previous fiscal year. For example, the report submitted September 30, 2008 shall cover the reporting period July 1, 2007 to June 30, 2008."[188]

Section D. of the test claim permit addresses the substantive requirements for the JURMP and, as relevant here, requires the permittees to implement a schedule of maintenance activities and inspections of the catch basins, storm drain inlets, and open channels (as required by section D.3.a.3.b.)[189] and sweeping of municipal roads, streets, highways, and parking facilities (as required by section D.3.a.5.)[190] The Commission found that the street sweeping activities required by Section D. were new requirements when compared to the prior permit and federal law, but the claimants had fee authority sufficient as a matter of law to pay for those requirements.[191] The Commission also found that the conveyance system inspection activities were not new but were required by the prior permit, and the requirements related to the conveyance system cleaning (as required by Part D.3.a.3.b.iii. of the test claim permit and discussed

[186] Exhibit A, Amended Test Claim Decision on Remand, pages 70-73.

[187] Exhibit U (13), Test Claim, page 319 (Order No. R9-2007-0001).

[188] Exhibit U (13), Test Claim, page 319 (Order No. R9-2007-0001 Part J.3.a. Thereafter, the permittees had the option of integrating the JURMP, WURMP, and RURMP annual reports into one report, which would be due the first January 31 after approval of the report form, and each January 31 thereafter. "The reporting period for Integrated Annual Reports shall be the previous fiscal year. For example, a report submitted January 31, 2010 shall cover the reporting period July 1, 2008 to June 30, 2009." Exhibit U (13), Test Claim, pages 328-329 (Order No. R9-2007-0001, Part J.3.a.).

[189] Exhibit U (13), Test Claim, pages 287-288 (Order No. R9-2007-0001).

[190] Exhibit U (13), Test Claim, page 288 (Order No. R9-2007-0001).

[191] Exhibit A, Amended Test Claim Decision on Remand, pages 67-68, 131-134.

in the next section below) were new, mandated requirements.[192] The reimbursable state-mandated activity at issue here to *report* the conveyance system inspection and cleaning and street sweeping information comes from the permittees' implementing their JURMPs.

As originally adopted, each permittee had 365 days after adoption of the test claim permit, or until January 24, 2008, to implement their JURMPs. Prior to that time, the permittees were required to comply with the JURMP document prepared under the prior permit (Order No. 2001-01).[193] Since implementation of the street sweeping requirements and conveyance system cleaning requirements are new, the permittees had until January 24, 2008, to implement those requirements. The conveyance system inspection activities required under the prior permit, however, had to be implemented as required by the prior permit without delay.

As indicated above, the requirements in Part D to implement the JURMPs were extended by an Addendum of the Regional Board to March 24, 2008, as follows:

> a. Jurisdictional Urban Runoff Management Program, Section D, . . . "Each Copermittee shall implement all requirements of section D of this Order no later than ~~365~~ **425** days after adoption of the Order, unless otherwise specified in this Order. Prior to ~~365~~ **425** days after adoption of the Order each Copermittee shall at a minimum implement is Jurisdictional URMP document, as the document was developed and amended to comply with the requirements of Order No. 2001-01."[194]

Thus, the claimants had until March 24, 2008, to implement their JURMPs with respect to conveyance system cleaning and street sweeping.

The JURMP annual reporting requirements were not delayed, however. The first report was due September 30, 2008, and had to cover the reporting period from July 1, 2007, to June 30, 2008, and every September 30 thereafter so that the report due September 30, 2009, covered the reporting period from July 1, 2008, to June 30, 2009.[195] The first report due September 30, 2008, may only cover a three and a half month time period from March 2008 through June 30, 2008, for the information reported about street sweeping and conveyance system cleaning since those activities were delayed until no later than March 24, 2008. However, the information required to be reported on conveyance system *inspections,* which are bulleted again below, would address the entire 2007-2008 fiscal year:

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[192] Exhibit A, Amended Test Claim Decision on Remand, pages 70-72.

[193] Exhibit U (13), Test Claim, page 269 (Order No. R9-2007-0001).

[194] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

[195] Exhibit U (13), Test Claim, page 319 (Order No. R9-2007-0001, Parts J.3.a. & J.3.a.2.).

- 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.
- Identification of the total distance (miles) of the MS4 [Municipal Separate Storm Sewer System], 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.
- 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.

These activities are identified in Section IV.B.1.a. of the Parameters and Guidelines, with clarification that the annual report was due by September 30, 2008, and each September 30th thereafter for the previous fiscal year, and a footnote to indicate that the street sweeping and conveyance system cleaning requirements were delayed until no later than March 24, 2008.

The claimants also request reimbursement for the following costs and additional activities, alleging they are reasonably necessary to comply with the mandate to report on street sweeping and conveyance system cleaning:

> Reporting and Tracking Policies and Procedures: Claimants' personnel costs to develop, update and implement street sweeping reporting and tracking policies and procedures.
>
> Data Tracking and Analysis: Claimant's costs, to develop, update, and implement data tracking and analysis methods and procedures and personnel costs to develop and maintain data tracking methods or systems, and performing data tracking and analysis for reports to the Regional Water Quality Control Board. Also included are the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.
>
> Report Writing: Claimant's personnel costs, to develop and write reports to the Regional Water Quality Control Board.
>
> Employee Supervision and Management: Time spent by supervisory and management personnel supervising personnel directly responsible for performing the mandated activities. (Hereinafter referred to as "Employee Supervision and Management".)
>
> Contracted Services: Any of the costs described above may be incurred through the use of vendors, contractors, consultants, or other service

> providers. In such case, only actual costs to the claimant will be claimed, and will only include that portion of the cost that is related to the reimbursable mandate. Claimants may also include the costs of preparing requests for proposals or requests for bids, negotiating and drafting third party contracts, and subsequently administering service contracts for the time they are performing these tasks using the claimant's Personnel rates. (Hereinafter referred to as "Contracted Services".)[196]

The Water Boards comment that there is insufficient detail for the first two activities: report tracking policies and procedures and data tracking and analysis.[197] As to data tracking and analysis, the Water Boards object to purchasing computer equipment and upgrades unless they are limited to what is necessary to comply with the test claim permit and used only for the reimbursable activities.[198] Regarding report writing, the Water Boards repeat their objection to computer equipment and upgrade purchases, and repeat their objection to unspecified personnel costs.[199] As to employee supervision and management and contracted services, the Water Boards assert that the claimants should demonstrate how their supervisors' and managers' time is spent supervising work only on mandated provisions.[200] Further, the Water Boards argue that claimants should only be allowed to claim 'contracted services' costs to prepare requests for bids, negotiate and draft third party contracts, and administer service contracts if the claimants can demonstrate that these costs, together with the costs of the contracted service, is the most cost effective and reasonable manner, through a cost-benefit analysis, of complying with the street sweeping reporting mandate.[201]

In response, the claimants argue that policies and procedures to track and report street sweeping and conveyance system cleaning should be reimbursable:

> In order for the Municipal Claimants to report on street sweeping and conveyance system cleaning, they had to have policies and procedures as to how the reporting should be done. Without policies and procedures, it

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[196] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 36, 37, 40-41.

[197] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, page 9.

[198] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, page 9.

[199] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, page 9.

[200] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, page 9.

[201] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 8-9, 12, 21-22.

> would not be clear to the reporting staff what needed to be reported. As such, the costs to update and implement street sweeping reporting and tracking policies and procedures is necessary to accurately report on the street sweeping and conveyance system cleaning and should be subject to reimbursement. As part of the claims process, the Municipal Claimants should be permitted to submit evidence of these reasonable and necessary costs.[202]

The 2025 Declaration of John Quenzer, the claimants' consultant, further explains the following:

> The activities described above ["developing policies and procedures, or developing, updating and implementing data tracking and analysis methods and procedures for reports to the Regional Board"] are necessary to comply with the mandate and therefore should be considered reimbursable. To complete reporting as required by the 2007 Permit, Co-Permittees must identify the data that will be needed for reporting, develop procedures to collect and record that data, and implement those procedures such that the necessary data is recorded and is available to be compiled for reporting. When an annual report is required, Co-Permittees need to develop and implement procedures across their organizations to collect the necessary data. A reporting mandate imposes both data tracking system development and implementation, which is an ongoing effort, and the actual preparation and submittal of the required report, which occurs over a limited portion of each fiscal year.
>
> For street sweeping, the 2007 Permit required the Co-Permittees to track information such as the frequency of sweeping completed on three categories of roads (high, moderate, and low debris generation), the frequency of sweeping completed for municipal parking lots, curb miles swept, and debris removed. Tracking all of this data was not required under the 2001 Permit, so Co-Permittees would need to develop and implement procedures to track this information and ensure the staff responsible for tracking the information understand and properly implement the procedures.
>
> For conveyance system cleaning reporting, the 2001 Permit required only "record keeping of cleaning and the overall quantity of waste removed." The 2007 Permit required reporting much more detailed information, such as numbers or linear distances inspected, found with waste exceeding the cleaning criteria, and cleaned and the total debris removed for each of the

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[202] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 13.

following three categories: (1) catch basins and inlets, (2) linear municipal separate storm sewer systems ("MS4") facilities other than open channels, and (3) open channels. Because this is not the same information required to be tracked and reported under the 2001 Permit, work to develop and implement new data tracking procedures designed to collect the information the 2007 Permit required to be reported, including oversight and training of staff involved in implementing these procedures, were necessary.[203]

Section 1183.7 defines "reasonably necessary activities" and the requirements to approve reimbursement of those activities as follows:

> "Reasonably necessary activities" are those activities necessary to comply with the statutes, regulations and other executive orders found to impose a state-mandated program. Activities required by statutes, regulations and other executive orders that were not pled in the test claim may only be used to define reasonably necessary activities to the extent that compliance with the approved state-mandated activities would not otherwise be possible. Whether an activity is reasonably necessary is a mixed question of law and fact. All representations of fact to support any proposed reasonably necessary activities shall be supported by documentary evidence in accordance with section 1187.5 of these regulations.

Based on the 2025 Quenzer declaration submitted by the claimants, which is signed under penalty of perjury, the Commission finds that developing policies and procedures and a data tracking system (one-time), recording and analyzing data in the data tracking system in order to prepare the street sweeping and conveyance systems reports to the Regional Board, and one-time training per employee assigned to track the information identified above to ensure the staff responsible for tracking the information understand and properly implement the procedures, are reasonably necessary to comply with the mandate. As indicated above, the data required to be reported is detailed and comprehensive information and includes the total number of curb miles generating the most trash, a moderate amount of trash, and low volumes of trash; the total number of municipal parking lots swept and the frequency of sweeping, and total distance of miles swept and tons of trash collected; cleaning activities including number of catch basins, number of inlets and miles of MS4 cleaned and tons of trash collected; and inspection activities including the number of catch basins and inlets inspected, the distance of the MS4 inspected, and identification of any MS4 facility found to require inspection less than annually following two years of inspection. This information has to be recorded by each permittee over the course of the year and then reported to the County of San Diego as the principal permittee to combine and submit as a unified annual report to the

[203] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 30-31 (2025 Quenzer Declaration, para. 14.b.)

Regional Board. And Mr. Quenzer declares under penalty of perjury that these activities were necessary to comply with the mandate. Thus, the Parameters and Guidelines authorize reimbursement as follows:

iii. Reimbursement for the reporting activities identified in Section IV.B.1.a.i. and ii. of these Parameters and Guidelines includes the following:

- The *one-time* activity of developing policies and procedures and a data tracking and analysis system for gathering and reporting only the new data identified above.
- One-time training per employee assigned to track the information identified above to ensure the staff responsible for tracking the information understand and properly implement the procedures.
- The *ongoing* activity of recording the new data identified above in the data tracking system to prepare the annual street sweeping and conveyance systems report.

In addition, the claimants' requests for "personnel," "contracted services" and "computer hardware and software" are addressed as direct costs in Section V.A. of the Parameters and Guidelines, governing salaries and benefits, contracted services, and fixed assets (expressly including "computer equipment") and do not need to be repeated in Section IV. of the Parameters and Guidelines. The pro rata share of these costs attributable to the reimbursable activities are eligible for reimbursement and are subject to the Controller's review and audit.[204] Section V.A. of the Parameters and Guidelines states in pertinent part:

> Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.
>
> 1. Salaries and Benefits
>
> Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.
>
> [¶] . . . [¶]
>
> 3. Contracted Services

[204] Government Code section 17561(d)(1) authorizes the State Controller's Office to audit the records of any local agency to verify the actual amount of the mandated costs, and to reduce any claim the Controller determines is excessive or unreasonable.

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

Accordingly, Section IV.B.1.a. of the Parameters and Guidelines authorizes reimbursement for the claimants to:

a. By September 30, 2008, and each September 30th thereafter, include in the JURMP Annual Report the following information for the prior fiscal year:

    i. Street Sweeping Information (Part J.3.a.(3)(c)(x.-xv))

    - 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.
    - 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.
    - 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.
    - Identification of the total distance of curb-miles swept.

- Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
- Amount of material (tons) collected from street and parking lot sweeping.[205]

ii. Conveyance System Cleaning Information (Part J.3.a(3)(c)(iv.-viii.))

- 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.
- 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.
- 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.
- Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
- Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.[206]

iii. Reimbursement for the reporting activities identified in Section IV.B.1.a.i. and ii. of these Parameters and Guidelines includes the following:

- The *one-time* activity of developing policies and procedures and a data tracking and analysis system for gathering and reporting only the new data identified above.

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[205] The requirements for street sweeping were delayed until no later than March 24, 2008. Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

[206] The requirements for conveyance system cleaning were delayed until no later than March 24, 2008. Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

- *One-time* training per employee assigned to track the information identified above to ensure the staff responsible for tracking the information understand and properly implement the procedures.
- The *ongoing* activity of recording the new data identified above in the data tracking system to prepare the annual street sweeping and conveyance systems report.

b. JURMP Conveyance System Cleaning (Section IV.B.1.b. of the Parameters and Guidelines)

The Commission approved reimbursement for the following activity in Part D.3.a.(3)(b)(iii) of the test claim permit:

> Conveyance system cleaning
>
> > 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:
> >
> > 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.[207]

As indicated above, the implementation of these activities was delayed under the December 12, 2007 Permit Addendum by the Regional Board until no later than March 24, 2008.[208]

In addition, the test claim permit explains that the cleaning requirements are annual, but can be *reduced* for facilities (defined above as catch basins, storm drain inlets, open channels, etc.) that are *not* self-cleaning, to every other year following two years of

[207] Exhibit A, Amended Test Claim Decision on Remand, pages 70-71. The conclusion in the Decision (p. 140) incorrectly states that the following in Part D.3.a.(3)(a) of the test claim permit is reimbursable: "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." This activity was expressly denied by the Commission on page 72: "[P]art 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)." Thus, the Parameters and Guidelines identify the Commission's findings to authorize reimbursement only for Part D.3.a.3.b.iii.

[208] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

inspections if the facility requires less than annual cleaning, which at the earliest would be in fiscal year 2010-2011.[209] Thus, the following activities represent the higher level of service and are reimbursable beginning no later than March 24, 2008:

- Cleaning catch basins and storm drain inlets when accumulated trash and debris is greater than 33% of design capacity.
- Cleaning those MS4 facilities designed to be self-cleaning immediately of any accumulated trash and debris.
- Cleaning observed anthropogenic litter in open channels annually, which may be reduced to every other year after two years of inspections (which at the earliest would be in fiscal year 2010-2011) if the open channel requires less than annual cleaning.

Section IV.B.1.b. of the Parameters and Guidelines tracks these activities accordingly, with a clarification that the activities were delayed under the December 12, 2007 Addendum by the Regional Board until no later than March 24, 2008, as follows:

> b. Conveyance System Cleaning (Part D.3.a.(3)(b)(iii)). No later than March 24, 2008, the claimants shall comply with the following activities:[210]
>
> i. Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc).
>
> ii. The maintenance activities shall, at a minimum, include the following:
>
> - Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, which 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.
> - Cleaning observed anthropogenic litter in open channels annually, which may be reduced to every other year after two years of inspections (which at the earliest would be in fiscal year 2010-2011) if the open channel requires less than annual cleaning.

The claimants also propose the following "reasonably necessary" activities and costs, and propose clarifying some non-reimbursable activities:

- <u>Conveyance System Inspection.</u> Claimant's personnel costs to inspect the conveyance system for the purpose of assessing the accumulation of trash, debris, or litter, or for verifying the proper operation of structural treatment controls.

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[209] Exhibit U (13), Test Claim, page 287 (Order No. R9-2007-0001, Parts D.3.b.ii.).

[210] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

- Conveyance System Cleaning Operations. Claimant's personnel costs to clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, to clean accumulated trash and debris from any MS4 facility that is designed to be self cleaning, or to clean open channels of observed anthropogenic litter.
- Vehicles and Equipment. Claimant's costs to purchase, rent, lease, or contract for vehicles and equipment to perform conveyance system inspection or cleaning (including vector [*sic*] trucks or other cleaning equipment), and to transport and dispose of collected material. This includes one-time costs for equipment purchases and corresponding equipment depreciation costs.
- Vehicles and Equipment Maintenance. Annual maintenance costs, including parts, supplies (e.g. water), and personnel costs. This also includes the costs for operating, renting, leasing, or contracting for facilities to store and maintain vehicles, equipment and supplies.
- Fuel. The actual costs of the fuel necessary to run the vehicles and equipment, to inspect and clean the MS4 facilities, and to transport and dispose of collected materials.
- Program Development. Claimant's costs, to develop and update the claimant's conveyance system cleaning program including specific criteria, policies, procedures, manuals and forms. This includes the development and utilization of inspection and maintenance schedules. Program development tasks are generally one-time costs with annual reviews and periodic updates.
- Employee and Vendor Training. Claimant's costs, to develop, update, and conduct training on conveyance system inspection, cleaning, and disposal policies and practices. The costs include training of all claimant and vendor employees who perform tasks necessary to implement conveyance system cleaning and related functions during the life of the Permit.
- Parking Signage and Enforcement. Claimant's costs to purchase and install signage and to enforce parking prohibitions in areas where conveyance system cleaning is scheduled and costs to purchase, installation, or replacement of signage to inform the public of applicable parking restrictions, as well as their surveillance and enforcement.
- Employee Supervision and Management. (See Section IV.A.)
- Contracted Services. (See Section IV.A.)

Non-reimbursable Activities

Conveyance System Cleaning (part D.3.a.(3)): reimbursable activities and costs do not include:

1. Part D.3.a.(3)(a) of the 2007 permit;
2. Part D.3.a.(3)(b)(i), (iv) - (vi) of the 2007 permit;
3. Annual inspection of MS4 facilities (D.3.a.(3)(b)(i));
4. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a.(3)(b)(iv));
5. Proper disposal of waste removed pursuant to applicable laws (D.3.a.(3)(b)(v));
6. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a.(3)(b)(vi)). Part D.3.a.(3)(b)(ii) of the 2007 Permit.[211]

The Water Boards comment that the Commission found that many conveyance system cleaning activities are not reimbursable because they were in the prior permit, so only the costs incurred beyond those to comply with the prior permit should be reimbursable.[212] The Water Boards also state that inspections were required under the 2001 permit, so they should not be reimbursable.[213] As to cleaning system operations, the Water Boards argue that phrases such as "including Personnel Costs" are not specific enough.[214] Regarding vehicles and equipment and maintenance, the Water Boards assert that if they are acquired for materials disposal they should not be reimbursable because disposal was required under the prior permit. Further, costs must be incurred during the permit term, and for contracts, not already included in contract costs. According to the Water Boards, it is unclear what equipment the claimants would need to clean conveyance systems they did not already own prior to the permit. If the vehicles and equipment are solely dedicated to conveyance system cleaning, the Water Boards question whether the single-purpose use is the most reasonable method to comply with the mandate.[215]

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[211] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 38-39.

[212] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 9-10.

[213] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, page 10.

[214] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, page 10.

[215] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, page 10.

The Water Boards further argue to the extent that conveyance system cleaning is contracted, fuel should be included in the contract cost.[216] Regarding program development, the Water Boards state that it is unclear what “internal conveyance system cleaning program” means, and request specificity to allow meaningful evaluation.[217]

The Water Boards also disagree that vendor training is necessary because vendors should be well versed in the services they provide. And vendors’ costs should be prorated if necessary to only the reimbursable activities in the permit.[218] In addition, the Water Boards question whether parking enforcement signs would be the same as for street sweeping. To the extent the signage overlaps with other types of parking enforcement unrelated to the permit, costs should be segregated. And the claimants should be required to offset any reimbursement for signage enforcement with enforcement revenue.[219]

Regarding the last two activities, employee supervision and management and contracted services, the Water Boards assert that the claimants should demonstrate how their supervising work is prorated to only mandated provisions. Further, the claimants should only be allowed to claim costs to negotiate and prepare contract-related documents if they can demonstrate through a cost-benefit analysis that these costs, together with the cost of the service, are the most cost-effective and reasonable way to comply with the conveyance system cleaning mandate.[220]

The claimants acknowledge that they may not claim activities that were required under the prior permit, and propose listing non-reimbursable activities in the Parameters and Guidelines to ensure that erroneous claims are not filed.[221] The claimants also acknowledge that MS4 inspections are not reimbursable because they were required

[216] Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, page 11.

[217] Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, page 11.

[218] Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, pages 6, 11.

[219] Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, page 11.

[220] Exhibit D, Water Boards’ Comments on the Proposed Parameters and Guidelines, pages 8-9.

[221] Exhibit E, Claimants’ Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 15-16.

under the prior permit.[222] The claimants removed "including Personnel Costs" from its Revised Proposed Parameters and Guidelines.[223] The claimants disagree with the Water Boards regarding the most reasonable method to comply with the mandate, stating that their revised Parameters and Guidelines closely follow the Commission's regulations and the "most reasonable methods" to comply are necessary to carry out the mandated program. The claimants acknowledge the need to prorate the cost of vehicles, equipment, maintenance, storage of vehicles and equipment used for multiple purposes in accordance with the Controller's Mandated Cost Manual. Claims for equipment are limited to the permit term "with the proviso that . . . depreciation and use allowance costs are also allowable even if the initial purchase was made in a prior period and accounting requirements found in SCO's Manual are met."[224] The claimants concur that disposal of materials is not reimbursable.[225] In response to the assertion that fuel should be included in any contracted costs for conveyance system cleaning, the claimants acknowledge that vendors must accurately account for their reimbursement requests as limited by the claiming requirements in the Mandated Cost Manual.[226] In response to the Water Boards' comments on program development, the claimants state that they removed "internal" from the term "conveyance system cleaning program."[227] The claimants disagree with the Water Boards regarding vendor training, stating that they may recover training costs "as may be necessary in utilizing new types of equipment and/or protocols."[228] The claimants acknowledge that signage should only be reimbursed once, and that unrelated parking enforcement costs should not be claimed. The claimants argue that they cannot use enforcement revenue to offset the cost of signage because of Proposition 26, which exempts fines and penalties from the definition of taxes and requires that the amount charged bears a fair or reasonable relationship to the payor's burden on, or benefit received from the government activity.

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[222] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 16.

[223] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 5, 16, 38-39.

[224] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 17-18.

[225] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 18.

[226] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 6, 18-19.

[227] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 19, 39.

[228] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 6.

The claimants argue that the cost of signage does not bear a fair or reasonable relationship to the payor's burden or benefit received from the conveyance system cleaning.[229] In response to the comments on employee supervision and contract services, the claimants state that they will follow the Mandated Cost Manual on supervisory costs and will not claim them as both direct and indirect. The claimants disagree with the Water Boards regarding a cost benefit analysis to determine whether contracting is the most cost-effective method to comply with the mandate. Rather, the claimants rely on the Mandated Cost Manual, which authorizes contracting without a cost-benefit analysis.[230]

The Commission finds that the proposed activities and costs are either eligible for reimbursement under the boilerplate language of the Parameters and Guidelines, or are overbroad and not supported by evidence in the record.

First, direct costs like employee supervision and management, materials and supplies, fixed assets, and contracted services that directly relate to the state-mandated activities may be claimed under Section V.A. of the Parameters and Guidelines and are subject to review and audit by the Controller.[231]

However, the Commission found the inspection requirements in Part D.3.a.(3).a. and b. are not a new program or higher level of service because inspections were required under the prior permit.[232] The claimants' Proposed Parameters and Guidelines request reimbursement for personnel costs to inspect the conveyance system, but in rebuttal comments, acknowledge that inspections in Part D.3.a.3.a. of the test claim permit are not reimbursable.[233] Thus, the Parameters and Guidelines clarify the activities that are *not* eligible for reimbursement as follows:

> The following conveyance system activities are *not* reimbursable:
>
> 1. Implementing a schedule of inspection activities (Part D.3.a.(3)(a));
> 2. Inspections of MS4 facilities (D.3.a.(3)(b)(i), D.3.a(3)(b)(ii).);
> 3. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (Part D.3.a.(3)(b)(iv.));

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[229] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 11-12, 20.

[230] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 13.

[231] Government Code section 17561.

[232] Exhibit A, Amended Test Claim Decision on Remand, page 79.

[233] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 15.

4. Proper disposal of waste removed pursuant to applicable laws (Part D.3.a.(3)(b)(v));
5. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (Part D.3.a.(3)(b)(vi)).[234]

Moreover, there is no evidence in the record that the claimants' proposed activities are reasonably necessary to implement the mandate. These include developing programs and policies and procedures, employee and vendor training, and installing signs and enforcing parking prohibitions in areas where conveyance system cleaning is scheduled. Proposed reasonably necessary activities must be supported by substantial evidence in the record explaining why they are necessary to perform the state mandate.[235] In addition, the Commission's regulations require that oral or written representations of fact shall be under oath or affirmation, and that all written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so.[236]

The 2025 Quenzer declaration addresses training by concluding that training "is reasonably necessary to carry out the required catch basin cleaning," but there is no explanation on why training is necessary to comply with the mandate which appears straight forward and represents only a higher level of service when compared to the prior permit, which expressly required MS4 cleaning for the removal of waste and proper disposal of waste.[237] In addition, the claimants' proposed RRM for this activity does not include any training costs and, thus, it is not clear why the claimants are requesting reimbursement for training.[238]

Therefore, the claimants' proposed reasonably necessary activities related to the JURMP Conveyance System Cleaning requirements are denied.

c. <u>JURMP Educational Component (Section IV.B.1.c. of the Parameters and Guidelines)</u>

The Commission partially approved the requirements imposed by Part D.5. addressing the test claim permit's educational component, recognizing that the prior permit also required education and training on many of the listed topics in the permit, including

[234] Exhibit A, Amended Test Claim Decision on Remand, pages 57-62.

[235] Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

[236] California Code of Regulations, title 2, section 1187.5.

[237] See Exhibit A, Amended Test Claim Decision on Remand, page 72.

[238] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 36 (2025 Quenzer Declaration, paragraph 15.b.2.).

those for "municipal departments and personnel."[239] Thus, the Commission found that the following new education-related activities are eligible for reimbursement:

- D.5.a.(1): Each copermittee shall educate each target community (municipal departments, construction site owners and developers, industrial owners and operators, commercial owners and operators, the residential community, the general public, and school children) on the following topics: erosion prevention, non-stormwater discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control.
- D.5.a.(2): The 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;[240] and (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."[241]
- 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,

[239] Exhibit A, Amended Test Claim Decision on Remand, page 79.

[240] Development Projects are defined in Attachment C of the test claim permit as: "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." Exhibit U (13), Test Claim, page 345 (Order No. R9-2007-0001, Attachment C).

[241] The conclusion in the Amended Decision states that these educational topics in i.-iv. are reimbursable for "Planning Boards and Elected Officials." Exhibit A, Amended Test Claim Decision on Remand, pages 141-142. The Commission found, however, that all the topics in (a) i.-iv. are new for planning boards and elected officials, and the topics in (a) iii.-iv. are also new for planning and development review staffs. Exhibit A, Amended Test Claim Decision on Remand, page 80.

and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an 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 [Standard Urban Storm Water Mitigation Plan][242] requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

- D.5.(b)(1)(c): 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.5.(b)(1)(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.
- D.5.(b)(2): As early in the planning and development process as possible and all through the permitting and construction process, implement a program to educate project applicants, contractors, property owners, and community planning groups *who are not developers or construction site owners*. 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 these groups 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

[242] SUSMP is defined in Attachment C of the test claim permit as: "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects." Exhibit U (13), Test Claim, page 351 (Order No. 2007-0001, Attachment C).

trips, hands-on experiences, or other educational methods.[243] The topics of education are listed in Table 3 of the test claim permit.[244]

These new state-mandated activities are identified in Section IV.B.1.c. of the Parameters and Guidelines, with a clarification that the implementation of these activities was delayed until March 24, 2008, by the Regional Board's Addendum, which states the following:

> Jurisdictional Urban Runoff Management Program, Section D, . . . "Each Copermittee shall implement all requirements of section D of this Order no later than ~~365~~ **425** days after adoption of the Order, unless otherwise specified in this Order. Prior to ~~365~~ **425** days after adoption of the Order each Copermittee shall at a minimum implement is Jurisdictional URMP document, as the document was developed and amended to comply with the requirements of Order No. 2001-01.[245]

In addition, the collaboration required in Part D.5.b.3 (educating residential, the general public, and school children) is required by the first sentence in Part L.1. The Commission approved the requirements in Part L.1. for the copermittees to collaborate with all other copermittees to address *new* common issues, and to plan and coordinate the *newly* mandated activities.[246] Part D.5.b.3. also requires the copermittees to "collaboratively conduct or participate in development and implementation of a plan to educate residential, general public and school children target communities."[247] Thus, this portion of the Parameters and Guidelines references both Part D.5.b.3. and the first sentence in Part L.1. Although there is overlap between Part D.5.b.3. and Part L.1., and Part L.1. was not delayed by the Regional Board's Addendum, the Commission finds that the collaboration required here was delayed until no later than March 24, 2008, since all of the provisions of Part D. were delayed.[248]

The claimants also request reimbursement for the following costs and activities they allege are reasonably necessary to comply with the mandate:

- Program Development. Claimant's costs, to develop an educational program for the target communities and the costs of preparation,

[243] Exhibit A, Amended Test Claim Decision on Remand, pages 74, 78-84, 141-143.

[244] Exhibit U (13), Test Claim, pages 298-299 (Order R9-2007-0001, Table 3).

[245] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

[246] Exhibit A, Amended Test Claim Decision on Remand, pages 112, 150.

[247] Exhibit A, Amended Test Claim Decision on Remand, pages 82-83.

[248] Under the rules of statutory interpretation, when a conflict exists between general and specific provisions in the law, the specific provisions prevail over the general provisions relating to the same subject. Code of Civil Procedure section 1859; *Pacific Lumber Co. v. State Water Resources Control Board* (2006) 37 Cal.4th 921, 942-943.

collaboration, and development of the educational program, training, policy development, establishment of procedures, and updates to the same. While program development tasks are generally one-time costs, the permit requires measurable increases in knowledge and measurable changes in behavior, which necessitate annual reviews and periodic updates to the program; therefore these costs are also included.

- Reporting and Tracking Policies and Procedures: Claimant's personnel costs to develop, update and implement reporting and tracking policies and procedures.
- Data Tracking and Analysis: Claimant's costs to implement and update data tracking and analysis methods and procedures and personnel costs to develop and maintain data tracking methods or systems and performing data tracking and analysis for reports to the Regional Water Quality Control Board, as well as the costs of purchases of and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting in of the reimbursable mandate in compliance with the Permit.
- Educational Materials. Claimant's personnel and printing costs to develop, produce, and distribute educational materials and related reporting to document the efforts.
- Employee and Vendor Annual Training. Claimant's costs to develop, update, and conduct training of staff responsible for providing education to target communities and the costs of training of all claimant and vendor employees who perform tasks necessary to implement educational functions during the life of the Permit.
- Education of Target Audiences. Claimant's personnel and printing costs to implement and conduct educational programs for the target communities.
- Report Writing. Claimant's personnel costs to develop and write reports to the Regional Water Quality Control Board.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).[249]

[249] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 44-45.

The Water Boards comment that there is insufficient detail for the first two activities: report tracking policies and procedures and data tracking and analysis.[250] They also recommend that the claimants prorate personnel and other costs to ensure only the approved activities are reimbursed. And to the extent that Program Development incorporates a hydromodification management plan or low impact development, the copermittees must segregate those costs to avoid seeking improper reimbursement.[251] As to data tracking and analysis, the Water Boards state that claimants have not identified the computer upgrades or why they are necessary to perform the reimbursable activities. The Water Boards also object to purchasing computer equipment and upgrades unless they are limited to what is necessary to comply with the permit and segregated for reimbursable activities. According to the Water Boards, the claimants should be required to transparently demonstrate what percentage of computer equipment is reimbursable beyond the prior permit.[252]

Regarding educational materials, the Water Boards again request specificity and proration of costs. And to the extent that the educational materials incorporate a hydromodification management plan or low impact development, the copermittees must segregate those costs to avoid seeking improper reimbursement.[253] The Water Boards also disagree that vendor training should be reimbursable, and say that vendor costs should be prorated to only the reimbursable activities in the permit.[254] Regarding educating target audiences and report writing, the Water Boards again criticize a lack of specificity, and recommend that report writing be prorated to exclude activities that are not reimbursable.[255]

As to employee supervision and management and contracted services, the Water Boards again assert that the claimants should demonstrate how their supervising work is limited to the mandated provisions. And the Water Boards repeat their argument that service contract costs should only be allowed if the claimants can demonstrate, through

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[250] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, page 12.

[251] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 12-13.

[252] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 12, 13.

[253] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 13.

[254] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 6, 13.

[255] Exhibit D, Water Boards' Combined Comments on the Proposed Parameters and Guidelines, pages 6, 13.

a cost-benefit analysis, that they are the most cost effective and reasonable way to comply with the mandate.[256]

In response to the Water Boards, the claimants revised their proposed reimbursable activities to specify only those that are reasonably necessary, and agree that only prorated costs are appropriate. The claimants also explain that Educational Program Development activities that incorporate hydromodification management plan activities or low impact development activities are now explicitly prohibited in the claimant's revised proposed Parameters and Guidelines.[257] In response to the Water Boards' comments on data tracking and analysis, the claimants state that computer and software upgrades are necessary to comply with the updated data tracking and analysis requirements in the test claim permit. Because computer systems vary among the claimants, the claimants propose that each jurisdiction claim upgrades that fit their system, which would be "disclosed and justified on reimbursement claim forms submitted to SCO in accordance with their Mandated Cost Manual. . . ."[258] In response to the Water Boards' comments on educational materials, the claimants revised their proposed reimbursable activities to specify only the reimbursable activities that are reasonably necessary, and agree that only prorated costs are appropriate, and have inserted activities that are not reimbursable.[259] The claimants disagree with the Water Boards regarding vendor training, stating "[w]hile vendors' employees do not generally require additional training to meet the Claimants' needs, if this is not the case, Claimants may recover such additional training costs as may be necessary in utilizing new types of equipment and/or protocols."[260] The claimants revised their proposed activities for educating target audiences and report writing to increase specificity and agree that proration is appropriate.[261] As to employee supervision and management and contracted services, the claimants state that they will follow the Mandated Cost Manual in identifying supervisory costs and will not claim those costs as both direct and indirect. The claimants disagree with the Water Boards regarding performing a cost-benefit analysis

[256] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 8-9, 12.

[257] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 13.

[258] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 12, 13, 22-23.

[259] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 3-5, 23.

[260] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 24.

[261] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 4-5, 24.

to determine whether contracting out is the most cost-effective method to comply with the mandate. Rather, the claimants rely on the Mandated Cost Manual, which they quote as saying that contracted services are allowable if "the local agency lacks the staff resources or necessary expertise, or it is economically feasible to hire a contractor to perform the mandated activity."[262]

First, the Commission agrees with the claimants that *developing* and *implementing* the educational program for residential communities, the general public, and school children is expressly required by the plain language of Part D.5.b.3., which states: "Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities."[263]

However, the introductory paragraph in Part D.5. and language in Part D.5.b.1.-2. mandate that each copermittee only *implement* an education program for the other target communities (municipal departments and personnel, new development and construction) and does not expressly require developing those programs.[264] In construing regulations and statutes, it is a well-established rule that the use of different words indicates that different meanings are intended.[265] So the requirement in D.5.b.3., for "development and implementation" of the residential, general public, and school district programs indicates a different meaning than the requirement in Parts D.5., D.5.b.1., and D.5.b.2., for only implementation of the education programs for municipal staffs, elected officials, planning boards, project applicants, and community planning groups.

Nevertheless, the claimants argue that developing education programs should be reimbursable:

> In order to implement a program it must be developed; one cannot simply implement a new program without developing it. As such, development of these education programs is a cost that is reasonably necessary to support required implementation.
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> Additionally, the Commission's reliance on rules relating to legislative interpretation is misplaced. The general rules of statutory construction

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[262] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 13, 22.

[263] Exhibit A, Amended Test Claim Decision on Remand, pages 82-83.; see also Exhibit U (13), Test Claim, page 300 (Order No. R9-2007-0001).

[264] Exhibit U (13), Test Claim, pages 297-300 (Order No. R9-2007-0001).

[265] *Trancas Property Owners Assoc. v. City of Malibu* (1998) 61 Cal.App.4th 1058, 1061. The California Supreme Court said that using different words "is significant" to show a different intention existed. *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 507.

> and interpretation requires laws and rules to be read in a manner that is harmonious with *all* laws. [Citation omitted.] Here, interpreting the mandate as only including the implementation of the education system is improper because it explicitly conflicts with both Government Code section 17557 and California Code of Regulations, title 2, section 1183.7.
>
> Reimbursement is proper for "activities that are reasonably necessary for the performance of the state mandated program." [Cite to Gov. Code, § 17557 & CCR, tit.2, § 1183.7.] As stated above, it is unreasonable to expect implementation of a program that is new or different without some type of development of this program. Interpreting the mandate as only including implementation improperly ignores Government Code section 17557 and California Code of Regulations, title 2, section 1183.7. Therefore, development costs should be reimbursed along with the implementation. As part of the claims process, the Municipal Claimants should be permitted to submit evidence of these reasonable and necessary costs.[266]

However, educational programs for municipal departments and personnel, as well as for developers and construction site owners *were also required under the prior permit,*[267] and as stated above, the plain language of the test claim permit does not require developing the program. Moreover, there is no evidence in the record that developing a program for the other target communities is reasonably necessary to comply with the mandate.[268] Thus, the Commission finds only *implementing* the educational programs for these target communities is eligible for reimbursement and the parameters and guidelines make it clear that reimbursement is *not* required to develop these programs.

In addition, the educational program required by Part D.5. is ongoing. The program is part of the Jurisdictional Urban Runoff Management Program (JURMP) and is, therefore, subject to the Program Effectiveness Assessment requirements of Part I.1. of the test claim permit, which requires that the program be annually assessed to identify modifications and improvements needed to maximize effectiveness.[269]

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[266] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 13.

[267] Exhibit A, Amended Test Claim Decision on Remand, pages 79-83.

[268] California Code of Regulations, title 2, section 1183.7(d).

[269] Exhibit A, Amended Test Claim Decision on Remand, page 100. According to declarations in the Test Claim record, including this by Jon Van Rhyn of the County of San Diego: "Compliance with these mandated activities [in Section D.5.] requires the routine incorporation of testing and surveying methods into the program elements to ensure that implementation is resulting in the targeted outcomes. To comply with this mandate, the County expects to expend 288 hours of staff time in FY 2008-09, and

As to the claimants' proposed activities and costs, the pro rata direct costs of employee supervision and management, materials and supplies, fixed assets (including computer equipment), training, and contracted services that relate directly to the state-mandated activities may be claimed under Section V.A. of the Parameters and Guidelines, and are subject to the Controller's audit.[270]

However, the Commission finds that the claimants' remaining proposed reasonably necessary activities are either overbroad or not supported by evidence in the record.

The claimants requested activities of "reporting" and "report writing," are required by Part J.a.3.i. of the test claim permit, but neither they nor Part J.a.3.i. were pled in this Test Claim. The Commission's regulations are clear that "[a]ctivities required by statutes, regulations and other executive orders that were not pled in the test claim may only be used to define reasonably necessary activities to the extent that compliance with the approved state-mandated activities would not otherwise be possible."[271]

Moreover, there is no evidence in the record that the claimants' remaining proposed activities (tracking policies and procedures, data tracking and analysis, and annual training for vendors) are reasonably necessary to perform the state-mandated education and training, so they are denied. Proposed reasonably necessary activities must be supported by substantial evidence in the record explaining why they are necessary to perform the state-mandate in accordance with the Government Code and Commission's regulations.[272] In addition, the Commission's regulations require that oral or written representations of fact shall be under oath or affirmation, and all written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so.[273]

Thus, Section IV.B.1.c. of the Parameters and Guidelines identify the reimbursable activities as follows:

c. Educational Component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3),

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each year thereafter, to develop, administer and analyze surveys and tests." Exhibit U (13), Test Claim, page 589, (Declaration of Jon Van Rhyn, Water Quality Manager, County of San Diego).

[270] Government Code section 17561.

[271] California Code of Regulations, title 2, section 1183.7(d).

[272] Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

[273] California Code of Regulations, title 2, section 1187.5.

and the first sentence in Part L.1.) No later than March 24, 2008, the claimants shall comply with the following mandated activities:[274]

i. Each copermittee shall educate each target community (municipal departments, construction site owners and developers, industrial owners and operators, commercial owners and operators, the residential community, the general public, and school children) on the following topics: erosion prevention, non-stormwater discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control. (D.5.a.(1).)

   The 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).)

ii. 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; and (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).)

iii. 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)(a).)

iv. 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 understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows:

   - Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.

[274] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

- The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
- Current advancements in BMP technologies.
- SUSMP [Standard Urban Storm Water Mitigation Plan] requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms. (D.5.b.(1)(b)(iii) - (vi).)

v. 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.5.b.(1)(c).)

vi. 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.(1)(d).)

vii. As early in the planning and development process as possible and all through the permitting and construction process, implement a program to educate project applicants, contractors, property owners, and community planning groups *who are not developers or construction site owners*. 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 these groups on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training. (D.5.b.(2).)

*Reimbursement is **not** required to develop any of the educational programs described above in D.5.a., D.5.b.(1), or D.5.b.(2) of the permit.*

*Reimbursement is also **not** required to educate developers and construction site owners on the topics listed in D.5.b.(2).*[275]

viii. Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities on those topics listed in Table 3 of the test claim permit. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events,

[275] Exhibit A, Amended Test Claim Decision on Remand, page 82.

classroom education, field trips, hands-on experiences, or other educational methods. (D.5.b.(3) and the first sentence in Part L.1.)

3. Watershed Urban Runoff Management Program (Section IV.B.2. of the Parameters and Guidelines)

The Commission partially approved reimbursement for the following new state-mandated activities required by Parts E.2.f. and E.2.g. of the test claim permit, addressing the Watershed Urban Runoff Management Program (WURMP):[276]

> Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] identified 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 [maximum extent practicable], 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
>
> (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.

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[276] Watershed is defined in Attachment C of the test claim 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 drainage area, catchment, or river basin)." Exhibit U (13), Test Claim, page 352 (Order No. R9-2007-0001, Attachment C).

Watershed Urban Runoff Management Plan is defined in Attachment C of the test claim permit as: "A written description of the specific watershed urban runoff management measures and programs that each watershed group of Copermittees will implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards." Exhibit U (13), Test Claim, page 352 (Order No. R9-2007-0001, Attachment C).

The Watershed Management Areas (WMAs) identified in the test claim permit are: Santa Margarita River, San Luis Rey River, Carlsbad, San Dieguito River, Peñasquitos, Mission Bay, San Diego River, San Diego Bay, and Tijuana River. Exhibit U (13), Test Claim, pages 303-304 (Order No. R9-2007-0001, Table 4).

(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 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.[277]

In addition, the first sentence in Part L.1. of the test claim permit that the Commission found reimbursable requires copermittee collaboration "to address common issues, [and] promote consistency among Watershed Urban Runoff Management Programs" and, therefore, this section of the Parameters and Guidelines also references the first sentence in Part L.1.[278] As indicated above, reimbursement for collaboration is limited to activities approved by the Commission in the Test Claim Decision (to collaborate on an *updated* WURMP for each listed watershed). The prior permit also required a WURMP and required the copermittees to collaborate to address common issues to promote consistency among WURMPs, so collaboration is required only on the *updated* WURMP as described in the activities listed in the Parameters and Guidelines.[279]

Section E.1. of the test claim permit required each copermittee to implement the requirements of Section E no later than 365 days after the adoption of the test claim permit (or no later than January 24, 2008), and until then, the permittees were required to implement the Watershed URMP document developed under the prior permit, Order No. 2001-01.[280] Implementation of Section E was subsequently delayed by order of the Regional Board dated December 12, 2007, to March 24, 2008, as follows:

c. Watershed Urban Runoff Management Program, Section E.1, . . . "Each Copermittee shall implement all requirements of section E of this Order no later than ~~365~~ **425** days after adoption of this Order, unless otherwise specified in this Order. Prior to ~~365~~ **425** days after adoption of this Order, each Copermittee shall collaborate with the other Copermittees within its

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[277] Exhibit A, Amended Test Claim Decision on Remand, pages 72-77, emphasis added.

[278] Exhibit U (13), Test Claim, page 329 (Order No. R9-2007-0001).

[279] Exhibit A, Amended Test Claim Decision on Remand, pages 90, 111. According to the Decision: "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."

[280] Exhibit U (13), Test Claim, page 300 (Order No. R9-2007-0001).

Watershed Management Area(s) (WMA) to at a minimum implement its Watershed URMP document, as the document was developed and amended to comply with the requirements of Order No. 2001-01."[281]

Although there is overlap between Parts E.2.f. and E.2.g. and Part L.1., and Part L.1. was not delayed by the Addendum of the Regional Board, the Commission finds that the collaboration required here was delayed until no later than March 24, 2008, since all of the provisions of Part E were delayed.[282]

Thus, the mandated activities are identified in Section IV.B.2. of the Parameters and Guidelines, with clarification that implementation began no later than March 24, 2008.

The claimants also request reimbursement for the following costs and activities they allege are reasonably necessary:

- Working Body Support and Representation: Claimant's costs to organize and administer the Watershed Urban Runoff Management Program ("WURMP") Working Bodies.[283] And the costs incurred 1) to perform the responsibilities of chairs,[284] co-chairs, and secretaries,[285] 2) attend and participate at meetings

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[281] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

[282] Under the rules of statutory interpretation, when a conflict exists between general and specific provisions in the law, the specific provisions prevail over the general provisions relating to the same subject. *Pacific Lumber Co. v. State Water Resources Control Board* (2006) 37 Cal.4th 921, 942-943.

[283] Permit Part E.2.g. requires the collaborative development and implementation of a WURMP for each of the following WMAs: 1) Santa Margarita River; 2) San Luis Rey River; 3) San Dieguito River; 4) Peñasquitos; 5) Mission Bay; 6) San Diego River; 7) San Diego Bay; 8) Tijuana River. Exhibit U (13), Test Claim, pages 302-304 (Order No. R9-2007-0001, Table 4).

[284] MOU Section I defines a Chair as follows: "Chair means presiding over and providing leadership and direction to a Working Body. This includes serving as a point of contact to external entities such as the Regional Board staff, stakeholders, and industry groups, soliciting group input on and developing meeting content, facilitating meetings, and coordinating with the Secretary or Working Body Support staff to finalize work products for distribution to the Working Body. Chair responsibilities may also be divided between Co-Chairs." Exhibit U (13), Test Claim, page 497 (MOU).

[285] MOU Section I defines a Secretary as follows: "Secretary means a person who takes responsibility for the records, correspondence, minutes, or notes of meetings, and related affairs of a working body. This includes: maintaining group contact lists; preparing and sending out meeting notifications and agendas; arranging for meeting rooms and equipment; taking, preparing, and finalizing meeting minutes or notes; and,

(including preparation and travel time), 3) other activities required for planning, discussion, and coordination such as telephone calls, emails, and video conferencing. Required tasks include 1) developing and distributing meeting agendas and notes, and 2) distributing, presenting, reviewing, and approving any of the Watershed Work Products described below.

- Collaborative Watershed Work Product Development. Claimant's Personnel costs to develop and update WURMP Work Products and the costs of such activities, including:
- Watershed Urban Runoff Management Programs ("WURMPs"). A WURMP that includes all the elements described in Permit Part E.2.;
- Watershed Activities Lists. Any Watershed Quality Activity[286] or Watershed Education Activity[287] necessary to meet the requirements of Permit Part E.2.f.(2), to include any or all of the minimum information identified in Permit Part E.2.f.(3);
- Annual WURMP Work Plans and Budgets. Any Work Plan or Budget developed to support the implementation of a WURMP;
- WURMP Annual Reports. Both the annual report content provided by individual Watershed Copermittees and the completion of the consolidated WURMP Annual Report;
- Watershed Specific Standards: 1) Watershed reporting, assessment, and program data and information management standards; and 2) standards and approaches for watershed-level management of specific source categories or types. It applies to work products developed by individual Copermittees, their consolidation into comprehensive, watersheds standards documents, and periodic updates as necessary for each;
- Working Body Status Reports: Watershed Working Body status reports developed for dissemination to Copermittees and interested parties. Status reports typically describe Watershed Working Body activities and

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coordinating with the Chair or Working Body Support staff to organize and distribute work products to the Working Body." Exhibit U (13), Test Claim, page 497-499 (MOU).

286 Watershed quality activities are "activities other than education that address high priority water quality problems in the WMA." Exhibit U (13), Test Claim, page 302 (Order No. R9-2007-0001).

287 Watershed education activities are "Outreach and training activities that address high priority water quality problems in the WMA." Exhibit U (13), Test Claim, page 302 (Order No. R9-2007-0001).

accomplishments, success in completing scheduled tasks, and key issues, activities, and tasks to be addressed; and

- Other Watershed Work Products. Any Watershed Working Body Work Product not specifically identified above, but required to achieve or maintain compliance with Permit Part E.2.
- Watershed Implementation of Programs and Activities. Claimant's costs for the ongoing implementation of programs and activities funded and/or conducted at the watershed level and Watershed programs and activities costs including:
- Watershed Water Quality Activities
- Watershed Education Activities
- Other programs and activities required to implement the WURMP.

Implementation costs associated with these programs and activities including:

- Materials production and distribution, equipment, supplies, fees, media purchases, and other costs associated with program implementation.
- Equipment. The actual cost of purchasing, renting, leasing, or contracting for vehicles and equipment to perform watershed activities mandated by the Permit. This includes one-time costs for vehicle and equipment purchases and corresponding equipment depreciation costs.
- Vehicle and Equipment Maintenance. Annual vehicle and equipment maintenance costs, including parts, supplies (e.g., water), and Personnel Costs. This also includes the costs of operating, renting, leasing, or contracting for facilities to store and maintain the vehicles and/or equipment and supplies.
- Fuel. The actual cost of the fuel for the vehicles and equipment performing watershed activities mandated by the Permit.
- Reporting and Tracking Policies and Procedures. Claimant's personnel costs to develop, update, and implement each WMA activity and tracking policies and procedures.
- Data Tracking and Analysis. Claimant's costs to develop, update, and implement data tracking and analysis methods and procedures for reports to the Regional Water Quality Control Board and costs of purchases and upgrades to equipment, hardware, software necessary to support data tracking, analysis, and reporting in compliance with the Permit and subject to the reimbursable mandate.
- Report Writing. Claimant's personnel costs to develop and write reports to the Regional Water Quality Control Board.

- Employee and Vendor Annual Training. Claimant's costs to develop, update, and conduct training of staff responsible for developing or conducting WMA activities and costs of training of all claimant and vendor employees who perform tasks necessary to implement these functions during the life of the Permit.
- Cost Accounting and Documentation. Claimant's personnel costs to monitor and conduct cost accounting for all expenditures incurred in accordance with WURMP development and implementation and costs of documenting and monitoring expenditures incurred in developing and distributing budget balance and expenditure reports, and claim submittal forms and costs of individual Copermittee activities in developing and maintaining data tracking methods or systems, and of performing data tracking and analysis (including staff training), as well as the costs of purchases and upgrades to equipment, hardware, and software necessary to support expenditure tracking, analysis and reporting.
- Coordination. Claimant's personnel costs, to coordinate WURMP Working Body content, issues, programs, and activities with organizations and parties outside the claimant's jurisdiction and the costs of coordination with Regional Board staff, participation at professional organizations and societies, and representation on applicable California Stormwater Quality Association ("CASQA") working bodies.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).[288]

The Water Boards comment that the claimants use too many vague, non-specific phrases regarding the WURMP. They say that after nearly four years of implementation, the claimants should be able to specifically describe the necessary tasks to perform the WURMP, as well as anticipated changes over the remainder of the permit term. The Water Boards also repeat their comments about vendor training and computer upgrades, and they question specific costs proposed for equipment and vehicle and equipment maintenance, as well as facilities to store and maintain vehicles and equipment. The Water Boards state that WURMP may require vehicles only to attend meetings, and it is unlikely that cars would be purchased exclusively for WURMP activities, so the claimants should be required to specify and prorate costs for only WURMP activities.[289]

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[288] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 49-52.

[289] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 13-14.

The claimants respond that they have increased specificity and deleted catch-all phrases and categories in their proposed activities. The claimants disagree that vendor training is not recoverable, and agree that computer equipment must be prorated to apply only to the reimbursable activities. As to vehicles, the claimants agree that the WURMP activities do not generally require vehicles and equipment to implement, but because the claimants attend meetings, mileage for required travel should be reimbursable.[290]

The 2025 Quenzer Declaration also addresses mileage costs and states that the costs associated mileage costs are reasonably necessary to comply with the mandate as follows:

> Many watershed activities include field work to make observations, interact with the public, etc. Because these activities take place away from Co-Permittees' offices, mileage or other transportation costs are appropriate. Where a watershed activity can be completed without transportation being needed, mileage and other transportation costs are not included in the activity's cost.[291]

First, as stated earlier, pro rata direct costs for employee supervision and management, materials and supplies, fixed assets (including computers and software), travel (including mileage), and contracted services that relate directly to the state-mandated activities may be claimed under Section V.A.

In addition, the proposed "reporting" and "report writing activities," including the data tracking and analysis for reports, are too broadly stated and, as stated, may be required by Parts J.1.b. (submitting the WURMP to the Regional Board) and J.3.b. (submitting WURMP annual reports to the Regional Board) of the test claim permit, which were not pled in the Test Claim. The mandate here is limited to submitting the Watershed Activities List to the Regional Board, and not the plan or annual report itself. In this respect, however, the 2025 Quenzer declaration, signed under penalty of perjury, states that a Regional Watershed Activities Database was developed to track the watershed activities that are newly required by the test claim permit.[292] The mandate is to submit a Watershed Activities List with each updated WURMP and updated annually thereafter. The Watershed Activities List is required to include the following detailed information: a description of the activity; a time schedule for implementation of the activity, including key milestones; an identification of the specific responsibilities of Watershed

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[290] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 24-26.

[291] Exhibit T, Claimants' Comments on the Revised Proposed Decision and Parameters and Guidelines, page 46 (2025 Quenzer Declaration, para. 17.b.3.).

[292] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 47 (2025 Quenzer Declaration, para. 17.c.2.).

Copermittees in completing the activity; a description of how the activity will address the identified high priority water quality problem(s) of the watershed; a description of how the activity is consistent with the collective watershed strategy; a description of the expected benefits of implementing the activity; and a description of how implementation effectiveness will be measured.

Based on the 2025 Quenzer declaration and the fact that the Watershed Activities List requires detailed information on each activity to be submitted to the Regional Board, the Commission finds that the following activities are reasonably necessary to comply with the Watershed Activities List requirements:

- The *one-time* activity and pro-rata share of costs to develop a data tracking and analysis system for gathering and reporting the new data required to be included in the Watershed Activities List identified above. Reimbursement is ***not*** required to the extent that the data tracking and analysis system was developed for the purpose of submitting the WURMP annual report as a whole.
- The *ongoing* activity of recording the data identified above in the data tracking system to prepare the Watershed Activities List.

However, the claimants' remaining proposed reasonably necessary activities are overbroad. Reimbursement for the costs to "organize and administer the Watershed Urban Runoff Management Program ("WURMP") Working Bodies" is consistent with the copermittees' MOU, which establishes several working bodies the MOU defines as: "Committees, Subcommittees, Workgroups, Sub-workgroups, or any other group of Copermittees assembled to conduct work required by, for, or in furtherance of, compliance with the Permit …."[293] The MOU established a WURMP sub-workgroup to meet four times per year, unless otherwise approved by all the copermittees, to develop and implement the WURMP and the watershed activities required by the test claim permit.[294] However, the prior permit also required a WURMP and required the copermittees to collaborate to address common issues and to promote consistency among the WURMPs, and required the MOU to provide a management structure that identified joint responsibilities and collaborative arrangements, so the working bodies were likely organized under the prior permit's MOU.[295] The Test Claim Decision limited reimbursement for collaboration to the new activities in Part E.2.f., which the Commission found mandated a new program or higher level of service.[296] Thus,

[293] Exhibit U (13), Test Claim, page 499 (MOU).

[294] Exhibit U (13), Test Claim, page 527 (MOU).

[295] Exhibit A, Amended Test Claim Decision on Remand, page 90; see also pages 111-112 for a discussion of the MOU under the prior permit.

[296] Exhibit A, Amended Test Claim Decision on Remand, page 90. The Decision states: "As to part E.2.g., although the 2001 (in parts J.1. & J.2.) and 2007 permits both require

substantial evidence in the record is required to show that the costs incurred to "organize and administer the WURMP Working Bodies" are reasonably necessary to comply with the mandate to "develop and implement an ***updated*** Watershed Urban Runoff Management Program." In addition, the claimant's reimbursement request for developing and updating WURMP work products "that includes all the elements described in Permit Part E.2." is overly broad, as the Commission only approved Parts E.2.f. (watershed activities, including watershed education activities) and E.2.g. (copermittee collaboration) for reimbursement.

Accordingly, Section IV.B.2. of the Parameters and Guidelines identifies the following reimbursable activities:

1. Watershed Urban Runoff Management Program (WURMP) (Parts E.2.f, E.2.g, and the first sentence in Part L.1.). No later than March 24, 2008, the claimants shall comply with the following activities:[297]

   a. Each Copermittee shall collaborate with other Copermittees within its Watershed Management Area identified in Table 4 of the test claim permit, with frequent regularly scheduled meetings, to develop and implement an ***updated*** WURMP for each watershed to reduce the discharge of pollutants from the MS4 to the MEP (maximum extent practicable) and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, as specified below.

   b. Update the WURMP to include and implement *only* the following elements:

      i. 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. 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. Watershed Education Activities are outreach and training activities that

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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."

[297] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

address high priority water quality problems in the WMA.[298] These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

ii. Submit a Watershed Activities List with each updated 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.

iii. Each activity on the Watershed Activities List shall include the following information:

- A description of the activity;
- A time schedule for implementation of the activity, including key milestones;
- An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
- A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
- A description of how the activity is consistent with the collective watershed strategy;
- A description of the expected benefits of implementing the activity; and
- A description of how implementation effectiveness will be measured.

iv. Reimbursement for the Watershed Activities List identified in Section IV.B.2.b.ii. and iii. of these Parameters and Guidelines includes the following:

- The *one-time* activity and pro-rata share of costs to develop a data tracking and analysis system for gathering and reporting the new data required to be included in the Watershed Activities List identified above. Reimbursement is ***not*** required to the extent that the data tracking and analysis system was developed for the purpose of submitting the WURMP annual report as a whole.

[298] Exhibit U (13), Test Claim, page 143 (Order No. R9-2007-0001, Part E.2.f.1.a. & b.).

- The *ongoing* activity of recording the data identified above in the data tracking system to prepare the Watershed Activities List.

c. 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.

4. Regional Urban Runoff Management Program (Part IV.B.3. of the Parameters and Guidelines)

The Commission approved the following new state-mandated activities based on Parts F.1.-F.3. of the test claim permit relating to the Regional Urban Runoff Management Program (RURMP):[299]

> Each copermittee shall collaborate with the other copermittees to develop, implement, and update as necessary a RURMP 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 RURMP 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

[299] RURMP is defined in Attachment C of the test claim permit as: "A written description of the specific regional urban runoff management measures and programs that the Copermittees will collectively implement to comply with this Order and ensure that pollutant discharges in urban runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards." Exhibit U (13), Test Claim, page 350 (Order No. R9-2007-0001, Attachment C).

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,[300] and,

3. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.[301]

These activities are identified in the Parameters and Guidelines, with clarifying modifications as discussed below.

There is some overlap between Parts F.1.-F.3. and other parts of the permit the Commission found reimbursable. For example, collaboration is also required in Part L.1., and the Commission approved reimbursement for the requirement in Part L.1. for the copermittees to collaborate with each other to address common issues, and to plan and coordinate activities, which were found to mandate a new program or higher level of service.[302] Thus, the Parameters and Guidelines identify Part L.1. together with Parts F.1.-F.3.

However, the requirement in Part F.3., that the RURMP be developed and implemented to "facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs," needs further interpretation. Part I also requires program effectiveness assessment. As described in the next section below, the Commission

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[300] Section G.2. of the Test Claim Permit describes the standardized fiscal analysis method as follows: "As part of the Regional Urban Runoff Management Program, the Copermittees shall 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). This standardized method shall:

a. Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.

b. Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program.

c. Identify a metric or metrics to be used to report program component and total program expenditures."

Exhibit U (13), Test Claim, page 305 (Order No. R9-2007-0001, Part G.2.)

[301] Exhibit A, Amended Test Claim Decision on Remand, pages 91-92, 96, 144-145.

[302] Exhibit A, Amended Test Claim Decision on Remand, pages 109-112, 150.

approved reimbursement to annually assess the jurisdictional and watershed programs, as required by Parts I.1. and I.2., and to conduct a long-term effectiveness assessment (a one-time activity) that addresses the jurisdictional, watershed, and regional programs "no later than 210 days in advance of the expiration of this [test claim permit]," as required by Part I.5. Conducting the assessments is provided for in Part I, so "*facilitate* the assessment . . . of the jurisdictional, watershed, and regional programs" does not mean to actually assess these programs. The general rule is that materially different language in a statute or regulation on the same or related subjects indicates a different meaning is intended.[303] In addition, it is noteworthy that the claimants did not plead Part I.3. of the test claim permit, which addresses annually assessing the effectiveness of the regional program, so this activity is not eligible for reimbursement.[304] Neither the test claim permit nor the Fact Sheet explains what "facilitate" the assessment of the effectiveness of the jurisdictional, watershed, and regional programs means. The best description of facilitating assessments is in the MOU, which lists the general responsibilities of regional workgroups and sub-workgroups (or working bodies), including their roles in facilitating consistency in the program and developing, annually reviewing, and updating as necessary subject-specific standards for assessments. It states in pertinent part:

> The purpose of Regional Workgroups and Sub-workgroups is to provide regional coordination of urban runoff management activities within assigned subject areas, to develop and implement recommended Regional General Programs, and to provide coordination of activities with stakeholders and interested parties. Regional Workgroups are advisory to the Management Committee through the Planning Subcommittee. Regional Sub-workgroups are advisory to the Regional Workgroups to which they are subordinate.
>
> [¶] . . . [¶]
>
> At a minimum, each Regional Workgroup and Sub-workgroup shall have the following responsibilities within its assigned subject area:
>
> [¶] . . . [¶]
>
> *Facilitate* consistency in the development, implementation, review, and revision of General Programs, and the development of associated reports and work products;

303 *Trancas Property Owners Assoc. v. City of Malibu* (1998) 61 Cal.App.4th 1058, 1061. The California Supreme Court said that using different words "is significant" to show a different intention existed. *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 507.

304 Exhibit U (13), Test Claim, pages 201, 209-212 (Order No. R9-2007-0001).

> Develop, annually review, and update as necessary subject-specific standards for reporting, *assessment,* and data and information management;[305]

As the claimants stated in their Proposed Parameters and Guidelines:

> With limited exception, all Copermittee collaboration and coordination is carried out through these Working Bodies [pursuant to the MOU].[306] Working Body meetings typically address regional, jurisdictional, and watershed issues or functions concurrently because a clear separation between them does not exist. The types of costs presented below [proposed reasonably necessary activities] therefore apply to parts L, F, and I.5.[307]

The MOU and the claimants' comment comport with the plain meaning of "facilitate." The courts look to dictionary definitions to determine the usual and ordinary meaning of a term in a statute or regulation.[308] The dictionary defines "facilitate" as "to make easier" or to "help bring out."[309] The MOU's description of developing, annually reviewing, and updating as necessary subject-specific standards for assessments fall within that definition. Thus, the Parameters and Guidelines clarify that reimbursement for this activity includes "facilitating consistency in the assessment programs and developing, annually reviewing, and updating as necessary subject-specific standards for the assessments."

In addition, Section F. of the test claim permit states "The Copermittees shall implement all requirements of section F of this Order no later than 365 days after adoption of this Order," or by January 24, 2008.[310] By an Addendum of the Regional Board dated December 12, 2007, that date was further delayed until March 24, 2008, as follows:

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[305] Exhibit U (13), Test Claim, pages 513-514 (MOU). Emphasis added.

[306] According to the MOU: "Working Body means Committees, Subcommittees, Workgroups, Sub-workgroups, or any other group of Copermittees assembled to conduct work required by, for, or in furtherance of, compliance with the Permit (Figure A identifies the Working Bodies established in this MOU)." Exhibit U (13), Test Claim, page 499 (MOU).

[307] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 53.

[308] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 567.

[309] Exhibit U (5), Merriam-Webster Dictionary, facilitate, https://www.merriam-webster.com/dictionary/facilitate#:~:text=transitive%20verb,make%20easier%20%3A%20help%20bring%20about (accessed on June 9, 2023).

[310] Exhibit U (13), Test Claim, page 304 (Order No. R9-2007-0001).

c. Regional Urban Runoff Management Program, Section F, . . . "The Copermittees shall implement all requirements of section F of this Order no later than ~~365~~ **425** days after adoption of this Order, unless otherwise specified in this Order."[311]

This information is included in the Parameters and Guidelines.

The claimants also request reimbursement for the following costs and alleged "reasonably necessary" activities:

- Regional Coordination of Copermittees and Regional Working Bodies. Claimant's costs to develop, distribute, review, and present work products necessary for regional planning, coordination, and collaboration amongst Copermittees and Regional Working Bodies and the costs of written work products, presentations at meetings, and other means of coordination and review such as email.
- Working Body Support and Representation. [Fn. omitted.] Claimant's costs to organize and administer the Regional Working Bodies and the costs of activities: 1) to perform the responsibilities of chairs co-chairs, and secretaries, 2) attend and participate in meetings (including preparation and travel time), and 3) planning, discussion, and coordination telephone calls, emails, and video conferencing. Required tasks include: 1) developing and distributing meeting agendas and notes, and 2) distributing, presenting, reviewing, and approving any of the Regional Work Products described below.
- Regional Work Product Development. Claimant's personnel costs to develop and update any regional work product identified in an approved Regional Working Body Work Plan and Budget and the costs of such activities including:
    - Working Body Status Reports: Regional Working Body status reports developed for dissemination to Copermittees and interested parties. Status reports typically describe Regional Working Body activities and accomplishments, success in completing scheduled tasks, and key issues, activities, and tasks to be addressed;
    - Annual Work Plans and Budgets. Both individual Regional Working Body Work Plans and Budgets and the Copermittees' Annual Regional Work Plan and Regional Shared Costs Budget;
    - Regional URMP Annual Reports. Both the annual report content provided by individual Regional Working Bodies and the completion of the consolidated Regional URMP Annual Report;

[311] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

- Regional Standards. 1) Regional reporting, assessment, and program data and information management standards; and 2) regional standards and approaches for the management of specific source categories or types. It applies to work products developed by individual Regional Working Bodies, their consolidation into comprehensive, regional standards documents, and periodic updates as necessary for each; and
- Other Regional Work Products. Any Regional Working Body Work Product not specifically identified above, but required by the Permit or necessary to achieve or maintain Permit compliance. This includes, but is not limited to:
  - A formal agreement between the Copermittees that provides a management structure for meeting the requirements of the Permit. [Fn. omitted.]
  - By-laws for the conduct of Copermittee Working Bodies.
  - A standardized method and format for annually conducting and reporting fiscal analyses of urban runoff management programs.[312]
  - A Long Term Effectiveness Assessment ("LTEA") that addresses at least the following: review and assessment of jurisdictional, watershed, and regional program effectiveness (including analysis of outcome levels 1-6); assessment of the effectiveness of the Receiving Waters Monitoring Program in meeting its ability to answer the five core management questions, and; evaluation of the relationship of program implementation to changes in water quality. This may also include shared or individual Copermittee costs of collaboratively developing assessment methods and approaches, developing or maintaining data tracking methods or systems, and of performing data collection, tracking, management, analysis, and reporting (including staff training), as well as purchases and upgrades to equipment, hardware, and software necessary to support these data management functions.
  - Regional Implementation of Programs and Activities. Claimant's personnel costs for the ongoing implementation of regionally-funded and/or conducted programs arid costs of materials production and distribution, equipment, supplies, fees, and media. Regional programs and activities include:
    - Education of Residential Target Audiences

[312] The standardized fiscal method must be submitted to the Regional Board by January 31, 2009. It is a one-time requirement.

- Annual Regional Effectiveness Assessments
- Programs and Activities Included as Part of the Regional URMP

- Cost Accounting and Documentation. Claimant's personnel costs to monitor and conduct cost accounting for all expenditures incurred in accordance with Regional Working Body Work Plans and Budgets and the Copermittees' Annual Regional Work Plan and Regional Shared Costs Budget and costs associated with documenting and monitoring expenditures (e.g., developing and distributing budget balance and expenditure reports, claim submittal forms) incurred pursuant to approved Regional Working Body Work Plans and Budgets. It also includes the individual Copermittee costs of developing or maintaining data tracking methods or systems, and of performing data tracking and analysis (including staff training), as well as the costs of purchases and upgrades to equipment, hardware, and software necessary to support expenditure tracking, analysis, and reporting.
- External Coordination. Claimant's personnel costs to coordinate Regional Working Body content, issues, programs, and activities with external organizations and parties and coordination with Regional Board staff, participation at professional organizations and societies, and representation on applicable California Stormwater Quality Association ("CASQA") working bodies.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).[313]

The Water Boards object to the proposed qualifying language such as "costs, including personnel costs" and "costs including, but not limited to . . . ." The Water Boards are also concerned about the lack of specificity in the claimant's proposed language. Further, the Water Boards disagree that training vendors is reimbursable because vendors that bid on and carry out contracted activities should be well-versed or expert in the services they provide.[314] The Water Boards also point to the claimants' identification of costs to purchase upgrades to equipment, hardware and software to support data analysis, tracking and reporting, saying such costs should be limited to those incurred after January 24, 2007 and that claimants should be required to demonstrate that the purchases are necessary to comply with the test clam permit but not necessary to comply with the prior permit. According to the Water Boards, the claimants should be required to "demonstrate how they intend to exclude, in a transparent manner, the percentage of costs of equipment and upgrades used for

[313] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 53-56.

[314] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 6, 15.

unreimbursable purposes . . . in a verifiable manner."[315] Additionally, the Water Boards specifically object to the claimant's proposed Report of Waste Discharge (ROWD) as a regional work product because a ROWD was not approved by the Commission and is required by federal law.[316]

In rebuttal comments, the claimants revised their proposed activities to reduce open ended and vague activities.[317] The claimants disagree that they have not adequately described the tasks necessary to perform the Regional Collaboration requirements, as the tasks are described in the proposed activities listed above.[318] The claimants also disagree that vendor training should not be recoverable.[319] The claimants acknowledge that costs for computer equipment should be prorated to cover only the reimbursable activities.[320] The claimants also agree that the costs of preparing and submitting a ROWD should not be reimbursable, and deleted it from their proposed activities.[321]

First, the direct costs for personnel, materials and supplies, fixed assets, travel, and contracted services that relate directly to the state-mandated activities may be claimed under Section V.A.

Second, the claimants' reimbursement request to organize and administer the Regional Working Bodies and to adopt a formal agreement between the copermittees that provides a management structure for meeting the requirements of the test claim permit are required by Part L.1.a.3.-6. of the test claim permit that governs all copermittee collaboration, and is accounted for as a one-time activity in Section IV.A.1. of the Parameters and Guidelines. Similarly, conducting the Long Term Effectiveness Assessment (LTEA) is required by Part I.5. of the Test Claim permit, and as described below, is identified as a one-time reimbursable activity in Section IV.A.2. of the Parameters and Guidelines.

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[315] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, pages 6, 14-15.

[316] Exhibit D, Water Boards' Comments on the Proposed Parameters and Guidelines, page 15.

[317] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 5.

[318] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 27.

[319] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, pages 5-6, 27.

[320] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 27.

[321] Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 28.

In addition, the reimbursement request for regional implementation of programs and activities, including the "annual regional effectiveness assessments" is denied. As indicated above, the claimants did not plead Part I.3. of the test claim permit, which addresses the regional annual effectiveness assessment.

Moreover, much of the claimants' proposed language is overbroad and not narrowly tailored to the state-mandated activities approved by the Commission. These include, for example, "Claimant's personnel costs to develop and update *any regional work product* identified in an approved Regional Working Body Work Plan and Budget;" "Any Regional Working Body Work Product not specifically identified above, but required by the Permit or necessary to achieve or maintain Permit compliance;" "Claimant's personnel costs to monitor and conduct cost accounting for all expenditures incurred in accordance with Regional Working Body Work Plans and Budgets;" and "Claimant's personnel costs to coordinate Regional Working Body content, issues, programs, and activities with external organizations and parties and coordination with Regional Board staff, participation at professional organizations and societies, and representation on applicable California Stormwater Quality Association ("CASQA") working bodies." Reasonably necessary activities are limited to those activities necessary to comply with the statutes, regulations and other executive orders that the Commission found impose a state-mandated program.[322]

In addition, there is no evidence in the record that the activities identified by the claimants are reasonably necessary to comply with the mandated activities.

Thus, Section IV.B.3. of the Parameters and Guidelines states:

> 2. Regional Urban Runoff Management Program (Parts F.1.-F.3., and the first sentence of Part L.1.)
>
> No later than March 24, 2008, each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that 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.[323] The Regional Urban Runoff Management Program shall include the following:
>
> a. Develop and implement a Regional Residential Education Program which shall include the following:
>
> - 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.

[322] California Code of Regulations, title 2, section 1183.7(d).

[323] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

- Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a. (bacteria, nutrients, sediment, pesticides, and trash).

b. Develop the standardized fiscal analysis method required in Section G. of the permit. The standardized fiscal analysis method shall:

- Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.
- Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program.

c. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs. This includes facilitating consistency in the assessment programs and developing, annually reviewing, and updating as necessary subject-specific standards for the assessments.

5. Program Effectiveness Assessments (Sections IV.A.2., IV.B.4. of the Parameters and Guidelines)

The Commission approved the following state-mandated activities from Parts I.1. (annual assessment of the JURMP), and I.2. (annual assessment of the WURMP) of the test claim permit:

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 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[324] 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 of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

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[324] 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." Exhibit U (13), Test Claim, pages 345-346 (Order No. R9-2007-0001, Attachment C).

(5) Utilize Implementation Assessment,[325] Water Quality Assessment,[326] and Integrated Assessment,[327] 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.[328] 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

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[325] Implementation Assessment is defined in Attachment C of the test claim permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measurable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed." Exhibit U (13), Test Claim, page 347 (Order No. R9-2007-0001, Attachment C).

[326] Water Quality Assessment is defined in Attachment C of the test claim permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges." Exhibit U (13), Test Claim, page 352 (Order No. R9-2007-0001, Attachment C).

[327] Integrated Assessment is defined in Attachment C of the test claim 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." Exhibit U (13), Test Claim, page 347 (Order No. R9-2007-0001, Attachment C).

[328] Section A of the permit governs discharge prohibitions and receiving water limitations. Exhibit U (13), Test Claim, pages 265-267 (Order R9-2007-0001.).

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4) 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 [sic] 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.[329] 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.[330]

As indicated above, the effectiveness assessment of the JURMP is required to be included in the annual report, which as stated previously, is due September 30, 2008 and every September 30 thereafter for the previous fiscal year.[331] In addition, the effectiveness assessment of each watershed group of permittees (as identified in Table 4 of the test claim permit) is required to be reported in the annual WURMP report, which is due by January 31, 2009 and every January 31 thereafter for the previous fiscal year.[332] The Parameters and Guidelines identify these activities in Section IV.B.4. and these reporting due dates are included in the Parameters and Guidelines.

The Commission also approved reimbursement to conduct a one-time, long term effectiveness assessment.

Long Term Effectiveness Assessment (Part I.5.):

a. Collaborate with the other Copermittees to develop a Long Term Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be

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[329] Section A of the permit governs prohibitions and receiving water limitations. Exhibit U (13), Test Claim, pages 265-267 (Order R9-2007-0001.)

[330] Exhibit A, Amended Test Claim Decision on Remand, pages 145-149.

[331] Exhibit U (13), Test Claim, page 319 (Order R9-2007-0001.)

[332] Exhibit U (13), Test Claim, page 327 (Order R9-2007-0001.)

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)[333] 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 Management Programs and Watershed

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[333] 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." Exhibit U (13), Test Claim, page 309 (Order No. R9-2007-0001).

> Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.[334]

There is some overlap between Part I.5. (LTEA) and the first sentence of Part L.1. The Commission approved the requirement in Part L.1. for collaboration among all copermittees to address common issues, and to plan and coordinate the required new mandated activities.[335] Thus, the Parameters and Guidelines combine Part L.1. with the requirement in Part I.5. to collaborate.

In addition, collaborating on and submitting the long term effectiveness assessment to the Regional Board is not an annual requirement. Rather, it is submitted once, "no later than 210 days in advance of the expiration of the [test claim permit]."[336] Therefore, this is listed as a one-time activity in section IV.A.2. of the Parameters and Guidelines.

The claimants also request reimbursement for the following alleged reasonably necessary activities:

- Program Development. Claimant's costs to develop and annually update JURMP and WURMP effectiveness assessment methods, approaches, and documentation (e.g., policies, procedures, manuals and forms), as well as data management systems and tools necessary to support the implementation of effectiveness assessments.
- Program Implementation. Claimant's personnel costs to conduct the annual JURMP and WURMP effectiveness assessments in accordance with the Copermittee' s effectiveness assessment program and the requirements of Parts I.1 and I.2 of the Permit and the costs of purchases and upgrades to equipment, hardware, and software necessary to support data tracking, analysis, and reporting.
- Employee and Vendor Annual Training. Claimant's costs to develop, update, and conduct training of staff responsible for developing or conducting effectiveness assessments and the costs of training claimant and vendor employees who perform tasks necessary to implement assessment functions during the life of the Permit.
- JURMP and WURMP Modifications. Claimant's personnel costs to modify the JURMP and WURMP based upon the results of effectiveness assessments in accordance with the requirements of Parts· I.1.b and I.2.b of the Permit and the costs of the development

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[334] Exhibit A, Amended Test Claim Decision on Remand, pages 149-150.

[335] Exhibit A, Amended Test Claim Decision on Remand, pages 112, 150.

[336] Exhibit A, Amended Test Claim Decision on Remand, pages 105, 107, 149.

and implementation of plans and schedules to address the identified modifications and improvements.

- Report Writing. Claimant's personnel costs to develop and write reports required by Parts I.1.c and I.2.c of the Permit.
- Employee Supervision and Management. (See Section IV.A).
- Contracted Services. (See Section IV.A).[337]

First, the direct costs for personnel, materials and supplies, fixed assets, and contracted services that relate directly to the state-mandated activities may be claimed under Section V.A.

In addition, the claimants' request for reimbursement "to develop and write reports" required as part of the annual assessments of the JURMP and WURMP is already identified in the mandated activities. As indicated above, the Commission approved the following activities required by Part I.1.c. and I.2.c. as reimbursable state-mandated activities:

- 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.[338]
- 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.[339]

The annual reports for the JURMP and WURMP are governed by Part J.3. of the test claim permit, which generally requires the copermittees to submit detailed annual reports comprehensively describing all their efforts to meet the JURMP and WURMP requirements, including reporting the assessment of the effectiveness of these programs.[340] The claimants only claimed Part J. of the test claim permit for street sweeping (J.3.a.(3)(c)(x.-xv.) and conveyance system cleaning (J.3.a.(3)(c)(iv.-viii.), which are discussed above. However, based on the Commission's approval of Parts I.1.c. and I.2.c. of the test claim permit, it is reimbursable to *include* in the annual reports the program effectiveness assessments for the JURMP and the WURMP.

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337 Exhibit E, Claimants' Rebuttal Comments and Revised Proposed Parameters and Guidelines, page 61.

338 Exhibit A, Amended Test Claim Decision on Remand, pages 101, 147.

339 Exhibit A, Amended Test Claim Decision on Remand, pages 103, 149.

340 Exhibit U (13), Test Claim, pages 324, 327 (Order No. R9-2007-0001, Part J.3.a.3.i., JURMP and J.3.b.2.m., WURMP).

There is no evidence in the record supporting any of the claimants' proposed reasonably necessary activities to comply with the mandate in Part I, so these requested activities and costs are denied. Proposed reasonably necessary activities must be supported by substantial evidence in the record explaining why they are necessary to perform the state-mandated activity in accordance with the Government Code and Commission's regulations.[341] In addition, the Commission's regulations require that oral or written representations of fact shall be under oath or affirmation and if written must be signed under penalty of perjury by persons who are authorized and competent to do so.[342]

Accordingly, Section IV.A.2. of the Parameters and Guidelines authorizes one-time reimbursement to develop the Long Term Effectiveness Assessment as follows:

2. Long Term Effectiveness Assessment (Parts I.5 and the first sentence in Part L.1.):
    a. Collaborate with the other Copermittees to develop a Long Term 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 the test claim permit.
    b. The LTEA shall be designed to address each of the objectives listed below, and to serve as a basis for the Copermittees' Report of Waste Discharge (ROWD) for the next permit cycle:
        - Assessment of watershed health and identification of water quality issues and concerns.
        - Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns.
        - Evaluation of the need to address additional pollutant sources not already included in Copermittee programs.
        - Assessment of progress in implementing Copermittee programs and activities.
        - Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources.
        - Assessment of changes in discharge and receiving water quality.

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[341] Government Code sections 17557(a), 17559; California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

[342] California Code of Regulations, title 2, section 1187.5.

- Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality.
- Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

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 percent reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80 percent confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

Section IV.B.4. of the Parameters and Guidelines identifies the annual program effectiveness assessments of the JURMP and WURMP as follows:

4. Program Effectiveness Assessments (Parts I.1., I.2.)

   a. Annual Effectiveness Assessment of Jurisdictional Urban Runoff Management Program (Part I.1.)

      1. Each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

         (i) Specifically assess the effectiveness of each of the following:

            - Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
            - Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge Detection and Elimination, and Education); and
            - Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items listed above.

(iii) Utilize outcome levels 1-6, as defined in Attachment C to Order No. R9-2007-0001, to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible.

(iv) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible.

(v) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, as defined in Attachment C of Order No. R9-2007-0001, where applicable and feasible.

2. 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 (Prohibitions and Receiving Water Limitations).

   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.

3. Each copermittee shall *include* in the Jurisdictional Urban Runoff Management Program Annual Report due September 30, 2008, and every September 30 thereafter for the previous fiscal year, a report on the effectiveness assessment conducted the prior fiscal year as implemented under each of the requirements listed above.

b. Annual Effectiveness Assessment of the Watershed Urban Runoff Management Program Watershed (Part I.2.)

   1. Each watershed group of Copermittees identified in Table 4 of the test claim permit shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(i) Specifically assess the effectiveness of each of the following:

- Each Watershed Water Quality Activity implemented;
- Each Watershed Education Activity implemented; and
- Implementation of the Watershed Urban Runoff Management Program as a whole.

(ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items that are part of the WURMP listed above.

(iii) Utilize outcome levels 1-6 to assess the effectiveness of each Watershed Water Quality Activity implemented and each Watershed Education Activity implemented, where applicable and feasible.

(iv) 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.

(v) 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.

(vi) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness of each of the bulleted items that are part of the WURMP listed above, where applicable and feasible.

(vii) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

2. 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 (Prohibitions and Receiving Water Limitations).

   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.

3. Each watershed group of Copermittees shall *include* in the Watershed Urban Runoff Management Program Annual Report January 31, 2009 and every January 31 thereafter, a report on the effectiveness assessment conducted the prior fiscal year as implemented under each of the requirements listed above.

Reimbursement is not required to conduct the annual effectiveness assessment of the Regional Urban Runoff Management Program.

6. The Commission Has No Authority to Approve Reimbursement for Interest and Legal and Expert Costs in These Parameters and Guidelines as Requested by the Claimants.

The claimants request reimbursement for any owed interest from the reimbursements, as well as recoverable legal and expert costs to process the Test Claim.[343] This request is denied.

Administrative agencies, such as the Commission, are entities of limited jurisdiction that have only the powers that have been conferred on them, expressly or by implication, by statute or Constitution.[344]

While article XIII B, section 6 and Government Code section 17514 require reimbursement for all costs mandated by the state to comply with the state-mandated program, the Commission has no authority to approve reimbursement for interest. Government Code 17561.5 only authorizes reimbursement for interest if the Controller's payment of the claim is made more than 365 days after adoption of the statewide cost estimate:

> The payment of an initial reimbursement claim by the Controller shall include accrued interest at the Pooled Money Investment Account rate, if the payment is being made more than 365 days after adoption of the

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[343] Exhibit H, Claimant's Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 11; Exhibit M, Claimants' Rebuttal Comments, pages 15, 20.

[344] *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

> statewide cost estimate for an initial claim. Interest shall begin to accrue as of the 366th day after adoption of the statewide cost estimate for the initial claim. Payment of a subsequent claim that was reported to the Legislature pursuant to paragraph (2) of subdivision (b) of Section 17562 shall include accrued interest at the Pooled Money Investment Account rate for any unpaid amount remaining on August 15 following the filing deadline. Interest shall begin to accrue on August 16 following the filing deadline.

In addition, the Commission previously approved the *Mandate Reimbursement Process I and II* programs authorizing reimbursement for "[a]ll costs incurred by local agencies and school districts in preparing and presenting successful test claims . . . [including] the following: salaries and benefits, materials and supplies, consultant and legal costs, transportation, and indirect costs."[345] However, the Legislature has suspended that program for many years pursuant to Government Code section 17581, assigning a zero dollar appropriation for the program and making it voluntary during the suspended budget years.[346] Thus, there are no costs mandated by the state for expert or legal costs to file a successful test claim during the years the program is suspended.

Accordingly, the Commission has no authority to approve reimbursement for interest and legal and expert costs in these Parameters and Guidelines as requested by the claimants.

D. <u>Claim Preparation and Submission (Section V. of the Parameters and Guidelines)</u>

1. Training

Section V. of the Parameters and Guidelines (Claim Preparation and Submission) identifies the direct costs that are eligible for reimbursement. Training costs are included in Section V.6. because, as indicated above, the state-mandated activities include training. Accordingly, Section V.6. on Training provides:

> Report the cost of training an employee as specified in Section IV of this document. Report the name and job classification of each employee

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[345] Commission on State Mandates, Parameters and Guidelines Amendment, *Mandate Reimbursement Process I and II*, 12-PGA-03 (CSM 4204, 4485, and 05-TC-05), adopted May 24, 2013, https://www.csm.ca.gov/decisions/052813a.pdf (accessed on July 3, 2025).

[346] Statutes 2007, chapter 171 (SB 77), line item 8885-295-0001, schedule 3 (y), suspending the program for fiscal year 2007-2008, when the Test Claim was filed. The suspension continues today; see, Statutes 2024, chapter 22 (AB 107), line item 8885-295-0001, schedule 5 (aa), (bb). The suspension process in Government Code section 17581 has been upheld by the courts and determined constitutional. *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287.

preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A.1., Salaries and Benefits, and A.2., Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element A.3., Contracted Services.

2. Travel

In addition, Part E.2 (Watershed Urban Runoff Management Program) also mandates that the collaboration with other copermittees within its Watershed Management Area, "with frequent regularly scheduled meetings."[347] And other parts require copermittee collaboration. Thus, Section V.4. identifies the direct costs for travel as follows:

> Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

All other direct costs identified in the boilerplate language of Section V. of the Parameters and Guidelines are reimbursable as specified.

E. <u>The Claimants' Proposed Unit Cost Reasonable Reimbursement Methodologies (RRMs) Are Not Supported by Substantial Evidence or Evidence that the Proposals Reasonably Represent the Actual Costs Mandated by the State for All Eligible Claimants to Comply with the Higher Levels of Service Approved by the Commission.</u>

Government Code section 17561 provides that the state shall reimburse each local agency for all costs mandated by the state and that payment of the claim is subject to the Controller's audit of the records of any local agency "to verify the actual amount of the mandated costs."[348] The Controller may reduce any claim the Controller determines is excessive or unreasonable.[349]

Government Code section 17557(b) provides, however, that "[i]n adopting parameters and guidelines, the commission *<u>may</u>* adopt a reasonable reimbursement methodology,"

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[347] Exhibit U (13), Test Claim, page 146, (Order No. R9-2007-0001, Part E.2.g.).

[348] Government Code section 17561(d)(1)(C).

[349] Government Code section 17561(d)(1)(C).

or RRM. An RRM, as defined in Government Code section 17518.5, is a general allocation formula, unit cost, or other approximation of local costs mandated by the state, which may be adopted by the Commission for the reimbursement of an approved activity, so that the claimants do not need to provide detailed documentation of the actual costs to the State Controller's Office for its review and audit of the claimants' reimbursement claims. When an RRM is adopted, the Controller simply reviews the claimant's application of the RRM to the costs claimed.[350] Government Code section 17518.5 states the following:

(a) "Reasonable reimbursement methodology" means a formula for reimbursing local agencies and school districts for costs mandated by the state, as defined in Section 17514.

(b) A reasonable reimbursement methodology shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs.

(c) A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner.

(d) Whenever possible, a reasonable reimbursement methodology shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state, rather than detailed documentation of actual local costs. In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.

(e) A reasonable reimbursement methodology may be developed by any of the following:

(1) The Department of Finance.

(2) The Controller.

(3) An affected state agency.

(4) A claimant.

(5) An interested party.

(f) This section shall become operative on July 1, 2019.

The Commission has adopted RRMs in the past when the costs were consistent and repetitive in nature (like counting widgets) and the RRM proposal was supported by

[350] Government Code section 17561(d)(2).

substantial evidence that the unit cost and formula reasonably represented the costs mandated by the state for all eligible claimants.

For example, in 2011, the Commission approved a unit cost and formula RRM in *Municipal Storm Water and Urban Runoff Discharges,* 03-TC-04, 03-TC-20, 03-TC-21 to reimburse eligible claimants in the Los Angeles region for the ongoing direct and indirect costs to maintain trash receptacles at $6.74 for each trash collection or pickup, multiplied by the annual number of trash collections, subject to the limitation of no more than three pickups per week. This RRM was based on declarations filed by the claimants, sworn testimony, and other supporting information including contracts and surveys.[351]

In 2015, the Commission approved a unit cost RRM in an amendment to the Parameters and Guidelines for the *Immunization Records – Pertussis* program, 14-PGA-01 (11-TC-02). That program reimburses school districts to annually verify whether pupils entering the 7th through 12th grades are fully immunized against pertussis, including all pertussis boosters appropriate for the pupil's age. The unit cost RRM of $9.17 per eligible pupil, which covers both direct and indirect costs, was adopted for future reimbursement claims based on the weighted average of costs identified and already claimed in the initial reimbursement claims filed with the State Controller's Office and signed under penalty of perjury, less any outliers that were identified, and the costs were supported by a declaration from the Controller's Office and CDE enrollment data.[352]

The Commission has also denied proposed unit cost RRMs when the proposal was based solely on survey or time study responses, which are generally considered hearsay and are not sufficient by themselves to support a finding under the Commission's regulations.[353] For example, in 2012, the Commission considered a proposed unit cost RRM in *Voter Identification Procedures,* 03-TC-23.[354] The test claim

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[351] Commission on State Mandates, Parameters and Guidelines, *Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-20, 03-TC-21, adopted March 24, 2011, https://www.csm.ca.gov/decisions/033011c.pdf (accessed on July 3, 2025).

[352] Commission on State Mandates, Parameters and Guidelines Amendment, *Immunization Records – Pertussis,* 14-PGA-01 (11-TC-02), adopted September 25, 2015, https://www.csm.ca.gov/decisions/doc25.pdf (accessed onJuly 3, 2025).

[353] California Code of Regulations, title 2, section 1187.5.

[354] Commission on State Mandates, Adopted Final Staff Analysis, Proposed Parameters and Guidelines, *Voter Identification Procedures,* 03-TC-23, adopted March 23, 2012, https://www.csm.ca.gov/matters/03-TC-23/Item5-StaffAnalysisPsGs.pdf (accessed on July 3, 2025); Minutes of the March 23, 2012 Commission hearing, adopted May 25,

statute requires the elections official to compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration and if the signatures do not compare, to reject the provisional ballot. The test claimant proposed a unit cost RRM of 1.88 minutes per provisional ballot, determined from "various survey data and time study data" from counties, multiplied by average salaries of employees, and then adjusted each year by the Implicit Price Deflator. The Commission did not adopt the RRM because the county responses identified in the spreadsheets of survey responses were out-of-court hearsay statements that were *not* provided under oath or affirmation from the responder. Also, it was also not clear from the record and there was no direct evidence explaining if the reported times in the spreadsheet to comply with the mandate were estimated by counties or were recorded as the actual time to check a signature on a provisional ballot during an election. If the times were estimated, there was no indication how time was estimated or who performed the estimate. Thus, the adopted Parameters and Guidelines required the claimants to submit reimbursement claims with the State Controller's Office based on a showing of actual costs incurred.[355]

The RRMs proposed here are more complicated. In this case, the reimbursable program has several different parts, with several proposed RRMs for each part. In addition, the period of reimbursement ended on December 31, 2017, and the claimants indicate that reimbursement ended June 26, 2013 (the day before the next permit was adopted) or June 26, 2015 (the day before the implementation of the next JURMP) and, thus, the costs were already incurred.[356] As indicated above, however, the claimants allege they no longer possess the source documents supporting the actual costs incurred due to the length of time this case has been pending.

The claimants' initial proposed RRMs was estimated to provide total reimbursement at over $252 million.[357] The claimants have recently modified their proposals to reduce

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2012, https://www.csm.ca.gov/matters/03-TC-23/032312minutes.pdf (accessed on July 3, 2025).

[355] Commission on State Mandates, Adopted Final Staff Analysis, Proposed Parameters and Guidelines, *Voter Identification Procedures*, 03-TC-23, adopted March 23, 2012, https://www.csm.ca.gov/matters/03-TC-23/Item5-StaffAnalysisPsGs.pdf (accessed on July 3, 2025); Minutes of the March 23, 2012 Commission hearing, adopted May 25, 2012 https://www.csm.ca.gov/matters/03-TC-23/032312minutes.pdf (accessed on July 3, 2025).

[356] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 27-28.

[357] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 48.

some of these costs, as explained in the analysis below.[358] The proposals do *not* take into account offsetting revenues, so to the extent the claimants used funds that are *not* their proceeds of taxes on the reimbursable activities (i.e., revenue from fees or assessments, grant funding), those revenues would have to be deducted from the costs claimed under any approved RRM and the Controller could audit the reimbursement claims for this purpose.

The claimants developed the proposals by hiring John Quenzer, a principal scientist at D-Max Engineering, Inc. to evaluate the following data retained by the County of San Diego, the principal permittee, relating to the test claim permit: 2011 county surveys, declarations from copermittees, JURMP annual reports, WQIP annual reports, WURMP annual reports, county fiscal analysis documents, MOUs, county watershed workgroup expenditure records, regional cost sharing documentation, and "D-Max proposal records relating to JRMP annual reporting services ('D-Max Files')."[359] Mr. Quenzer is a certified professional in stormwater quality and stormwater pollution prevention planning, has focused on stormwater management for municipal agencies within San Diego County, and has worked to implement the test claim permit.[360] The claimants provide Mr. Quenzer's declarations,[361] and those of County of San Diego employee Lara Barrett,[362] City of Chula Vista employee Marisa Soriano,[363] City of Coronado

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[358] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines.

[359] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 4, 32; Exhibit T, Claimants' Comments on the Revised Proposed Decision and Parameters and Guidelines, pages 25-26 (2025 Quenzer Declaration).

[360] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 32.

[361] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 32-49 (Quenzer Declaration). Exhibit M, Claimants' Rebuttal Comments, pages 52-102 (Quenzer Declaration). Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 24-88 (2025 Quenzer Declaration).

[362] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 27-31 (Barrett Declaration). Exhibit M, Claimants' Rebuttal Comments, pages 21-22 (Barrett Declaration). Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 116-117 (Barrett Declaration).

[363] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 89-93 (Soriano Declaration).

employee Kim Godby,[364] City of El Cajon employee Dennis Davies[365] City of Escondido employee Rafael Rivera,[366] City of National City employee Stephen Manganiello,[367] City of Solana Beach employee Dan King,[368] and City of Vista employee John Conley,[369] along with 14 volumes of documentation to support the proposed RRMs.[370]

Both the State Water Boards and the Department of Finance opposed the RRM proposals initially filed by the claimants.[371]

As explained below, the Commission finds that while some of the proposed formulas for reimbursement are reasonable, the proposed unit cost RRMs are not supported by substantial evidence in the record or evidence that the proposals reasonably represent the costs mandated by the state for all eligible claimants to comply with the higher levels of service. Section IV. of the Parameters and Guidelines therefore includes the following boilerplate language:

> To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event, or activity in

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364 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 94-95 (Godby Declaration).

365 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 96-99 (Davies Declaration).

366 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 100-105 (Rivera Declaration).

367 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 106-108 (Manganiello Declaration)

368 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 109-111 (King Declaration).

369 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 112-115 (Conley Declaration).

370 Exhibit M, Claimants' Rebuttal Comments, pages 52-102 (Quenzer Declaration). Exhibit I (1-14), Claimants' Supporting Documentation for Proposed RRMs.

371 Exhibit J, Finance's Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs. Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs.

question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

And Section VI. of the Parameters and Guidelines, Record Retention, requires the retention of documentation of actual costs incurred during the period subject to the Controller's review and audit, which is conducted by the Controller's Office in accordance with Government Auditing Standards issued by the Comptroller General of the United States. These standards require the auditor to obtain "appropriate evidence to provide a reasonable basis for the auditors' findings and conclusions" on each audited reimbursement claim.[372]

1. The Legal Requirements for an RRM

a. The RRM shall consider the variation in costs among local government claimants, balance accuracy with simplicity, and reasonably reimburse all eligible claimants for the actual costs mandated by the state.

Article XIII B, section 6 provides: "[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 that local government for the costs of the program or increased level of service [with exceptions not applicable here]...." This reimbursement obligation was "enshrined in the Constitution ... to provide local entities with the assurance that state mandates would not place additional burdens on their

[372] Exhibit U (12), State Controller's Office, Frequently Asked Questions, May 2022, https://sco.ca.gov/Files-ARD-Local/mancost_FAQsmandates2022.pdf (accessed on June 17, 2025), page 6 ["Section 1.04 of the standards states that 'These standards are for use by auditors of government entities…' The performance audit fieldwork standards (section 6.56) require an auditor to obtain sufficient, appropriate evidence to provide a reasonable basis for the auditors' findings and conclusions."].

increasingly limited revenue resources."[373] Government Code section 17561(a) states: "[t]he state *shall* reimburse each local agency and school district for *all* 'costs mandated by the state,' as defined in Section 17514."[374] The courts have interpreted the Constitutional and statutory scheme as requiring "full" payment of the actual costs incurred by a local entity once a reimbursable state mandate is determined by the Commission.[375]

The statute authorizing the adoption of an RRM, along with the other statutes in this part of the Government Code, are intended to implement article XIII B, section 6, and thus any RRM approved by the Commission must reasonably represent the actual costs mandated by the state for all eligible claimants to comply with the mandated new programs or higher levels of service approved by the Commission.[376]

In a 2007 report, the Legislative Analyst's Office (LAO) stated that an RRM is intended to reduce local and state costs to file, process, and audit claims; and reduce disputes regarding mandate reimbursement claims and the Controller's audit reductions. The report identifies, under the heading "Concerns With the Mandate Process," the difficulties under the statutes then-in-effect:

- Most mandates are not complete programs, but impose increased requirements on ongoing local programs. Measuring the cost to carry out these marginal changes is complex.
- Instead of relying on unit costs or other approximations of local costs, reimbursement methodologies (or "parameters and guidelines")

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[373] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, footnote 6; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282; *CSBA v. State of California* (2011) 192 Cal.App.4th 770, 785-786.

[374] Emphasis added.

[375] *CSBA v. State of California* (*CSBA II*) (Cal. Ct. App. 4th Dist. 2011) 192 Cal.App.4th 770, 786; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1264, 1284. The court in *County of Sonoma* recognized that the goal of article XIII B, section 6 was to prevent the state from forcing extra programs on local government in a manner that negates their careful budgeting of expenditures, and that a forced program is one that results in "increased actual expenditures." The court further noted the statutory mandates process that refers to the reimbursement of "actual costs incurred."

See also, Government Code sections 17522 defining "annual reimbursement claim" to mean a claim for "actual costs incurred in a prior fiscal year; and Government Code section 17560(d)(2) and (3), referring to the Controller's audit to verify the "actual amount of the mandated costs."

[376] Government Code sections 17500, et seq.

typically require local governments to document their actual costs to carry out each element of the mandate.

- The documentation required makes it difficult for local governments to file claims and leads to disputes with the State Controller's Office.[377]

The LAO's recommendation to address these issues was to:

> Expand the use of unit-based and *other simple claiming methodologies* by clarifying the type of easy-to-administer methodologies that the Legislature envisioned when it enacted this statute.[378]

Thus, Government Code section 17518.5 was enacted to provide a flexible definition of an RRM based on "general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state, rather than detailed documentation of actual local costs."[379]

As noted above, an RRM "shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of other local costs."[380] The statute does not provide for a minimum number of claimants to constitute a representative sample. However, the regulations provide that a "'representative sample of eligible claimants' does not include eligible claimants that do not respond to surveys or otherwise participate in submitting cost data."[381]

In addition, the RRM shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner.[382] "Costs to implement the mandate in a cost-efficient manner" is defined in the Commission's regulations to "include only those costs for the activities that were determined to be reimbursable by the Commission in the decision on the test claim, and the costs of reasonably necessary activities to comply with the mandate pursuant to section 1183.7(d) of these regulations."[383]

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[377] Exhibit U (8), Office of the Legislative Analyst, "State-Local Working Group Proposal to Improve the Mandate Process," June 21, 2007, pages 2-3.

[378] Exhibit U (8), Office of the Legislative Analyst, "State-Local Working Group Proposal to Improve the Mandate Process," June 21, 2007, page 3.

[379] Government Code section 17518.5(d).

[380] Government Code section 17518.5(b).

[381] California Code of Regulations, title 2, section 1183.10(b)(2).

[382] Government Code section 17518.5(c).

[383] California Code of Regulations, title 2, section 1183.10(b)(1).

Government Code section 17557(f) provides that the Commission "shall consult with the Department of Finance, the affected state agency, the Controller, the fiscal and policy committees of the Assembly and Senate, the Legislative Analyst, and the claimants to consider a reasonable reimbursement methodology that *balances accuracy with simplicity*." As indicated above, the Department of Finance and the affected state agencies (the Water Boards), oppose the adoption of the RRMs.

By determining a unit cost RRM based on approximations or averages of local costs pursuant to section 17518.5, some local entities may receive more than their actual costs incurred to comply with a state-mandated program and some may receive less. Therefore, for any given program with a unit cost, there may be some entities that are not reimbursed the full costs actually incurred, as the courts have determined is required by article XIII B, section 6. Nevertheless, the Legislature has the power to enact statutes, such as Government Code section 17518.5, that provide "reasonable" regulation and control of the rights granted under the Constitution.[384] The Commission must presume that Government Code section 17518.5 is constitutionally valid.[385] Additionally, the Commission has the duty to apply Government Code section 17518.5 in a constitutional manner. If the Commission approves a unit cost that does not comply with the requirements of section 17518.5 and does not represent a reasonable approximation of the actual costs mandated by the state for all eligible claimants, then the Commission's decision could be determined unconstitutional and invalid by the courts.

Accordingly, the substantive requirements to adopt an RRM are to consider the variation in costs among local government claimants, and to ensure that the RRM balances accuracy with simplicity and reasonably reimburses all eligible claimants the actual costs mandated by the state to comply with the new programs or higher levels of service approved by the Commission.

b. <u>The RRM must be based on substantial evidence in the record.</u>

The process to include RRM formulas and unit costs in the Parameters and Guidelines is not the equivalent of a settlement agreement.[386] Rather, the adoption of an RRM

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[384] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 493.

[385] California Constitution, article III, section 3.5.

[386] In this respect, the adoption of an RRM for inclusion in the Parameters and Guidelines is distinguished from the process outlined in Government Code sections 17557.1 and 17557.2, which allow the claimants and the Department of Finance to develop a joint reasonable reimbursement methodology and statewide estimate of costs, which is reviewed by the Commission only to determine if the parties complied with the process. It is also distinguished from the settlement process in Government Code section 17573, which allows the Department of Finance and local government or

must be based on substantial evidence in the record to support the conclusion that the proposed RRM reasonably represents the actual costs mandated by the state for all eligible claimants.

Government Code section 17559 allows a claimant or the state to petition for a writ of administrative mandamus under section 1094.5 of the Code of Civil Procedure, "to set aside a decision of the commission on the ground that the commission's decision is not supported by substantial evidence."[387] Section 1094.5 states that "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record." And the Commission's regulations require: "If representations of fact are made, they shall be supported by documentary or testimonial evidence in accordance with section 1187.5 of these regulations."[388] "A common formulation of the substantial evidence test asks whether a reasonable person could have reached the same conclusion on the evidence."[389]

The evidence required to adopt an RRM is necessarily more relaxed than an actual cost reimbursement methodology.[390] However, when the Legislature added section 17518.5 to the Government Code, it did not change the existing requirement in section 17559 that all of the Commission's findings be based on substantial evidence in the record. Statutory enactments must be considered in the context of the entire statutory scheme of which they are a part and be harmonized with the statutory framework as a whole.[391] Thus, the plain language of the statutory mandates scheme requires substantial evidence in the record to adopt an RRM.

The Commission is not required to observe strict evidentiary rules, but its decisions cannot be based on hearsay evidence alone. The courts have interpreted the evidentiary requirement for administrative proceedings as follows:

> While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally

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statewide associations of local governments to jointly request the Legislature to establish a reimbursement methodology.

387 Government Code section 17559(b) (Stats. 1999, ch. 643).

388 California Code of Regulations, title 2, section 1183.12.

389 *Napa Valley Unified School Dist. v. State Board of Education* (2025) 110 Cal.App.5th 609, 625.

390 See Government Code section 17518.5 that employs, for example, the terms "projections" and "approximations."

391 *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743.

> present, or by authenticated documents, maps or photographs; ordinarily, hearsay evidence standing alone can have no weight, and this would apply to hearsay evidence concerning someone else's opinion; furthermore, cross-examination within reasonable limits must be allowed. Telephone calls to one of the officials sitting in the case, statements made in letters and arguments made in petitions should not be considered as evidence.[392]

The Commission's regulations provide that when exercising its quasi-judicial functions, "[a]ny relevant non-repetitive evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."[393] This regulation is borrowed from the Administrative Procedures Act (APA), which contains substantially the same language.[394] The Commission's regulation also requires oral or written representations of fact offered by any person shall be under oath or affirmation. All written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based on the declarant's personal knowledge, information, or belief.[395]

Both the Commission's regulations and the APA provisions in the Government Code provide that hearsay evidence is admissible if it is inherently reliable, but *will not be sufficient in itself* to support a finding unless the evidence would be admissible over

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[392] *Desert Turf Club v. Board of Supervisors for Riverside County* (1956) 141 Cal.App.2d 446, 455. The board based its denial of land use permit for a race track on testimony, letters and phone calls from members of the public opposing horse racing and betting on moral grounds. The court held that there was no evidence in the record to support the decision. On remand, the court directed the board to "reconsider the petition of appellants as to land use, wholly excluding any consideration as to the alleged immorality of horse racing and betting as authorized by state law, and wholly excluding from such consideration all testimony not received in open hearing, and all statements of alleged fact and arguments in petitions and letters on file, except the bare fact that the petitioners or letter writers approve or oppose the granting of the petition; also wholly excluding each and every instance of hearsay testimony unless supported by properly admissible testimony, it being further required that the attorneys representing any party in interest be granted a reasonable opportunity to examine or cross-examine every new witness produced." *Id*. page 456.

[393] California Code of Regulations, title 2, section 1187.5(a).

[394] Government Code section 11513.

[395] California Code of Regulations, title 2, section 1187.5(c).

objection in a civil case with a hearsay exception.[396] Hearsay evidence may be used only for the purpose of supplementing or explaining other evidence.[397]

Hearsay evidence is defined as an out-of-court statement (either oral or written) that is offered to prove the truth of the matter stated.[398] Under the evidentiary requirements for the courts, written testimony in the form of a declaration or affidavit is considered hearsay because the declarant is an out-of-court witness making statements about the truth of the matters asserted and is not available for cross examination.[399] However, under the relaxed rules of evidence in the Commission's regulations, written testimony made under oath or affirmation is considered direct evidence and may properly be used to support a fact.[400]

Out-of-court statements that are *not* made under oath or affirmation, however, are hearsay. Unless there is an exception provided by law, hearsay evidence alone cannot be used to support a finding under Government Code section 17518.5 because out-of-court statements are generally considered unreliable. The witness is not under oath, there is no opportunity to cross-examine the witness, and the witness cannot be observed at the hearing.[401] There are many exceptions to the hearsay rule, however. If one of the exceptions applies, then an out-of-court statement is considered trustworthy under the circumstances and may be used to prove the truth of the matter stated.[402]

In addition, the Commission may take official notice of any facts which may be judicially noticed by the courts.[403] Such facts include the official acts of any legislative, executive, or judicial body; records of the court; and other facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination.

The Commission's regulations further provide that each party has the right to present witnesses, introduce exhibits, and propose to the chairperson questions for opposing

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[396] California Code of Regulations, title 2, section 1187.5; Government Code section 11513.

[397] California Code of Regulations, title 2, section 1187.5.

[398] Evidence Code section 1200(a). "Statement" is defined in Evidence Code section 225(a) as "oral or written verbal expression."

[399] *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 597.

[400] California Code of Regulations, title 2, section 1187.5.

[401] *People v. Cudjo* (1993) 6 Cal.4th 585; *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 597.

[402] See Evidence Code sections 1200 et seq. for the statutory hearsay exceptions.

[403] California Code of Regulations, title 2, section 1187.5. See also, Evidence Code sections 451 and 452.

witnesses, and "[i]f declarations are to be used in lieu of testimony, the party proposing to use the declarations shall comply with Government Code section 11514." [404] Government Code section 11514, in turn, provides:

> (a) At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, *shall be given the same effect as if the affiant had testified orally*. If an opportunity to cross-examine an affiant is not afforded after request therefore is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.[405]

Note that the Commission's regulations use the word "declaration," and the Government Code refers to an "affidavit." An affidavit, by definition, if it is to be used before a court, must "be taken before any officer authorized to administer oaths," usually a judge.[406] But under the Code of Civil Procedure, section 2015.5, a declaration made *under penalty of perjury* is given the same force and effect as an affidavit sworn before an authorized officer. Such declaration must be in writing, must be "subscribed by him or her," and must name the date and place of execution.[407]

Therefore, in keeping with the applicable evidentiary standards provided by the statutes and regulations, and in an attempt to harmonize the case law with the clear import of statute and regulation, the following standards emerge:

- Commission decisions must be supported by "substantial evidence" under Government Code section 17559. Thus, substantial evidence is required before the Commission can find that a proposed RRM reasonably represents the actual costs mandated by the state for all eligible claimants to the state-mandated program.
- Any relevant non-repetitive evidence *shall* be admitted if it is the sort of evidence on which responsible persons are accustomed to rely. Oral or written representations of fact offered by any person shall be under oath or affirmation. All written representations of fact must be signed under penalty of perjury by

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[404] California Code of Regulations, title 2, section 1187.5.

[405] Government Code section 11514(a), emphasis added.

[406] Code of Civil Procedure section 2012.

[407] Code of Civil Procedure section 2015.5.

persons who are authorized and competent to do so and must be based on the declarant's personal knowledge, information, or belief.[408]

- Hearsay evidence may be used to supplement or explain, although it shall not be sufficient alone to support a finding unless admissible over objection in civil actions.[409]
- Under Government Code section 11514, as referenced in the Commission's regulations, an affidavit or declaration may be "given the same effect as if the affiant had testified orally," if properly noticed and an opportunity to cross-examine the affiant is given.[410]
- The Commission may take official notice of any facts which may be judicially noticed by the courts, including official acts of any legislative, executive, or judicial body and records of the court.[411]
- Furthermore, surveys and other cost analyses of eligible claimants as a method of gathering cost data are contemplated by the statute and the regulations as a viable form of evidence, but they must be admissible under the Commission's regulations and the evidence rules, as discussed above.[412]

2. The Proposed RRMs Are Not Supported by Substantial Evidence in the Record Showing they Reasonably Represent the Costs Mandated by the State for All Eligible Claimants to Comply with the Higher Levels of Service.

a. <u>The proposed RRMs for annual reporting on street sweeping and conveyance system inspections and cleaning</u>

The Parameters and Guidelines authorize reimbursement for annual reporting on street sweeping and conveyance system inspection and cleaning. This involves reporting certain information in the JURMP Annual Reports regarding each jurisdictions' sweeping (including the total number of curb miles generating the most trash, a moderate amount of trash, and low volumes of trash; the total number of municipal parking lots swept and the frequency of sweeping, and total distance of miles swept and tons of trash collected), cleaning activities (including number of catch basins, number of inlets and miles of MS4 cleaned and tons of trash collected), and inspection activities

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408 California Code of Regulations, title 2, section 1187.5.

409 California Code of Regulations, title 2, section 1187.5.

410 California Code of Regulations, title 2, section 1187.5.

411 California Code of Regulations, title 2, section 1187.5*;* Government Code section 11515.

412 Government Code section 17518.5; California Code of Regulations, title 2, sections 1183.10(b), 1187.5.

(including the number of catch basins and inlets inspected, the distance of the MS4 inspected, and identification of any MS4 facility found to require inspection less than annually following two years of inspection) as required by Permit Parts J.3.a.(3)(c)(x.-xv) and J.3.a(3)(c)(iv.-viii.).

The first report was due September 30, 2008, covering the information reported from July 1, 2007 to June 30, 2008, and every September 30 thereafter for the prior fiscal year.[413] As indicated above, the first report due September 30, 2008, may only cover a three and a half month time period from March 2008 through June 30, 2008, for the information reported about street sweeping and conveyance system cleaning since implementing those new activities was delayed until no later than March 24, 2008. However, the information required to be reported on conveyance system *inspections* would address the entire 2007-2008 fiscal year, since the inspections were not new.

i. Initial RRM Unit Cost Proposal.

Initially, the claimants proposed an RRM where each Municipal Claimant would be entitled to claim $5,784.85 adjusted annually by the Consumer Price Index (CPI) "for each of the six-and-a-half-years Conveyance Reporting Cost was required" and $6,143.67 adjusted annually for CPI for "each of the six and- a-half-years for Sweeping Reporting Cost was required."[414] This totals $87,247.59 per claimant, or an estimated $1,657,704.21 for all eligible claimants to comply with the requirement to report on street sweeping and conveyance system cleaning from "FY 2006/2007 through FY2012/2013."[415]

The claimants state the "Conveyance Reporting Cost standard unit cost represents the median of the permittee's average annual conveyance system cleaning reported costs between FY 2007/2008 to FY 2009/2010 as reported by the Co-Permittees in submitted 2011 Co-Permittee Surveys focused on conveyance system cleaning located in Vol. 1, pp. 22-239 and the County 2011 County Survey 2 attached and authenticated in the Barrett Declaration" and was "selected as a representative value for a standard unit cost for this unfunded mandate as it is a more conservative value than that obtained by utilizing the average of costs reported by the subset of Co-Permittees."[416]

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[413] Exhibit U (13), Test Claim, page 319 (Order No. R9-2007-0001, Parts J.3.a., J.3.a.2.).

[414] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 5, 36 (Quenzer Declaration). Exhibit M, Claimants' Rebuttal Comments, pages 58-59 (Quenzer Declaration).

[415] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 5, 35 (Quenzer Declaration).

[416] Exhibit M, Claimants' Rebuttal Comments, page 7, 21-22 (Barrett Declaration), 58 (Quenzer Declaration).

Similarly, the claimants state the following:

> The standard unit cost for Sweeping Reporting Cost represents the median of the permittee's average annual reporting costs to cover street sweeping reporting between FY 2007/2008 to FY 2009/2010 as reported by the subset of Co-Permittees that prepared and submitted 2011 Co-Permittee Surveys focused on street sweeping located in Vol. 1, pp. 240-376. [Fn. omitted.] The median was selected as a representative value for a standard unit cost for this unfunded mandate as it is a more conservative value than that obtained by utilizing the average of costs reported by the subset of Co-Permittee.[417]

The declaration of Mr. Quenzer also states that the proposal is consistent with an "NPDES Stormwater Cost Survey Final Report from January 2005" as follows:

> In my opinion, the total cost spent on reporting for each Co-Permittee is comparable to the amounts reported in the NPDES Stormwater Cost Survey Final Report from January 2005 ("2005 State Survey").[418]

The Water Boards opposed the proposal, contending that the 2011 survey does not support an accurate or verifiable approximation of local costs since individual claimants responded to the surveys with different types of inputs based on subjective determinations. The data are not comparable and cannot be normalized for purposes of developing a methodology that can be relied upon as accurate and verifiable.[419] The Water Boards also argue that the proposed RRM is overbroad since the first annual JURMP report was not due until the 2008-2009 fiscal year.[420] In addition, the Water Boards assert that the claimants were not required to start implementing the 2007 Order required activities until near the end of the second half of fiscal year 2007/2008 or nine months from the start of fiscal year 2007/2008, and that the claimants did not begin fully implementing the 2007 Order activities until fiscal year 2008-2009 or July 1, 2008, through June 30, 2009.[421] The Water Boards further object to the use of the 2005 State

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[417] Exhibit M, Claimants' Rebuttal Comments, page 7.

[418] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 35 (Quenzer declaration).

[419] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 9.

[420] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 36, 42.

[421] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 38, 42-43.

Cost Survey, since that survey is not representative of local costs and does not represent local agency stormwater budgets.[422]

ii. New RRM unit cost proposals.

In response to the Revised Draft Proposed Decision and Parameters and Guidelines, which found the claimants' proposed RRM was overbroad, not limited to the mandated activities, and not supported by substantial evidence,[423] the claimants revised their RRM reporting proposals as described below. The period of reimbursement "is from March 24, 2008, which is the date that Co-Permittees were required to begin implementing their JURMP developed per the 2007 Permit requirements, to, June 26, 2013, which is the day before the effective date of the 2013 Permit."[424] However, "[d]ata tracking is the reason why the proposed RRM states that costs in 2007-2008 should be reimbursable. While the first JURMP annual report that contained the new street sweeping and catch basin cleaning requirements was not due until September 2008, which is in fiscal year 2008-2009, the September 2008 report was a report on data from 2007-2008. Therefore, data collection and recording were needed in 2007-2008 to successfully report on 2007-2008 data in the report due September 2008."[425] The claimant further explains that

> The 2007/2008 reporting cost claimed should be 27.05% of the standard unit cost for reporting. This reflects that 99 days of the 366 days in fiscal year 2007/2008 were on or after March 24, 2008. The 2012/2013 reporting cost claimed should be 98.90% of the standard unit cost for reporting. This reflects that 361 of the 365 days in fiscal year 2012/2013 were on or before June 26, 2013.[426]

<u>Reporting on Conveyance System Cleaning and Inspections</u>

The proposed unit cost for reporting on the conveyance system cleaning and inspections is based on the median (or middle value) of the permittees' average annual reporting costs for the conveyance system between fiscal years 2007-2008 to 2009-2010, adjusted annually by the Consumer Price Index. The costs are identified in the

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[422] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 85.

[423] Exhibit O, Revised Draft Proposed Decision and Parameters and Guidelines, pages 142-150.

[424] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 29.

[425] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 29.

[426] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 30.

2011 Surveys by the following 12 permittees: County of San Diego and the cities of Carlsbad, Chula Vista, El Cajon, Escondido, Imperial Beach, La Mesa, Lemon Grove, Poway, San Marcos, Santee, and Solana Beach. The claimants also filed declarations from the County of San Diego and the cities of Chula Vista, Escondido, and Solana Beach to support the average conveyance system reporting costs and the 2025 Quenzer Declaration states that while the costs for Escondido and Solana Beach were the same as their 2011 survey responses, the Chula Vista costs were "somewhat lower than reported in the 2011 Survey."[427]

The claimants identify the average costs for each of the responding 12 co-permittees, the overall median costs when the fiscal year 2007-2008 are included and when they are not, and the location of the documentation in the record to support these numbers (which are the 2011 survey responses and the declarations) in Table 1 to the Quenzer declaration, as follows:[428]

Co-Permittee	**2007-2008**	**2008-2009**	**2009-2010**	**Average Annual Reported Conveyance System Cleaning Reporting Costs (Average of FY 07/08 to FY 09/10 costs)**	**Location of Data**
Carlsbad	$531	$547	$563	$547.00	Vol. 1, page 25[429]
Chula Vista	$111,885	$115,242	$118,700	$115,275.67	Soriano Declaration, par. 14 and 15[430]

[427] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 31.

[428] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 59 (Table 1).

[429] "Vol.1" refers to Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permitee Survey). This document is on PDF page 26.

[430] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 92 (Declaration from Marisa Soriano, Environmental Manager for the City of Chula Vista). Paragraphs 14 and 15 of the Declaration state the following:

> 14. In FY 2007-08, the City incurred $24,863 in personnel costs relating to staff time for reporting on conveyance system inspections. In FY 2008-09, the City incurred $25,609 in personnel costs relating to staff time for reporting on conveyance system inspections. In FY 2009-10, the City incurred $26,378 in personnel costs relating to staff time for reporting on conveyance system inspections.

Co-Permittee	2007-2008	2008-2009	2009-2010	Average Annual Reported Conveyance System Cleaning Reporting Costs (Average of FY 07/08 to FY 09/10 costs)	Location of Data
County of San Diego - Roads	$3,079	$3,171	$3,266	$3,172.00	Barrett Declaration for Rebuttal, Exhibit B, page 4[431]
El Cajon	$31,994	$32,954	$33,942	$32,963.33	Vol. 1, page 52[432]
Escondido	$16,703	$17,204	$17,721	$17,209.33	Rivera Declaration, par. 17 and 18[433]

> 15. In FY 2007-08, the City incurred $87,022 in personnel costs relating to staff time for reporting on conveyance system cleaning operations. In FY 2008-09, the City incurred $89,633 in personnel costs relating to staff time for reporting on conveyance system cleaning operations. In FY 2009-10, the City incurred $92,322 in personnel costs relating to staff time for reporting on conveyance system cleaning operations.

When these fiscal year costs are added, they show the costs identified in Table 1.

[431] Exhibit M, Claimants' Rebuttal Comments, pages 22-23, 39 (Exhibit B to Barrett Declaration, which is the "County Roads portion of the County 2011 County Permittee Survey 2," showing reporting costs for conveyance system cleaning as identified in Table 1.)

Ms. Barrett's declaration was signed December 12, 2024, she has been employed for the County of San Diego as an Environmental Planner III for the six years prior to date she signed the declaration and, thus, not during the period of reimbursement, and she declares that "On December 11, 2023, I was asked to gather records to support the creation of reasonable reimbursement methodologies to support reimbursement for the stormwater mandates from the 2007 Permit." Exhibit M, Claimants' Rebuttal Comments, pages 22-23.

[432] Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permitee Survey), page 53.

[433] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 100-105 (Rivera Declaration). Paragraphs 17 and 18 of the Declaration state the following:

> 17. In FY 2007-08, the City incurred $9,515 in personnel costs relating to staff time for reporting on conveyance system inspections. In FY 2008-09, the City incurred $9,801 in personnel costs relating to staff time for reporting on conveyance system

Co-Permittee	2007-2008	2008-2009	2009-2010	Average Annual Reported Conveyance System Cleaning Reporting Costs (Average of FY 07/08 to FY 09/10 costs)	Location of Data
Imperial Beach	$591	$240	$270	$367.00	Vol. 1, page 93[434]
La Mesa	$8,183	$8,429	$8,682	$8,431.33	Vol. 1, page 107[435]
Lemon Grove	$30,292	$31,200	$32,136	$31,209.33	Vol. 1, page 120[436]
Poway	$1,291	$1,330	$1,370	$1,330.33	Vol. 1, page 146[437]
San Marcos	$0	$19,555	$112,669	$44,074.67	Vol. 1, page 185[438]
Santee	$1,529	$1,575	$1,622	$1,575.33	Vol. 1, page 200[439]
Solana Beach	$913	$940	$968	$940.33	King Declaration, par. 9[440]

inspections. In FY 2009-10, the City incurred $10,095 in personnel costs relating to staff time for reporting on conveyance system inspections.

18. In FY 2007-08, the City incurred $7,188 in personnel costs relating to staff time for reporting on conveyance system cleaning operations. In FY 2008-09, the City incurred $7,403 in personnel costs relating to staff time for reporting on conveyance system cleaning operations. In FY 2009-10, the City incurred $7,626 in personnel costs relating to staff time for reporting on conveyance system cleaning operations.

When these fiscal year costs are added, they show the costs identified in Table 1.

434 Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permitee Survey), page 94.

435 Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permitee Survey), page 108.

436 Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 121.

437 Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 147.

438 Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permitee Survey), page 186.

439 Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 201.

440 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 111 (King Declaration, paragraph 9, which says the following: "In FY 2007-08, the City incurred $913 in personnel costs relating to staff

Co-Permittee	2007-2008	2008-2009	2009-2010	Average Annual Reported Conveyance System Cleaning Reporting Costs (Average of FY 07/08 to FY 09/10 costs)	Location of Data
			MEDIAN	$5,801.67	
	MEDIAN if 2007-2008 data is excluded			$5,887.00[441]	

Mr. Quenzer further declares that the "Co-Permittees are willing to accept the . . . contention that there is some overlap with the conveyance system cleaning data tracking required under the 2001 Permit and what was required under the 2007 Permit" and thus, the claimants are willing to reduce the proposal by 50 percent:

> **For these reasons, the Co-Permittees propose that the RRM unit cost for conveyance system maintenance reporting, or *Conveyance Reporting Costs,* should be reduced to $2,900.83, which is 50% of the previously proposed unit cost.** The percentage is based on my best professional judgment informed by experience preparing annual reports under both the 2001 and 2007 Permits and working with agencies to prepare updated stormwater programs and procedures (via JURMP documents) in response to the 2007 Permit.[442]

From this information, the claimants propose the following unit cost options:

1. Fifty (50) percent of the median cost ($5,801.67), which represents the average reporting costs for conveyance system reporting from fiscal year 2007-2008 through 2009-2010 for the 12 co-permittees, or $2900.83 per year for each eligible claimant.
2. If the average costs for fiscal year 2007-2008 are excluded, then the unit cost would be 50 percent of $5,887.00, or $2,943.50 per year for each eligible claimant.
3. If the 2011 survey data is excluded, then the unit cost is revised to $8,604.67, which is 50 percent of the median of the data set identified in the declarations

time for reporting on conveyance system inspections. In FY 2008-09, the City incurred $940 in personnel costs relating to staff time for reporting on conveyance system inspections. In FY 2009-10, the City incurred $968 in personnel costs relating to staff time for reporting on conveyance system inspections.")

441 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 59.

442 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 32, emphasis in original.

(which identified average annual costs of $115,275.67, $17,209.33, $3,172.00, and $940.33, as stated in the table above).

4. If the 2011 survey data and the fiscal year 2007-2008 costs are excluded, then the unit cost is $8.731.25, which is 50 percent of the median 2007-2008 data excluded ($17,462.50).[443]

Thus, under these proposals, reimbursement to the 19 eligible claimants for reporting the conveyance system data would total between $289,882 and $827,644, depending on the options above, adjusted annually by the Consumer Price Index.[444]

<u>Reporting Street Sweeping Data</u>

The claimants propose the following unit cost RRMs for reporting the street sweeping data:

1. The median unit cost of $6,143.67, the same as originally proposed, is based on the co-permittee declarations from the cities of Chula Vista, Coronado, Escondido, and National City for the average costs from fiscal year 2007-2008 through 2009-2010. The average costs were the same as reported in the 2011 surveys.
2. If fiscal year 2007-2008 data is excluded, then the median unit cost proposal is $6,234.00.
3. If the 2011 survey responses are excluded, then the median unit cost, based on the 2025 declarations, is revised to $3,596.33.
4. If the 2011 survey data and the 2007-2008 costs are excluded, then the median unit cost is $3,649.25.[445]

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[443] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 32-33.

[444] The low cost of $2900.83 x 19 eligible claimants = $55,115.77 per fiscal year. $55,115.77 x 27.05% for data collecting after March 24, 2008 (FY 2007-2008) plus $55,115.77 x 4 fiscal years (2008-2009, 2009-2010, 2010-2011, 2011-2012), plus $55,115.77 x 98.9% for fiscal year 2012-2013, with costs ending June 26, 2013 = $289,882.

The higher proposal of $8,731.25 (which does not include fiscal year 2007-2008 or the 2011 survey data) x 19 eligible claimants = $165,893.75 per fiscal year. $165,893.75 x 4 fiscal years (2008-2009, 2009-2010, 2010-2011, 2011-2012), plus $165,893.75 x 98.9% for fiscal year 2012-2013, with costs ending June 26, 2013 = $827,644.

[445] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 33-34.

The claimants identify these numbers in Table 3 to Mr. Quenzer's 2025 declaration, which shows annual costs ranging from a low of $138 to a high of $69,975.00 as follows:[446]

Co-Permittee	2007-2008	2008-2009	2009-2010	Average Annual Reported Street Sweeping Reporting Costs (Average of FY 07/08 to FY 09/10 costs)	Location of data
Chula Vista	$16,097.00	$16,097.00	$16,097.00	$16,097.00	Soriano Declaration, par.12[447]
Coronado	$1,018.00	$1,049.00	$1,080.00	$1,049.00	Godby Declaration, par. 9[448]
El Cajon	$31,993.00	$32,953.00	$33,942.00	$32,962.67	Vol. 1, page 275
Escondido	$5,963.00	$6,142.00	$6,326.00	$6,143.67	Rivera Declaration, par. 15[449]

[446] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 61 (Table 3).

[447] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 92 (Soriano Declaration, paragraph 9, which states: "In each year from FY 2007-08 through FY 2009-10, the City incurred $16,097 in costs relating to contractor time for reporting on street sweeping.")

[448] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 95 (Godby Declaration, paragraph 9, which states: "In FY 2007-08, the City incurred a total of $1,018 for personnel costs relating to staff time for reporting on street sweeping costs. In FY 2008-09, the City incurred a total of $1,049 for reporting on street sweeping cost. In FY 2009-10, the City incurred a total of $1,080 for reporting on street sweeping cost.")

[449] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 103 (Rivera Declaration, paragraph 15, which states: "In FY 2007-08, the City incurred a total of $5,963 for personnel costs relating to staff time for reporting on street sweeping costs. In FY 2008-09, the City incurred a total of $6,142 for reporting on street sweeping cost. In FY 2009-10, the City incurred a total of $6,326 for reporting on street sweeping cost.")

Co-Permittee	2007-2008	2008-2009	2009-2010	Average Annual Reported Street Sweeping Reporting Costs (Average of FY 07/08 to FY 09/10 costs)	Location of data
Lemon Grove	$138.00	$138.00	$138.00	$138.00	Vol. 1, page 307
National City	$893.00	$920.00	$947.00	$920.00	Manganiello Declaration, par. 7[450]
Oceanside	$65,958.00	$67,937.00	$69,975.00	$67,956.67	Vol. 1, page 323
City of San Diego	$25,111.00	$25,864.00	$26,640.00	$25,871.67	Vol. 1, page 347
County of San Diego	$3,079.00	$3,171.00	$3,266.00	$3,172.00	Vol. 1, page 339
			MEDIAN	**$6,143.67**	
			MEDIAN if 2007-2008 data is excluded	**$6,234.00**	

iii. There is not substantial evidence to support the conclusion that the proposed unit cost RRMs for the reporting requirements reasonably represent the actual costs mandated by the state for all eligible claimants.

The Commission denies the proposed RRMs for reporting the street sweeping and conveyance system cleaning and inspections.

The claimants' proposal is based on survey data from 12 eligible claimants and declarations filed in 2025 showing average personnel costs for three fiscal years to comply with the mandate, and the base unit cost proposal is the median or middle value of these costs.

Even *assuming* the survey responses and declarations were all determined to be reliable evidence and the numbers identified in the Tables submitted in the 2025 Quenzer Declaration accurately represent the actual costs incurred to comply with the mandated activity, the proposed annual unit cost RRM between $5,081.67 and $8,731.25 for street sweeping and the proposed unit cost RRM between $3,596.33 and

[450] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 107 (Manganiello Declaration, paragraph 7, which states the following: "In FY 2007-08, the City incurred a total of $893 for personnel costs relating to staff time for reporting on street sweeping costs. In FY 2008-09, the City incurred a total of $920 for reporting on street sweeping cost. In FY 2009-10, the City incurred a total of $947 for reporting on street sweeping cost.")

$6,234.00 for conveyance system cleaning and inspections, which represent the median cost range based on the options proposed, do not reasonably represent the actual costs mandated by the state for all eligible claimants.

The range of costs identified in the tables is wide. For street sweeping, the City of Oceanside had an average cost of $67,956.67 per year to comply with the street sweeping reporting, while the City of Lemon Grove had an average cost of $138. Given the detailed information that is required to be reported, which is based on the total distance swept and cleaned, it may be reasonable that a larger city like the City of Oceanside (42.9 square miles) would have higher costs for reporting on street sweeping than a smaller jurisdiction like the City of Lemon Grove (3.88 square miles). However, assuming those costs are accurate, the proposed median unit cost of either $5081.67 or $8.731.25, or anywhere between those numbers, does not reasonably represent the actual costs mandated by the state because those two eligible claimants would be either grossly overpaid or grossly underpaid, and thus, the RRM would not satisfy the requirements of article XIII B, section 6. Similarly, three additional responders reported costs far exceeding the proposed unit cost RRM: Chula Vista ($16,097.00), El Cajon ($32,962.67), and the City of San Diego ($25,871.67), and thus taking the middle or median value of the averages reported by half of the eligible claimants as the proposed RRM of $5081.67 or $8.731.25, or anywhere between those figures, does not reasonably provide reimbursement for the actual costs mandated by the state for all eligible claimants.

Similarly, the average costs reported by 12 of the 19 eligible claimants to comply with the conveyance system reporting requirement ranges from $367 per year (City of Imperial Beach) to $115,275.67 (City of Chula Vista) and, thus, if those figures are accurate, the proposed unit cost of either $2,900.83 or $8,731.25, or anywhere between those numbers, does not reasonably represent the costs mandated by the state for these eligible claimants. Three other eligible claimants also reported average annual costs far exceeding the proposed unit cost: Escondido ($17,209.33), Lemon Grove ($31,209.33), and San Marcos ($44,074.67). And two other eligible claimants reported average annual costs far below the proposed unit cost: Solana Beach ($940.22) and Carlsbad ($547). Thus, based on the numbers reported, the proposed unit cost RRMs do not reasonably represent the actual costs mandated by the state by seven of the 12 responders. And no information is provided by the other seven eligible claimants.

Moreover, substantial evidence in the record is required to support an RRM proposal. However, the survey data identified by the claimants to develop the proposed unit cost cannot be considered evidence of either actual or estimated costs incurred by the eligible claimants to perform the mandated activity because the survey responses are hearsay. The responses are out-of-court statements that are *not* provided under oath or affirmation. The claimant is using the out-of-court responses to prove the truth of the matters asserted; i.e. that the surveys focused on conveyance system cleaning and street sweeping and “was selected as a representative value for a standard unit cost for this unfunded mandate."[451] For these reasons, the courts have held that survey data is hearsay and cannot be considered evidence unless a hearsay exception applies.[452] But the surveys do not fall under the hearsay exception for records prepared in the normal course of business.[453] The surveys, entitled "Reasonable Reimbursement Methodology Unit Cost Survey," were prepared for the sole purpose of obtaining mandate reimbursement and cannot be considered records prepared in the normal course of business.[454]

The claimants allege that the survey responses can be admitted under the official public records exception.[455] That exception is in Evidence Code section 1280, which states the following:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
>
> (a) The writing was made by and within the scope of duty of a public employee.
>
> (b) The writing was made at or near the time of the act, condition, or event.
>
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

However, there is no evidence that the survey was made by and within the scope of duty of a public employee. Even if it is assumed a public employee completed the survey, the surveys are not signed and the job title of the contact person's name is not identified.[456] Thus, it is impossible to tell if filling out the survey is within the employee's "scope of duty" as required by subdivision (a). These facts are similar to those in *Furman v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 416. In that case, Furman challenged a forensic alcohol report submitted by DMV was hearsay. The court

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[451] Exhibit M, Claimants' Rebuttal Comments, pages 7 and 21-22 (Barrett Declaration).

[452] *People v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1269.

[453] Evidence Code section 1271.

[454] Exhibit M, Claimants' Rebuttal Comments, pages 7 and 21-22 (Barrett Declaration). Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), pages 23, 241.

[455] Exhibit T, Claimants' Comments on Revised Draft Proposed Decision and Parameters and Guidelines, pages 8-9.

[456] Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), pages 1-376.

agreed it was hearsay because DMV did not meet its burden to produce evidence to establish the foundation for finding if Evidence Code section 1280's hearsay exception applied. The court rejected DMV's argument regarding the presumption in Evidence Code section 664 that public employees properly performed their official duties. In holding DMV did not provide a foundation to support a finding that the document preparer had an official duty to do so, the court said: "It is this 'official duty' that underlies both Evidence Code section 664's presumption and Evidence Code section 1280's exception to the hearsay rule."[457] Here, as in the *Furman* case, the claimants do not support a finding that those who filled out the surveys had an official duty to do so.

In addition, the survey responses were not made at or near the time of the costs were allegedly incurred. The surveys were due January 19, 2011, and purport to collect data from three prior fiscal years: 2007-2010.[458] The surveys are not dated except for the pre-printed due date. With a potential four-year gap between the information surveyed and the writing, the Commission cannot find that the surveys comply with the timeliness requirement. As one court said in finding a motorist's blood alcohol test report was not timely recorded and did not meet this requirement despite being prepared only five working days after the motorist's arrest, "memory is subject to erosion with every day that passes, whether working or nonworking."[459]

Moreover, there is not substantial evidence to show the source of information relied on by the survey responders. The survey instructions state: "**Note 6 (Source of Information)**. Please indicate the documents and assumptions used for reported costs. Also document any assumptions used to derive the reported values."[460] Yet, in some responses, the source of information in Note 6 of the survey form was left blank.[461] In others, the response is not clear. For example, in one response, the source of information for reporting, which was reported as costing $30,294 and does not include supervision and management, was described based on an estimate of time spent on maintenance of data management and reporting as follows:

> One Public Works Specialist dedicated to storm drain inspection and maintenance data management and reporting. Estimated 20% time for inspections, 80% for maintenance. Based on 1,800 working hours per

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[457] *Furman v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 416, 422, emphasis in original.

[458] Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), pages 14-26.

[459] *Glatman v. Valverde* (2006) 146 Cal.App.4th 700, 705.

[460] Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 25.

[461] Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), pages 31, 126.

year. Rates from Fully Allocated Hourly Rates minus Maintenance and Operation.[462]

It is not clear from this response if the permittee was claiming all of maintenance data management and reporting costs (representing 80 percent of that person's time), or only the pro rata share representing the mandated higher level of service here, which is limited to reporting specified information. Other responses to that question indicated "Approximately 8 hours per year in a year composed of approximately 1,992 hours" spent on reporting and another estimated 16 hours.[463] Similarly, other responses include: "Supervisor used work order assignments from past years to calculate along with Best Professional Judgement [sic] for information not recorded or easily available."[464] There is no consistency in the responses regarding the source of information for the costs identified and no evidence to indicate that the information is reliable and trustworthy. Therefore, the public records exception to the hearsay rule does not apply to the survey responses and the survey responses are hearsay, which under the Commission's regulations cannot be relied upon as direct evidence.[465]

There are similar issues with the claimants' declarations. The Barrett declaration relies on the survey responses, which are hearsay.[466] The other declarations all identify total personnel or contract costs in fiscal years 2007-2008 and 2008-2009 for reporting and are signed under penalty of perjury, but do not identify the contract or the terms of the contract to determine if the scope of work is within the scope of the mandate, or the source of information for the personnel costs.[467] Thus, the claimants have not provided a foundation to support the costs alleged.

Finally, the claimants originally opined that the total cost spent on reporting for each copermittee is comparable to the amounts reported in the NPDES Stormwater Cost Survey Final Report from January 2005 ("2005 State Survey").[468] However, the 2005 State Survey only surveyed six municipalities, one of which is an eligible claimant

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[462] Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 41.

[463] See for example, Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), pages 59, 149.

[464] Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 110.

[465] California Code of Regulations, title 2, section 1187.5.

[466] Exhibit M, Claimants' Rebuttal Comments, pages 22-23.

[467] Exhibit T, Claimants' Comments on the Revised Proposed Decision and Parameters and Guidelines, pages 92, 95, 103-104, 107, and 111.

[468] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 35 (Quenzer declaration).

(Encinitas), and represents about five percent of all the eligible claimants here.[469] The purpose of that survey was to determine total stormwater costs per household.[470] The report considered reporting as part of the overall stormwater management program, but there is no information in that survey about reporting the information required for street sweeping and conveyance system inspection and cleaning that represent the mandated higher level of service in this case. Moreover, Encinitas reported costs based on the prior 2001 San Diego County permit and not the 2007 test claim permit.[471] Thus, the 2005 survey is not relevant to the issues here.

Accordingly, there is not substantial evidence in the record supporting the proposed unit cost RRM or that the proposed unit costs reasonably represents the costs mandated by the state for all eligible claimants. Thus, the Commission denies this proposal.

b. The proposed RRMs for conveyance system cleaning.

The Parameters and Guidelines authorize reimbursement for the following conveyance system cleaning activities:

> Conveyance System Cleaning (Part D.3.a.(3)(b)(iii)). No later than March 24, 2008, the claimants shall comply with the following activities:[472]
>
> i. Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.).
>
> ii. The maintenance activities shall, at a minimum, include the following:
>
> - Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, which shall be cleaned in a timely manner.

[469] Exhibit U (7), NPDES Stormwater Cost Survey, January 2005, pages 5-6. The surveyed local governments were Encinitas, Freemont, Santa Clarita, Corona, Sacramento, and the Fresno-Clovis metropolitan area, https://www.owp.csus.edu/research/papers/papers/NPDES_Stormwater_costsurvey.pdf (accessed on January 3, 2025).

[470] Exhibit U (7), NPDES Stormwater Cost Survey, January 2005, pages 5-6. The surveyed local governments were Encinitas, Freemont, Santa Clarita, Corona, Sacramento, and the Fresno-Clovis metropolitan area, https://www.owp.csus.edu/research/papers/papers/NPDES_Stormwater_costsurvey.pdf (accessed on January 3, 2025).

[471] Exhibit U (7), NPDES Stormwater Cost Survey, January 2005, https://www.owp.csus.edu/research/papers/papers/NPDES_Stormwater_costsurvey.pdf (accessed on January 3, 2025), page 33.

[472] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

- Any MS4 facility that is designed to be self-cleaning shall be cleaned of any accumulated trash and debris immediately.
- Cleaning observed anthropogenic litter in open channels annually, which may be reduced to every other year after two years of inspections (which at the earliest would be in fiscal year 2010-2011) if the open channel requires less than annual cleaning.

i. Initial Unit Cost RRM Proposal.

Initially, the claimants proposed a unit cost RRM (based on "reasonable values in 2007") to clean one inlet or storm basin ($150.66), one linear foot of pipe ($6.77/ft.), and one linear foot of the channel ($8.52/ft.); times the total number of inlets and storm basins, feet of channel cleaned, and feet of pipe cleaned; adjusted annually by the Consumer Price Index, for fiscal years 2007-2008 through 2014-2015.[473] The claimants state that the following feet of structures and channels have been cleaned:

Fiscal Year	# MS4 Structures Cleaned (#S)	Linear ft of MS4 Pipe Cleaned (P)	Linear ft of MS4 Open Channel Cleaned (C)
FY 2006/2007	12092	131439.75	1553201.076
FY 2007/2008	41847	140301.15	485964.3222
FY 2008/2009	37227	106249.1	2016202.269
FY 2009/2010	34392	182277.3	1981611.457
FY 2010/2011	35260	142610.9	1955701.586
FY 2011/2012	54261	128042.25	1609647.248
FY 2012/2013	29820	142091.1	1620035.61
FY 2013/2014	38952	142091.1	1620035.61
FY 2014/2015	38952	142091.1	1620035.61[474]

The total for conveyance system cleaning was initially estimated at over $192.43 million,[475] which is 76 percent of the original estimate of total costs for the program.

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473 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 6-7; Exhibit M, Claimants' Rebuttal Comments, pages 8, 61-62.

474 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 38.

475 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 7, 37, emphasis added.

The claimants state that the unit costs are based on Mr. Quenzer's review of the County 2011 Co-Permittee Surveys and JRMP Annual Reports[476] and the costs align with 2005 State Survey responses from the Cities of Santa Clarita and Corona:

> The *Unit Costs* align with those found in the 2005 State Survey. The 2005 State Survey determined that the average cost of basin cleaning in Santa Clarita was one hundred and seventy dollars ($170) per basin which is more than the 2007 *(Unit Cost)S*. Additionally, the State Survey found that the average cost of drain line and channel cleaning in the City of Corona was eight dollars per linear foot ($8/ft), which is more than a weighted average of the 2007 *(Unit Cost)P* and 2007 *(Unit Cost)C*. Therefore, the 2005 State Survey supports that the Unit Costs are reasonable to apply to all Co-Permittees.[477]

The claimants further state that the reported costs are in the 2011 Co-Permittee Surveys, located in Vol. 1, pp. 22-239, 2010 Co-Permittee Declarations located in Vol. 1, pp. 377-743, data included JRMP Annual Reports located in Vols. 2-11, and the County 2011 County Survey 2 attached and authenticated in the Barrett Declaration. "Each Unit Cost is the median cost to clean during FY 2007/2008. The median was selected as a representative value for a standard unit cost for this unfunded mandate as it is a more conservative value than that obtained by utilizing the average of costs reported by the subset of Co-Permittees."[478]

The Water Boards opposed the RRM on the following grounds:

- The permit did not require claimants to fully implement conveyance system cleaning until March 24, 2008. Thus, for the majority of fiscal year 2007-2008 (75 percent), the claimants implemented the 2001 permit, and did not implement the test claim permit.[479]
- The Quenzer declaration includes a table of the storm drain inlets cleaned, which increased by 20,000 from 2010-2011 to 2011-2012, when the number of inlets would decrease based on the 2007 test claim permit's reduction in cleaning. The Water Boards argue that claimants do not indicate whether their formula

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[476] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 36 (Quenzer Declaration).

[477] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 37.

[478] Exhibit M, Claimants' Rebuttal Comments, page 8.

[479] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 44 (Technical Analysis).

accounts for the permit's debris volume or facility design criteria regarding which conveyances actually need to be cleaned.[480]

- The information the claimants provided does not reflect an accurate or representative number of the total number of facilities cleaned. The claimants do not identify a process that affirms or demonstrates that they actually cleaned a facility as required by the test claim permit. Without indication that the facilities that were cleaned were *required* to be cleaned, the proposed RRM would overstate reimbursement amounts and potentially reimburse for cleaning that the test claim permit did not actually require due to the timing or debris criteria.[481]

  ii. *There is not substantial evidence in the record to support the conclusion that the **new** proposed unit cost RRMs reasonably represent the actual costs mandated by the state for all eligible claimants.*

In response to the Revised Draft Proposed Parameters and Guidelines, which found the proposed unit cost RRMs for conveyance system cleaning were not supported by substantial evidence, nor evidence that the proposed unit costs reasonably represents the costs mandated by the state for all eligible claimants to comply with the higher levels of service approved by the Commission,[482] the claimants have submitted revised RRM proposals for cleaning catch basins or storm drain inlets and for linear MS4 cleaning.

The period of reimbursement is from March 24, 2008, which is the date that Co-Permittees were required to begin implementing JURMP developed under the test claim permit, to June 26, 2015, which is the day before the claimants were required to submit and begin implementing JRMPs that reflected requirements of the 2013 Permit. The claimant explains the following:

> In accordance with the above reimbursement period, the following conservative adjustments are proposed to the conveyance system cleaning for the 2007/2008 and 2012/2013 fiscal years. The 2007/2008 reporting cost claimed should be 27.05% of the standard unit cost. This reflects that 99 days of the 366 days in fiscal year 2007/2008 were on or after March 24, 2008. The 2014/2015 cost claimed should be 98.90% of

480 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 46 (Technical Analysis).

481 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 48 (Technical Analysis).

482 Exhibit O, Revised Draft Proposed Decision and Parameters and Guidelines, pages 150-156.

the standard unit cost. This reflects that 361 of the 365 days in fiscal year 2014/2015 were on or before June 26, 2015.[483]

Catch Basins or Storm Drain Inlets

The claimants propose a unit cost of $162.32 per storm drain inlet or catch basin (increased from $150.66 as originally proposed), adjusted annually by the Consumer Price Index, which is the median cost based on data from fiscal years 2007-2008 through 2009-2010, with the costs of training excluded. The proposed unit cost is based on 2011 survey responses and 2025 declarations from the cities of Chula Vista, El Cajon, Escondido, Solano Beach, and Vista.[484] The following table (Table 7 to 2025 Quenzer declaration) identifies the average costs to clean a storm drain inlet or catch basin and the median proposed unit cost of $162.32 per storm drain inlet or catch basin based on the 2011 survey data and the declarations.[485]

Co-Permittee	**Data Referenced**	**2007-2008**	**2008-2009**	**2009-2010**	**Agency Average (All three years)**	**Agency Average (2008-2009, 2009-2010; excludes 2007-2008)**
Carlsbad	Contract	$325.40	$325.40	$325.40	$325.40	$325.40
Chula Vista	In-House	$107.42	$127.23	$124.42	$119.69	$125.82
City of San Diego	In-House	NA	NA	$275.72	$275.72	$275.72
County of San Diego - Flood Control	In-House	$1,474.41	$2,459.08	$1,612.06	$1,848.52	$2,035.57
El Cajon	In-House	$87.97	$88.48	$89.39	$88.61	$88.94
Escondido	In-House	$2,729.37	$2,271.88	$1,086.84	$2,029.36	$1,679.36
Imperial Beach	In-House	$877.97	$760.61	$474.96	$704.52	$617.79
La Mesa	In-House	$77.40	$71.02	$95.95	$81.46	$83.49
Lemon Grove	In-House	$2,421.05	$2,200.32	$2,266.32	$2,295.90	$2,233.32

483 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 34-35.

484 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 38.

485 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 67.

Co-Permittee	Data Referenced	2007-2008	2008-2009	2009-2010	Agency Average (All three years)	Agency Average (2008-2009, 2009-2010; excludes 2007-2008)
Oceanside	Contract	$19.31	$21.98	$20.50	$20.60	$21.24
Poway	In-House	$101.31	$85.51	$136.28	$107.70	$110.89
San Marcos	In-House, Contract (weighted average)	$164.27	$102.76	$89.86	$118.96	$96.31
Santee	In-House	$2,582.00	$1,696.35	$1,901.15	$2,059.83	$1,798.75
Solana Beach	In-House	$87.00	$117.15	$60.35	$88.17	$88.75
Vista	In-House	$91.62	$87.18	$90.12	$89.64	$88.65
Median (proposed unit cost)					**$162.32**	**$154.68**
Average (not used, for reference only)					$686.45	$646.59

If the 2007-2008 costs are removed, the unit cost is $154.68. If the 2011 survey data is removed, the unit cost is $89.64. If the 2011 survey data and the 2007-2008 costs are removed, the unit cost is $88.94.[486]

Table 8 of the 2025 Quenzer declaration summarizes the costs and the number of catch basins cleaned, as identified in the declarations filed by the cities of Chula Vista, El Cajon, Escondido, Solano Beach, and Vista:[487]

Table 8: Supporting Data for Unit Cost for Catch Basin Cleaning: In-House Costs (Co-Permittee Declarations Only)

	Catch Basin Cleaning Cost			**Number of Catch Basins Cleaned**			
Co-Permittee	**2007-2008**	**2008-2009**	**2009-2010**	**2007-2008**	**2008-2009**	**2009-2010**	**Location of Data in Documentation**

[486] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 39.

[487] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 68.

	Catch Basin Cleaning Cost			Number of Catch Basins Cleaned			
Chula Vista	$412,747	$674,09 [sic][488]	$519,917	2,324	3,830	3,899	Soriano Declaration, par.19 and 20[489]
El Cajon	$42,225	$43,002	$43,803	480	486	490	Davies Declaration, par.14 and 15[490]
Escondido	$379,382	$390,764	$408,650	139	172	376	Rivera Declaration, par.24 and 25[491]

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[488] As indicated in the next footnote, this number should be $674,099. Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 93 (Soriano Declaration, paragraph 20).

[489] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 93 (Soriano Declaration, paragraphs 19 and 20), which states:

> 19. In FY 2007-08, the City cleaned 2324 catch basins. In FY 2008-09, the City cleaned 3830 catch basins. In FY 2009-10, the City cleaned 3899 catch basins.
>
> 20. In FY 2007-08, the City incurred a total of $412,747 for conveyance system cleaning which includes conveyance system cleaning operations, employee supervision and management, equipment maintenance and fuel (“Conveyance System Cleaning”); Conveyance System Cleaning does not include reporting. In FY 2008-09, the City incurred a total of $674,099 for Conveyance System Cleaning. In FY 2009-10, the City incurred a total of $519,917 for Conveyance System Cleaning.

[490] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 98-99 (Davies Declaration, paragraphs 14 and 15), which state:

> 14. In FY 2007-08, the City cleaned 480 catch basins. In FY 2008-09, the City cleaned 486 catch basins. In FY 2009-10, the City cleaned 490 catch basins.
>
> 15. In FY 2007-08, the City incurred a total of $42,225 for conveyance system cleaning which includes conveyance system cleaning operations, equipment maintenance and fuel ("Conveyance System Cleaning"); Conveyance System Cleaning does not include reporting and employee and vendor training. In FY 2008-09, the City incurred a total of $43,002 for Conveyance System Cleaning. In FY 2009-10, the City incurred a total of $43,803 for Conveyance System Cleaning.

[491] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 105 (Rivera Declaration, paragraphs 24 and 25), which states:

	Catch Basin Cleaning Cost			Number of Catch Basins Cleaned			
Solana Beach	$1,479	$1,523	$1,569	17	13	26	King Declaration, par. 10 and 11[492]
Vista	$132,937	$136,792	$140,763	1,451	1,569	1,562	Conley Declaration, par.15 and 16[493]

The proposal then requires each claimant to provide supporting documentation to the Controller's Office to demonstrate that only the catch basin cleanings that meet the criteria of the mandate (cleaning is required when any catch basin or storm drain inlet

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24. In FY 2007-08, the City cleaned 139 catch basins. In FY 2008-09, the City cleaned 172 catch basins. In FY 2009-10, the City cleaned 376 catch basins.

25. In FY 2007-08, the City incurred a total of $379,382 for conveyance system cleaning which includes conveyance system cleaning operations, employee supervision and management, equipment maintenance and fuel ("Conveyance System Cleaning"); Conveyance System Cleaning does not include reporting and employee and vendor training. In FY 2008-09, the City incurred a total of $390,764 for Conveyance System Cleaning. In FY 2009-10, the City incurred a total of $408,650 Conveyance System Cleaning.

[492] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 111 (King Declaration, paragraphs 10 and 11), which states:

10. In FY 2007-08, the City cleaned 17 catch basins. In FY 2008-09, the City cleaned 13 catch basins. In FY 2009-10, the City cleaned 26 catch basins.

11. In FY 2007-08, the City incurred a total of $1,479 for conveyance system cleaning which includes conveyance system cleaning operations ("Conveyance System Cleaning"); Conveyance System Cleaning does not include reporting and employee and vendor training. In FY 2008-09, the City incurred a total of $1,523 for Conveyance System Cleaning. In FY 2009-10, the City incurred a total of $1,569 for Conveyance System Cleaning.

[493] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 114-115 (Conley Declaration, paragraphs 14 and 15), which state:

14. In each year from FY 2007-08 through FY 2009-10, the City incurred $843 in conveyance system cleaning costs relating to non-personnel equipment maintenance.

15. In FY 2007-08, the City cleaned 1451 catch basins. In FY 2008-09, the City cleaned 1569 catch basins. In FY 2009-10, the City cleaned 1562 catch basins.

has accumulated trash and debris greater than 33% of design capacity) are being claimed for reimbursement.[494]

The Commission finds that there is not substantial evidence in the record to support the conclusion that the proposed unit cost RRM of $162.32 per storm drain inlet or catch basin reasonably represents the actual costs mandated by the state for all eligible claimants.

First, the proposed unit cost RRM $162.32 per storm drain inlet or catch basin relies on survey responses, which are not signed or dated or contain any explanation of the costs or where the information is coming from, and as explained above, are considered hearsay and cannot be used as direct evidence of actual or estimated costs.

Second, even assuming the survey data is reliable, the average costs reported to clean each catch basin and storm drain inlet are wide and range from $20.60 per catch basin or inlet (Oceanside) to $2,059.83 (Santee) per catch basin or inlet. When the survey data is removed and the five declarations are considered, the costs range from $88.17 (Solana Beach) to $2,029.36 (Escondido) per catch basin or storm drain inlet. The City of Escondido's declarant states that the costs include "conveyance system cleaning operations, employee supervision and management, equipment maintenance and fuel," but the City of Solana Beach's declaration does not explain the costs except to say that the cost per catch basin and storm drain inlet does not include reporting and employee and vendor training.[495] In any event, a proposed unit cost RRM based on median averages of either $162.32 or $89.64, given the wide range of costs reported (from $20.60 to $2,059.83), does not reasonably represent the actual costs mandated by the state for all eligible claimants.

Accordingly, the Commission denies the RRM proposal for catch basin and storm drain inlet cleaning.

Linear MS4 Cleaning

The claimants' new proposal is a single, combined unit cost for both channels and pipes at $3.02 per linear foot (compared to the original proposal of one linear foot of pipe at $6.77/ft., and one linear foot of the channel at $8.52/ft.), based on fiscal year 2007-2008 cost data from the cities of Carlsbad, Chula Vista, and Imperial Beach (three of the 19 eligible claimants).[496] The proposed unit cost is based on the following:

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[494] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 38.

[495] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 105 (Rivera Declaration, paragraph 25), 111 (King Declaration, paragraph 11).

[496] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 40, 69 (Table 10 to 2025 Quenzer declaration).

- The approach subtracts the total catch basin cleaning and inspection costs from the overall conveyance system cleaning costs, with the remainder being the linear MS4 cleaning costs. "Conveyance system cleaning programs generally consist of these three activities, so it is reasonable to estimate linear cleaning costs by subtracting the costs of catch basin inspections and cleaning."
- The calculation uses each co-permittee's own cleaning and inspection program costs, rather than relying on an overall average.
- The total linear cleaning costs were then divided by the linear distance of pipe or channel cleaned to get a unit cost per linear foot cleaned.
- The proposed unit cost is the median cost per linear foot cleaned by the cities of Carlsbad, Chula Vista, and Imperial Beach in fiscal year 2007-2008.
- The cities of Escondido and Vista had previously been included in the calculation but were removed after further review due to lack of applicable data needed to calculate linear MS4 cleaning.[497]

Table 10 to the 2025 Quenzer declaration shows the median cost per linear foot at $3.02, along with citations to declarations that support the information presented.[498] As indicated in Table 10, the City of Carlsbad's overall MS4 cleaning costs in fiscal year 2007-2008 was $56,000[499] less the catch basin cleaning and inspection costs of $3,254[500] and $8,966,[501] for a total of $43,780. The length of pipe cleaned in fiscal year 2007-2008 was 15,000 feet[502] and the length of MS4 channel cleaned in fiscal

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[497] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 39-40.

[498] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 69.

[499] Exhibit U (13), Test Claim, page 607 and Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), pages 404, 412 (Declaration of Glenn Pruim, Public Works Director for the City of Carlsbad, in Support of the Test Claim, filed with the Test Claim in 2008 ("Because all inspected facilities must be cleaned in accordance with specific requirements, the City of Carlsbad has encumbered $53,000 to pay for a contractor to provide these services for FY 2007-08. An additional $3,000 is allocated for staff time to oversee these activities.")).

[500] Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 26 (City of Carlsbad 2011 survey response).

[501] Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 26 (City of Carlsbad 2011 survey response).

[502] Exhibit I (2), Claimant's Supporting Documentation for Proposed RRMs, Volume 2 (Copermittee 2010 Declarations, JURMP Reports), pages 879, 927 (City of Carlsbad

year 2007-2008 was 1,100 feet, for a total of 16,100 feet cleaned.[503] Thus, the cost per linear foot cleaned in fiscal year 2007-2008 ($43,780 divided by 16,100) was $2.72 per foot.[504]

As reported in Table 10, the City of Chula Vista's overall MS4 cleaning costs in fiscal year 2007-2008 was $824,196[505] less the catch basin cleaning and inspection costs of $499,769[506] and $205,491[507] for a total of $118,936. The length of pipe cleaned in fiscal year 2007-2008 was 6,917 feet[508] and the length of MS4 channel cleaned in fiscal year 2007-2008 was 720 feet, for a total of 7,637 feet cleaned.[509] Thus, the cost per

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JURMP Annual Report for fiscal year 2007-2008, signed under penalty of perjury on September 26, 2008, by Glen Pruim, Public Works Director).

503 Exhibit I (2), Claimant's Supporting Documentation for Proposed RRMs, Volume 2 (Copermittee 2010 Declarations, JURMP Reports), pages 879, 927 (City of Carlsbad JURMP Annual Report for fiscal year 2007-2008, signed under penalty of perjury on September 26, 2008, by Glen Pruim, Public Works Director).

504 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 69 (Table 10).

505 Exhibit U (13), Test Claim, page 626 and Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), pages 423, 430 (Declaration of Khosro Aminpour, Senior Civil Engineer for the City of Chula Vista, in Support of the Test Claim, filed with the Test Claim in 2008 ("City of Chula Vista's additional conveyance system inspection and cleaning costs in FY 2007-2008 for staff and equipment is $824,196.")).

506 Table 10 identifies the Soriano Declaration, paragraphs 15 and 20, to support the catch basin cleaning and inspection costs of $499,769. Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 92.

507 Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 39 (City of Chula Vista 2011 survey response).

508 Exhibit I (2), Claimants' Supporting Documentation for Proposed RRMs, Volume 2 (Copermittee 2010 Declarations, JURMP Reports), pages 3500, 3551 (City of Chula Vista JURMP Annual Report for fiscal year 2007-2008, signed under penalty of perjury on September 23, 2008, by Matt Little, Assistant Director of Public Works ("A total of 1.31 miles of MS4 was cleaned", which amounts to 6916.8 feet.)).

509 Table 10 identifies "Vol 2, page 3550" as the supporting documentation for the 720 feet of MS4 Channel Cleaned in fiscal year 2007-2008. This page is in Exhibit I (2), Claimants' Supporting Documentation for Proposed RRMs, Volume 2 (Copermittee 2010 Declarations, JURMP Reports), pages 3551; the City of Chula Vista JURMP Annual Report for fiscal year 2007-2008.

linear foot cleaned in fiscal year 2007-2008 ($118,836 divided by 7,637) was $15.57 per foot.[510]

The City of Imperial Beach's overall MS4 cleaning costs in fiscal year 2007-2008 was $171,200[511] less the catch basin cleaning and inspection costs of $34,163[512] and $62,987[513] for a total of $74,050. The length of pipe cleaned in fiscal year 2007-2008 was 24,481 feet[514] and the length of MS4 channel cleaned in fiscal year 2007-2008 was 0 feet.[515] Thus, the cost per linear foot cleaned in fiscal year 2007-2008 ($74,050 divided by 24,481) was $3.02 per foot, which is the median cost of the three cities.[516]

The Commission finds that the proposed unit cost RRM for linear MS4 cleaning at $3.02 per linear foot is not supported by substantial evidence in the record that the proposed unit cost reasonably represents the costs mandated by the state for all eligible claimants.

First, the claimants are also relying on survey responses to support the costs of linear MS4 cleaning for the City of Imperial Beach. Survey responses, however, are hearsay and cannot be used as direct evidence of the costs incurred.

In addition, some of the information in Table 10 is not clear. For example, Table 10 says that the City Chula Vista's costs for catch basin cleaning and inspections, which

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510 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 69 (Table 10).

511 Exhibit U (13), Test Claim, pages 743, 746 and Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 547, Declaration of Judith Keir, Environmental Program Manager for the City of Carlsbad, in Support of the Test Claim, filed with the Test Claim in 2008 ("The City of Imperial Beach's cost·in FY2007-08 for two Sewer Division Personnel required to perform the extra cleaning duties is $107 per hour. The increase to the City of Imperial Beach's staffing cost to comply with this mandated activity in FY 2007-08 is $17,200 . . . ").

512 Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 94 (City of Imperial Beach 2011 survey response).

513 Exhibit I (1), Claimants' Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 94 (City of Imperial Beach 2011 survey response).

514 Exhibit I (3), Claimants' Supporting Documentation for Proposed RRMs, Volume 3 (JURMP Reports), pages 3812, 3849 (City of Imperial Beach JURMP Annual Report for fiscal year 2007-2008, signed under penalty of perjury on September 28, 2008, by H.A. Levien, Public Works Director).

515 The claimant does not cite to any supporting documentation for the length of MS4 channel cleaned by the City of Imperial Beach in fiscal year 2007-2008.

516 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 69 (Table 10).

were deducted from the proposed RRM, total $499,769. The Table cites to the Soriano Declaration, paragraphs 15 and 20. However, paragraph 15 of the Soriano Declaration addresses reporting and not cleaning or inspections.[517] And Paragraph 20 identifies costs of $412,747 and not $499,769 for conveyance system cleaning.[518] There is no evidence cited to support the City's reduction of inspection costs. In addition, Table 10 identifies the length of pipe cleaned by the City of Chula Vista in fiscal year 2007-2008 as 6,917 feet *and* the length of MS4 channel cleaned in fiscal year 2007-2008 as 720 feet, for a total of 7,637 feet cleaned. The 6,917 feet of pipe cleaned is supported by the City's 2007-2008 JURMP; however, there is no evidence supporting the 720 feet of MS4 channel cleaned. Table 10 identifies "Vol 2, page 3550" as the supporting documentation for the 720 feet of MS4 Channel Cleaned in fiscal year 2007-2008. This page is in Exhibit I, Volume 2, page 3551; the City of Chula Vista JURMP Annual Report for fiscal year 2007-2008. However, there is no reference in that report of 720 feet of MS4 channel cleaned. Rather, that report says "A total of 1.31 miles of MS4 was cleaned", which amounts to 6916.8 feet, which supports the length of pipe cleaned.[519]

Even if the figures in Table 10 are reliable, data from just three claimants (or just 16% of the 19 eligible claimants) for one fiscal year, with a wide range of costs from $2.72 to $15.57 per foot, does not provide substantial evidence in the record that the proposed RRM of $3.02 per linear foot reasonably represents the actual costs mandated by the state incurred by all eligible claimants during the period of reimbursement.

Accordingly, the Commission denies the proposed unit cost RRM for linear MS4 cleaning.

c. The proposed RRMs for the JURMP educational component.

The Parameters and Guidelines authorize reimbursement for the jurisdictional educational activities identified in the JURMP section of the test claim permit. This

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517 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guideline, page 92: "In FY 2007-08, the City incurred $87,022 in personnel costs relating to staff time for *reporting* on conveyance system cleaning operations. In FY 2008-09, the City incurred $89,633 in personnel costs relating to staff time for reporting on conveyance system cleaning operations. In FY 2009-10, the City incurred $92,322 in personnel costs relating to staff time for reporting on conveyance system cleaning operations.".

518 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 93: "In FY 2007-08, the City incurred a total of $412,747 for conveyance system cleaning which includes conveyance system cleaning operations, employee supervision and management, equipment maintenance and fuel ("Conveyance System Cleaning").

519 Exhibit I (2), Claimants' Supporting Documentation for Proposed RRMs, Volume 2 (Copermittee 2010 Declarations, JURMP Reports), page 3551.

includes educating municipal departments, construction site owners and developers, industrial owners and operators, planning boards and elected officials, on a number of new specified topics in accordance with Part D.5.a. and b.1-2.

The claimants are also required to collaboratively develop and implement a plan for educating residents, the general public, and school children in accordance with Part D.5.b.3., which must evaluate the use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.[520]

As indicated above, implementation of the Education Component requirements of the JURMP was delayed to no later than March 24, 2008.[521]

i. Initial RRM Proposal

The claimants propose two RRM formulae; one for the jurisdictional education program and one for the residential education program.

The RRM initially proposed by the claimants for the *jurisdictional education program* (presumably to educate municipal departments, construction site owners and developers, industrial owners and operators, planning boards and elected officials, on a number of new specified topics) is calculated using the average percentage of the stormwater budget spent on yearly education costs between fiscal year 2007-2008 and fiscal year 2014-2015, which is 2.16 percent, times the Municipal Claimant's total stormwater budget each fiscal year, resulting in an estimated reimbursement of $16,336,242.47.[522]

The claimants state:

> The value of Education Costs was determined by compiling a dataset of the total stormwater expenditures as reported by a subset of Co-Permittees as education costs. The expenditures listed in the JRMP annual reports located in Vols. 2-11, the jurisdictional education program expenditures as reported in JRMP annual reports located in Vols. 2-11, WURMP Annual Reports located in Vol. 13 pp. 1-10,756, and D-Max Proposal Documents located in Vol. 14, pp. 8-189 were used to calculate the percentage of each years reported total stormwater expenditures each Co-Permittee spent on jurisdictional educational costs."[523] The Quenzer declaration states "[t]he formula and components of the formula [for the

[520] Exhibit A, Amended Test Claim Decision on Remand, pages 112, 150.

[521] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

[522] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 7, 39-40; Exhibit M, Claimants' Rebuttal Comments, page 66.

[523] Exhibit M, Claimants' Rebuttal Comments, pages 9-10.

jurisdictional education programs] were determined by reviewing the JRMP Annual Reports, WQIP Annual Reports, D-Max Files, and County Fiscal Analysis Documents.[524]

The Quenzer declaration further states the average percentage spent on education of 2.16 percent is reasonable based on: "The 2005 State Survey found that permittees spent between two and seven percent of the annual stormwater budget on education. The *Education Costs* are within the range found by the state supporting that this average percentage is reasonable to apply to the Co-Permittees."[525]

For the *residential education program* (educating residents, the general public, and school children), the initial proposal multiplies the actual annual shared costs for developing and implementing the program (called "County Education Costs"), times the claimant's proportional share of cost based on applicable MOUs.[526] The claimants state the yearly program development and implementation costs are estimated as follows:

Fiscal Year	**County Costs for Regional Residential Education Program Development and Implementation**
FY 2007/2008	$219,226.90
FY 2008/2009	$438,452.75
FY 2009/2010	$876,907.50
FY 2010/2011	$920,752.90
FY 2011/2012	$966,791.36
FY 2012/2013	$138,040.00
FY 2013/2014	$8,880.99

[524] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 38.

[525] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 40.

[526] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 39; see also, Exhibit M, Claimants' Rebuttal Comments, page 9, which states: "The yearly County Education Costs were reported in the Co-Permittee Declarations for FY 2007/2008 to FY 2011/2012 located in Vol. 1, pp. 377-743. [Fn. omitted.] For FY 2012/2013, the County Education Costs were determined by reviewing Regional Cost Sharing Documentation located in Vol. 13, pp. 10,917- 13,074. [Fn. omitted.] The data from both sources were summarized by year to calculate total annual regional education program development and implementation cost incurred by the Co-Permittees."

Fiscal Year	County Costs for Regional Residential Education Program Development and Implementation
FY 2014-2015	$102,746.96[527]

This brings the total estimated costs under the initial proposal for developing and implementing the Residential Education Program to $3,560,171.41. The formula and components of the formula were determined by reviewing the JRMP Annual Reports,[528] WQIP Annual Reports,[529] D-Max Files,[530] and county fiscal analysis documents."[531]

Based on these proposals, the claimants' total estimate for the educational program reimbursement under the initial proposal is $23.68 million.[532] In rebuttal comments, the claimants reduce a percentage of these costs based on when implementation was required to begin.[533]

The Water Boards opposed the RRMs on the following grounds:

- The claimants were not required to implement the educational component until March 24, 2008, before which they implemented the prior (2001) permit during all of 2006-2007 and 75 percent of 2007-2008.[534] This also applies to the Regional

[527] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 39; Exhibit M, Claimants' Rebuttal Comments, pages 64-65.

[528] Exhibit I (2-11), Claimants' Supporting Documentation for Proposed RRMs, Volumes 2-11.

[529] Exhibit I (12), Claimants' Supporting Documentation for Proposed RRMs, Volume 12 (Water Quality Improvement Project Reports).

[530] Exhibit I (14), Claimants' Supporting Documentation for Proposed RRMs, Volume 14 (Quenzer Resume, DMAX Files).

[531] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP reports, County Records, MOUs), pages 10757-10784.

[532] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 7, 38 (Quenzer declaration).

[533] Exhibit M, Claimants' Rebuttal Comments, page 65 (Quenzer Declaration).

[534] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 35, 51 (Technical Analysis).

Education Program in part F of the permit.[535] The claimants' summary table does not prorate 25 percent of costs for 2007-2008.[536]

- Using each claimants' "total stormwater budget" contains costs that are not for mandated reimbursable activities, and costs already proposed for reimbursement for other mandated activities outside of the education component, so the RRM equation reflects reimbursing the same mandated activity, fully or partially, more than once.[537]
- Stormwater budgets vary broadly among claimants as to what is included. Annual reports under the test claim permit indicate stormwater budgets were inconsistently reported based on each claimant's interpretation of what to include in the fiscal analysis. This inconsistency among stormwater budgets has been an ongoing and long-standing concern for assessing MS4 permit annual reports statewide since 2005.[538]
- The proposed RRMs do not subtract developing educational programs or calculate a pro rata adjustment for just the increased level of service.[539]
- The claimants do not address local variation in costs from one claimant to another. For example, a large jurisdiction may have a significant stormwater budget and a small jurisdiction may have a much smaller stormwater budget that will increase the total percent of a budget component across the board for all claimants and is not representative or reasonable.[540]
- The claimants request reimbursement for developing an educational program, but in the Draft Proposed Decision, staff found that (except in part D.5.(b)(3) for educating residential, general public, and school children target communities) only implementing but not developing education program was reimbursable and that costs for developing regional and jurisdictional programs were to be prorated

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[535] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 51 (Technical Analysis).

[536] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 35, 51 (Technical Analysis).

[537] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 49 (Technical Analysis).

[538] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 50 (Technical Analysis).

[539] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 49-50 (Technical Analysis).

[540] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 50 (Technical Analysis).

for the higher level of service in the test claim permit. The claimants do not prorate these costs.[541]

- The claimants do not indicate if the MOU cost share is implementing section F requirements (residential education program) which are not part of the reimbursable section D requirements.[542] The claimants do not differentiate between jurisdictional development and implementation costs from regional development and implementation costs. Regional educational programs were not a requirement of the reimbursable activities in Section D. of the test claim permit.[543]

ii. There is not substantial evidence in the record to support the conclusion that the ***new*** *proposed unit cost RRMs for the JURMP education requirements reasonably represent the actual costs mandated by the state for all eligible claimants.*

The claimants have revised their RRM in response to the Revised Draft Proposed Decision and Parameters and Guidelines[544] as described below.

Residential Education Program

The proposed RRM still multiplies the actual annual shared costs for developing and implementing the program (called "County Education Costs"), times the claimant's proportional share of cost based on applicable MOUs. However, the claimant has clarified the proposal.

The 2025 Quenzer declaration explains that since the Residential Education program requires public outreach, which benefits from consistency throughout the region, all agencies through their Education and Regional Sources Workgroup elected to contract with a consultant to develop that program.

> As required by the 2007 Permit, the Co-Permittees developed and implemented a Regional Education Program. The Co-Permittees retained a consultant to complete the mandated activities and each Co-Permittee

[541] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 52-53 (Technical Analysis).

[542] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed Reasonable Reimbursement Methodology, page 53 (Technical Analysis).

[543] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 53 (Technical Analysis).

[544] Exhibit O, Revised Draft Proposed Decision and Parameters and Guidelines, pages 156-163.

> provided covered a share of the costs as determined by a formula set out in the MOUs.
>
> The implementation of the Regional Education Program was a separate mandated activity in addition to the implementation of jurisdictional educational programs by each Co-Permittee. The Regional Education Program does not overlap with jurisdiction education activities as the Regional Education Program was completed via contracted work, with the cost shared among the Co-Permittees. Regional education activities are targeted at the public. Because public outreach benefits from consistency, all agencies elected to utilize a consultant, via the Education and Regional Sources Workgroup, to provide consistency to regional education activities.[545]

The proposed RRM covers the period from January 24, 2007 (the effective date of the test claim permit and beginning of the period of reimbursement) to June 26, 2013, which is the day before the effective date of the 2013 permit. The claimants started developing the program in 2006-2007, to ensure they could implement it on time. To adjust for these dates, the RRM proposes to reduce the fiscal year 2006-2007 costs to 43.29 percent of the costs, because 158 days in fiscal year 2006-2007 were on or after January 24, 2007. In addition, the fiscal year 2012-2013 costs should be 98.9 percent of the total costs, to reflect that 361 days in fiscal year 2012-2013 were on or before June 26, 2013.[546]

The formula takes the total costs for development and implementation of the residential education program, as noted in Table 11 to the 2025 Quenzer declaration, and each permittee would receive their share of costs identified in their MOU. Costs total $914,828.20.[547] Table 11, however, does not show any costs for fiscal years 2006-2007 and 2007-2008. Table 11 starts with fiscal year 2008-2009.[548]

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[545] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 41-42 (2025 Quenzer declaration).

[546] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 41 (2025 Quenzer declaration).

[547] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 42, 71-72 (Table 11).

[548] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 71-72.

The revised RRM proposal includes only those costs reported by the Education and Regional Sources Workgroup “that were clearly targeted at educating the general public.”[549] The 2025 Quenzer declaration describes these tasks as follows:

- Materials Development and Distribution (most often Subtask 3.A): This subtask was defined by the workgroup as work that focused on “Development of regional education outreach materials for dissemination to the public [that] will utilize a regional brand and will target pollutants outlined in the Regional Residential Education Plan.” (Vol 13 p 10994.)
- Partnership Development (most often Subtask 3.B): This subtask was defined by the workgroup as work to “Continue identifying new partners and support current partners that have a regional influence in the following categories: 1) Other governmental agencies; 2) Corporations; and 3) Non-governmental Agencies (NGOs)” (Vol 13 p 10994). The broad range of entities targeted for partnerships shows that this subtask was focused on providing education for the general public.
- Regional Branding [fn. omitted] (most often Subtask 3.C): This subtask was defined as work to “Manage [the] Regional Branding Program” (Vol 13 p 10994). The Regional Branding was associated with the development, review, and maintenance of materials and messaging used for materials distribution to general public audiences and mass media campaigns such as the program’s logo.
- Market Research and Assessment Tools (often subtask 3.C, sometimes subtask 3.D): Work under this task included telephone survey, event survey, and associated data analysis. This work was undertaken to support the development of educational materials and inform the development and implementation of outreach and engagement efforts to the general public.
- Regional Website (often subtask 3.D, sometimes subtask 3.E): Work for this subtask was focused on the maintenance of and updates to a regional website. The website was designed to reach a general audience.
- Underserved Target Audience (often subtask 3.F): This subtask was defined by the workgroup as work to “develop and implement outreach strategies and materials to address low socioeconomic communities” (Vol 13 p 10995). This work focused on how to better engage more of the general public and underserved residential audiences.
- Mass Media Campaign (often subtask 3.G): This subtask was defined as work to “develop and implement mass media and PR campaign” (Vol 13 p 10996). These

[549] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 42.

campaigns were designed to support the engagement of and outreach to the general public.

- Regional Events (often subtask 3.H): This subtask was defined as work to "coordinate community outreach events throughout San Diego County" (Vol 13 p 10996). Community outreach work targeted the general public.[550]

Table 11 breaks down the costs incurred, which are supported by workplan, budget, and expenditure summaries of the Educational and Residential Sources Workgroup, and invoices from consultants:

Fiscal Year	ERS Workgroup Task	Reported Expenditures	Data Location	Fiscal Year Total RRM
FY08-09	Subtask 3.A. Materials Development and Distribution	$1,110.70	Vol 13 - p 10,985 [fn. omitted][551]	$210,633.39
	Subtask 3.B. Partnership Development	$325.99		
	Subtask 3.C. Regional Brand	$14,979.66		
	Subtask 3.D. Market Research and Assessment Tools	$62,943.12		
	Subtask 3.E. Regional Website	$4,976.40		
	Subtask 3.G. Mass Media and Public Relations	$121,940.88		
	Subtask 3.H. Regional Events	$4,356.64		

[550] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 42-43. The document cited in the declaration is a "Educational and Residential Sources Workgroup FY 2009-2010 Workplan and Budget." (Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 10994-10997.)

[551] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), page 10986 ("2008-09 Education and Residential Sources Workgroup Expenditure Summary," dated January 14, 2010, which identifies the numbers in the Table).

Fiscal Year	ERS Workgroup Task	Reported Expenditures	Data Location	Fiscal Year Total RRM
FY09-10	Market Research and Assessment	$32,372.75	Vol 13 – pp 11,020 to 11,208 [fn. omitted][552]	$277,607.28
	Mass Media	$146,568.82		
	Materials Development and Distribution	$69,667.51		
	Partnership Development	$14,308.15		
	Regional Brand	$11,270.21		
	Regional Events	$1,794.51		
	Regional Website	$1,039.86		
	Underserved	$213.95		
FY10-11	Sub-task 3.A. Materials Development and Distribution	$25,443.00	Vol 13 – pp 11,941 to 11,942 [fn. omitted][553]	$153,551.00
	Subtask 3.B. Partnership Development	$565.00		
	Subtask 3.C. Market Research and Assessment Tools	$79,378.00		

[552] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 11021-11029 (FY 2009-2010 Education and Residential Sources Workgroup expenditure claim sheets and invoices from Action Research, with a certification of costs signed by the County and City of San Diego for the "4th Quarter FY 2009-10 (April 1- June 30, 2010)," dated in 2010, for $133,405.25 for expenditures during those months).

However, the costs in the Table do not match the figures on these pages, do not total $277,607.28, and do not total the amount certified. PDF page 11022 (hard page 11021) shows costs of $1,182.66 for market research and assessment, regional website, and mass media campaign from April 1-June 30, 2010; page 11023 shows costs of $318.30 for regional events and materials development from April 1-June 30, 2010; pages 11024, 11026-11027, and 11028-11029 show costs of $18,900.65 for market research and assessment with invoices from Action Research and materials development from April 1-June 30, 2010; and page 11025 shows costs of $114,504.61 from May 30-June 11, 2010 for mass media. This totals $134,906.22, which does not match the amount certified of $133,405.25, or the total amount in the Table of $277,607.28.

[553] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports County Records, MOUs), pages 11941-11942 (FY 2010-2011 Education and Residential Sources Workgroup expenditures, marked "Final September 2011, which identifies the costs in the Table.)

Fiscal Year	ERS Workgroup Task	Reported Expenditures	Data Location	Fiscal Year Total RRM
	Subtask 3.D. Regional Website	$2,220.00		
	Subtask 3.E. Underserved Target Audience	$871.00		
	Subtask 3.F. Mass Media Campaign	$43,674.00		
	Subtask 3.G. Regional Events	$1,354.00		
	Subtask 3.H. Regional Logo	$46.00		
Fiscal Year	**ERS Workgroup Task**	**Reported Expenditures**	**Data Location**	**Fiscal Year Total RRM**
FY11-12	3B1 Materials Development and Distribution	$57,298.00	Vol 13 - p 12,305 [fn. omitted][554]	$140,320.00
	3B2 Partnership Development	$0.00		
	3B3 Underserved Target Audience	$0.00		
	3B4 Regional Events	$6,591.00		
	3C Market Research and Assessment Tools	$12,469.00		
	3D Website	$866.00		
	3E Mass Media Campaign	$63,096.00		
FY12-13	Materials Development and Distribution	$45,968.69	Vol 13 pp 12,372 to12,414 [fn. omitted][555]	$132,716.53
	Regional Events	$8,930.24		

[554] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), page 12306 (FY 2011-2012 Education and Residential Sources Workgroup expenditures, which identifies the costs in the Table).

[555] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 12373-12415 (FY 2012-2013 Education and Residential Sources Workgroup expenditures and invoices, with two certifications of costs signed by the County of San Diego for fiscal year 2012-2013, totaling $136,587.94). The invoices are from RBF Consulting, Action Research, Webster Design, Xerox Corp., Freedom Three Publishing, Emerge Industries, San Diego County Fairgrounds, Events Online, UltraStar Cinemas, several radio stations.

	Market Research and Assessment Tools Regional Website	$15,762.60 $630.00		
	Mass Media	$61,425.00		
			Total:	**$914,828.20** [556]

The Commission finds that the formula to reimburse claimants based on actual annual shared costs for developing and implementing the residential education program, times the claimant's proportional share of cost based on applicable MOUs, satisfies the definition of the RRM and provides reimbursement for the actual costs mandated by the state for all eligible claimants. The requirement in Part D.5.b.3. to "collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities" to '[t]he . . . use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods" was found to be a new state-mandated activity.[557] The test claim permit authorizes the permittees to develop and implement urban runoff management activities on a regional level and requires the permittees to execute and submit an MOU to the Regional Board that identifies the collaborative arrangements to comply with the permit.[558] Thus, the Parameters and Guidelines, in Section IV. Reimbursable Activities, following the identification of the reimbursable activity in Part D.5.b.(3) says the following:

> Reimbursement for the activities required by Part D.5.b.(3) may be based on the actual annual shared costs of developing and implementing the program, times the claimant's proportional share of costs indicated in the claimants' MOU.

The Commission also finds that the types of costs identified above fit within this reimbursable activity, as long as they are limited to educating residential, general public, and school children target communities on the topics listed in Table 3 of the test claim permit.[559]

However, there is not substantial evidence in the record to support a finding that the total costs of the program are $914,828.20, as alleged by the claimants. As indicated

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The costs identified on these pages, however, do not total the amount in the Table of $132,716.53.

[556] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 71-72.

[557] Exhibit A, Amended Test Claim Decision on Remand, pages 74, 78-84, 141-143.

[558] Exhibit U (13), Test Claim, pages 304, 329-330 (Order R9-2007-0001).

[559] Exhibit U (13), Test Claim, pages 298-299 (Order R9-2007-0001).

above, there is no evidence supporting any costs incurred in fiscal years 2006-2007 and 2007-2008, yet the 2025 Quenzer declaration states that the claimants began developing the program in 2006-2007 and the proposed RRM begins reimbursement on January 24, 2007.[560] In addition, and as explained in footnote 729, the costs identified in Table 11 for fiscal year 2009-2010 are not supported by the documents cited in the table. In addition, some of the expenditure summaries provided to support the costs are not signed, dated, or certified; it is not clear if an employee of an eligible claimant prepared those documents; and it is not clear where the information is coming from.[561] The expenditure summary documents are hearsay and cannot be used as direct evidence to support the costs alleged.

Thus, the proposed unit cost RRM of $914,828.20 is denied.

Jurisdictional Education Program

The claimants have made some adjustments to their RRM proposal for the Jurisdictional Education Program.

The proposed RRM covers the period from March 24, 2008 (which is when they began implementing the JURMP under the test claim permit) until June 26, 2015 (which is the day before the JURMP under the next permit went into effect).[562] The fiscal year 2007-2008 costs claimed should be 27.05 percent of the unit cost to reflect the 99 days of the 366 days in fiscal year 2007-2008 that were on or after March 24, 2008. The fiscal year 2014-2015 costs claimed should be 98.90 percent of the proposed unit cost, which reflects that 361 of the 365 days in fiscal year 2014-2015 were on or before June 26, 2015.[563]

The revised RRM is calculated using the average percentage of the stormwater budget spent on yearly education costs between fiscal year 2007-2008 and fiscal year 2014-2015 times the Municipal Claimant's total stormwater expenditures each fiscal year. As originally proposed, the average percentage of the stormwater budget spent on yearly education costs between fiscal year 2007-2008 and fiscal year 2014-2015 was 2.16 percent. The claimants have reduced that percentage to 0.39 percent of total costs, which is the difference between the median value for education costs as a percentage of total stormwater program costs (jurisdictional component) under the 2001 permit and

[560] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 41 (2025 Quenzer declaration).

[561] See for example, the expenditure summary in Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), page 10986.

[562] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 43.

[563] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 43.

the median value for education costs as a percentage of total stormwater program costs (jurisdictional component) under the test claim permit as follows:

> For each year, the education cost was compared to the total stormwater program cost, both of which were reported in the fiscal analysis sections of JURMP annual reports. Not all Co-Permittees reported education program costs as unique line items prior to the 2007 Permit, after which a standard fiscal reporting method that required reporting education as a line item was adopted. Data from Co-Permittees that reported education costs both before and after the 2007 Permit was used to perform this calculation. As shown in Table 14 in Attachment 1, the median value for education costs as a percentage of total stormwater program cost was 1.44% during the 2001 Permit years and 1.83% during the 2007 Permit years, an increase of 0.39%. If averages were used, the increase would be 1.72%, but the median is proposed to be conservative.
>
> **The Co-Permittees proposed updating the jurisdictional "*Education Costs"* of the total stormwater program budget to 0.39%.**[564]

Table 14 then identifies the percentages as follows:

Co-Permittee	2001 Permit 2005-2006 [A]	2001 Permit 2006-2007 [B]	2001 Permit Average	2007 Permit 2008-2009 [C]	2007 Permit 2009-2010 [D]	2007 Permit 2010-2011 [E]	2007 Permit 2011-2012 [F]	2007 Permit Average
City of San Diego	3.87%	6.72%	5.30%	11.73%	9.04%	5.33%	3.80%	7.48%
Encinitas	0.46%	0.02%	0.24%	0.03%	1.23%	0.92%	0.94%	0.78%
La Mesa	1.24%	1.64%	1.44%	2.05%	1.59%	1.97%	1.72%	1.83%
Solana Beach	0.39%	0.36%	0.37%	2.10%	9.73%	8.79%	5.70%	6.58%
Vista	2.61%	1.99%	2.30%	0.95%	0.77%	1.14%	2.24%	1.28%
Median			**1.44%**					**1.83%**
Average			1.85%					3.56%
Proposed RRM, Education % of Total Stormwater Budget: 0.39% (2007 Median – 2001 Median)[565]								

The footnote to Table 14 says "Percentages for individual agencies and years in this table are taken from the preceding table. Averages and medians were calculated from those numbers." The preceding table is Table 13, which identifies the costs of the

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[564] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 44.

[565] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 78 (Table 14).

jurisdictional component of the stormwater program and education costs, percentages, and supporting documents for fiscal years 2005-2006 through 2006-2007, and 2008-2009 through 2011-2012 for the cities of San Diego, Encinitas, La Mesa, Solana Beach, and Vista.[566] For example, Table 13 shows the following figures for the City of San Diego, supported by the City's JURMP annual report:

Fiscal Year	Total Stormwater Costs	Jurisdictional Education Costs	Education % of Total Cost	Supporting Documentation Cited
05-06	$33,562,843	$1,300,000	3.87%	May 2025 Barret Decl, Exhibit C, p 94[567]
06-07	$44,602,619	$2,996,927	6.72%	Vol 6 pp 2,599 - 2,560[568]
08-09	$47,821,511	$5,610,999	11.73%	Vol 7 pp 655 - 656[569]
09-10	$35,582,609	$3,216,076	9.04%	Vol 7 p 5,173[570]
10-11	$52,342,560	$2,789,130	5.33%	Vol 7 p 6,135[571]

[566] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 76.

[567] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 546 (City of San Diego, 2006 JURMP Annual Report, Fiscal Assessment).

[568] Exhibit I (6), Claimants' Supporting Documentation for Proposed RRMs, Volume 6 (JURMP Reports), pages 2599-2600 (2007 JURMP Annual Report).

[569] Exhibit I (7), Claimants' Supporting Documentation for Proposed RRMs, Volume 7 (JURMP Reports), pages 655-656 (2009 JURMP Annual Report), which identifies the total cost of the jurisdictional component of the stormwater program and $5,610,999 spent on "Education, *Residential*, & Public Participation." Residential education costs, however, are captured above in the proposed RRM for "Residential Education Program."

[570] Exhibit I (7), Claimants' Supporting Documentation for Proposed RRMs, Volume 7 (JURMP Reports), page 5174 (2010 JURMP Annual Report), which identifies the total cost of the jurisdictional component of the stormwater program and $3,216,076 for "Education, *Residential*, and Public Participation."

[571] Exhibit I (7), Claimants' Supporting Documentation for Proposed RRMs, Volume 7 (JURMP Reports), page 6136 (2011 JURMP Annual Report), which identifies the total

Fiscal Year	Total Stormwater Costs	Jurisdictional Education Costs	Education % of Total Cost	Supporting Documentation Cited
11-12	$46,086,836	$1,753,316	3.80%	Vol 7 p 8,032[572]

It is generally reasonable to compare the percentage of education costs from the prior permit to the percentage of state-mandated costs incurred under the test claim permit since the Commission found that the requirements for the education and training of municipal departments and personnel, was not a new program but represented a higher level of service compared to prior law.[573]

In addition, the JURMP annual reports are required by the test claim permit and are reports prepared in the normal course of business and, thus, are excepted from the hearsay rule and can be relied on as direct evidence.[574]

However, the fiscal analysis in some of the JURMP annual reports relied on for this proposal identify total costs for education, which in some cases includes additional costs for public participation, investigation, and "residential" costs, which goes beyond the scope of the mandated requirements imposed here.[575] It is not clear what investigation costs are, but investigation was not approved as a reimbursable activity and public participation requirements are imposed by Part D.6. of the test claim permit, which was not pled in the Test Claim and not approved by the Commission. The "Residential Education" costs are supposed to be covered by the proposed RRM identified in the section above, and while the 2025 Quenzer declaration states the

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cost of the jurisdictional component of the stormwater program and $2,789,130 for "Education, *Residential*, and Public Participation."

[572] Exhibit I (7), Claimants' Supporting Documentation for Proposed RRMs, Volume 7 (JURMP Reports), page 8033 (2012 JURMP Annual Report), which identifies the total cost of the jurisdictional component of the stormwater program and $1,753,316 for "Education, *Residential*, and Public Participation."

[573] Exhibit A, Amended Test Claim Decision on Remand, page 79.

[574] Evidence Code 1271.

[575] See, for example, Exhibit I (3), Claimants' Supporting Documentation for Proposed RRMs, Volume 3 (JURMP Reports), page 2599 (City of San Diego, 2007 JURMP Annual Report), showing total education costs, which include "public participation"; page 1402 (City of Encinitas, 2008-2009 JURMP Annual Report), showing costs for "Education & Public Participation"; Exhibit I (10) Claimants' Supporting Documentation for Proposed RRMs, Volume 3 (JURMP Reports), page 1817 (City of Solana Beach, 2006-2007 JURMP Annual Report), showing costs for "Education and Investigation"; page 2819 (City of Solana Beach, 2009-2010 JURMP Annual Report), showing costs for "Residential, Education, and Public Participation."

residential education program costs are separate from the jurisdiction education costs,[576] the JURMP annual reports identify the costs for education as a whole. Thus, the costs included in the percentages may include more than the costs mandated by the state for this RRM proposal.

Even assuming the costs included in the calculations cover only the mandated costs and are accurate, using the median percentage of costs of five of the 19 eligible claimants does not reasonably represent the actual costs mandated by the state for all eligible claimants. The average percentage of costs spent on education by the City of Vista went down under the test claim permit (from 2.30% to 1.28% of its total stormwater costs) and, thus, there is no showing that this claimant has increased costs for education.[577] Second, assuming the percentages of the remaining four claimants are accurate, the difference in percentages of costs spent on education from the 2001 permit to the test claim permit ranges from a low of 0.39 percent (La Mesa) to a high of 6.21 percent (Solana Beach).[578] This wide range of percentages suggests that the claimants are not performing the mandated activities in the same way and there is no consistency in costs. While 0.39 percent of total costs may be a reasonable percentage of reimbursement for La Mesa (which is their actual percentage) and for Encinitas (at 0.54%), reimbursing Solana Beach six percent of their costs (0.39% divided by 6.21%) does not comply with the requirement to provide reimbursement for all costs mandated by the state.[579] Moreover, the claimants have not pointed to any evidence of costs incurred by the remaining 14 eligible claimants.

Accordingly, the Commission denies this proposal.

d. <u>The proposed RRMs for the watershed activities and collaboration in the updated WURMP.</u>

The Parameters and Guidelines authorize reimbursement for the following new state-mandated activities required for the Watershed Urban Runoff Management Program (WURMP), including the first sentence in Part L.1. requiring collaboration on the *updated* WURMP, no later than March 24, 2008:

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[576] Exhibit T, Claimants' Comments on the Revised Proposed Decision and Parameters and Guidelines, page 41.

[577] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 78 (Table 14).

[578] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 78 (Table 14).

[579] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 78 (Table 14); California Constitution, article XIII B, section 6; Government Code section 17514.

- Each Copermittee shall collaborate with other Copermittees within its Watershed Management Area identified in Table 4 of the test claim permit, with frequent regularly scheduled meetings, to develop and implement an ***updated*** WURMP for each watershed to reduce the discharge of pollutants from the MS4 to the MEP (maximum extent practicable) and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, as specified below.
- Update the WURMP to include and implement *only* the following elements:
  - Watershed water quality activities (activities other than education) and education activities (outreach and training) that address *high priority* water quality problems in the watershed management area. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.
  - Submit a Watershed Activities List with each updated WURMP and updated annually thereafter. The Watershed Activities List shall include the following information: a description of the activity; a time schedule for implementation of the activity, including key milestones; an identification of the specific responsibilities of Watershed Copermittees in completing the activity; a description of how the activity will address the identified high priority water quality problem(s) of the watershed; a description of how the activity is consistent with the collective watershed strategy; a description of the expected benefits of implementing the activity; and a description of how implementation effectiveness will be measured.
  - 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 (i.e., the activity shows significant pollutant load reductions or other quantifiable benefits, and the education activities show changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences).

i. Initial RRM Proposals.

The claimants initially proposed four RRM formulae in this section: watershed workgroup cost share contributions; jurisdictional watershed activities; regional watershed activities; and watershed workgroup meetings.

<u>Watershed Workgroup Cost Share Contributions</u>

For the watershed workgroup cost share contributions, the original RRM proposal reimbursed each "municipal claimant" based on its proportional share of cost identified in the applicable MOUs of the total yearly "watershed lead costs." The "watershed lead costs" are defined as follows: "The yearly Watershed Lead Costs that [sic] for the

Watershed Workgroup lead Co-Permittee were determined by reviewing the County of San Diego costs included in the County Watershed Workgroup Expenditure Records located in Vol. 13, p. 10908 and dividing the reported County costs by the percent of watershed costs that the County was responsible for in a given year . . . ."[580] When costs are added across fiscal years, the total reimbursement was estimated at $616,316.21.[581]

As explained below, the claimants are no longer proposing an RRM for these costs.

Jurisdictional Watershed Activities

The proposed RRM initially proposed for performing the watershed activities on a jurisdictional basis multiplies the average cost in fiscal year 2007-2008 to perform one jurisdictional activity per co-permittee (a unit cost of $2,500), adjusted annually for the CPI, by the number of activities required each year (with the assumption that each jurisdiction completed the minimum four watershed activities). The proposed unit cost of $2,500 is based on the median cost to perform one jurisdictional activity in fiscal year 2007-2008 as reported in "Co-Permittee Declarations located in Vol. 1, pp. 377-743."[582] The total watershed activity cost is then divided by the number of watersheds in which the copermittee is located to account for the copermittees being in multiple watersheds that implemented different or duplicative activities in different watersheds.[583] This proposal is also based on the County Watershed Activities Database.[584] Mr. Quenzer's declaration states that "[u]sing this formula, each Copermittee would receive . . . $221,461.50"; and when "added across the time the mandate applied and all the Municipal Claimants, the total is: Reimbursement = $4,207,768.50."[585]

Regional Watershed Activities

The proposed RRM initially proposed for performing the watershed activities on a regional basis is each claimant's proportional share of costs based on applicable MOUs

[580] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 40; see also Exhibit M, Claimants' Rebuttal Comments, pages 10-11.

[581] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 41 (Quenzer declaration).

[582] Exhibit M, Claimants' Rebuttal Comments, page 71 (Quenzer declaration).

[583] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 41 (Quenzer Declaration). Exhibit M, Claimants' Rebuttal Comments, pages 11, 71.

[584] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 41 (Quenzer Declaration).

[585] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 41-42 (Quenzer Declaration).

times the "WURMP costs." "WURMP costs" are the actual annual costs for the Regional Watershed Urban Runoff Management Plan Working Group's costs ("WURMP costs") to develop and maintain the Regional Watershed Activities Database.[586] Mr. Quenzer's declaration states that, based on the County Watershed Workgroup Expenditure Records, the average amount spent on the Regional Watershed Urban Runoff Management Plan Working Group's costs totals $2,737.91 in fiscal year 2008-2009, and $3,287.23 in fiscal year 2009-2010,[587] and "[w]hen the WURMP Costs are added across the time the mandate applied and all the Municipal Claimants, the total" estimated reimbursement is $6,025.14.[588]

Watershed Workgroup Meetings

And, finally, the proposed RRM initially proposed for the Watershed Workgroup Meetings is calculated by multiplying the average cost of an employee to attend a meeting by the number of attendees the claimant had attend the meeting, by the number of meetings per year.[589] Based on Co-Permittees' Declarations, County 2011 Co-Permittee Surveys, and WURMP Annual Reports, the average cost to attend a meeting in fiscal year 2007-2008 was $262.88.[590] The number of meetings each year are as follows:

FY 2007/2008	369
FY 2008-2009	312
FY 2009-2010	334
FY 2010-2011	338
FY 2011-2012	355

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586 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 42 (Quenzer Declaration); Exhibit M, Claimants' Rebuttal Comments, pages 11, 72.

587 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 42 (Quenzer Declaration); Exhibit M, Claimants' Rebuttal Comments, page 72.

588 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 42 (Quenzer Declaration).

589 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 42 (Quenzer declaration); Exhibit M, Claimants' Rebuttal Comments, page 74.

590 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 42-43 (Quenzer declaration); Exhibit M, Claimants' Rebuttal Comments, page 74.

FY 2012-2013 320[591]

Assuming one attendee per meeting, total costs for all "municipal claimants" are estimated at $560,630.93.[592]

The claimants estimate the total for these WURMP activities at $5.39 million, based on the initial proposals.[593]

The Water Boards opposed the RRM proposals on the following grounds:

- The Section E requirements under the 2007 permit were not required to be implemented until March 24, 2008, or the last 90 days of 2007-2008. Claimants should not be reimbursed for "watershed lead costs" for fiscal year 2006-2007 and 75 percent of fiscal year 2007-2008 because they implemented the 2001 permit before that time.[594]
- The claimants propose the annual proportionate share of costs implementing the "applicable" MOUs for fiscal years 2006-2007 through 2012-2013 as the basis for the RRM equation for these mandated activities, but no description of the MOU or activities are referenced. Costs for developing an MOU or developing programs are not reimbursable and claimants do not differentiate between development and implementation of reimbursement costs specific to the mandated watershed activities for 2007.[595] Also, the claimants do not provide a methodology to prorate the cost differential required to implement the 2007 permit requirements above and beyond the 2001 permit program implementation.[596]
- A minimum of four activities required to be implemented per watershed per claimant in the proposed RRM appears reasonable, but the claimants are unclear how the average cost was calculated for a jurisdictional activity in FY 2007-2008,

[591] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 43 (Quenzer declaration).

[592] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 43 (Quenzer declaration).

[593] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 8, 40 (Quenzer declaration).

[594] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 54-55, 56-57, 57-58 (Technical Analysis).

[595] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 55-56 (Technical Analysis).

[596] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 56 (Technical Analysis).

since they were implementing activities required under the 2001 permit and not the 2007 permit until March 24, 2008. And it is also unclear whether the costs were only for the mandated activities.[597]

- Under table 4 of the test claim permit, the number of annual activities in each watershed can range from four to 40. The claimants do not identify the methodology in their proposed RRM formula to calculate the number of jurisdictional activities they implemented annually in the nine watersheds to arrive at the total cost.[598]
- The claimants do not explain their RRM equation for Permit Part E.2.f. that states the activities "may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level."[599] Nor do claimants explain their methodology to calculate the average proportional share of costs based on the "applicable MOUs," nor are the proportional shares adjusted to include only the costs to implement the section E.2.f. activities.[600] The claimants also do not provide a methodology to adjust the total number of meetings each fiscal year to account for those focused on 1) the 2001 Permit requirements; 2) development of watershed programs; 3) development and management of MOUs and 4) claimant meetings focused on implementing the mandated activity required by the 2007 permit.
- The claimants are unclear if the 2012-2013 activities during these meetings were development of the MOU or discussions regarding the 2013 Permit.[601]
- The claimants do not include supporting documentation or a methodology for the total number of meetings in the summary table held for each fiscal year, and do not include the basis of the assumption that every claimant had an attendee at every single watershed group meeting for fiscal years 2007-2008 through 2012-

[597] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 57 (Technical Analysis).

[598] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 57 (Technical Analysis).

[599] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 58 (Technical Analysis).

[600] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 58 (Technical Analysis).

[601] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines Opposition to Proposed RRMs, page 59 (Technical Analysis).

2013, although the 2007 MOU only identified some claimants to attend and others with voting rights.[602]

- For regional workgroup meetings, the claimants provide no supporting methodology for calculating the average rate of meeting attendance ($262.88). The 2011 copermittee survey instructions asked the claimants to use a rate equivalent to the annual salary of the consultant when a consultant attended the meetings. The claimants do not identify if contractor rates are included in the average from the 2011 survey. The Water Boards point to the Draft Proposed Decision that says the claimants cannot be reimbursed for contractor or consultant costs beyond that charged to the claimants.[603]
- The claimants adjust the number of jurisdictional activities to include the number of watersheds where claimant is geographically located and for which it is required to perform the mandated activity, but do not identify how the number of watersheds in which a claimant is located would be determined. Nor do the claimants account for costs that were incurred on a region-wide basis or demonstrate how this formula does not duplicate costs for mandated activities already accounted for in the other RRM formulas. The claimants do not provide documentation of, or otherwise explain, how all jurisdictional efforts would have been conducted equally, or approximately equally, by all claimants in all watersheds at the same cost. These costs vary significantly. For almost all claimants except a few located in only one watershed, claimants did not conduct jurisdictional activities in all watersheds solely because some portion of the jurisdictional boundary was included in the watershed.[604]

ii. *There is not substantial evidence in the record to support the conclusion that the **new** proposed unit cost RRMs for Watershed activities and collaboration on the updated WURMP reasonably represent the actual costs mandated by the state for all eligible claimants.*

The claimants submit new RRM proposals as explained below.

<u>Watershed Workgroup Cost Share Contributions</u>

The claimants are no longer proposing an RRM for the Watershed Workgroup Cost Share Contributions, and plan to submit reimbursement claims based on actual costs for these expenses. They state the following:

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[602] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 60 (Technical Analysis).

[603] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 60 (Technical Analysis).

[604] Exhibit N, Water Boards' Late Comments on Claimants' Rebuttal, pages 17-18.

a. Watershed Workgroup Cost Share Contributions

The Co-Permittees no longer propose an RRM for this category. Invoices for services provided via contract services will be reviewed to determine which charges are for work considered an unfunded mandate, such as the WURMP update. The Co-Permittees anticipate submitting those charges as part of claims based on actual cost.[605]

Jurisdictional Watershed Activities

The claimants revised the proposed RRM for performing the watershed activities on a jurisdictional basis, which multiplies the median unit cost of these activities ($5,000 per jurisdictional activity adjusted annually by the Consumer Price Index), times four (the minimum number of activities required to be implemented each year),[606] times the number of watersheds each co-permittee is located, from March 24, 2008, through June 26, 2013 (the day before the effective date of the 2013 permit) for each eligible claimant.[607] The 2025 Quenzer declaration states, "it is assumed that each Co-Permittee performed the minimum number of watershed activities required under the 2007 Permit in each watershed."[608]

Mr. Quenzer declares that the 2013 permit did not include a provision requiring the co-permittees to continue implementing their WURMP while the Water Quality Improvement Plans (WQIPs) were in development, which is why the period of reimbursement ends when the 2013 went into effect. The costs claimed for fiscal year 2007-2008 should be 27.05 percent of the unit costs to reflect the 99 days on or after March 24, 2008. The 2012-2013 costs claimed should be 98.9 percent of the costs to reflect the 361 days on or before June 26, 2013.[609]

The median unit cost of $5,000 is based on 71 watershed activities in each watershed management area, which are identified in WURMP annual reports and listed in

[605] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 15, 45.

[606] The test claim permit requires the following: "For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase." Exhibit U (13), Test Claim, pages 302-304 (Order R9-2007-0001, Part E.2.f.).

[607] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 45-46, 80-85 (Table 17).

[608] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 46.

[609] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 45.

Table 17 to Mr. Quenzer's declaration. The 2025 Quenzer declaration explains the following:

> . . . watershed activities with reported costs were identified in WURMP annual reports, and those costs are now used as the basis for the proposed unit cost. This data set includes 71 activities; each watershed management area within the area subject to the 2007 Permit is included in this data set. The activity costs were included in WURMP annual reports from 2008-2009 through 2011-2012. Activities that were reported to be funded by exclusively grant or state proposition funding were excluded from this subset as were activities reported with "costs not to exceed" a set amount. For activities that were partially funded by grant or proposition funding, only the portion of costs that were matching or supplemental costs provided by a Co-Permittee were included.
>
> The Commission also noted that it was unclear why certain costs, such as mileage, might be applicable to watershed activities. Many watershed activities include field work to make observations, interact with the public, etc. Because these activities take place away from Co-Permittees' offices, mileage or other transportation costs are appropriate. Where a watershed activity can be completed without transportation being needed, mileage and other transportation costs are not included in the activity's cost.
>
> **The *Jurisdictional Activities* is $5,000.** See Attachment 1, Table 17 for a table of the activities and costs, along with references. While the Co-Permittees acknowledge that WURMP annual reports did not include cost data for every watershed activity, the proposed unit cost is based on a substantial number of watershed activities and is believed to be reasonably representative of the typical cost to perform a watershed activity.[610]

Table 17 contains a five-page list of activities identified in WURMP Reports organized by watershed and fiscal year, with costs and references to WURMP annual reports filed with the Regional Board and included in Exhibit I, Volume 13, to support the costs identified.[611] While the table shows several activities costing $5,000 or below, the range in costs goes from a low of $190 for the "Aubrey Street Continuous Deflective Separation Device" to a high of $84,000 for the "Buena Vista Creek Cleanup and Restoration," with several other activities costing $47,112.00, $33,000.00, $27,086.00,

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[610] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 46.

[611] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 80-85.

$16,065.90, $15,000.00.[612] Given the wide range of costs identified (between $190 to $84,000), the Commission finds that the proposed unit cost of $5,000 per activity does not reasonably represent the actual costs mandated by the state for all eligible claimants.

Therefore, the Commission denies this proposed RRM.

Regional Watershed Activities

The claimants clarify their proposed RRM for the regional watershed activities, which reimburses the claimants for the proportional share of costs under the MOU for the Regional WURMP Working Group to develop and maintain the Regional Watershed Activities Database from March 24, 2008, through June 26, 2013.[613] Table 19 identifies the costs incurred in fiscal years 2008-2009 and 2009-2010, which are the same as the costs originally proposed, and the supporting documentation as follows:[614]

Table 19: Supporting Data for Regional Watershed Activities - WURMP

Co-Permittee	WURMP Costs	Data Location
FY 2008/2009	$2,737.91	Vol. 13, p 10982
FY 2009/2010	$3,287.23	Vol. 13, pp. 11630-11650

The supporting documents identified in the chart are the Regional WURMP Workgroup costs for "Subtask 2.C. Watershed Activities Database, $2,737.91" in fiscal year 2008-2009[615] and expenditure sheets showing costs incurred by the Regional WURMP Working Group for "Sub-task 2.F., Watershed Activities Database" for fiscal year 2009-2010 of $3,287.23.[616]

As indicated above, the Commission approved reimbursement for the following activities as reasonably necessary to comply with the Watershed Activities List requirements:

612 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 80-81.

613 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 47.

614 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 86.

615 Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), page 10983.

616 Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 11633 ($423.89), 11635 ($252.24), 11637 ($343.70), 11646-11647 ($803.16), 11649 ($825.84), and 11651 ($638.30).

- The *one-time* activity and pro-rata share of costs to develop a data tracking and analysis system for gathering and reporting the new data required to be included in the Watershed Activities List identified above. Reimbursement is ***not*** required to the extent that the data tracking and analysis system was developed for the purpose of submitting the WURMP annual report as a whole.
- The *ongoing* activity of recording the data identified above in the data tracking system to prepare the Watershed Activities List.

The proposed formula for reimbursement based on the proportional share of costs under the MOU for the Regional WURMP Working Group to develop and maintain the Regional Watershed Activities Database is a reasonable formula, and language has been added to the Parameters and Guidelines to indicate that costs may be claimed this way as follows: "The claimants may claim these costs based on their proportional share of costs under the MOU for the Regional WURMP Working Group to develop and maintain the Regional Watershed Activities Database."

However, there is not substantial evidence in the record to support a finding that the $6,025.14 in costs alleged represents the actual total costs for these activities. The expenditure spreadsheet documents provided by the claimants are considered hearsay and not direct evidence. The expenditure documents are out-of-court documents offered to prove the truth of matter asserted. They are not signed or dated; it is not clear who prepared the documents or where the information is coming from; and the only "certification" page identified in the referenced pages certifies unknown expenditures of $1,591.93 from the Regional WURMP Workgroup, dated October 2009.[617]

Thus, there is not substantial evidence supporting the total proposed RRM unit cost of $6,025.14, and that proposal is denied.

<u>Watershed Workgroup Meetings</u>

The claimants have revised their proposed RRM for the watershed workgroup meetings to reduce the unit cost per meeting and to identify the supporting documentation. Specifically, the proposal reimburses the claimants from January 24, 2007, or the effective date of the test claim permit, to June 26, 2013. Mr. Quenzer states the following:

> The period of summation for watershed workgroup meetings contributions is from January 24, 2007, or the effective date of the 2007 Permit, to June 26, 2013, which is the day before the effective date of the 2013 Permit. The watershed workgroups are an element of Co-Permittee collaboration that required significant planning and development work that

[617] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), page 11631.

took place before Co-Permittees were required to begin implementing WURMPs that were developed per the 2007 Permit requirements. After WURMP implementation began, meetings to coordinate implementation of and reporting on the WURMPs continued throughout the period the 2007 Permit was in effect. The requirements for watershed workgroup collaboration related to the WURMP did not carry over in the same capacity following the effective date of the 2013 Permit (June 27, 2013). After the effective date of the 2013 Permit, watershed groups meetings were primarily focused on work to develop and implement Water Quality Improvement Plans required under the 2013 Permit.[618]

Fiscal year 2006-2007 costs are reduced to 43.29 percent of the cost to reflect that 158 days of the year were on or after January 24, 2007, and fiscal year 2012-2013 costs are 98.9 percent of the total costs to reflect the 361 days in fiscal year 2012-2013 that were on or before June 26, 2013.[619]

The proposed unit cost per meeting is reduced from $262.88 per meeting as originally proposed (based on the average cost to attend a meeting in 2007) to the following:

- For meetings that occurred between the 2007 Permit effective date and the WURMP update submittal in March 2008, the RRM unit cost per attending meetings is reduced by 50 percent, from $262.88 to $131.44. While most of the discussion during those meetings is believed to have related to 2007 Permit requirements, this reduction accounts for discussion of other topics during those meetings.
- For meetings that occurred after the WURMP update submittal in March 2008, the RRM unit cost is reduced by 90 percent, from $262.88 to $26.29.[620]

The 2025 Quenzer declaration further states that the "WURMP annual reports, which include lists of meetings with topics covered during the meetings, are included at Vol. 13, pp. 1-10,756."[621] In addition, he states, "The formula and components of the formula were determined by reviewing the Co-Permittee Declarations, 2011 Surveys

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[618] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 48.

[619] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 48.

[620] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 49.

[621] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 49. These documents are located in Exhibit I (13) Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 2-10767.

focused on mandated meetings."[622] The original proposal identified the following number of meetings:

FY 2007/2008	369
FY 2008-2009	312
FY 2009-2010	334
FY 2010-2011	338
FY 2011-2012	355
FY 2012-2013	320[623]

As indicated above, the test claim permit mandates the claimants to collaborate with the co-permittees within its Watershed Management Area identified in Table 4 of the test claim permit, with frequent regularly scheduled meetings, to develop and implement an *updated* WURMP to reflect the new state-mandated requirements. Thus, meetings are required. However, the Commission denies the RRM unit cost proposal because there is not substantial evidence in the record that the unit costs reasonably represent the actual costs mandated by the state for each eligible claimant.

First, the 2025 Quenzer declaration states that meetings occurred to coordinate implementation of and "*reporting on the WURMPs*." Reimbursement is not required for the annual WURMP report. Parts J.1.b. (submitting the WURMP to the Regional Board) and J.3.b. (submitting WURMP annual reports to the Regional Board) of the test claim permit were not pled in the Test Claim. Thus, the alleged costs and number of meetings may be overstated.

Second, the claimants state the proposal is based on the "WURMP annual reports, which include lists of meetings with topics covered during the meetings, [and] are included at Vol. 13, pp. 1-10,756," Co-Permittee Declarations, and 2011 Surveys focused on mandated meetings. The claimants do not identify the specific pages in that volume or the data referred to in the annual reports and do not identify which declarations are relevant for the proposal. In addition, there is no evidence supporting how the unit cost of $262.88, and then reduced by a percentage, was specifically calculated. As the courts have held, "A party is required to support its argument with appropriate and page-specific references to the record; failure to do so effectively waives the argument."[624] Thus, without specific references to the record, the Commission will not consider the WURMP annual reports, declarations, or surveys for

[622] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 48.

[623] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 43 (Quenzer declaration).

[624] *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.

the meetings to update the WURMP. Moreover, as discussed earlier, the survey responses are hearsay and may not be used as direct evidence.

Accordingly, the Commission denies the proposed unit cost RRM.

e. The proposed RRM for the Regional Urban Runoff Management Program (RURMP) and Collaboration in the updated RURMP.

The Parameters and Guidelines authorize reimbursement for the copermittees to collaborate to develop, implement, and update as necessary a RURMP that meets the requirements of section F, 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. As part of the updated plan, the copermittees are required to develop and implement a Regional Residential Education Program with specified content, develop the standardized fiscal analysis method required in section G of the permit,[625] and facilitate assessing the effectiveness of jurisdictional, watershed, and regional programs (which includes facilitating consistency in the assessment programs and developing, annually reviewing, and updating as necessary subject-specific standards for the assessments, but does not include actually assessing these programs).[626]

The proposed RRM for the Regional Urban Runoff Management Plan is claimant's proportional share of costs based on the applicable MOUs for fiscal year 2006-2007 through fiscal year 2012-2013, multiplied by the actual annual costs invoiced by the

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[625] Section G.2. of the Test Claim Permit describes the standardized fiscal analysis method as follows: "As part of the Regional Urban Runoff Management Program, the Copermittees shall 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). This standardized method shall:

a. Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.

b. Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program.

c. Identify a metric or metrics to be used to report program component and total program expenditures."

Exhibit U (13), Test Claim, page 305 (Order No. R9-2007-0001, Part G.2.)

[626] Exhibit A, Amended Test Claim Decision on Remand, pages 91-92, 96, 144-145.

County for *annual reporting*, as discussed below.[627] The claimants have not revised this proposal.[628]

Based on the County Watershed Workgroup Expenditure Records, the annual costs are estimated at:

FY 2008/2009 $2,928.91

FY 2009/2010 $5,230.98

FY 2010/2011 $1,926.50[629]

The claimants explain the following:

> RURMP costs are Regional Workgroup Expenditures *specifically designated as allocated for RURMP annual reporting* as reported by the following workgroups: Fiscal, Reporting, and Assessment (FRA); Industrial and Commercial Sources (ICS), Monitoring (MON), Municipal (MUNI), WURMP, Education and Regional Sources (ERS), and Land Development (LD). [Fn. omitted.] The RURMP expenditures reported by these workgroups were removed from the workgroup expenditures presented for some of these workgroups in other categories (e.g., FRA expenses in item 17.b [Regional Fiscal, Reporting, and Assessment ("FRA") Workgroup Expenditures, discussed in the next section below]) to avoid double counting. [Fn. omitted.] Expenditures data can be found in the County Watershed Workgroup Expenditure Records located in Vol. 13, pp. 10,908-10,916 and the Regional Cost Sharing documentation located in Vol. 13, pp. 19,017-13,074.[630]

The 2025 Quenzer declaration further states that the proposed RRM covers only the work group's costs for *RURMP annual reporting* as follows:

> Many of the items discussed in the Revised Proposed Decision, such as a Regional Residential Education Program and developing standardized fiscal analysis method, are covered in other RRMs. *As described in*

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627 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 43.

628 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 49, 74-75.

629 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 43; Exhibit M, Claimants' Rebuttal Comments, page 75; Exhibit T, pages 74-75 (Table 12), emphasis added.

630 Exhibit M, Claimants' Rebuttal Comments, page 12, emphasis added. The reference to pages "19,017-13,074" appears to be a mistake, and should be "10,917-13,074" as stated in the Table of Contents to Exhibit I (1).

> *Claimants' Rebuttal, the proposed RRM for the RURMP covers only Co-Permittee work groups' costs for RURMP annual reporting*. These costs do not overlap with costs included in any other RRM. RURMP annual reporting is a reimbursable activity because it is required by the 2007 Permit and is part of implementing the RURMP. A more detailed table of costs used to develop the RURMP RRM and specific citations for these costs is included in Attachment 1, Table 12.[631]

The proposed RRM estimates total reimbursement at $10,086.39.[632]

The documents cited as support for the proposed RRM are identified in Table 12 to the 2025 Quenzer declaration and consist of the workgroup expenditure summaries that identify costs for RURMP annual reporting.[633]

The Water Boards object to the proposed RRM on the following grounds:

- Section F of the permit was not effective until March 24, 2008 due to the 365-day implementation delay in the permit and the Addendum that added 60 days due to a wildfire emergency in San Diego County. But the claimants proposed RRM period is from July 1, 2006, to June 30, 2013.[634]
- Regarding the MOU basis for the cost share, the claimants do not state which MOUs were relied on, and the claimants' summary table gives a proportion to each claimant without explanation. Claimants are "unclear if the MOU costs were for implementing the mandated activities, or for managing, facilitating and developing MOUs or activities."[635]

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[631] Exhibit T, Claimants' Comments on the Revised Proposed Decision and Parameters and Guidelines, page 50 (2025 Quenzer Declaration), emphasis added.

[632] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 44; Exhibit T, Claimants' Comments on the Revised Proposed Decision and Parameters and Guidelines, pages 74-75 (Table 12).

[633] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 74-75 (Table 12); Exhibit I (13), Claimants' Documentation Supporting Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 10986 et al. (as cited in Exhibit T, Table 12).

[634] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 61 (Technical Analysis). The claimants revised these dates in their rebuttal to January 24, 2007 to June 26, 2013. Exhibit M, Claimants' Rebuttal Comments, page 74 (Quenzer Declaration).

[635] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 61-62 (Technical Analysis).

The Commission finds the proposed RRM goes beyond the scope of the mandate since *annual reporting on the RURMP* is *not* a reimbursable activity. The reimbursable activities are limited to those requirements in Part F.1-3. of the test claim permit as follows:

a. Develop and implement a Regional Residential Education Program which shall include the following:

    - 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.

    - Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a. (bacteria, nutrients, sediment, pesticides, and trash). (Part F.1.)

b. Develop the standardized fiscal analysis method required in section G of the permit. The standardized fiscal analysis method shall:

    - Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.

    - Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program. (Part F.2.)

c. *Facilitate* the assessment of the effectiveness of jurisdictional, watershed, and regional programs. This includes facilitating consistency in the assessment programs and developing, annually reviewing, and updating as necessary subject-specific standards for the assessments. (Part F.3.)

Section F. also says "the Regional Urban Runoff Management Program may: . . . Develop and implement a strategy to integrate management, implementation, and reporting of jurisdictional, watershed, and regional activities, as determined to be necessary by the Copermittees."[636] Developing and implementing a strategy to integrate reporting of the regional activities is discretionary, not mandated by the state, and was not approved as a reimbursable state-mandated activity. In addition, annual reporting on the RURMP, which identifies all regional activities conducted by the co-permittees during the previous annual reporting period, is required by Part J.3.c. of the test claim permit, but that Part was not pled in the Test Claim.[637]

Thus, the proposed RRM for the RURMP annual reporting is denied.

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[636] Exhibit U (13), Test Claim, page 305 (Order R9-2007-0001).

[637] Exhibit U (13), Test Claim, page 327 (Order R9-2007-0001).

The claimants do propose RRMs for the activities in Parts F.2. and F.3. described above but include them in the discussion of program effectiveness assessment requirements in the next section below.

f. The proposed RRMs for the Program Effectiveness Assessment.

The Parameters and Guidelines authorize reimbursement for conducting an annual assessment of the JURMP for permit Part I.1. and of the WURMP for Permit Part I.2. based on assessment outcome levels, annually review those programs following the assessments to determine if they comply with receiving water limitations and discharge prohibitions, and report to the Regional Board on the effectiveness assessment as implemented under each of the requirements.

i. Initial RRM Proposals

The RRM initially proposed for the Jurisdictional Program Effectiveness Assessment is based on the percentage of the total stormwater budget all copermittees spent assessing the effectiveness of the jurisdiction program (which is 3.72 percent, based on JRMP annual reports in Volumes 2-11 and D-Max Proposals in Volume 14, pages 8-189) to the Municipal Claimant's total stormwater budget, from fiscal year 2007-2008 through fiscal year 2012-2013.[638] Mr. Quenzer states that total reimbursement would be $26,804,749.26, but in that statement, he refers to the "Residential Education Program."[639]

The proposed RRM for the "Regional Fiscal, Reporting, and Assessment Workgroup is the proportional share of costs based on MOUs to the total shared costs for developing and implementing the Regional Fiscal, Report, and Assessment Workgroup, from fiscal year 2006-2007 through 2012-2013.[640] Based on a review of the County Watershed Workgroup Expenditure Records, Mr. Quenzer declares that the actual shared costs for developing and implementing the program was as follows for the following three fiscal years:

FY 2008/2009	$24,466.92
FY 2009/2010	$32,423.11

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[638] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 44; Exhibit M, Claimants' Rebuttal Comments, page 77.

[639] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 44 (Quenzer Declaration).

[640] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 45 (Quenzer Declaration); Exhibit M, Claimants' Rebuttal Comments, page 78 (Quenzer Declaration).

FY 2010-2011 $72,983.57[641]

The declaration states that "When the costs for developing and implementing the *Residential Education Program* is added across the time the mandate applied for all Municipal Claimants, the total is: *Reimbursement* = $129,873.60."[642]

The Water Boards opposed the proposed RRMs on the following grounds:

- The claimants were not required to implement the JURMP or WURMP mandated activities until March 24, 2008, or near the end of fiscal year 2007-2008. Until this date, claimants were required to implement the 2001 Permit requirements.[643]

  In addition, the test claim permit did not require submitting annual reports for the JURMP and WURMP until September 30, 2008, or fiscal year 2008-2009. Claimants were required to implement annual effectiveness assessments under the 2001 permit for the JURMP and WURMP until March 28, 2008 and would not have been fully implementing the test claim permit until 2009-2010.[644]
- For the Jurisdictional Program Effectiveness Assessment, the claimants do not provide any summary or supporting documentation explaining the methodology or basis for calculating the percentage of 3.72 percent or how the total of the claimant's total stormwater budget was calculated to identify a $26.8 million reimbursement.[645]
- Section 15.b. of the claimants' declaration does not contain the total annual stormwater budgets, as the claimant indicated, but contains the "Claimant Jurisdictional Activities basis for reimbursement costs." It is unclear what "total annual stormwater budget" for reimbursement costs the claimants refer to in section 15.b when they state the basis of their costs.[646]

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641 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 44-45 (Quenzer Declaration); Exhibit M, Claimants' Rebuttal Comments, page 79 (Quenzer Declaration).

642 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 45 (Quenzer Declaration), emphasis added.

643 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 62 (Technical Analysis).

644 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 62-63, 64-65 (Technical Analysis).

645 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 63 (Technical Analysis).

646 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 63-64 (Technical Analysis).

- The claimants do not provide a description or specific data or records for the Regional Fiscal, Reporting and Assessment (FRA) Workgroup expenditure formula the claimants say were determined by reviewing the County Watershed Workgroup Expenditure Records.[647] Nor do the claimants describe the methodology or data used to calculate the proportional share of MOU costs for the workgroups or for the summary table for each fiscal year of reimbursement.[648] And the claimants do not identify if the MOU costs were adjusted or prorated to remove non-mandated activities such as developing and managing the MOUs for each fiscal year. The effectiveness assessment was a requirement of the 2001 permit that continued into the 2007 test claim permit with some minor modifications.[649]
- The RRM includes costs of the Regional FRA Workgroup that are not required in Sections I.1. and I.2. of the test claim permit, which only address 1) implementing and annual reporting of each claimant's jurisdictional effectiveness assessment and 2) implementing each Claimant's WURMP effectiveness assessment. Regional Effectiveness Assessment and Reporting is included in Section I.3 under the RURMP.[650]
- The claimants do not identify if the MOU cost shares were actual spent costs or proposed budgets. Claimants refer to the Residential Education costs which is under a different proposed RRM methodology.[651]

ii. *There is not substantial evidence in the record to support the **new** proposed unit cost RRMs for the program effectiveness assessments of the JURMP and WURMP or the conclusion that the new proposed unit cost RRMs reasonably represent the actual costs mandated by the state for all eligible claimants.*

The claimants have revised their proposals as follows:

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[647] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 64 (Technical Analysis).

[648] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 65 (Technical Analysis).

[649] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 65 (Technical Analysis).

[650] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 65-66 (Technical Analysis).

[651] Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 66 (Technical Analysis).

Jurisdictional Program Effectiveness Assessment

The claimants' revised RRM is still based on the percentage of the total stormwater expenditures on the jurisdictional program effectiveness assessment each fiscal year from March 24, 2008, through June 26, 2013 (with the fiscal year 2007-2008 costs 27.05 percent of the reported costs and 90.9 percent of the costs claimed for fiscal year 2012-2013).[652] However, the unit percentage proposed is lowered from 3.72 percent of the total stormwater expenditures to 0.28 percent of the stormwater expenditures, based on data for some fiscal years from the cities of La Mesa (2007-2008 through 2011-2012), National City (2008-2009), Poway (2010-2011 and 2011-2012), San Diego (2007-2008, 2008-2009), and Santee (2007-2008 through 2011-2012), and reduced to account for potential overlap with the requirements of the prior permit.[653] The 2025 Quenzer declaration states the following:

> The standard percentage of Co-Permittees' total stormwater budget reasonably estimated to be spent on jurisdictional program effectiveness assessment is 0.37%. This number was revised compared to the previous RRM submittal based on additional data review and analysis completed in response to the Commission's comments (see Attachment 1, Table 20). The standard percentage of total stormwater budget spent by Co-Permittees on assessing jurisdictional program effectiveness was determined by evaluating the actual costs charged to several Co-Permittees for work completed by D-Max to fulfill the program effectiveness assessment requirements and costs for program effectiveness assessment implementation reported by Co-Permittees in JURMP annual reports where available. [Fn. omitted.] The D-Max costs are a conservative estimate because they only include program effectiveness work performed as part of annual reporting and do not include any other program effectiveness assessment work Co-Permittees completed.
>
> The Commission expressed that the source of jurisdictional program effectiveness assessment costs used to develop the RRM was not clear. The procedure was based on data reported by Co-Permittees in the fiscal analysis components of their JURMP annual reports. In the fiscal analysis, each Co-Permittee reports their total stormwater program costs from the applicable reporting year. Certain Co-Permittees also reported how much of that total cost was attributable to program effectiveness assessment. The effectiveness assessment cost was divided by the total stormwater

[652] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 50-51.

[653] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 51, footnote 15, and pages 87-88 (Table 20).

> program cost to yield the percent of the total stormwater cost attributable to program effectiveness assessment. A more detailed table of costs used to develop the RRM and associated citations is provided in Attachment 1, Table 20.
>
> The Commission noted that claiming all jurisdictional program effectiveness costs is not supported because the 2001 Permit also required some level of jurisdictional program effectiveness assessment. [Fn. omitted.] While the 2001 Permit required some effectiveness assessment, the 2007 Permit was a significant increase in effectiveness assessment requirements. The Co- Permittees developed and implemented procedures to perform assessments of the six levels discussed in the 2007 Permit. This was a new effort that served as a model for other agencies in the State and was later incorporated into Statewide guidance for municipal stormwater programs by the California Stormwater Quality Association. [Fn. omitted.] The Co-Permittees also formed the FRA Workgroup (discussed in more detail below) to provide guidance on new program assessment procedures necessary to meet the 2007 Permit requirements. These large changes indicate that complying with the 2007 Permit's effectiveness assessment requirements was a substantial increase over the 2001 Permit requirements.
>
> The 2007 Permit's effectiveness assessment requirements were a major increase over the relatively minimal requirements of the 2001 Permit. This suggests that almost all of the reported program effectiveness assessment costs under the 2007 Permit were new costs. However, to account for some overlap in program effectiveness requirements across the two permits, the Co-Permittees propose reducing the RRM standard percentage of stormwater program costs (as reporting in the fiscal analysis sections of jurisdictional annual reports) by 25%,[fn omitted] which reduces it from 0.37% to 0.28%. **The new value for *Effectiveness* is 0.28%.**[654]

The Quenzer declaration explains the reduction of the unit percentage by an additional 25 percent (from 0.37% to 0.28%) to account for overlap with the prior permit as follows:

> The City of San Diego reported program effectiveness assessment costs in 2006-2007, before the 2007 Permit was adopted, and in 2007-2008 and 2008-2009. The 2006-2007 program effectiveness assessment cost was 3.03 % of the City's stormwater program costs ($1,351,292/$44,602,619 = 3.03%; numbers from Vol. 6 pp 2599-2600). As shown in Attachment 1,

[654] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 51-52.

Table 20, the average program effectiveness assessment cost from 2007-2008 and 2008-2009, after the 2007 Permit was adopted (2007-2008: 16.84%; 2008-2009: 10.07%) was 13.46%. The 2006-2007 number (3.03%) was about 22.5% of the average for the 2007-2008 and 2008-2009. This suggests removing about 25% of the program effectiveness assessment costs to account for 2001 Permit program effectiveness assessment costs is reasonable.[655]

Table 20 identifies the numbers supporting the unit percentage and the supporting documentation.[656] The percentages for program effectiveness to the total stormwater budgets for the Cities of San Diego, La Mesa, National City, Poway, and Santee range from a high of 16.84 percent (City of San Diego, fiscal year 2007-2008) to a low of 0.13 percent (City of Poway, for fiscal years 2007-2008 and 2008-2009), with the median of 0.37 percent.[657] The supporting documents identified in Table 20 are JURMP Annual Reports, which show the total stormwater budgets for these cities for the fiscal years identified in Table 20 and the City of San Diego's fiscal reports show costs for "program assessment."[658] "Program assessment" annual costs are not shown in the remaining

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[655] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 52-53, footnote 18.

[656] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 87-88.

[657] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 87-88.

[658] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 87-88; Exhibit I (6), Claimants' Supporting Documentation for Proposed RRMs, Volume 6 (JURMP Reports), page 4668 (City of San Diego's 2008 JURMP Annual Report); Exhibit I (7), Claimants' Supporting Documentation for Proposed RRMs, Volume 7 (JURMP Reports), page 655 (City of San Diego's 2009 JURMP Annual Report); Exhibit I (4), Claimants' Supporting Documentation for Proposed RRMs, Volume 4 (JURMP Reports), pages 655, 1614, 2311, 3129, 3641 (City of La Mesa's 2007/2008 through 2011-2012 JURMP Annual Reports) showing the total stormwater budget only; Exhibit I (5), Claimants' Supporting Documentation for Proposed RRMs, Volume 5 (JURMP Reports), page 1706 (National City's 2008-2009 JURMP Annual Report), showing total stormwater budget only; Exhibit I (6), Claimants' Supporting Documentation for Proposed RRMs, Volume 6 (JURMP Reports), pages 1884, 2237 (City of Poway's 2010-2011 and 2011-2012 JURMP Annual Reports), showing the total stormwater budget only; Exhibit I (9), Claimants' Supporting Documentation for Proposed RRMs, Volume 9 (JURMP Reports), pages 562-563, 1487-1488 (City of Santee's 2007-2008, 2008-2009 JURMP Annual Reports), showing the total stormwater budget only; Exhibit I (10), Claimants' Supporting Documentation for Proposed RRMs, Volume 10 (JURMP Reports), pages 1069, 1383

JURMP Annual Reports, but are taken from proposals to prepare JURMP annual reports, including an analysis of the program effectiveness using outcome levels 1-6 and the proposed costs to perform that work, from D-Max Engineering, Inc.[659]

The Commission finds that while reimbursing the claimants based on a percentage of total stormwater costs spent on the jurisdictional program effectiveness assessment requirements is reasonable, there is not substantial evidence in the record to support a finding that the proposed unit percentage of 0.37 percent, and then reduced again by 25%, reasonably represents the actual costs mandated by the state for all eligible claimants to comply with the state mandated activities.

The JURMP reports from the City of San Diego, which identify the costs spent on "program effectiveness" in a pie chart, appears to identify total program effectiveness assessment costs for the year, which is more than just assessing the jurisdictional component. As explained above, it includes assessing the watershed program as well. In addition, there is a long-term assessment requirement. Thus, the JURMP annual reports from the City of San Diego do not clearly show that the costs identified are limited to the jurisdictional assessment.

Moreover, the D-Max *proposals* show costs estimated to complete the jurisdictional effectiveness assessment, but there is no evidence in the record to show the costs spent by the cities to comply with the requirements in any fiscal year. Invoices from D-Max or other documents of costs spent on the mandated activities are not provided.

In addition, the Commission found that the prior 2001 permit required an assessment of the jurisdictional program, but that the test claim permit more specifically required an assessment using outcome levels 1-6 for each jurisdictional activity and, thus, a higher

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(City of Santee's 2010-2011 and 2011-2012 JURMP Annual Reports), showing the total stormwater budget only.

[659] Exhibit I (14), Claimants' Supporting Documentation for Proposed RRMs, Volume 14 (Quenzer Resume, DMAX Files), pages 9-11, 12-18, 19-25, 26-32, 33-39 (D-Max proposals to the City of La Mesa to prepare the 2006-2007 through 2011-2012 JURMP Annual Reports, including the proposed costs to analyze program effectiveness of $2,080 (2006-2007), $2,230 (2007-2008), $1,760 (2008-2009, 2009-2010, 2011-2012); pages 61-68 (D-Max proposal to National City to prepare the 2007-2008 JURMP Annual Report, including the proposed cost to analyze program effectiveness of $6,865); pages 144-146, 147 (D-Max proposal to the City of Poway to prepare the 2009-2010 and 2010-2011 JURMP Annual Report, including the proposed cost to analyze program effectiveness of $2,390 and $2,400); and pages 160-167, 168-174, 175-182, 183-186 (D-Max proposal to the City of Santee to prepare the 2007-2008 through 2011-2012 JURMP Annual Reports, including the proposed cost to analyze program effectiveness of $5,600, $2,540, $2,458, $2,618.)

level of service was required.[660] However, there is no evidence that 25 percent accurately represents the higher level of service for all eligible claimants since that assumption is based only on reports from the City of San Diego for "program effectiveness assessment costs."

Finally, even assuming the costs and percentages of costs are reliable and limited only to the effectiveness assessment for the jurisdictional program, reimbursing all eligible claimants based on the median percentage identified by five of the 19 eligible claimants, which range from 0.13 to 16.84 percent of their total stormwater costs, does not reasonably represent the actual costs mandated by the state to comply with the mandated activities for all eligible claimants. Moreover, the claimants have not pointed to any evidence of costs incurred by the remaining 14 eligible claimants.

Thus, the proposed RRM is denied.

"Regional Fiscal, Reporting, and Assessment Workgroup"

The proposed RRM for the "Regional Fiscal, Reporting, and Assessment Workgroup" remains the proportional share of costs based on MOUs to the total shared costs for developing and implementing the Regional Fiscal, Report, and Assessment Workgroup, from January 24, 2007, to June 26, 2013, the day before the effective date of the 2013 permit, and is based on the County Watershed Workgroup Expenditure Records and Cost-Sharing MOUs.[661] However, recognizing the overlap in the RRM proposal with other RRM proposals, this calculation subtracts the following costs, reducing overall costs to $53,173.37: Long Term Effectiveness Assessment costs, RURMP development and reporting costs, and development of the ROWD for the 2013 permit, all of which were done by this workgroup.[662] The 2025 Quenzer declaration explains the following:

> As noted on pages 170 to 171 of Revised Proposed Decision, developing a standardized fiscal analysis method and facilitating program effectiveness assessment are reimbursable activities. The FRA was formed for these purposes. [Fn. omitted.][[663]] The other activities the FRA

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[660] Exhibit A, Amended Test Claim Decision on Remand, page 104.

[661] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 53.

[662] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 53-54.

[663] The footnote omitted states the following: "See workgroup duties description on page 12 of the 2007 Co-Permittee MOU, Section E.1." This MOU is in Exhibit U (13), Test Claim, page 517, which describes the work of the Fiscal, Reporting, and Assessment Workgroup as follows:

> The purpose of the Fiscal, Reporting, and Assessment Workgroup is to provide regional standards and consistency in the implementation, assessment, and reporting of Copermittee urban runoff management

workgroup performed were overseeing development of the Long Term Effectiveness Assessment ("LTEA") and RURMP development and reporting; both of those activities are also reimbursable and are included in separate RRMs. The FRA Workgroup RRM includes the FRA workgroup expenditures, less the workgroup meeting support, LTEA and RURMP development and reporting costs included in other categories. Development of the Report of Waste Discharge, which was not identified as a reimbursable activity, is also excluded. Because in 2010-2011 the FRA Workgroup only reported costs related to the Report of Waste Discharge or LTEA, costs from 2010- 2011 have been excluded. Therefore, it is limited to reimbursable activities. A table of FRA Workgroup costs and citations for those costs is included in Attachment 1, Table 15.[664]

Table 15 identifies the total costs proposed and supporting documentation as follows:

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activities and programs. At a minimum, the Fiscal, Reporting, and Assessment Workgroup shall have the following responsibilities:

a. Develop, annually review, and update as necessary regional reporting, assessment, and program data and information management standards;

b. Develop regional fiscal analysis standards and metrics by December 31, 2008;

c. Develop, annually review, and update as necessary standards for tracking and reporting expenditures.

d. Receive and consolidate data for budget preparation and monitoring;

e. Develop the Copermittees' Regional URMP (RURMP);

f. Develop the Copermittees' Regional Annual Reports;

g. Develop the Copermittees' Long Term Effectiveness Assessment (LTEA);

h. Develop the Copermittees' Report of Waste Discharge (ROWD); and

i. Provide representation on the CASQA Effectiveness Assessment Subcommittee or equivalent.

[664] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 53-54.

Fiscal Year	FRA Workgroup Task[1]	Reported Expenditures	Data Location	Fiscal Year Total RRM value
FY08-09	Subtask 2.E. Fiscal Reporting Standards	$20,518.00	Vol 13 – p 11,011[2665]	$21,369.62
	Subtask 2.F. Regional Standards for Reporting and Assessment	$851.62		
FY09-10	Subtask 2.F. Regional Standards for Reporting and Assessment	$31,803.75	Vol 13 p 11,597 to 11,600[3666]	$31,803.75
	Total:	**$53,173.37**		

[Notes omitted.][667]

This request is confusing and needs further explanation. The Quenzer declaration states that the Fiscal, Reporting, and Assessment (FRA) workgroup was formed to "develop a standardized fiscal analysis method," which is *not* a reimbursable activity under the program effectiveness assessment requirements of the WURMP in Part I. It is instead addressed under the Regional Program requirements (RURMP) in Part F.2., which requires the claimants to "develop the standardized fiscal analysis method required in section G of this Order," and Section G states the following:

> As part of the *Regional Urban Runoff Management Program*, the Copermittees shall 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). This standardized method shall:

[665] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 11012-11013, Expenditure Summaries for fiscal year 2008-2009.

[666] Exhibit I (13), Claimants' Documents Supporting Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 11597-11,600, Certification and Expenditure Summaries for fiscal year 2009-2010, but at a cost of $29,868.25 (a difference of $1,935.50 from what is in Table 15).

[667] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 79 (Table 15).

a. Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.

b. Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program.

c. Identify a metric or metrics to be used to report program component and total program expenditures.[668]

As indicated earlier, the claimants state that the costs to develop a standardized fiscal analysis method were not included in the proposed RRM for the RURMP activities, but were instead included in other proposed RRMs, which must mean here, under the program effectiveness assessment of the WURMP.

Table 15 identifies total costs incurred in fiscal year 2008-2009 of $20,518.00, supported by an expenditure summary document from the workgroup showing 2008-2009 costs of $20,518.00 as a result of "Subtask 2.E. Fiscal Reporting Standards." This document is an out-of-court document offered to prove the truth of the matter asserted regarding the costs to develop a standardized fiscal analysis method and is considered hearsay. The document is not signed or certified under penalty of perjury, it contains no signature or indication of the person who prepared the document or the person's job title, and no information is provided regarding how the costs were calculated. Thus, there is no evidence supporting the proposed unit cost RRM to develop a standardized fiscal analysis method, as required by Part F.2.

The Quenzer declaration also states that the FRA workgroup was formed to facilitate the program effectiveness assessment. That activity is not required by the program effectiveness assessment of the WURMP in Part I. of the permit, but by Part F.3., as discussed under the RURMP. Part F.3. requires permittees to "facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs," and as discussed in that section, "facilitate" does not mean to *do* the assessment on the WURMP. As stated in the Parameters and Guidelines, "facilitate" in this context means "facilitating consistency in the assessment programs and developing, annually reviewing, and updating as necessary subject-specific standards for the assessments."

The documents identified in Table 15 include the expenditure summary document from the workgroup showing 2008-2009 costs of $851.62 from "Subtask 2.F. Regional Standards for Reporting and Assessment" with no explanation of the activities performed or if they are related to the WURMP or facilitating the assessment programs overall,[669] and the other expenditure summary documents identified in "Vol. 13, pages

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[668] Exhibit U (13), Test Claim, page 305 (Order No. R9-2007-0001, Part G.2.)

[669] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 79 (Table 15).

11597-11,600", do not appear to have anything to do with assessing the effectiveness of the WURMP or the other programs.[670] Instead those pages provide the following information:

- Page 11597 shows costs of $3,186.78 for the following meetings and distribution of meeting materials by the Regional Program Planning Subcommittee:

  December meeting e-mail distribution of meeting summary and materials;

  January meeting e-mail distribution of meeting summary and materials;

  March meeting e-mail announcement and materials;

  Preparation of materials for Mar. 18, 2010 Management Committee meeting (implementation of Regional Work Plans and Budgets; regional budget update; approval of work products for RWQCB submittal);

  March meeting e-mail distribution of meeting summary and materials;

  June meeting e-mail announcement and materials;

  Preparation of materials for June 17, 2010 Management Committee meeting (FY 2009-10 regional shared cost budget and work plan; regional shared cost expenditures documentation); and

  June meeting e-mail distribution of meeting summary and materials.[671]

- Pages 11598-11600 contain a "Co-permittee expenditures cover and certification sheet" for fiscal year 2009-2010 with a co-permittee certification statement signed by County of San Diego's water quality manager certifying costs of $6,370.69 in hourly expenditures claimed and $29,868.23 in "contract/other expenditures claimed." Attached to the certification are expenditure summary sheets for different sub-tasks of the working group.[672] Table 15 refers specifically to costs incurred by "Subtask 2.F. Regional Standards for Reporting and Assessment." However, these pages do not include any information about that sub-task or the alleged costs of $31,803.75.

  Pages 11633, 11635, 11637 of Volume 13 do identify costs for "Sub-Task 2.F, Watershed Activities Database" of $423.89, $252.34, $343.70, but these are for meetings on database development, revisions to the list of sub-categories,

[670] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), page 11597-11637.

[671] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), page 11597.

[672] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 11598-11600.

research and revision to sub-categories, and preparation of materials for "Leads Meeting."[673]

Thus, the documents relied on by the claimants do not provide any evidence of the total costs incurred to perform the mandated activities to annually assess the effectiveness of the WURMP. Accordingly, this proposal is denied.

g. <u>The proposed RRM for the one-time long term effectiveness assessment (LTEA).</u>

The Parameters and Guidelines authorize reimbursement to comply with the new requirement in Part I.5, to collaborate with the other copermittees to develop a Long Term Effectiveness Assessment (LTEA), which shall build on the results of an August 2005 Baseline LTEA conducted by the copermittees. The LTEA is required to be designed to address the effectiveness outcome levels 1-6; assess the effectiveness of the Receiving Waters Monitoring Program; and address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment. The LTEA is required to be submitted no later than 210 days before the end of the permit term and serves as the basis for the permittees' ROWD for the next permit cycle. As explained above, this assessment is a one-time requirement. The County of San Diego Report of Waste Discharge for the next term permit states that the LTEA for the receiving waters monitoring program was conducted in 2010 as follows:

> The LTEA analysis was conducted in 2010 and evaluated data from the MS4, receiving water (RW), wet, and ambient separately. In addition, inclusion of a constituent on the §303(d) list did not result in that constituent categorized as high priority. Constituent groups are used for the comparison of the BLTEA [Baseline Long Term Effectiveness Assessment] and the receiving waters LTEA. Priorities within watersheds were also evaluated. The purpose of this evaluation was to determine if the answer to management question #1 (conditions in receiving waters protective of beneficial uses) is the same in 2010 (LTEA) as the 2005 (BLTEA).[674]

The claimants' proposed RRM formula for reimbursement for the LTEA is the proportional share of costs based on the applicable MOUs times the "actual annual costs of the contractors needed to assess the long term effectiveness of the projects reported by [the] County" (which totals $344,539.21, according to the Regional Workgroup Expenditure Records) from fiscal year 2007-2008 through fiscal year 2012-

[673] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 11633, 11635, 11637.

[674] Exhibit U (4), County of San Diego, Report of Waste Discharge, June 24, 2011, page 72.

2013.[675] "The Regional Cost Sharing Documentation located in Vol. 13, pp. 10,917-13,074 was used to determine the *Contractor Costs,"* but the claimants do not point to any specific pages.[676]

The claimants do not revise the proposed RRM in their most recent comments but explain the following:

> As described in the Claimants' Rebuttal, LTEA costs are limited to the cost of preparing and submitting the LTEA as required by the 2007 Permit. This includes consultant costs and contract management. Costs for LTEA preparation were identified only in 2010-2011 and therefore are also claimed only for that year. These costs were shared among Co-Permittees according to the Co-Permittees' MOU. Therefore, the RRM proposes that each Co-Permittee may claim its percentage of the cost share times the total LTEA preparation cost.[677]

The 2025 Quenzer declaration includes Table 16, which shows the costs proposed and the supporting documentation as follows:

Table 16: Supporting Data for Long Term Effectiveness Assessment (LTEA) Costs[678]

Fiscal Year	LTEA Costs	Location of Data
FY 2010/2011 (FRA Workgroup Costs)	$132,212[fn. omitted]	Vol. 13, p 11,665
FY 2010/2011 (Monitoring Workgroup Costs)	$212,327	Vol. 13, p 11,719
Total Contractor Costs	**$344,539**	

The documents identified in the table above are Regional Workgroup Expenditure Records from fiscal year 2010-2011, reporting costs for "Subtask 2.F. Long Term Effectiveness Assessment" of $132,212 and "Task 3.C. 5-Year Regional Monitoring Program Assessment and Updating for ROWD and LTEA" at $212,327 (based on hourly, contract, and contract management expenses).[679]

675 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 10, 45-46 (Quenzer Declaration); Exhibit M, Claimants' Rebuttal Comments, pages 14, 80 (Quenzer Declaration).

676 Exhibit M, Claimants' Rebuttal Comments, page 14.

677 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 55.

678 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 79.

679 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 11,665 and 11,720.

The Water Boards oppose the proposed RRM on the following grounds:

- Section I.5 of the 2007 permit was not implemented until 210 days before the permit expired. So, the claimant's statement that reimbursement is "*halfway through FY 2006/2007 through FY 2012/2013*" is incorrect.[680] The claimants do not explain the costs incurred three years prior to the required mandated activity date.[681]
- The claimants do not provide supporting documentation to explain their "yearly contractor costs for Long-term Effectiveness Assessment" of $344,539.[682]
- The claimants do not explain their methodology to determine reimbursement for the Regional Work Group MOUs for the claimants and the contractors, and do not prorate reimbursement to include only the increased higher level of service compared to costs implementing the 2001 permit.[683]

The Commission finds that the proposed formula to reimburse claimants their percentage of the total actual costs (based on the share of costs identified in the MOU) to develop the LTEA and assess the effectiveness of the Receiving Waters Monitoring Program and the jurisdictional, watershed, and regional programs with an emphasis on watershed assessment, satisfies the definition of the RRM and provides reimbursement for the actual costs mandated by the state for all eligible claimants. The formula is identified in Section IV.A.2., under the Long Term Effectiveness Assessment activities.

However, there is not substantial evidence in the record to support the total alleged costs of $344,539.21. The documents relied on by the claimants are Regional Workgroup Expenditure Records, which are hearsay records that are not signed, dated, or certified under penalty of perjury and it is not clear where the information is coming from or who prepared the records. Thus, the total proposed unit cost is not supported by substantial evidence in the record and is denied. As stated above, Section IV.A.2. of the Parameters and Guidelines states the following:

> Reimbursement for the activities required by Part I.5 and the first sentence of Part L.1. may be based on the actual annual shared consultant and contract management costs to develop the LTEA to assess the effectiveness of the Receiving Waters Monitoring Program and to address

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680 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 67 (Technical Analysis).

681 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 68 (Technical Analysis).

682 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 67-68 (Technical Analysis).

683 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, page 68 (Technical Analysis).

the jurisdictional, watershed, and regional programs with an emphasis on watershed assessment, times the claimant's proportional share of costs indicated in the claimants' MOU.

h. The proposed RRMs for all co-permittee collaboration.

The Parameters and Guidelines authorize reimbursement for the collaboration required by the first sentence in Part L.1. as an ongoing reimbursable activity, which is identified in the Parameters and Guidelines for other approved sections of the test claim permit where collaboration is expressly required (i.e., the Educational Component of the Jurisdictional Urban Runoff Management Program, the requirement to update the Watershed Urban Runoff Management Program, the Regional Urban Runoff Management Program, and the Long Term Effectiveness Assessment).

Reimbursement for collaboration is limited to what the Commission approved in its Decision. Reimbursement is not required for activities or requirements not pled in the Test Claim, imposed by the prior (2001) permit, or expressly denied by the Commission.[684] The Commission also found the prior permit required the parties to enter into a Memorandum of Understanding (MOU) and expressly limited reimbursement for collaboration to the new activities found to mandate a new program or higher level of service.[685] Thus, only the pro-rata costs to collaborate on the activities and costs approved by the Commission are eligible for reimbursement.

Based on information in the record, the copermittees entered into a new MOU dated November 16, 2007.[686] The MOU establishes a regional management committee, a regional planning subcommittee and nine regional workgroups or sub-workgroups to support the regional coordination of programs.[687]

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684 Exhibit A, Amended Test Claim Decision on Remand, pages 111-112, 118-126.

685 Exhibit A, Amended Test Claim Decision on Remand, pages 111-112. The Decision states: "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."

686 Exhibit U (13), Test Claim, pages 495 -579 (MOU).

687 Exhibit U (13), Test Claim, pages 517-525, 535. The MOU's nine regional workgroups or sub-workgroups include: fiscal, reporting, and assessment workgroup; education and residential sources workgroup; regional monitoring workgroup and two sub-workgroups for dry weather and coastal monitoring; regional watershed URMP workgroup; land development workgroup; municipal activities workgroup; and industrial and commercial sources workgroup.

The claimants propose RRM formulas and unit costs to reimburse eligible claimants for the ongoing requirement to collaborate pursuant to Part L.1.[688]

The Water Boards opposed the original RRM proposals for collaboration on several grounds, including that the costs alleged in the RRMs duplicated the costs alleged for other sections of the Parameters and Guidelines and were not clear.[689]

In response to the Revised Draft Proposed Decision and Parameters and Guidelines, the claimants state that the proposed RRMs here do not include collaboration costs related to the WURMP, RURMP, or LTEA because those costs were included in the RRMs for those activities.[690] Thus, that leaves only the collaboration required for the Educational Component of the JURMP. The 2025 Quenzer Declaration states the following:

> The Co-Permittees' RRMs for all Co-Permittee collaboration did not include collaboration costs related to the WURMP, RURMP, or the LTEA because those are included in other RRMs. In response to the Commission's direction, the Co-Permittees propose limiting the scope of the RRMs related to all Co-Permittee collaboration to the educational component of the JURMP, which was carried out through the Educational and Residential Sources Workgroup.[691]

The revised RRM proposals are explained below.

i. RRM Proposals.

Support for Regional Workgroup Meetings

The proposed RRM for "Support for Regional Workgroup Meetings" is the proportional share of costs based on applicable MOUs to the actual costs of $5,886.02 to support the Educational and Residential Sources Workgroup from January 24, 2007, through

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688 Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 46 (Quenzer declaration); Exhibit M, Claimants' Rebuttal Comments, pages 14-15; Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 59.

689 Exhibit L, Water Boards' Comments on the Draft Proposed Decision and Parameters and Guidelines and Opposition to Proposed RRMs, pages 68-80 (Technical Analysis); Exhibit O, Revised Draft Proposed Decision and Parameters and Guidelines, pages 183-189.

690 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 19, 55 (2025 Quenzer Declaration).

691 Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 55 (2025 Quenzer Declaration).

June 26, 2013.[692] The total costs are identified in Table 18, with a citation to the supporting documents as follows:

Table 18: Supporting Data for Regional Workgroup Meeting Support[693]

Fiscal Year	Reported Meeting Support Costs for ERS Workgroup	Data Location
FY08-09	$232.20	Vol 13 – p 10,985
FY09-10	$256.70	Vol 13 – p 11,160
FY10-11	$231.00	Vol 13 – p 11,940
FY11-12	$2,849.00	Vol 13 – p 12,305
FY12-13	$2,317.12	Vol 13 – p 12,374
Total:	**$5,886.02**	

The supporting documents identified in the table are "Educational and Residential Sources Workgroup" Expenditure Summaries identifying the costs in the table for "meeting support."[694]

Regional Workgroup Meeting Participation

The proposed RRM for "Regional Workgroup Meetings" equals the number of employees from a "municipal claimant" that attended a meeting of the Educational and Residential Sources Workgroup, times the average costs to attend one meeting of $262.88, times the number of meetings attended.[695] The claimants explain that,

> The formula sets a unit cost for attending a meeting. When submitting a claim, each Co-Permittee will supply the number of meetings its staff

[692] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 56, 86 (Table 18).

[693] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 86 (Table 18).

[694] Exhibit I (13), Claimants' Supporting Documentation for Proposed RRMs, Volume 13 (WURMP Reports, County Records, MOUs), pages 10986, 11161, 11941, 12306, and 12375.

[695] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 57. See prior proposal in Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 11, 47; and Exhibit M, Claimants' Rebuttal Comments, page 82.

attended and supporting documentation to demonstrate the meetings were in fact attended.[696]

The claimants further state that the same unit cost of $262.88 is proposed here as was proposed for the Watershed Workgroup Meetings, because "in my experience the group of Co-Permittee staff that attended regional meetings was comparable to the group of Co-Permittee staff that attended watershed meetings."[697]

Regional Workgroup Expenditures

The RRM for the "Workgroup Expenditures" that was initially proposed was the proportional share of costs based on applicable MOUs to the actual costs of activities performed by the workgroup in fiscal years 2006-2007 through 2012-2013.[698] Based on a review of the Regional Cost Sharing Documentation (Volume 13, pages 10917-13074), the actual costs in fiscal years 2008-2009 and 2009-2010 for these activities is $418.10.[699]

The claimants now say they are *not* proposing an RRM for the Regional Workgroup Expenditures as follows: "Given that the Commission had directed that only certain collaboration among workgroups is reimbursable, and this RRM was developed to include collaboration among all workgroups, the Co-Permittees no longer propose an RRM for this category."[700]

ii. There is not substantial evidence in the record to support the proposed RRM unit costs.

As indicated above, the test claim permit in Part L.1. requires the permittees to "collaborate with the other copermittees to address common issues" and to "plan and coordinate activities required under the permit." Collaboration is required to comply with the Educational Component of the JURMP, which requires the permittees to collaboratively develop and implement a plan for educating residential, the general public, and school children in accordance with Part D.5.b.3. The plan for educating residential, the general public, and school children is required to evaluate the use of

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[696] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 57.

[697] Exhibit M, Claimants' Rebuttal Comments, page 82; Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 57.

[698] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, pages 11, 47.

[699] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Parameters and Guidelines and Proposed RRMs, page 48; Exhibit M, Claimants' Rebuttal Comments, page 83.

[700] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, page 59.

mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods. As described in the sections above, the claimants propose an RRM to develop and implement the residential education program and claim they limited costs for that proposal to the costs of educating the general public (i.e., costs for Materials Development and Distribution, Partnership Development, Regional Branding, Market Research and Assessment, Regional Website, Underserved Target Audience, Mass Media, and Regional Events).[701] The costs to conduct the meetings of that workgroup are identified separately under this proposal. Since the test claim permit required the permittees to collaborate and meet on the residential education program, the costs of attendance at those meetings and the direct costs of the group meetings are reimbursable. However, only the pro-rata costs incurred for attendance and other meeting support costs relating directly to educating residential, the general public, and school children are eligible for reimbursement. Any costs incurred for other meeting purposes are not reimbursable.

Here, there is no evidence in the record that the meetings were limited to the mandated activity to develop and implement a plan for educating residents, the general public, and school children in accordance with Part D.5.b.3. Moreover, the proposed unit cost of $262.88 per person to attend the meetings of the Educational and Residential Sources Workgroup is not supported by any evidence in the record.

In addition, while it is reasonable to provide reimbursement for meeting support costs based on the proportional share of costs identified in the MOU to the actual costs to support the Workgroup, the total costs alleged to support the meetings of $5,886.02 is based only on expenditure summaries of the workgroup, which are not signed, dated, or certified under penalty of perjury and are considered hearsay, and it is not clear where the information is coming from or who prepared the records.

Accordingly, the Commission denies the proposed unit cost RRMs.

F. <u>Offsetting Revenues and Reimbursements (Section VII. of the Parameters and Guidelines)</u>

In the Test Claim Decision, the Commission identified the following potential offsetting revenues:

- 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- 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

[701] Exhibit T, Claimants' Comments on the Revised Draft Proposed Decision and Parameters and Guidelines, pages 42-43.

> 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.[702]

Accordingly, Section VII. of the Parameters and Guidelines states:

> Any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, state and federal funds, any service charge, fee, or assessment authority to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes, shall be identified and deducted from any claim submitted for reimbursement. Such offsetting revenues include the following:
>
> - Any fees or assessments approved by the voters or property owners for any activities in the permit, including stormwater fees and those authorized by Public Resources Code section 40059 for reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning.
> - 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.

Based on the record and documents publicly available, some of the eligible claimants have imposed property-related stormwater fees, which if used on the reimbursable activities, are not the claimant's proceeds of taxes and shall be identified as offsetting revenues. For example,

- City of Coronado adopted a storm drain fee of $3.80, or $45.80 per year, by Ordinance 1847 (Chapter 60.16.020), which is collected with the property taxes.[703]
- City of Del Mar utilizes a "Clean Water Fee" to offset a portion of the costs associated with the implementation of the Clean Water Program and in fiscal year 2008-2009, the City brought the Clean Water Service Fee before the voters,

[702] Exhibit A, Amended Test Claim Decision on Remand, pages 139, 151.

[703] Exhibit U (1), City of Coronado 2007-2008 Storm Drain Fee, https://www.coronado.ca.us/DocumentCenter/View/1375/2007-and-2008-Soild-Waste-Storm-Drain-and-Sewer-Rates-PDF?bidId= (accessed on June 13, 2025).

following the requirements of Proposition 218, which passed and ensured “that a substantial portion of the program will continue to be funded into the future.”[704]

- City of Escondido adopted a stormwater fee ordinance in 1994 (§ 17-287), which states the following:

  (a) There is established a fee on all properties in the city which shall be used to fund a stormwater management program. The fee shall be established by resolution of the city council from time to time and shall be included as part of each city sewer and water bill, or in the case of properties which do not receive city sewer or water service, on the trash collection bill.

  (b) The fee shall be considered part of the bill, shall be separately identified on such bill, and shall be due and payable at the same time and on the same terms as the bill. Failure to pay the fee shall be treated and subject to the same penalties as failure to pay the bill.[705]

- City of Poway “has a storm water fee to offset a portion of the costs of the program.”[706]

- City of San Diego has a storm drain fee, which is the “main source of dedicated funding for stormwater activities” and has remained unchanged since the passage of Proposition 218 in 1996. The stormwater fee is 95 cents per month per single family home, or $0.0647 per hundred cubic feet of water use for multi-family and commercial water users.[707]

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[704] Exhibit I (1) Claimants’ Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 465 (Declaration Joseph M. DeStefano·II, City of Del Mar Clean Water Manager); Exhibit I (2) Claimants’ Supporting Documentation for Proposed RRMs, Volume 2 (Copermittee 2010 Declarations, JURMP Reports), page 6166 (Del Mar 2008-2009 JURMP Annual Report, “During the Reporting Period, the City took steps to bring the Clean Water Service Fee before the voters, following the requirements of Proposition 218. With the successful passage of the fee the City has ensured that a substantial portion of the program will continue to be funded into the future.”).

[705] Exhibit U (2), City of Escondido Stormwater Fee, https://ecode360.com/43260177 (accessed on June 13, 2025).

[706] Exhibit I (1) Claimants’ Supporting Documentation for Proposed RRMs, Volume 1 (2011 Permittee Survey), page 717 (Declaration of Danis Bechter, NPDES Coordinator for the City of Poway).

[707] Exhibit U (3), City of San Diego Analysis of the Stormwater Division Funding Strategy Report, https://www.sandiego.gov/sites/default/files/21-04_funding_strategy_report.pdf (accessed on June 16, 2025), page 2.

V. Staff Recommendation

Based on the foregoing analysis, the Commission hereby adopts the Proposed Decision and Parameters and Guidelines.

PARAMETERS AND GUIDELINES[708]

San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), L.1.a.(3)-(6)

07-TC-09-R

Period of reimbursement is January 24, 2007 through December 31, 2017.

I. SUMMARY OF THE MANDATE

These Parameters and Guidelines address activities related to reducing stormwater pollution in compliance with NPDES Permit (CAS0108758, Order No. R9-2007-0001) issued by the San Diego Regional Water Quality Control Board (Regional Board), a state agency.

On May 26, 2023, the Commission adopted the Amended Test Claim Decision on Remand.[709] The Commission partially approved the Test Claim, finding that the test claim permit imposes a reimbursable state-mandated program on local agency copermittees within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission approved this Test Claim for the following reimbursable activities only:

- Reporting on street sweeping and conveyance system cleaning (Part J.3.a.(3)(c) (iv)-(viii), (x)-(xv));
- Conveyance system cleaning (Part D.3.a.(3)(b)(iii));
- Educational component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii.-vi.), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), 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);

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[708] Please note that the Decision and Parameters and Guidelines is a single document and must be read as a whole. It is not intended to be separated and should be posted in its entirety.

[709] Exhibit A, Amended Test Claim Decision on Remand.

- 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)).[710]

Further, the Commission found that 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 reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- 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.

II. ELIGIBLE CLAIMANTS

The following city and county copermittees are eligible to claim reimbursement, provided they are subject to the taxing restrictions of articles XIII A and XIII C of the California Constitution, and the spending limits of article XIII B of the California Constitution, and incur increased costs as a result of this mandate that are paid from their local proceeds of taxes:

> The County of San Diego and the Cities of 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.

The San Diego Unified Port District and San Diego County Regional Airport Authority are *not* eligible to claim reimbursement under article XIII B, section 6 of the California Constitution.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimant filed the test claim on June 20, 2008, establishing eligibility for reimbursement for the 2006-2007 fiscal year. Therefore, costs incurred would be reimbursable on or after July 1, 2006; but because the permit did not become effective until January 24, 2007, costs are reimbursable beginning January 24, 2007.

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[710] Exhibit A, Amended Test Claim Decision on Remand, pages 5-6.

Beginning January 1, 2018, there are no costs mandated by the state because the claimants have fee authority sufficient as a matter of law to cover the costs of these activities pursuant to Government Code section 17556(d).[711] Therefore, costs incurred are reimbursable from January 24, 2007, through December 31, 2017.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller (Controller) within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a local agency may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a local agency filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Gov. Code §17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event, or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, “I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct,” and must further comply with

[711] Government Code sections 57350 and 57351 (SB 231, Stats. 2017, ch. 536).

the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant that incurs increased costs, the following activities are reimbursable:

A. One-Time Activities

1. 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 (Part L.1.a.(3)-(6)) that:

   a. Establishes a management structure to promote consistency and develop and implement regional activities;

   b. Establishes standards for conducting meetings, decisions-making, and cost-sharing.

   c. Provides guidelines for committee and workgroup structure and responsibilities;

   d. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

   *Reimbursement is limited to the pro rata costs to execute and submit an MOU or formal agreement on only the four topics identified above. Executing and submitting a full MOU, JPA, or other formal agreement is **not** reimbursable.*[712]

2. Long Term Effectiveness Assessment (Part I.5 and the first sentence in Part L.1.):

   a. Collaborate with the other Copermittees to develop a Long Term 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 the test claim permit.

   b. The LTEA shall be designed to address each of the objectives listed below, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle:

[712] Exhibit A, Amended Test Claim Decision on Remand, page 111.

- Assessment of watershed health and identification of water quality issues and concerns.
- Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns.
- Evaluation of the need to address additional pollutant sources not already included in Copermittee programs.
- Assessment of progress in implementing Copermittee programs and activities.
- Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources.
- Assessment of changes in discharge and receiving water quality.
- Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality.
- Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

c. The LTEA shall address outcome levels 1-6,[713] and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

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[713] 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

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 percent reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80 percent confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

Reimbursement for the activities required by Part I.5 and the first sentence in Part L.1 may be based on the actual annual shared consultant and contract management costs to develop the LTEA to assess the effectiveness of the Receiving Waters Monitoring Program and to address the jurisdictional, watershed, and regional programs with an emphasis on watershed assessment, times the claimant's proportional share of costs indicated in the claimants' MOU.

B. Ongoing Activities

1. Jurisdictional Urban Runoff Management Program

a. By September 30, 2008, and each September 30th thereafter, *include* in the JURMP Annual Report the following information for the prior fiscal year:

i. Street Sweeping Information (Part J.3.a.(3)(c)(x-xv))

- 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.
- 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

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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." Exhibit U (13), Test Claim, pages 188-189 (Order No. R9-2007-0001, Attachment C).

as the frequency of sweeping conducted for such roads, streets, and highways.

- 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.
- Identification of the total distance of curb-miles swept.
- Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
- Amount of material (tons) collected from street and parking lot sweeping.[714]

ii. Conveyance System Cleaning Information (Part J.3.a.(3)(c)(iv)-(viii))

- 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.
- 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.
- 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.
- Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

[714] The requirements for street sweeping were delayed until no later than March 24, 2008. (Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.)

- Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.[715]

iii. Reimbursement for the reporting activities identified in Section IV.B.1.a.i. and ii. of these Parameters and Guidelines includes the following:

- The *one-time* activity of developing policies and procedures and a data tracking and analysis system for gathering and reporting only the new data identified above.
- *One-time* training per employee assigned to track the information identified above to ensure the staff responsible for tracking the information understand and properly implement the procedures.
- The *ongoing* activity of recording the new data identified above in the data tracking system to prepare the annual street sweeping and conveyance systems report.

b. Conveyance System Cleaning (Part D.3.a.(3)(b)(iii)). No later than March 24, 2008, the claimants shall comply with the following activities:[716]

i. Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.).

ii. The maintenance activities shall, at a minimum, include the following:

- Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, which 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.
- Cleaning observed anthropogenic litter in open channels annually, which may be reduced to every other year after two years of inspections (which at the earliest would be in fiscal year 2010-2011) if the open channel requires less than annual cleaning.

The following conveyance system activities are not reimbursable:

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[715] The requirements for conveyance system cleaning were delayed until no later than March 24, 2008. (Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.)

[716] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

- Implementing a schedule of inspection activities (Part D.3.a.(3)(a));
- Inspections of MS4 facilities (Part D.3.a.(3)(b)(i), D.3.a.(3)(b)(ii));
- Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (Part D.3.a.(3)(b)(iv));
- Proper disposal of waste removed pursuant to applicable laws (Part D.3.a.(3)(b)(v));
- Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (Part D.3.a.(3)(b)(vi)).[717]

c. Educational Component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), and the first sentence in Part L.1.). No later than March 24, 2008, the claimants shall comply with the following mandated activities:[718]

   i. Each copermittee shall educate each target community (municipal departments, construction site owners and developers, industrial owners and operators, commercial owners and operators, the residential community, the general public, and school children) on the following topics: erosion prevention, non-stormwater discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control. (Part D.5.a.(1).)

   The educational programs shall emphasize underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources. (Part D.5.a.(2).)

   ii. 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; and (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization). (Part D.5.b.(1)(a).)

   iii. 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

[717] Exhibit A, Amended Test Claim Decision on Remand, pages 57-62.

[718] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

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." (Part D.5.b.(1)(a).)

iv. 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 understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows:

- Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
- The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
- Current advancements in BMP technologies.
- SUSMP [Standard Urban Storm Water Mitigation Plan] requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms. (Part D.5.b.(1)(b)(iii) - (vi).)

v. 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. (Part D.5.b.(1)(c).)

vi. 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. (Part D.5.b.(1)(d).)

vii. As early in the planning and development process as possible and all through the permitting and construction process, implement a program to educate project applicants, contractors, property owners, and community planning groups who are not developers or construction site owners. 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 these groups on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training. (Part D.5.b.(2).)

*Reimbursement is **not** required to develop any of the educational programs described above in Parts D.5.a., D.5.b.(1), or D.5.b.(2).*

*Reimbursement is also **not** required to educate developers and construction site owners on the topics listed in Part D.5.b.(2).*[719]

viii. Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities on those topics listed in Table 3 of the test claim permit. 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. (Part D.5.b.(3) and the first sentence in Part L.1.)

Reimbursement for the activities required by Part D.5.b.(3) may be based on the actual annual shared costs of developing and implementing the program, times the claimant's proportional share of costs indicated in the claimants' MOU.

2. Watershed Urban Runoff Management Program (WURMP, Parts E.2.f, E.2.g, and the first sentence in Part L.1.). No later than March 24, 2008, the claimants shall comply with the following activities:[720]

   a. Each Copermittee shall collaborate with other Copermittees within its Watershed Management Area (WMA) identified in Table 4 of the test claim permit, with frequent regularly scheduled meetings, to develop and implement an ***updated*** WURMP for each watershed to reduce the discharge of pollutants from the MS4 to the MEP (maximum extent practicable) and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, as specified below. (Part E.2.g. and the first sentence in Part L.1.)

   b. Update the WURMP to include and implement *only* the following elements:

      i. 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

[719] Exhibit A, Amended Test Claim Decision on Remand, page 82.

[720] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

Activities. 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. Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

ii. Submit a Watershed Activities List with each updated 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.

iii. Each activity on the Watershed Activities List shall include the following information:

- A description of the activity;
- A time schedule for implementation of the activity, including key milestones;
- An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
- A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
- A description of how the activity is consistent with the collective watershed strategy;
- A description of the expected benefits of implementing the activity; and
- A description of how implementation effectiveness will be measured.

iv. Reimbursement for the Watershed Activities List identified in Section IV.B.2.b.ii. and iii. of these Parameters and Guidelines includes the following:

- The *one-time* activity and pro-rata share of costs to develop a data tracking and analysis system for gathering and reporting the new data required to be included in the

Watershed Activities List identified above. Reimbursement is ***not*** required to the extent that the data tracking and analysis system was developed for the purpose of submitting the WURMP annual report as a whole.

- The *ongoing* activity of recording the data identified above in the data tracking system to prepare the Watershed Activities List.

The claimants may claim these costs based on their proportional share of costs under the MOU for the Regional WURMP Working Group to develop and maintain the Regional Watershed Activities Database.

c. 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. (Part E.2.f.)

3. Regional Urban Runoff Management Program (Parts F.1-F.3, and the first sentence in Part L.1.)

No later than March 24, 2008,[721] each copermittee shall collaborate with the other copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that 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 include the following:

a. Develop and implement a Regional Residential Education Program which shall include the following:

- Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different

[721] Exhibit U (9), Regional Board Addendum to Test Claim Permit, December 12, 2007.

pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.

- Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a. (bacteria, nutrients, sediment, pesticides, and trash). (Part F.1.)

b. Develop the standardized fiscal analysis method required in section G of the permit. The standardized fiscal analysis method shall:

- Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.
- Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program. (Part F.2.)

c. *Facilitate* the assessment of the effectiveness of jurisdictional, watershed, and regional programs. This includes facilitating consistency in the assessment programs and developing, annually reviewing, and updating as necessary subject-specific standards for the assessments. (Part F.3.)

4. Program Effectiveness Assessments (Parts I.1, I.2., I.5.)

a. Annual Effectiveness Assessment of Jurisdictional Urban Runoff Management Program (Part I.1.)

1. Each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(i) Specifically assess the effectiveness of each of the following:

- Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
- Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge Detection and Elimination, and Education); and
- Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items listed above.

(iii) Utilize outcome levels 1-6, as defined in Attachment C to Order No. R9-2007-0001, to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible.[722]

(iv) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible.

(v) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, as defined in Attachment C of Order No. R9-2007-0001, where applicable and feasible.[723]

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[722] 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." (Exhibit U (13), Test Claim, pages 345-346 (Order No. R9-2007-0001, Attachment C).)

[723] Implementation Assessment is defined in Attachment C of the test claim permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measurable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed." (Exhibit U (13), Test Claim, page 347 (Order No. R9-2007-0001, Attachment C).)

2. 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 (Prohibitions and Receiving Water Limitations).

   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.

3. Each copermittee shall *include* in the Jurisdictional Urban Runoff Management Program Annual Report, due September 30, 2008 and every September 30 thereafter for the previous fiscal year, a report on the effectiveness assessment conducted the prior fiscal year as implemented under each of the requirements listed above.

b. Annual Effectiveness Assessment of the Watershed Urban Runoff Management Program Watershed (Part I.2.)

   1. Each watershed group of Copermittees identified in Table 4 of the test claim permit shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

   (i) Specifically assess the effectiveness of each of the following:

Water Quality Assessment is defined in Attachment C of the test claim permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges." (Exhibit U (13), Test Claim, page 352 (Order No. R9-2007-0001, Attachment C.)

Integrated Assessment is defined in Attachment C of the test claim 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." (Exhibit U (13), Test Claim, page 347 (Order No. R9-2007-0001, Attachment C).)

- Each Watershed Water Quality Activity implemented;
- Each Watershed Education Activity implemented; and
- Implementation of the Watershed Urban Runoff Management Program as a whole.

(ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items that are part of the WURMP listed above.

(iii) Utilize outcome levels 1-6 to assess the effectiveness of each Watershed Water Quality Activity implemented and each Watershed Education Activity implemented, where applicable and feasible.

(iv) 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.

(v) 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.

(vi) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness of each of the bulleted items that are part of the WURMP listed above, where applicable and feasible.

(vii) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

2. 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 (Prohibitions and Receiving Water Limitations).

   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.

3. Each watershed group of Copermittees shall *include* in the WURMP Annual Report, due by January 31, 2009 and every January 31 thereafter for the previous fiscal year, a report on the effectiveness assessment conducted the prior fiscal year as implemented under each of the requirements listed above.

*Reimbursement is **not** required to conduct the annual effectiveness assessment of the Regional Urban Runoff Management Program.*

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV., Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

6. Training

Report the cost of training an employee as specified in Section IV of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A.1., Salaries and Benefits, and A.2., Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element A.3., Contracted Services.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both: (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement in accordance with the Office of Management and Budget Circular 2 CFR, Chapter I and Chapter II, Part 200 et al. Claimants have the option of using 10 percent of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10 percent.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR, Chapter I and Chapter II, Part 200 et al.) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR, Chapter I and Chapter II, Part 200 et al.). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be: (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.); (2) direct salaries and wages; or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in 2 CFR, Chapter I and Chapter II, Part 200 et al.) shall be accomplished by: (1) classifying a department's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage that the total amount of allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in 2 CFR, Chapter I and Chapter II, Part 200 et al.) shall be accomplished by: (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed pursuant to this chapter[724] is subject to the initiation of an audit by the

[724] This refers to title 2, division 4, part 7, chapter 4 of the Government Code.

Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV., must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, state and federal funds, any service charge, fee, or assessment authority to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes shall be identified and deducted from any claim submitted for reimbursement. Such offsetting revenue includes the following:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including stormwater fees and those authorized by Public Resources Code section 40059 for reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning.
- 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.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local governments in claiming costs to be reimbursed. The claiming instructions shall be derived from these parameters and guidelines and the decisions on the test claim and parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the eligible claimants to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of an eligible claimant, the Commission shall review the claiming instructions issued by the Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.17.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The decisions adopted for the test claim and parameters and guidelines are legally binding on all parties and interested parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.

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 December 10, 2025, I served the:

- **Current Mailing List dated December 3, 2025**
- **Decision and Parameters and Guidelines adopted December 5, 2025**

  San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6), 07-TC-09-R County of San Diego, Cites of 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, 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 December 10, 2025 at Sacramento, California.

Jill Magee

Jill Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 12/3/25

Claim Number: 07-TC-09-R

Matter: 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.

Claimants: City of Carlsbad
City of Chula Vista
City of Del Mar
City of Encinitas
City of Escondido
City of Imperial Beach
City of La Mesa
City of Lemon Grove
City of National City
City of Oceanside
City of Poway
City of San Diego
City of San Marcos
City of Santee
City of Solana Beach
City of Vista

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.)

Adaoha Agu, *County of San Diego Auditor & Controller Department*
Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego, CA 92123
Phone: (858) 694-2129
Adaoha.Agu@sdcounty.ca.gov

Rachelle Anema, Assistant Auditor-Controller, *County of Los Angeles*
Accounting Division, 500 W. Temple Street, Los Angeles, CA 90012
Phone: (213) 974-8321
RANEMA@auditor.lacounty.gov

Donna Apar, Finance Director, *City of San Marcos*
Claimant Contact
1 Civic Center Drive, San Marcos, CA 92069
Phone: (760) 744-1050
dapar@san-marcos.net

Lili Apgar, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-0254
lapgar@sco.ca.gov

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

Aaron Avery, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
Aarona@csda.net

David Bass, Vice Mayor, *CIty of Rocklin*
3970 Rocklin Road, Rocklin, CA 95677
Phone: (916) 663-8504
David.Bass@rocklin.ca.us

Ginni Bella Navarre, Deputy Legislative Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8342
Ginni.Bella@lao.ca.gov

Richard Boon, Chief of Watershed Protection Division, *County of Riverside Flood Control Disrict*
1995 Market Street, Riverside, CA 92501
Phone: (951) 955-1273
rboon@rivco.org

Jonathan Borrego, City Manager, *City of Oceanside*
Claimant Contact
300 North Coast Highway, Oceanside, CA 92054
Phone: (760) 435-3065
citymanager@oceansideca.org

Molly Brennan, Director of Finance, *City of National City*
Claimant Contact
1243 National City Blvd., National City, CA 91950
Phone: (619) 336-4330
finance@nationalcityca.gov

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

Guy Burdick, Consultant, *MGT Consulting*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 833-7775
gburdick@mgtconsulting.com

Rica Mae Cabigas, Chief Accountant, *Auditor-Controller*
Accounting Division, 500 West Temple Street, Los Angeles, CA 90012
Phone: (213) 974-8309
rcabigas@auditor.lacounty.gov

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Julissa Ceja Cardenas, *California State Association of Counties*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
jcejacardenas@counties.org

Sheri Chapman, General Counsel, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8267
schapman@calcities.org

Rolando Charvel, Chief Financial Officer, *City of San Diego*
Claimant Contact
202 C Street, 9th Floor, San Diego, CA 92101
Phone: (619) 236-6218
rcharvel@sandiego.gov

Ali Chemkhi, Senior Supervising Accountant/Auditor, *County of San Bernardino*
Office of Auditor-Controller, 268 West Hospitality Lane, Fourth Floor, San Bernardino, CA 92415-0018
Phone: (909) 382-7035
ali.chemkhi@sbcountyatc.gov

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, *Legislative Analyst's Office*
925 L Street, Suite 1000, 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

Erika Cortez, Administrative Services Director, *City of Imperial Beach*
Claimant Contact
825 Imperial Beach Boulevard, Imperial Beach, CA 91932
Phone: (619) 423-8303
ecortez@imperialbeachca.gov

Adam Cripps, Interim Finance Manager, *Town of Apple Valley*
14955 Dale Evans Parkway, Apple Valley, CA 92307

Phone: (760) 240-7000
acripps@applevalley.org

Thomas Deak, Senior Deputy, *County of San Diego*
Claimant Representative
Office of County Counsel, 1600 Pacific Highway, Room 355, San Diego, CA 92101
Phone: (619) 531-4810
Thomas.Deak@sdcounty.ca.gov

Adrian Del Rio, Assistant Director, *City of Chula Vista*
Finance Department, 276 Fourth Ave Bldg A, Chula Vista, CA 91910
Phone: (619) 409-3820
adelrio@chulavistaca.gov

Nicole Denow, Chief Deputy City Attorney, *City of San Diego*
Environment Section, 1200 Third Avenue, Suite 1100, San Diego, CA 92101
Phone: (619) 533-6173
NDenow@sandiego.gov

Tracy Drager, Auditor and Controller, *County of San Diego*
Claimant Contact
1600 Pacific Highway, Room 166, San Diego, CA 92101
Phone: (619) 531-5413
tracy.drager@sdcounty.ca.gov

Heather Ferbert, City Attorney, *City of San Diego*
1200 Third Avenue, Suite 1100, San Diego, CA 92101-4100
Phone: (619) 533-5800
hferbert@sandiego.gov

Kevin Fisher, Assistant City Attorney, *City of San Jose*
Environmental Services, 200 East Santa Clara Street, 16th Floor, San Jose, CA 95113
Phone: (408) 535-1987
kevin.fisher@sanjoseca.gov

Tim Flanagan, Office Coordinator, *County of Solano*
Register of Voters, 678 Texas Street, Suite 2600, Fairfield, CA 94533
Phone: (707) 784-3359
Elections@solanocounty.com

Jennifer Fordyce, Assistant Chief Counsel, *State Water Resources Control Board*
Office of Chief Counsel, 1001 I Street, 22nd floor, Sacramento, CA 95814
Phone: (916) 324-6682
Jennifer.Fordyce@waterboards.ca.gov

Justin Garrett, Acting Chief Policy Officer, *California State Association of Counties (CSAC)*
1100 K Street, Ste 101, Sacramento, CA 95814
Phone: (916) 327-7500
jgarrett@counties.org

David Gibson, Executive Officer, *San Diego Regional Water Quality Control Board*
9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340
Phone: (858) 467-2952
dgibson@waterboards.ca.gov

Juliana Gmur, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814

Phone: (916) 323-3562
juliana.gmur@csm.ca.gov

Shawn Hagerty, *Best Best & Krieger, LLP*
San Diego Office, 655 West Broadway, 15th Floor, San Diego, CA 92101
Phone: (619) 525-1300
Shawn.Hagerty@bbklaw.com

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, 8th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

Christina Holmes, Director of Finance, *City of Escondido*
Claimant Contact
201 North Broadway, Escondido, CA 92025
Phone: (760) 839-4676
cholmes@escondido.org

Ken Howell, Senior Management Auditor, *State Controller's Office*
Audits, Compliance Audits Bureau, 3301 C Street, Suite 725A, Sacramento, CA 95816
Phone: (916) 323-2368
KHowell@sco.ca.gov

Rachel Jacobs, Finance Director/Treasurer, *City of Solana Beach*
Claimant Contact
635 South Highway 101, Solana Beach, CA 92075-2215
Phone: (858) 720-2463
rjacobs@cosb.org

Heather Jennings, Director of Finance, *City of Santee*
Claimant Contact
10601 Magnolia Avenue, Building #3, Santee, CA 92071
Phone: (619) 258-4100
hjennings@cityofsanteeca.gov

Jason Jennings, Director, *Maximus Consulting*
Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (804) 323-3535
SB90@maximus.com

Angelo Joseph, Supervisor, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
AJoseph@sco.ca.gov

Anne Kato, Acting Chief, *State Controller's Office*
Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 322-9891
akato@sco.ca.gov

Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Joanne Kessler, Fiscal Specialist, *City of Newport Beach*
Revenue Division, 100 Civic Center Drive , Newport Beach, CA 90266
Phone: (949) 644-3199
jkessler@newportbeachca.gov

Zach Korach, Finance Director, *City of Carlsbad*
Claimant Contact
1635 Faraday Ave., Carlsbad, CA 92008
Phone: (442) 339-2127
zach.korach@carlsbadca.gov

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Anya Kwan, Associate, *Best Best & Krieger LLP*
300 South Grand Ave., 25th Floor, Los Angeles, CA 90071
Phone: (213) 542-3867
Anya.Kwan@bbklaw.com

Michael Lauffer, Chief Counsel, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
michael.lauffer@waterboards.ca.gov

Government Law Intake, *Department of Justice*
Attorney General's Office, 1300 I Street, Suite 125, PO Box 944255, Sacramento, CA 94244-2550
Phone: (916) 210-6046
governmentlawintake@doj.ca.gov

Eric Lawyer, Legislative Advocate, *California State Association of Counties (CSAC)*
Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 650-8112
elawyer@counties.org

Kim-Anh Le, Deputy Controller, *County of San Mateo*
555 County Center, 4th Floor, Redwood City, CA 94063
Phone: (650) 599-1104
kle@smcgov.org

Fernando Lemus, Principal Accountant - Auditor, *County of Los Angeles*
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-0324
flemus@auditor.lacounty.gov

Erika Li, Chief Deputy Director, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
erika.li@dof.ca.gov

Kenneth Louie, Chief Counsel , *Department of Finance*
1021 O. Street, Suite 3110, Sacramento, CA 95814

Phone: (916) 322-0971
Kenny.Louie@dof.ca.gov

Everett Luc, Accounting Administrator I, Specialist, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0766
ELuc@sco.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Darryl Mar, Manager, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
DMar@sco.ca.gov

Ensen Mason, Auditor-Controller/Treasurer/Tax Collector, *County of San Bernardino*
268 West Hospitality Lane, San Bernardino, CA 92415-0018
Phone: (909) 387-8322
webinfo@sbcountyatc.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Monica Molina, Finance Manager/Treasurer, *City of Del Mar*
Claimant Contact
1050 Camino Del Mar, Del Mar, CA 92014
Phone: (858) 755-9354
mmolina@delmar.ca.us

Jill Moya, Financial Services Director, *City of Oceanside*
300 North Coast Highway, Oceanside, CA 92054
Phone: (760) 435-3887
jmoya@oceansideca.org

Marilyn Munoz, Senior Staff Counsel, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-8918
Marilyn.Munoz@dof.ca.gov

Tim Nash, Director of Finance, *City of Encinitas*
Claimant Contact
505 S Vulcan Avenue, Encinitas, CA 92054
Phone: N/A
finmail@encinitasca.gov

Kaleb Neufeld, Assistant Controller, *City of Fresno*
2600 Fresno Street, Fresno, CA 93721
Phone: (559) 621-2489
Kaleb.Neufeld@fresno.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819

Phone: (916) 455-3939
andy@nichols-consulting.com

Dale Nielsen, Director of Finance/Treasurer, *City of Vista*
Claimant Contact
Finance Department, 200 Civic Center Drive, Vista, CA 92084
Phone: (760) 726-1340
dnielsen@ci.vista.ca.us

Adriana Nunez, Staff Counsel, *State Water Resources Control Board*
Los Angeles Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 322-3313
Adriana.Nunez@waterboards.ca.gov

Erika Opp, Administrative Analyst, *City of St. Helena*
City Clerk, 1480 Main Street, St. Helena, CA 94574
Phone: (707) 968-2743
eopp@cityofsthelena.gov

Eric Oppenheimer, Executive Director, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5615
eric.oppenheimer@waterboards.ca.gov

Patricia Pacot, Accountant Auditor I, *County of Colusa*
Office of Auditor-Controller, 546 Jay Street, Suite #202 , Colusa, CA 95932
Phone: (530) 458-0424
ppacot@countyofcolusa.org

Arthur Palkowitz, *Law Offices of Arthur M. Palkowitz*
12807 Calle de la Siena, San Diego, CA 92130
Phone: (858) 259-1055
law@artpalk.onmicrosoft.com

Kirsten Pangilinan, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 322-2446
KPangilinan@sco.ca.gov

Helen Holmes Peak, *Lounsbery Ferguson Altona & Peak, LLP*
960 Canterbury Place, Ste. 300, Escondido, CA 92025
Phone: (760) 743-1201
hhp@lfap.com

Brian Pierik, *Burke,Williams & Sorensen,LLP*
2310 East Ponderosa Drive, Suite 25, Camarillo, CA 93010-4747
Phone: (805) 987-3468
bpierik@bwslaw.com

Johnnie Pina, Legislative Policy Analyst, *League of Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8214
jpina@cacities.org

Trevor Power, Accounting Manager, *City of Newport Beach*
100 Civic Center Drive, Newport Beach , CA 92660

Phone: (949) 644-3085
tpower@newportbeachca.gov

Jonathan Quan, Associate Accountant, *County of San Diego*
Projects, Revenue, and Grants Accounting, 5530 Overland Ave, Suite 410, San Diego, CA 92123
Phone: 6198768518
Jonathan.Quan@sdcounty.ca.gov

Roberta Raper, Director of Finance, *City of West Sacramento*
1110 West Capitol Ave, West Sacramento, CA 95691
Phone: (916) 617-4509
robertar@cityofwestsacramento.org

David Rice, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 341-5161
david.rice@waterboards.ca.gov

Ashley Rodriguez, Local Government Affairs Manager, *City of Chula Vista*
Finance Department, 276 Fourth Ave Bldg A, Chula Vista, CA 91910
Phone: (619) 409-3820
AClark@chulavistaca.gov

Marco Rodriguez, Accounting Analyst, *City of Lemon Grove*
3232 Main Street, Lemon Grove, CA 91945
Phone: (619) 825-3822
mrodriguez@lemongrove.ca.gov

Lydia Romero, City Manager, *City of Lemon Grove*
Claimant Contact
3232 Main Street, Lemon Grove, CA 91945
Phone: (619) 825-3819
lromero@lemongrove.ca.gov

Tammi Royales, Director of Finance, *City of La Mesa*
Claimant Contact
8130 Allison Avenue, PO Box 937, La Mesa, CA 91944-0937
Phone: (619) 463-6611
findir@cityoflamesa.us

Jessica Sankus, Senior Legislative Analyst, *California State Association of Counties (CSAC)*
Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
jsankus@counties.org

Alex Sauerwein, Attorney, *State Water Resources Control Board*
San Diego Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 327-8581
Alex.Sauerwein@waterboards.ca.gov

Craig Schmollinger, Director of Finance, *City of Poway*
13325 Civic Center Drive, Poway, CA 92064
Phone: (858) 668-4411
cschmollinger@poway.org

Sarah Schoen, Director of Finance, *City of Chula Vista*
Claimant Contact
276 Fourth Avenue , Chula Vista, CA 91910

Phone: (619) 691-5117
sschoen@chulavistaca.gov

Cindy Sconce, Director, *Government Consulting Partners*
5016 Brower Court, Granite Bay, CA 95746
Phone: (916) 276-8807
cindysconcegcp@gmail.com

Carla Shelton, Senior Legal Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

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

Marisa Soriano, Stormwater Program Manager, *City of Chula Vista*
276 Fourth Avenue, Chula Vista, CA 91910
Phone: (619) 409-5898
msoriano@chulavistaca.gov

Paul Steenhausen, Principal Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, , Sacramento, CA 95814
Phone: (916) 319-8303
Paul.Steenhausen@lao.ca.gov

Julie Testa, Vice Mayor, *City of Pleasanton*
123 Main Street PO Box520, Pleasanton, CA 94566
Phone: (925) 872-6517
Jtesta@cityofpleasantonca.gov

Jolene Tollenaar, *MGT Consulting Group*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Robert Torrez, Interim Chief Financial Officer, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5630
robert.torrez@surfcity-hb.org

Jessica Uzarski, Consultant, *Senate Budget and Fiscal Review Committee*
1020 N Street, Room 502, Sacramento, CA 95814
Phone: (916) 651-4103
Jessica.Uzarski@sen.ca.gov

Alejandra Villalobos, Management Services Manager, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, Forth Floor, San Bernardino, CA 92415
Phone: (909) 382-3191
alejandra.villalobos@sbcountyatc.gov

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Adam Whelen, Director of Public Works, *City of Anderson*
1887 Howard St., Anderson, CA 96007
Phone: (530) 378-6640
awhelen@ci.anderson.ca.us

R. Matthew Wise, Supervising Deputy Attorney General, *Department of Justice*
Attorney General's Office, 1300 I Street, Suite 125, PO Box 944255, Sacramento, CA 94244-2550
Phone: (916) 210-6046
Matthew.Wise@doj.ca.gov

Yuri Won, Attorney, Office of Chief Counsel, *State Water Resources Control Board*
San Francisco Bay Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 327-4439
Yuri.Won@waterboards.ca.gov

Arthur Wylene, General Counsel, *Rural County Representatives of California (RCRC)*
1215 K Street, Suite 1650, Sacramento, CA 95814
Phone: (916) 447-4806
awylene@rcrcnet.org

Elisa Wynne, Staff Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
elisa.wynne@sen.ca.gov

Kaily Yap, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Kaily.Yap@dof.ca.gov

Siew-Chin Yeong, Director of Public Works, *City of Pleasonton*
3333 Busch Road, Pleasonton, CA 94566
Phone: (925) 931-5506
syeong@cityofpleasantonca.gov

Traci Young, IS Project Director, *City and County of San Francisco*
San Francisco Public Utilities Commission (SFPUC), 525 Golden Gate Ave, San Francisco, CA 94102
Phone: (415) 653-2583
tmyoung@sfwater.org

Stephanie Yu, Assistant Chief Counsel, *State Water Resources Control Board*
Office of Chief Counsel, 1001 I Street, Sacramento, CA 95814
Phone: (916) 341-5157
stephanie.yu@waterboards.ca.gov

Aly Zimmermann, CIty Manager, *City of Rocklin*
3970 Rocklin Road, Rocklin, CA 95677
Phone: (916) 625-5585
alyz@rocklin.ca.us

Helmholst Zinser-Watkins, Associate Governmental Program Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-7876
HZinser-watkins@sco.ca.gov

Exhibit C

STATE *of* CALIFORNIA
COMMISSION ON STATE MANDATES

September 2, 2026

Mr. Thomas Deak
County of San Diego
Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

Ms. Anne Kato
State Controller's Office
Local Government Programs and Services Division
3301 C Street, Suite 740
Sacramento, CA 95816

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Draft Proposed Statewide Cost Estimate, Schedule for Comments, and Notice of Hearing
San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6), 07-TC-09-R

Dear Mr. Deak and Ms. Kato:

The Draft Proposed Statewide Cost Estimate for the above-captioned matter is enclosed for your review and comment.

Written Comments: Written comments may be filed on the Draft Proposed Statewide Cost Estimate by **September 14, 2026**. You are advised that comments filed with the Commission are required to be electronically filed (e-filed) in an unlocked legible and searchable PDF file, using the Commission's Dropbox. (Cal. Code Regs., tit. 2, § 1181.3(f).) Refer to https://www.csm.ca.gov/dropbox.shtml on the Commission's website for electronic filing instructions. If e-filing would cause the filer undue hardship or significant prejudice, filing may occur by first class mail, overnight delivery or personal service only upon approval of a request to the executive director. (Cal. Code Regs., tit. 2, § 1181.3(j).)

Hearing: This matter is set for hearing on **Friday, October 9, 2026, in person at 10:00 a.m., at The Jesse M. Unruh State Office Building, 915 Capitol Mall, Room 121, The Boardroom, Sacramento, California, 95814 and via Zoom.**

The Proposed Statewide Cost Estimate will be issued on or about September 25, 2026.

This matter is proposed for the Consent Calendar. Please let us know in advance if you oppose having this item placed on the Consent Calendar.

Please also notify Commission staff not later than noon on the Tuesday prior to the hearing, October 6, 2026, that you or a witness you are bringing plan to testify and please specify the names of the people who will be speaking for inclusion on the witness list and the names and email addresses of the people who will be speaking both in person and remotely to receive a hearing panelist link in Zoom.

The last communication from Commission staff will be the Proposed Statewide Cost Estimate, which will be issued approximately two weeks prior to the hearing, and it is incumbent upon the participants to let Commission staff know if they wish to testify or bring witnesses.

Very truly yours,

Juliana F. Gmur
Executive Director

Hearing Date: October 9, 2026

ITEM ___

DRAFT PROPOSED STATEWIDE COST ESTIMATE

$8,292,692 - $23,067,532
Initial Claim Period[1]

(January 24, 2007 through December 31, 2017)

San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6)

07-TC-09-R

The Commission on State Mandates (Commission) adopted this Statewide Cost Estimate by a vote of [vote count will be included in the adopted Statewide Cost Estimate] during a regularly scheduled hearing on October 9, 2026 as follows:

Member	Vote
Lee Adams, County Supervisor	
Karen Greene Ross, Public Member	
Deborah Gallegos, Representative of the State Controller	
William Pahland, Representative of the State Treasurer, Vice Chairperson	
Michele Perrault, Representative of the Director of the Department of Finance, Chairperson	
Alexander Powell, Representative of the Director of the Office of Land Use and Climate Innovation	

[1] The entire reimbursement period is within the initial claim period because the Commission found the mandate is not reimbursable beginning January 1, 2018 since the claimants have fee authority, sufficient as a matter of law, to pay for the reimbursable activities pursuant to Government Code section 17556(d).

STAFF ANALYSIS

Summary of the Mandate, Eligible Claimants, and Period of Reimbursement

This Statewide Cost Estimate addresses state-mandated activities arising from National Pollutant Discharge Elimination System (NPDES) Order No. R9-2007-0001, adopted by the San Diego Regional Water Quality Control Board on January 24, 2007.

The Commission adopted the Amended Test Claim Decision on Remand on May 26, 2023,[2] and the Decision and Parameters and Guidelines on December 5, 2025,[3] approving reimbursement beginning January 24, 2007, for the following city and county copermittees eligible to claim reimbursement, provided they are subject to the taxing restrictions of articles XIII A and XIII C of the California Constitution, and the spending limits of article XIII B of the California Constitution, and incur increased costs as a result of this mandate that are paid from their local proceeds of taxes:

> The County of San Diego and the Cities of 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.

The initial reimbursement period, which includes the entire reimbursement period, is January 24, 2007 through December 31, 2017 (five months and eight days of fiscal year 2006-2007 through the first half of fiscal year 2017-2018). Eligible claimants were required to file initial claims with the State Controller's Office (Controller) by July 8, 2026. Late initial reimbursement claims may be filed until July 8, 2027, but will incur a 10 percent late filing penalty of the total amount of the initial claim without limitation.[4]

Reimbursable Activities

The Commission approved the following reimbursable activities for this program:

A. One-Time Activities

1. 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 (Part L.1.a.(3)-(6)) that:

   a. Establishes a management structure to promote consistency and develop and implement regional activities;

   b. Establishes standards for conducting meetings, decisions-making, and cost-sharing.

[2] Exhibit A, Amended Test Claim Decision on Remand.

[3] Exhibit B, Decision and Parameters and Guidelines.

[4] Government Code section 17561(d)(3).

c. Provides guidelines for committee and workgroup structure and responsibilities;

d. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

*Reimbursement is limited to the pro rata costs to execute and submit an MOU or formal agreement on only the four topics identified above. Executing and submitting a full MOU, JPA, or other formal agreement is **not** reimbursable.*[5]

2. Long Term Effectiveness Assessment (Part I.5 and the first sentence in Part L.1.):

   a. Collaborate with the other Copermittees to develop a Long Term 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 the test claim permit.

   b. The LTEA shall be designed to address each of the objectives listed below, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle:

      - Assessment of watershed health and identification of water quality issues and concerns.
      - Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns.
      - Evaluation of the need to address additional pollutant sources not already included in Copermittee programs.
      - Assessment of progress in implementing Copermittee programs and activities.
      - Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources.
      - Assessment of changes in discharge and receiving water quality.
      - Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality.

[5] Exhibit A, Amended Test Claim Decision on Remand, page 111.

- Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

c. The LTEA shall address outcome levels 1-6,[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 percent reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80 percent confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

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[6] 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." Exhibit B, Decision and Parameters and Guidelines citing the Test Claim, pages 188-189 (Order No. R9-2007-0001, Attachment C), Exhibit U (13).

Reimbursement for the activities required by Part I.5 and the first sentence in Part L.1 may be based on the actual annual shared consultant and contract management costs to develop the LTEA to assess the effectiveness of the Receiving Waters Monitoring Program and to address the jurisdictional, watershed, and regional programs with an emphasis on watershed assessment, times the claimant's proportional share of costs indicated in the claimants' MOU.

B. Ongoing Activities

1. Jurisdictional Urban Runoff Management Program

   a. By September 30, 2008, and each September 30th thereafter, *include* in the JURMP Annual Report the following information for the prior fiscal year:

      i. Street Sweeping Information (Part J.3.a.(3)(c)(x-xv))

         - 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.
         - 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.
         - 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.
         - Identification of the total distance of curb-miles swept.
         - Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
         - Amount of material (tons) collected from street and parking lot sweeping.[7]

[7] The requirements for street sweeping were delayed until no later than March 24, 2008. Exhibit B, Decision and Parameters and Guidelines citing Regional Board Addendum to Test Claim Permit, December 12, 2007, Exhibit U (9).

ii. Conveyance System Cleaning Information (Part J.3.a.(3)(c)(iv)-(viii))

- 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.
- 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.
- 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.
- Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
- Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.[8]

iii. Reimbursement for the reporting activities identified in Section IV.B.1.a.i. and ii. of these Parameters and Guidelines includes the following:

- The *one-time* activity of developing policies and procedures and a data tracking and analysis system for gathering and reporting only the new data identified above.
- *One-time* training per employee assigned to track the information identified above to ensure the staff responsible for tracking the information understand and properly implement the procedures.
- The *ongoing* activity of recording the new data identified above in the data tracking system to prepare the annual street sweeping and conveyance systems report.

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[8] The requirements for conveyance system cleaning were delayed until no later than March 24, 2008. Exhibit B, Decision and Parameters and Guidelines citing Regional Board Addendum to Test Claim Permit, December 12, 2007, Exhibit U (9).

b. Conveyance System Cleaning (Part D.3.a.(3)(b)(iii)). No later than March 24, 2008, the claimants shall comply with the following activities:[9]

   i. Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.).

   ii. The maintenance activities shall, at a minimum, include the following:

      - Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, which 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.
      - Cleaning observed anthropogenic litter in open channels annually, which may be reduced to every other year after two years of inspections (which at the earliest would be in fiscal year 2010-2011) if the open channel requires less than annual cleaning.

   The following conveyance system activities are not reimbursable:

   - Implementing a schedule of inspection activities (Part D.3.a.(3)(a));
   - Inspections of MS4 facilities (Part D.3.a.(3)(b)(i), D.3.a.(3)(b)(ii));
   - Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (Part D.3.a.(3)(b)(iv));
   - Proper disposal of waste removed pursuant to applicable laws (Part D.3.a.(3)(b)(v));
   - Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (Part D.3.a.(3)(b)(vi)).[10]

c. Educational Component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), and the first sentence in Part L.1.). No later than March 24, 2008, the claimants shall comply with the following mandated activities:[11]

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[9] Exhibit B, Decision and Parameters and Guidelines citing to Regional Board Addendum to Test Claim Permit, December 12, 2007, Exhibit U (9).

[10] Exhibit A, Amended Test Claim Decision on Remand, pages 57-62.

[11] Exhibit B, Decision and Parameters and Guidelines citing to Regional Board Addendum to Test Claim Permit, December 12, 2007, Exhibit U (9).

i. Each copermittee shall educate each target community (municipal departments, construction site owners and developers, industrial owners and operators, commercial owners and operators, the residential community, the general public, and school children) on the following topics: erosion prevention, non-stormwater discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control. (Part D.5.a.(1).)

   The educational programs shall emphasize underserved target audiences, high-risk behaviors, and “allowable” behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources. (Part D.5.a.(2).)

ii. 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; and (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization). (Part D.5.b.(1)(a).)

iii. 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.” (Part D.5.b.(1)(a).)

iv. 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 understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows:

   - Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
   - The Copermittee’s inspection, plan review, and enforcement policies and procedures to verify consistent application.
   - Current advancements in BMP technologies.

- SUSMP [Standard Urban Storm Water Mitigation Plan] requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms. (Part D.5.b.(1)(b)(iii) - (vi).)

v. 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. (Part D.5.b.(1)(c).)

vi. 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. (Part D.5.b.(1)(d).)

vii. As early in the planning and development process as possible and all through the permitting and construction process, implement a program to educate project applicants, contractors, property owners, and community planning groups who are not developers or construction site owners. 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 these groups on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training. (Part D.5.b.(2).)

*Reimbursement is **not** required to develop any of the educational programs described above in Parts D.5.a., D.5.b.(1), or D.5.b.(2).*

*Reimbursement is also **not** required to educate developers and construction site owners on the topics listed in Part D.5.b.(2).*[12]

viii. Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities on those topics listed in Table 3 of the test claim permit. 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. (Part D.5.b.(3) and the first sentence in Part L.1.)

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[12] Exhibit A, Amended Test Claim Decision on Remand, page 82.

Reimbursement for the activities required by Part D.5.b.(3) may be based on the actual annual shared costs of developing and implementing the program, times the claimant's proportional share of costs indicated in the claimants' MOU.

2. Watershed Urban Runoff Management Program (WURMP, Parts E.2.f, E.2.g, and the first sentence in Part L.1.). No later than March 24, 2008, the claimants shall comply with the following activities:[13]

   a. Each Copermittee shall collaborate with other Copermittees within its Watershed Management Area (WMA) identified in Table 4 of the test claim permit, with frequent regularly scheduled meetings, to develop and implement an ***updated*** WURMP for each watershed to reduce the discharge of pollutants from the MS4 to the MEP (maximum extent practicable) and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, as specified below. (Part E.2.g. and the first sentence in Part L.1.)

   b. Update the WURMP to include and implement *only* the following elements:

      i. 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. 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. Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

      ii. Submit a Watershed Activities List with each updated 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.

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[13] Exhibit B, Decision and Parameters and Guidelines citing to Regional Board Addendum to Test Claim Permit, December 12, 2007, Exhibit U (9).

iii. Each activity on the Watershed Activities List shall include the following information:

- A description of the activity;
- A time schedule for implementation of the activity, including key milestones;
- An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
- A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
- A description of how the activity is consistent with the collective watershed strategy;
- A description of the expected benefits of implementing the activity; and
- A description of how implementation effectiveness will be measured.

iv. Reimbursement for the Watershed Activities List identified in Section IV.B.2.b.ii. and iii. of these Parameters and Guidelines includes the following:

- The *one-time* activity and pro-rata share of costs to develop a data tracking and analysis system for gathering and reporting the new data required to be included in the Watershed Activities List identified above. Reimbursement is ***not*** required to the extent that the data tracking and analysis system was developed for the purpose of submitting the WURMP annual report as a whole.
- The *ongoing* activity of recording the data identified above in the data tracking system to prepare the Watershed Activities List.

The claimants may claim these costs based on their proportional share of costs under the MOU for the Regional WURMP Working Group to develop and maintain the Regional Watershed Activities Database.

c. 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. (Part E.2.f.)

3. Regional Urban Runoff Management Program (Parts F.1-F.3, and the first sentence in Part L.1.)

   No later than March 24, 2008,[14] each copermittee shall collaborate with the other copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that 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 include the following:

   a. Develop and implement a Regional Residential Education Program which shall include the following:

      - 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.
      - Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a. (bacteria, nutrients, sediment, pesticides, and trash). (Part F.1.)

   b. Develop the standardized fiscal analysis method required in section G of the permit. The standardized fiscal analysis method shall:

      - Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.
      - Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program. (Part F.2.)

   c. *Facilitate* the assessment of the effectiveness of jurisdictional, watershed, and regional programs. This includes facilitating consistency in the

[14] Exhibit B, Decision and Parameters and Guidelines citing Regional Board Addendum to Test Claim Permit, December 12, 2007, Exhibit U (9).

assessment programs and developing, annually reviewing, and updating as necessary subject-specific standards for the assessments. (Part F.3.)

4. Program Effectiveness Assessments (Parts I.1, I.2., I.5.)

    a. Annual Effectiveness Assessment of Jurisdictional Urban Runoff Management Program (Part I.1.)

        1. Each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

            (i) Specifically assess the effectiveness of each of the following:

                - Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
                - Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge Detection and Elimination, and Education); and
                - Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

            (ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items listed above.

            (iii) Utilize outcome levels 1-6, as defined in Attachment C to Order No. R9-2007-0001, to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible.[15]

[15] 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

(iv) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible.

(v) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, as defined in Attachment C of Order No. R9-2007-0001, where applicable and feasible.[16]

2. 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

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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." Exhibit B, Decision and Parameters and Guidelines citing the Test Claim, pages 188-189 (Order No. R9-2007-0001, Attachment C), Exhibit U (13).

[16] Implementation Assessment is defined in Attachment C of the test claim permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measurable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed." Exhibit B, Decision and Parameters and Guidelines citing the Test Claim, pages 188-189 (Order No. R9-2007-0001, Attachment C), Exhibit U (13).

Water Quality Assessment is defined in Attachment C of the test claim permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges." Exhibit B, Decision and Parameters and Guidelines citing the Test Claim, pages 188-189 (Order No. R9-2007-0001, Attachment C), Exhibit U (13).

Integrated Assessment is defined in Attachment C of the test claim 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." Exhibit B, Decision and Parameters and Guidelines citing the Test Claim, pages 188-189 (Order No. R9-2007-0001, Attachment C), Exhibit U (13).

effectiveness, as necessary to achieve compliance with section A of this Order (Prohibitions and Receiving Water Limitations).

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.

3. Each copermittee shall *include* in the Jurisdictional Urban Runoff Management Program Annual Report, due September 30, 2008 and every September 30 thereafter for the previous fiscal year, a report on the effectiveness assessment conducted the prior fiscal year as implemented under each of the requirements listed above.

b. Annual Effectiveness Assessment of the Watershed Urban Runoff Management Program Watershed (Part I.2.)

1. Each watershed group of Copermittees identified in Table 4 of the test claim permit shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(i) Specifically assess the effectiveness of each of the following:

- Each Watershed Water Quality Activity implemented;
- Each Watershed Education Activity implemented; and
- Implementation of the Watershed Urban Runoff Management Program as a whole.

(ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items that are part of the WURMP listed above.

(iii) Utilize outcome levels 1-6 to assess the effectiveness of each Watershed Water Quality Activity implemented and each Watershed Education Activity implemented, where applicable and feasible.

(iv) 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.

(v) 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.

(vi) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness of each of the bulleted items that are part of the WURMP listed above, where applicable and feasible.

(vii) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

2. 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 (Prohibitions and Receiving Water Limitations).

   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.

3. Each watershed group of Copermittees shall *include* in the WURMP Annual Report, due by January 31, 2009 and every January 31 thereafter for the previous fiscal year, a report on the

effectiveness assessment conducted the prior fiscal year as implemented under each of the requirements listed above.

*Reimbursement is **not** required to conduct the annual effectiveness assessment of the Regional Urban Runoff Management Program.*

Offsetting Revenues and Reimbursements

The Decision and Parameters and Guidelines specify that any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, state and federal funds, any service charge, fee, or assessment authority to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes shall be identified and deducted from any claim submitted for reimbursement. Such offsetting revenue includes the following:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including stormwater fees and those authorized by Public Resources Code section 40059 for reporting on street sweeping, and those authorized by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning.
- 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.

Offsetting revenues identified in the reimbursement claims totaled $4,600 and were claimed only by City of Oceanside in its 2009-2010 claim.

Statewide Cost Estimate

Staff reviewed 46 unaudited reimbursement claims submitted by six cities and one county, as compiled by the Controller. Staff developed the Statewide Cost Estimate based on the assumptions and methodology discussed herein.

Table 1. Initial Reimbursement Period Cost Estimate

A. One-Time Activities	
1. 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 (Part L.1.a.(3)-(6)) that:	$0

a. Establishes a management structure to promote consistency and develop and implement regional activities; b. Establishes standards for conducting meetings, decisions-making, and cost-sharing. c. Provides guidelines for committee and workgroup structure and responsibilities; d. Lays out a process for addressing Copermittee non-compliance with the formal agreement.	
2. Long Term Effectiveness Assessment (Part I.5 and the first sentence in Part L.1.): a. Collaborate with the other Copermittees to develop a Long Term 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 the test claim permit. b. The LTEA shall be designed to address each of the objectives listed below, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle: • Assessment of watershed health and identification of water quality issues and concerns. • Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. • Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. • Assessment of progress in implementing Copermittee programs and activities. • Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. • Assessment of changes in discharge and receiving water quality. • Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality.	\$142,188 - \$385,944

• Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies. 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 percent reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80 percent confidence. e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.	
B. Ongoing Activities	
1. Jurisdictional Urban Runoff Management Program	
a. By September 30, 2008, and each September 30th thereafter, *include* in the JURMP Annual Report the following information for the prior fiscal year: i. Street Sweeping Information (Part J.3.a.(3)(c)(x-xv)) • 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. • 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.	$831,966 - $2,258,190

• 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. • Identification of the total distance of curb-miles swept. • Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping. • Amount of material (tons) collected from street and parking lot sweeping. ii. Conveyance System Cleaning Information (Part J.3.a.(3)(c)(iv)-(viii)) • 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. • 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. • 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. • Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category. • Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding. iii. Reimbursement for the reporting activities identified in Section IV.B.1.a.i. and ii. of these Parameters and Guidelines includes the following: • The *one-time* activity of developing policies and procedures and a data tracking and analysis	

system for gathering and reporting only the new data identified above. • *One-time* training per employee assigned to track the information identified above to ensure the staff responsible for tracking the information understand and properly implement the procedures. • The *ongoing* activity of recording the new data identified above in the data tracking system to prepare the annual street sweeping and conveyance systems report.	
b. Conveyance System Cleaning (Part D.3.a.(3)(b)(iii)). No later than March 24, 2008, the claimants shall comply with the following activities: i. Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.). ii. The maintenance activities shall, at a minimum, include the following: • Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity, which 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. • Cleaning observed anthropogenic litter in open channels annually, which may be reduced to every other year after two years of inspections (which at the earliest would be in fiscal year 2010-2011) if the open channel requires less than annual cleaning.	\$515,571 - \$1,399,407
c. Educational Component (Parts D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), and the first sentence in Part L.1.). No later than March 24, 2008, the claimants shall comply with the following mandated activities:	
i. Each copermittee shall educate each target community (municipal departments, construction site owners and developers, industrial owners and operators, commercial owners and operators, the residential community, the general public, and school	\$1,045,533 - \$2,837,877

children) on the following topics: erosion prevention, non-stormwater discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control. (Part D.5.a.(1).) The educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources. (Part D.5.a.(2).)	
ii. 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; and (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization). (Part D.5.b.(1)(a).)	$0
iii. 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." (Part D.5.b.(1)(a).)	$0
iv. 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 understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows: • Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.	$0

• The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application. • Current advancements in BMP technologies. • SUSMP [Standard Urban Storm Water Mitigation Plan] requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms. (Part D.5.b.(1)(b)(iii) - (vi).)	
v. 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. (Part D.5.b.(1)(c).)	$0
vi. 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. (Part D.5.b.(1)(d).)	$0
vii. As early in the planning and development process as possible and all through the permitting and construction process, implement a program to educate project applicants, contractors, property owners, and community planning groups who are not developers or construction site owners. 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 these groups on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training. (Part D.5.b.(2).)	$0
viii. Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities on those topics listed in Table 3 of the test claim permit. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or	$5,602,093 - $15,205,681

other educational methods. (Part D.5.b.(3) and the first sentence in Part L.1.)	
2. Watershed Urban Runoff Management Program (WURMP, Parts E.2.f, E.2.g, and the first sentence in Part L.1.). No later than March 24, 2008, the claimants shall comply with the following activities:	
a. Each Copermittee shall collaborate with other Copermittees within its Watershed Management Area (WMA) identified in Table 4 of the test claim permit, with frequent regularly scheduled meetings, to develop and implement an ***updated*** WURMP for each watershed to reduce the discharge of pollutants from the MS4 to the MEP (maximum extent practicable) and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, as specified below. (Part E.2.g. and the first sentence in Part L.1.)	\$17,248 - \$46,816
b. Update the WURMP to include and implement *only* the following elements: i. 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. 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. Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level. ii. Submit a Watershed Activities List with each updated 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	\$54,610 - \$148,222

activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA. iii. Each activity on the Watershed Activities List shall include the following information: • A description of the activity; • A time schedule for implementation of the activity, including key milestones; • An identification of the specific responsibilities of Watershed Copermittees in completing the activity; • A description of how the activity will address the identified high priority water quality problem(s) of the watershed; • A description of how the activity is consistent with the collective watershed strategy; • A description of the expected benefits of implementing the activity; and • A description of how implementation effectiveness will be measured. iv. Reimbursement for the Watershed Activities List identified in Section IV.B.2.b.ii. and iii. of these Parameters and Guidelines includes the following: • The *one-time* activity and pro-rata share of costs to develop a data tracking and analysis system for gathering and reporting the new data required to be included in the Watershed Activities List identified above. Reimbursement is ***not*** required to the extent that the data tracking and analysis system was developed for the purpose of submitting the WURMP annual report as a whole. • The *ongoing* activity of recording the data identified above in the data tracking system to prepare the Watershed Activities List.	
c. 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	$0

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. (Part E.2.f.)	
3. Regional Urban Runoff Management Program (Parts F.1-F.3, and the first sentence in Part L.1.) No later than March 24, 2008, each copermittee shall collaborate with the other copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that 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 include the following: a. Develop and implement a Regional Residential Education Program which shall include the following: • 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. • Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a. (bacteria, nutrients, sediment, pesticides, and trash). (Part F.1.) b. Develop the standardized fiscal analysis method required in section G of the permit. The standardized fiscal analysis method shall: • Identify the various categories of expenditures attributable to the urban runoff management programs, including a description of the specific items to be accounted for in each category of expenditures.	$0

• Identify expenditures that contribute to multiple programs or were in existence prior to implementation of the urban runoff management program. (Part F.2.) c. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs. This includes facilitating consistency in the assessment programs and developing, annually reviewing, and updating as necessary subject-specific standards for the assessments. (Part F.3.)	
4. Program Effectiveness Assessments (Parts I.1, I.2., I.5.) a. Annual Effectiveness Assessment of Jurisdictional Urban Runoff Management Program (Part I.1.) 1. Each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall: (i) Specifically assess the effectiveness of each of the following: • Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented; • Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge Detection and Elimination, and Education); and • Implementation of the Jurisdictional Urban Runoff Management Program as a whole. (ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items listed above. (iii) Utilize outcome levels 1-6, as defined in Attachment C to Order No. R9-2007-0001, to assess the effectiveness of each of the bulleted items listed above, where applicable and feasible. (iv) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess	$0

the effectiveness of each of the bulleted items listed above, where applicable and feasible. (v) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, as defined in Attachment C of Order No. R9-2007-0001, where applicable and feasible. 2. 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 (Prohibitions and Receiving Water Limitations). 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. 3. Each copermittee shall *include* in the Jurisdictional Urban Runoff Management Program Annual Report, due September 30, 2008 and every September 30 thereafter for the previous fiscal year, a report on the effectiveness assessment conducted the prior fiscal year as implemented under each of the requirements listed above. b. Annual Effectiveness Assessment of the Watershed Urban Runoff Management Program Watershed (Part I.2.) 1. Each watershed group of Copermittees identified in Table 4 of the test claim permit shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At	

a minimum, the annual effectiveness assessment shall: (i) Specifically assess the effectiveness of each of the following: • Each Watershed Water Quality Activity implemented; • Each Watershed Education Activity implemented; and • Implementation of the Watershed Urban Runoff Management Program as a whole. (ii) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the bulleted items that are part of the WURMP listed above. (iii) Utilize outcome levels 1-6 to assess the effectiveness of each Watershed Water Quality Activity implemented and each Watershed Education Activity implemented, where applicable and feasible. (iv) 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. (v) 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. (vi) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness of each of the bulleted items that are part of the WURMP listed above, where applicable and feasible. (vii) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.	

2. 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 (Prohibitions and Receiving Water Limitations). 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. 3. Each watershed group of Copermittees shall *include* in the WURMP Annual Report, due by January 31, 2009 and every January 31 thereafter for the previous fiscal year, a report on the effectiveness assessment conducted the prior fiscal year as implemented under each of the requirements listed above.	
Total Direct Costs	$8,209,209 - $22,282,137
Indirect Costs	$88,083 - $2,228,214
Offsetting Revenues or Other Reimbursements	- ($4600 - $12,471)
Subtotal	$8,292,692 - $24,497,880
10 Percent Late Filing Penalty	-($0 - $1,430,348)
Total Costs	**$8,292,692 - $23,067,532**

Assumptions

1. The amount claimed for the initial period of reimbursement may be higher if late or amended claims are filed. Of the 19 eligible claimants, only seven filed reimbursement claims.[17] This may be because the Parameters and Guidelines require claimants to support actual costs incurred and claimed with contemporaneous source documents, which many claimants no longer possess. This matter was held up in court until 2022, and the reimbursement period is from January 24, 2007, through December 31, 2017. The claimants requested the Commission to adopt a reasonable reimbursement methodology for each reimbursable activity, totaling over $252 million for program, pursuant to Government Code 17518.5 so that source documents would not have to be provided. However, their requests were denied by the Commission since they were based on average cost estimates to perform the reimbursable activities, supported by survey data, which does not meet the evidentiary standards for determining the costs mandated by the state for all eligible claimants.

   For purposes of calculating the high-end projection of this Statewide Cost Estimate, it is presumed that no late or amended claims will be filed by the seven claimants. This Statewide Cost Estimate is based on the initial claims filed and the claims which the 12 eligible non-filer claimants could file late.

2. No costs were claimed for Activities A.1., B.1.c.ii., B.1.c.iii., B.1.c.iv., B.1.c.v., B.1.c.vi., B.1.c.vii., B.2.c., B.3., and B.4. Therefore, no data exists upon which to make a projection for non-filer claimants and a $0 estimate is provided. However, statewide costs may be higher if non-filers file late claims and seek reimbursement for these activities.

3. Projected indirect costs are low because overhead was only claimed by two claimants at 10 percent which averages 1.07 percent across the seven claimants. Since this percentage is far less than the 10 percent direct labor, excluding fringe benefits, available under the Office of Management and Budget Circular 2 CFR, Chapter I and Chapter II, Part 200 et al., the high-end projection will be the default 10 percent.[18]

4. Projected offsetting revenues are low because the only offsetting revenues identified in the reimbursement claims totaled $4,600 and were claimed solely by the City of Oceanside in its 2009-2010 claim. The Decision on the Parameters and Guidelines, however, identified potential offsetting revenues, including stormwater fees approved and imposed by the City of Coronado, City of Del Mar,

[17] The claimants include the County of San Diego and the Cities of San Marcos, San Diego, Poway, Oceanside, National City and Lemon Grove.

[18] Exhibit B, Decision and Parameters and Guidelines, page 224.

City of Escondido, and City of San Diego. Thus, costs may be lower than this estimate based on offsetting revenues applied to the reimbursable activities.

5. Costs may be lower than projected if either no reimbursable costs were incurred or if costs of less than $1,000 were incurred by non-filers, in which case a late reimbursement claim cannot be filed.[19]

6. Costs may be lower if the Controller audits the claims and determines that costs were improperly claimed or were not supported or that other offsetting revenues (i.e., funds that are not the claimant's proceeds of taxes) were used by a claimant to pay for the reimbursement activities.

Methodology

As explained below, the low-end statewide cost estimate represents the costs actually claimed by the seven local agencies. The high-end statewide cost estimate represents the costs actually claimed plus the costs that could be claimed in late claims filed by the remaining 12 eligible claimants.

Activity A.1. consists of the one-time activity of jointly executing and submitting to the Regional Board an updated instrument of formal agreement. No costs were claimed for this activity in initial claiming. Thus, there is no projection for non-filer claimants.

Activity A.2. potential claims, which address the one-time activity regarding the long term effectiveness assessment, are calculated by using the average costs claimed multiplied by the eligible claimants that have not yet filed claims.

> Activity A.2. actual costs claimed [$142,188] / the number of filers [7] = average Activity A.2. cost per filer [$20,313]
>
> Average activity A.2. cost per filer [$20,313] x number of non-filers [12] = total estimated non-filer Activity A.2. costs [$243,756]
>
> Activity A.2. actual costs claimed [$142,188] + estimated non-filer Activity A.2. costs that could be claimed in late claims [$243,756] = Total potential Activity A.2. costs [$385,944]

Activity B.1.a potential claims, which address reporting certain street sweeping and conveyance system cleaning information in the JURMP Annual Report, are calculated by using the average costs claimed multiplied by the eligible claimants that have not yet filed claims.

> Activity B.1.a. actual costs claimed [$831,966] / the number of filers [7] = average Activity B.1.a. cost per filer [$118,852]
>
> Average activity B.1.a. cost per filer [$118,852] x number of non-filers [12] = total estimated non-filer Activity B.1.a. costs [$1,426,224]

[19] Government Code section 17564.

Activity B.1.a. actual costs claimed [$831,966] + estimated non-filer Activity B.1.a. costs that could be claimed in late claims [$1,426,224] = Total potential Activity B.1.a. costs [$2,258,190]

Activity B.1.b. potential claims, which address conveyance system cleaning, are calculated by using the average costs claimed multiplied by the eligible claimants that have not yet filed claims.

Activity B.1.b. actual costs claimed [$515,571] / the number of filers [7] = average Activity B.1.b. cost per filer [$73,653]

Average activity B.1.b. cost per filer [$73,653] x number of non-filers [12] = total estimated non-filer Activity B.1.b. costs [$883,836]

Activity B.1.b. actual costs claimed [$515,571] + estimated non-filer Activity B.1.b. costs that could be claimed in late claims [$883,836] = Total potential Activity B.1.b. costs [$1,399,407]

Activity B.1.c.i potential claims, which address educating target communities, are calculated by using the average costs claimed multiplied by the eligible claimants that have not yet filed claims.

Activity B.1.c.i actual costs claimed [$1,045,533] / the number of filers [7] = average Activity B.1.c.i cost per filer [$149,362]

Average Activity B.1.c.i cost per filer [$149,362] x number of non-filers [12] = total estimated non-filer Activity B.1.c.i costs [$1,792,344]

Activity B.1.c.i actual costs claimed [$1,045,533] + estimated non-filer Activity B.1.c.i costs that could be claimed in late claims [$1,792,344] = Total potential Activity B.1.c.i costs [$2,837,877]

Activity B.1.c.ii. consists of implementing an education program for planning boards and elected officials on water quality laws and land use. No costs were claimed for this activity in initial claiming. Thus, there is no projection for non-filer claimants.

Activity B.1.c.iii. consists of implementing an education program for planning boards and staff and elected officials on LID BMP requirements and receiving water quality. No costs were claimed for this activity in initial claiming. Thus, there is no projection for non-filer claimants.

Activity B.1.c.iv. consists of implementing an annual education program claimant's construction, building, code enforcement, and grading review staff, inspectors, and other responsible construction staff. No costs were claimed for this activity in initial claiming. Thus, there is no projection for non-filer claimants.

Activity B.1.c.v. consists of annually training staff responsible for conducting stormwater compliance inspections and enforcement of industrial and commercial facilities. No costs were claimed for this activity in initial claiming. Thus, there is no projection for non-filer claimants.

Activity B.1.c.vi. consists of implementing an education program for municipal personnel and contractors performing activities which generate pollutants. No costs were claimed for this activity in initial claiming. Thus, there is no projection for non-filer claimants.

Activity B.1.c.vii. consists of implementing an education program for project applicants, contractors, property owners, and community planning groups who are not developers or construction site owners. No costs were claimed for this activity in initial claiming. Thus, there is no projection for non-filer claimants.

Activity B.1.c.viii. potential claims, which address educating residential, general public, and school children target communities, are calculated by using the average costs claimed multiplied by the eligible claimants that have not yet filed claims.

> Activity B.1.c.viii. actual costs claimed [$5,602,093] / the number of filers [7] = average Activity B.1.c.viii. cost per filer [$800,299]
>
> Average Activity B.1.c.viii. cost per filer [$800,299] x number of non-filers [12] = total estimated non-filer Activity B.1.c.viii. costs [$9,603,588]
>
> Activity B.1.c.viii. actual costs claimed [$5,602,093] + estimated non-filer Activity B.1.c.viii. costs that could be claimed in late claims [$9,603,588] = Total potential Activity B.1.c.viii. costs [$15,205,681]

Activity B.2.a. potential claims, which address collaborating to develop and implement an updated WURMP for each watershed, are calculated by using the average costs claimed multiplied by the eligible claimants that have not yet filed claims.

> Activity B.2.a. actual costs claimed [$17,248] / the number of filers [7] = average Activity B.2.a. cost per filer [$2,464]
>
> Average Activity B.2.a. per filer [$2,464] x number of non-filers [12] = total estimated non-filer Activity B.2.a. costs [$29,568]
>
> Activity B.2.a. actual costs claimed [$17,248] + estimated non-filer Activity B.2.a. costs that could be claimed in late claims [$29,568] = Total potential Activity B.2.a. costs [$46,816]

Activity B.2.b. potential claims, which address updating and implementing certain WURMP elements including the Watershed Activities List, are calculated by using the average costs claimed multiplied by the eligible claimants that have not yet filed claims.

> Activity B.2.b. actual costs claimed [$54,610] / the number of filers [7] = average Activity B.2.b. cost per filer [$7,801]
>
> Average Activity B.2.b. cost per filer [$7,801] x number of non-filers [12] = total estimated non-filer Activity B.2.b. costs [$93,612]
>
> Activity B.2.b. actual costs claimed [$54,610] + estimated non-filer Activity B.2.b. costs that could be claimed in late claims [$93,612] = Total potential Activity B.2.b. costs [$148,222]

Activity B.2.c. consists of implementing identified Watershed Activities pursuant to established schedules. No costs were claimed for this activity in initial claiming. Thus, there is no projection for non-filer claimants.

Activity B.3. consists of collaborating with the other copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program. No costs were claimed for this activity in initial claiming. Thus, there is no projection for non-filer claimants.

Activity B.4. consists of annually assessing the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. No costs were claimed for this activity in initial claiming. Thus, there is no projection for non-filer claimants.

Indirect Costs: The low-end of the range for indirect costs is those indirect costs actually claimed. The high-end, in addition to indirect costs actually claimed, assumes that all eligible claimants who have not yet filed claims will file claims for indirect costs at the default rate of 10 percent.

> Indirect Cost Rate [10%] x Estimated Direct Costs (sum of all estimated activity costs for the initial claim period) [$22,282,137] = High-End of the Estimated Indirect Costs [$2,228,214].

Offsetting Revenues: The low-end of the range for offsetting revenues is the total amount of offsetting revenues actually identified and deducted. The high-end assumes that all eligible claimants will file claims, with offsetting revenues reported by all eligible claimants at the same average rate and is calculated by dividing the offsetting revenue identified by the actual direct and indirect costs to get the offsetting revenue as a percentage of total costs claimed. Multiply the rate by the estimated direct and indirect costs not claimed. Then add the estimated offsetting revenue for non-filling claimants to the offsetting revenue actually claimed.

> Actual Offsetting Revenues [$4,600] / Actual Direct and Indirect Costs [$8,297,292] = Offsetting Rate (offsetting revenues as a percentage of total costs claimed) [0.055%].
>
> Estimated Non-filer Direct and Indirect Costs [$14,311,347] x Offsetting Rate [0.055%] = Non-filer Offsetting Revenues [$7,871].
>
> Actual Offsetting Revenues [$4600] + Non-filer Offsetting Revenues [$7,871] = High-End of Estimated Offsetting Revenues [$12,471]

Late Filing Penalties: The low-end is $0 because none of the initial claims compiled by the Controller were assessed a late filing penalty. The high-end assumes that all non-filers will file claims for the initial period of reimbursement, which will be subject to a late filing penalty of ten percent of non-filer direct plus indirect costs.

> Estimated Non-filer Direct and Indirect Costs [$14,311,347] – Estimated Non-filer Offsets [$7,871] = Estimated Non-filer Net Costs [$14,303,476].

Estimated Non-filer Net Costs [$14,303,476] x (10% late filing penalty) = Estimated Non-filer Late Filing Penalties [$1,430,348].

Actual Late Filing Penalties [$0] + Estimated Non-filer Late Filing Penalties [$1,430,348] = High-End of Estimated Late Filing Penalties [$1,430,348].

Draft Proposed Statewide Cost Estimate

On September 2, 2026, Commission staff issued the Draft Proposed Statewide Cost Estimate.[20]

Staff Recommendation

Staff recommends that the Commission adopt this Statewide Cost Estimate of $8,292,692 - $23,067,532 for the Initial Claim Period that began on January 24, 2007 and ends on December 31, 2017.

[20] Exhibit C, Draft Proposed Statewide Cost Estimate, issued September 2, 2026.

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 September 2, 2026, I served the:

- **Current Mailing List dated August 28, 2026**
- **Draft Proposed Statewide Cost Estimate, Schedule for Comments, and Notice of Hearing issued September 2, 2026**

  San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Parts D.3.a.(3)(b)(iii), D.5.a.(1), D.5.a.(2), D.5.b.(1)(a), D.5.b.(1)(b)(iii-vi), D.5.b.(1)(c), D.5.b.(1)(d), D.5.b.(2), D.5.b.(3), 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), the first sentence of L.1. as it applies to the newly mandated activities, and L.1.a.(3)-(6), 07-TC-09-R

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 September 2, 2026 at Sacramento, California.

Jill Magee

Jill Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/28/26

Claim Number: 07-TC-09-R

Matter: 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.

Claimants: City of Carlsbad
City of Chula Vista
City of Del Mar
City of Encinitas
City of Escondido
City of Imperial Beach
City of La Mesa
City of Lemon Grove
City of National City
City of Oceanside
City of Poway
City of San Diego
City of San Marcos
City of Santee
City of Solana Beach
City of Vista

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.)

Adaoha Agu, *County of San Diego Auditor & Controller Department*
Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego, CA 92123
Phone: (858) 694-2129
Adaoha.Agu@sdcounty.ca.gov

Nicholas Ajluni, Assistant Director of Utilities and Environmental Services, *City of Pleasanton*
PO Box 520, Pleasanton, CA 04566
Phone: (925) 931-5523
najluni@cityofpleasantonca.gov

Rachelle Anema, Assistant Auditor-Controller, *County of Los Angeles*
Accounting Division, 500 W. Temple Street, Los Angeles, CA 90012
Phone: (213) 974-8321
RANEMA@auditor.lacounty.gov

Donna Apar, Finance Director, *City of San Marcos*
Claimant Contact
1 Civic Center Drive, San Marcos, CA 92069
Phone: (760) 744-1050
dapar@san-marcos.net

Lili Apgar, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-0254
lapgar@sco.ca.gov

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

Aaron Avery, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
Aarona@csda.net

David Bass, Vice Mayor, *City of Rocklin*
3970 Rocklin Road, Rocklin, CA 95677
Phone: (916) 663-8504
David.Bass@rocklin.ca.us

Michael Beaton, Assistant County Administrative Officer, *County of Monterey*
County Administrative Office, 168 W. Alisal Street, 3rd Floor , Salinas, CA 93901
Phone: (831) 755-3835
beatonm@countyofmonterey.gov

Ginni Bella Navarre, Deputy Legislative Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8342
Ginni.Bella@lao.ca.gov

Jonathan Borrego, City Manager, *City of Oceanside*
Claimant Contact
300 North Coast Highway, Oceanside, CA 92054
Phone: (760) 435-3065
citymanager@oceansideca.org

Maz Bozorginia, Director of Public Works/City Engineer, *City of Brisbane*
50 Park Place, Brisbane, CA 94005
Phone: (415) 508-2131
MBozorginia@brisbaneca.gov

Molly Brennan, Director of Finance, *City of National City*
Claimant Contact
1243 National City Blvd., National City, CA 91950
Phone: (619) 336-4330
finance@nationalcityca.gov

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

Guy Burdick, Consultant, *MGT Consulting*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 833-7775
gburdick@mgtconsulting.com

Rica Mae Cabigas, Chief Accountant, *Auditor-Controller*
Accounting Division, 500 West Temple Street, Los Angeles, CA 90012
Phone: (213) 974-8309
rcabigas@auditor.lacounty.gov

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Julissa Ceja Cardenas, Legislative Analyst, *California State Association of Counties (CSAC)*
Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
jcejacardenas@counties.org

Sheri Chapman, General Counsel, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8267
schapman@calcities.org

Rolando Charvel, Chief Financial Officer, *City of San Diego*
Claimant Contact
202 C Street, 9th Floor, San Diego, CA 92101
Phone: (619) 236-6218
rcharvel@sandiego.gov

Ali Chemkhi, Senior Supervising Accountant/Auditor, *County of San Bernardino*
Office of Auditor-Controller, 268 West Hospitality Lane, Fourth Floor, San Bernardino, CA 92415-0018
Phone: (909) 382-7035
ali.chemkhi@sbcountyatc.gov

Annette Chinn, Consultant, *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, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Michael Coleman, Fiscal Policy Advisor, *Coleman Advisory Services*
2217 Isle Royale Lane, Davis, CA 95616
Phone: (530) 758-3952
coleman@muni1.com

Erika Cortez, Administrative Services Director, *City of Imperial Beach*
Claimant Contact
825 Imperial Beach Boulevard, Imperial Beach, CA 91932
Phone: (619) 423-8303
ecortez@imperialbeachca.gov

Oana Cosma, Budget and Finance Director, *County of Orange*
400 W. Civic Center Dr., 5th Floor, Santa Ana, CA 92701-4062
Phone: (714) 834-7410
Oana.Cosma@ceo.oc.gov

Thomas Deak, Senior Deputy, *County of San Diego*
Claimant Representative
Office of County Counsel, 1600 Pacific Highway, Room 355, San Diego, CA 92101
Phone: (619) 531-4810
Thomas.Deak@sdcounty.ca.gov

Adrian Del Rio, Assistant Director, *City of Chula Vista*
Finance Department, 276 Fourth Ave Bldg A, Chula Vista, CA 91910
Phone: (619) 409-3820
adelrio@chulavistaca.gov

Nicole Denow, Chief Deputy City Attorney, *City of San Diego*
Environment Section, 1200 Third Avenue, Suite 1100, San Diego, CA 92101
Phone: (619) 533-6173
NDenow@sandiego.gov

Tracy Drager, Auditor and Controller, *County of San Diego*
Claimant Contact
1600 Pacific Highway, Room 166, San Diego, CA 92101
Phone: (619) 531-5413
tracy.drager@sdcounty.ca.gov

Heather Ferbert, City Attorney, *City of San Diego*
1200 Third Avenue, Suite 1100, San Diego, CA 92101-4100
Phone: (619) 533-5800
hferbert@sandiego.gov

Kevin Fisher, Assistant City Attorney, *City of San Jose*
Environmental Services, 200 East Santa Clara Street, 16th Floor, San Jose, CA 95113
Phone: (408) 535-1987
kevin.fisher@sanjoseca.gov

Tim Flanagan, CIO-Registrar of Voters, *County of Solano*
Registrar of Voters, 678 Texas Street, Suite 2600, Fairfield, CA 94533
Phone: (707) 784-3359
Elections@solanocounty.com

Jennifer Fordyce, Assistant Chief Counsel, *State Water Resources Control Board*
Office of Chief Counsel, 1001 I Street, 22nd floor, Sacramento, CA 95814
Phone: (916) 324-6682
Jennifer.Fordyce@waterboards.ca.gov

David Gibson, Executive Officer, *San Diego Regional Water Quality Control Board*
9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340
Phone: (858) 467-2952
dgibson@waterboards.ca.gov

Juliana Gmur, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
juliana.gmur@csm.ca.gov

Shawn Hagerty, Partner, *Best Best & Krieger, LLP*
San Diego Office, 655 West Broadway, 15th Floor, San Diego, CA 92101
Phone: (619) 525-1300
Shawn.Hagerty@bbklaw.com

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, 8th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

Christina Holmes, Director of Finance, *City of Escondido*
Claimant Contact
201 North Broadway, Escondido, CA 92025
Phone: (760) 839-4676
cholmes@escondido.org

Ken Howell, Senior Management Auditor, *State Controller's Office*
Audits, Compliance Audits Bureau, 3301 C Street, Suite 725A, Sacramento, CA 95816
Phone: (916) 323-2368
KHowell@sco.ca.gov

Rachel Jacobs, Finance Director/Treasurer, *City of Solana Beach*
Claimant Contact
635 South Highway 101, Solana Beach, CA 92075-2215
Phone: (858) 720-2463
rjacobs@cosb.org

Jason Jennings, Director, *Maximus Consulting*
Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (804) 323-3535
SB90@maximus.com

Heather Jennings, Director of Finance, *City of Santee*
Claimant Contact
10601 Magnolia Avenue, Building #3, Santee, CA 92071
Phone: (619) 258-4100
hjennings@cityofsanteeca.gov

Angelo Joseph, Supervisor, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
AJoseph@sco.ca.gov

Emma Jungwirth, Senior Legislative Advocate, *California State Association of Counties (CSAC)*
1100 K Street, Ste 101, Sacramento, CA 95814

Phone: (916) 650-8115
ejungwirth@counties.org

Anne Kato, Acting Chief, *State Controller's Office*
Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 322-9891
akato@sco.ca.gov

Ryan Kearns, Chief of Watershed Protection Division, *County of Riverside Flood Control Disrict*
1995 Market Street, Riverside, CA 92501
Phone: (951) 955-2047
rkearns@rivco.org

Anita Kerezsi, Principal Consultant, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Joanne Kessler, Fiscal Specialist, *City of Newport Beach*
Revenue Division, 100 Civic Center Drive , Newport Beach, CA 90266
Phone: (949) 644-3199
jkessler@newportbeachca.gov

Daniel Kigel, Finance Manager II, *County of Monterey*
Administration and Finance, County Administrative Office (CAO), 168 W. Alisal Street, 3rd Floor (Room 35048), Salinas, CA 93901
Phone: (831) 755-5119
KigelD@countyofmonterey.gov

Zach Korach, Finance Director, *City of Carlsbad*
Claimant Contact
1635 Faraday Ave., Carlsbad, CA 92008
Phone: (442) 339-2127
zach.korach@carlsbadca.gov

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Anya Kwan, Associate, *Best Best & Krieger LLP*
300 South Grand Ave., 25th Floor, Los Angeles, CA 90071
Phone: (213) 542-3867
Anya.Kwan@bbklaw.com

David Lancaster, Attorney, Office of Chief Counsel, *State Water Resources Control Board*
San Francisco Bay Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 341-5196
david.lancaster@waterboards.ca.gov

Michael Lauffer, Chief Counsel, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
michael.lauffer@waterboards.ca.gov

Government Law Intake, *Department of Justice*
Attorney General's Office, 1300 I Street, Suite 125, PO Box 944255, Sacramento, CA 94244-2550
Phone: (916) 210-6046
governmentlawintake@doj.ca.gov

Eric Lawyer, Legislative Advocate, *California State Association of Counties (CSAC)*
Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 650-8112
elawyer@counties.org

Kim-Anh Le, Deputy Controller, *County of San Mateo*
555 County Center, 4th Floor, Redwood City, CA 94063
Phone: (650) 599-1104
kle@smcgov.org

William Lee, Chief Deputy District Attorney, *County of San Bernardino District Attorney's Office*
303 W. 3rd Street, San Bernardino, CA 92415-0502
Phone: (909) 382-3800
WLee@sbcda.org

Fernando Lemus, Principal Accountant - Auditor, *County of Los Angeles*
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-0324
flemus@auditor.lacounty.gov

Erika Li, Chief Deputy Director, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
erika.li@dof.ca.gov

Kenneth Louie, Chief Counsel , *Department of Finance*
915 L. Street, Sacramento, CA 95814
Phone: (916) 322-0971
Kenny.Louie@dof.ca.gov

Everett Luc, Accounting Administrator I, Specialist, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0766
ELuc@sco.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Suresh Malkani, Finance Director, *Town of Apple Valley*
14955 Dale Evans Parkway, Apple Valley, CA 92307
Phone: (760) 240-7000
smalkani@applevalley.org

Darryl Mar, Manager, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
DMar@sco.ca.gov

Ensen Mason, Auditor-Controller/Treasurer/Tax Collector, *County of San Bernardino*
268 West Hospitality Lane, San Bernardino, CA 92415-0018

Phone: (909) 387-8322
webinfo@sbcountyatc.gov

Frederick Mayo, Water Utilities Director, *City of Oceanside*
300 N. Coast Highway, Oceanside, CA 92054
Phone: (760) 435-5827
fmayo@oceansideca.org

Michelle Mendoza, Business Engineer Lead and Senior Manager, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Monica Molina, Finance Manager/Treasurer, *City of Del Mar*
Claimant Contact
1050 Camino Del Mar, Del Mar, CA 92014
Phone: (858) 755-9354
mmolina@delmar.ca.us

Tim Nash, Director of Finance, *City of Encinitas*
Claimant Contact
505 S Vulcan Avenue, Encinitas, CA 92054
Phone: N/A
finmail@encinitasca.gov

Kaleb Neufeld, Assistant Controller, *City of Fresno*
2600 Fresno Street, Fresno, CA 93721
Phone: (559) 621-2489
Kaleb.Neufeld@fresno.gov

Rosanna Nguyen, Program Budget Manager, *Department of Finance*
Local Government Unit, 915 L. Street, Sacramento, CA 95814
Phone: (916) 445-3274
Rosanna.Nguyen@dof.ca.gov

Adam Nguyen, Finance Director, *County of Contra Costa*
1025 Escobar Street, 4th Floor, Martinez, CA 94553
Phone: (925) 655-2048
adam.nguyen@cao.cccounty.us

Andy Nichols, Consultant, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Dale Nielsen, Director of Finance/Treasurer, *City of Vista*
Claimant Contact
Finance Department, 200 Civic Center Drive, Vista, CA 92084
Phone: (760) 726-1340
dnielsen@ci.vista.ca.us

Adriana Nunez, Staff Counsel, *State Water Resources Control Board*
Los Angeles Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 322-3313
Adriana.Nunez@waterboards.ca.gov

Erika Opp, Administrative Analyst, *City of St. Helena*
City Clerk, 1480 Main Street, St. Helena, CA 94574
Phone: (707) 968-2743
eopp@cityofsthelena.gov

Eric Oppenheimer, Executive Director, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5615
eric.oppenheimer@waterboards.ca.gov

Patricia Pacot, Accountant Auditor I, *County of Colusa*
Office of Auditor-Controller, 546 Jay Street, Suite #202 , Colusa, CA 95932
Phone: (530) 458-0424
ppacot@countyofcolusa.org

Arthur Palkowitz, Attorney, *Law Offices of Arthur M. Palkowitz*
12807 Calle de la Siena, San Diego, CA 92130
Phone: (858) 259-1055
law@artpalk.onmicrosoft.com

Kirsten Pangilinan, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 322-2446
KPangilinan@sco.ca.gov

Helen Holmes Peak, Attorney, *Lounsbery Ferguson Altona & Peak, LLP*
960 Canterbury Place, Ste. 300, Escondido, CA 92025
Phone: (760) 743-1201
hhp@lfap.com

Brian Pierik, Partner, *Burke, Williams & Sorensen, LLP*
2310 East Ponderosa Drive, Suite 25, Camarillo, CA 93010-4747
Phone: (805) 482-9834
bpierik@bwslaw.com

Johnnie Pina, Legislative Policy Analyst, *League of Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8214
jpina@cacities.org

Trevor Power, Accounting Manager, *City of Newport Beach*
100 Civic Center Drive, Newport Beach , CA 92660
Phone: (949) 644-3085
tpower@newportbeachca.gov

Jonathan Quan, Associate Accountant, *County of San Diego*
Projects, Revenue, and Grants Accounting, 5530 Overland Ave, Suite 410, San Diego, CA 92123
Phone: 6198768518
Jonathan.Quan@sdcounty.ca.gov

Roberta Raper, Director of Finance, *City of West Sacramento*
1110 West Capitol Ave, West Sacramento, CA 95691
Phone: (916) 617-4509
robertar@cityofwestsacramento.org

David Rice, Staff Counsel, *State Water Resources Control Board*
Office of Chief Counsel, 1001 I Street, 22nd Floor, Sacramento, CA 95814

Phone: (916) 341-5161
david.rice@waterboards.ca.gov

Chad Rinde, Director of Finance, *County of Sacramento*
700 H Street, Room 3650, Sacramento, CA 95814
Phone: (916) 874-7248
RindeC@SacCounty.gov

Ashley Rodriguez, Local Government Affairs Manager, *City of Chula Vista*
Finance Department, 276 Fourth Ave Bldg A, Chula Vista, CA 91910
Phone: (619) 409-3820
AClark@chulavistaca.gov

Marco Rodriguez, Accounting Analyst, *City of Lemon Grove*
3232 Main Street, Lemon Grove, CA 91945
Phone: (619) 825-3822
mrodriguez@lemongrove.ca.gov

Lydia Romero, City Manager, *City of Lemon Grove*
Claimant Contact
3232 Main Street, Lemon Grove, CA 91945
Phone: (619) 825-3819
lromero@lemongrove.ca.gov

Tammi Royales, Director of Finance, *City of La Mesa*
Claimant Contact
8130 Allison Avenue, PO Box 937, La Mesa, CA 91944-0937
Phone: (619) 463-6611
findir@cityoflamesa.us

Erica Ryan, Senior Environmental Specialist, *Riverside County Flood Control and Water Conservation District*
1995 Market Street, Riverside, CA 92501
Phone: (951) 955-0843
ERyan@rivco.org

Jessica Sankus, Senior Legislative Analyst, *California State Association of Counties (CSAC)*
Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
jsankus@counties.org

Alex Sauerwein, Attorney, *State Water Resources Control Board*
San Diego Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 327-8581
Alex.Sauerwein@waterboards.ca.gov

Craig Schmollinger, Director of Finance, *City of Poway*
13325 Civic Center Drive, Poway, CA 92064
Phone: (858) 668-4411
cschmollinger@poway.org

Sarah Schoen, Director of Finance, *City of Chula Vista*
Claimant Contact
276 Fourth Avenue , Chula Vista, CA 91910
Phone: (619) 691-5117
sschoen@chulavistaca.gov

Cindy Sconce, Director, *Government Consulting Partners*
5016 Brower Court, Granite Bay, CA 95746
Phone: (916) 276-8807
cindysconcegcp@gmail.com

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, Senior Legal Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

Marisa Soriano, Stormwater Program Manager, *City of Chula Vista*
276 Fourth Avenue, Chula Vista, CA 91910
Phone: (619) 409-5898
msoriano@chulavistaca.gov

Paul Steenhausen, Principal Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, , Sacramento, CA 95814
Phone: (916) 319-8303
Paul.Steenhausen@lao.ca.gov

Julie Testa, Vice Mayor, *City of Pleasanton*
123 Main Street PO Box520, Pleasanton, CA 94566
Phone: (925) 872-6517
Jtesta@cityofpleasantonca.gov

Jolene Tollenaar, Consultant, *MGT Consulting Group*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Robert Torrez, Interim Chief Financial Officer, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5630
robert.torrez@surfcity-hb.org

Jessica Uzarski, Consultant, *Senate Budget and Fiscal Review Committee*
1020 N Street, Room 502, Sacramento, CA 95814
Phone: (916) 651-4103
Jessica.Uzarski@sen.ca.gov

Alejandra Villalobos, Management Services Manager, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, Forth Floor, San Bernardino, CA 92415
Phone: (909) 382-3191
alejandra.villalobos@sbcountyatc.gov

Joshua Walden, Deputy County Counsel, *County of Santa Clara*
Office of the County Counsel, 70 West Hedding Street, 9th Floor, San Jose, CA 95110
Phone: (408) 229-9052
joshua.walden@cco.sccgov.org

Tiffany Walston, County Counsel, *County of Los Angeles*
648 Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, CA 90012-2713

Phone: (213) 974-1811
twalston@counsel.lacounty.gov

Renee Wellhouse, President, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
renee@wellhouseassociates.com

Adam Whelen, Director of Public Works, *City of Anderson*
1887 Howard St., Anderson, CA 96007
Phone: (530) 378-6640
awhelen@ci.anderson.ca.us

R. Matthew Wise, Supervising Deputy Attorney General, *Department of Justice*
Attorney General's Office, 1300 I Street, Suite 125, PO Box 944255, Sacramento, CA 94244-2550
Phone: (916) 210-6046
Matthew.Wise@doj.ca.gov

Arthur Wylene, General Counsel, *Rural County Representatives of California (RCRC)*
1215 K Street, Suite 1650, Sacramento, CA 95814
Phone: (916) 447-4806
awylene@rcrcnet.org

Elisa Wynne, Staff Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
elisa.wynne@sen.ca.gov

Kaily Yap, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Kaily.Yap@dof.ca.gov

Siew-Chin Yeong, Director of Public Works, *City of Pleasonton*
3333 Busch Road, Pleasonton, CA 94566
Phone: (925) 931-5506
syeong@cityofpleasantonca.gov

Traci Young, IS Project Director, *City and County of San Francisco*
San Francisco Public Utilities Commission (SFPUC), 525 Golden Gate Ave, San Francisco, CA 94102
Phone: (415) 653-2583
tmyoung@sfwater.org

Stephanie Yu, Assistant Chief Counsel, *State Water Resources Control Board*
Office of Chief Counsel, 1001 I Street, Sacramento, CA 95814
Phone: (916) 341-5157
stephanie.yu@waterboards.ca.gov

Aly Zimmermann, CIty Manager, *City of Rocklin*
3970 Rocklin Road, Rocklin, CA 95677
Phone: (916) 625-5585
alyz@rocklin.ca.us

Helmholst Zinser-Watkins, Associate Governmental Program Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 324-7876
HZinser-watkins@sco.ca.gov