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RECEIVED
July 31, 2017
Commission on State Mandates

WRITER'S DIRECT NUMBER
(213) 629-8788

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

July 31, 2017

VIA DROPBOX

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Re: Santa Ana Region Water Permit – County of San Bernardino, 10-TC-10; Response of Joint Test Claimants to Notice of Incomplete Joint Test Claim Filing

Dear Ms. Halsey:

I have been designated as Claimant Representative by all test claimants in the above-referenced Joint Test Claim and am therefore responding on behalf of the San Bernardino County Flood Control District ("District"), the County of San Bernardino and the Cities of Big Bear Lake, Chino, Chino Hills, Fontana, Highland, Montclair, Ontario and Rancho Cucamonga (collectively, the "Joint Test Claimants") to the Notice of Incomplete Joint Test Claim Filing dated April 6, 2017 ("Notice Letter"), which stated that the original joint test claim filing was incomplete on three grounds.

The Joint Test Claimants were originally informed that their test claim was deemed complete as of July 12, 2011. The Notice Letter required the Joint Test Claimants to undertake significant efforts, including locating old financial records and preparing new declarations, test claim forms and revisions to the Narrative Statement. The Joint Test Claimants thus incurred significant, unforeseeable costs to address the issues raised in the Notice Letter or risk having the test claim rejected for the reasons stated in therein. The Joint Test Claimants respectfully disagree as to the basis for the Notice Letter on grounds of law and equity, and reserve their right to contest the alleged deficiencies identified in the Notice Letter before the Commission on State Mandates.

Notwithstanding such reservation, and subject to it, the Joint Test Claimants submit with this letter the following new or revised documents:

(a) New Test Claim Forms;
(b) Revised Section 5 Narrative Statement;
(c) New Section 6 Declarations; and
(d) Section 7 Supplemental Authorities

As requested in the Notice Letter, the Joint Test Claimants are not re-attaching any supporting documentation originally filed with the Joint Test Claim.

The Notice Letter indicated that to cure the alleged deficiencies in the original test claim, the Joint Test Claimants were to provide:

1. "Evidence of the date and amount of costs *first* incurred as a result of the alleged new activities required under the Order."

2. "A revised test claim form from the County of San Bernardino, and the cities of Big Bear Lake, Colton, and Montclair."

3. "Revised written narratives and declarations from each co-claimant that provide a detailed description of the costs that are modified by the alleged mandate including the *actual* increased costs incurred by each co-claimant during the fiscal year for which the joint test claim was filed as well as the actual or estimated annual costs that will be incurred by each co-claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the joint test claim was filed. In addition, please provide the statewide cost estimate (in this case the "statewide cost" is the cost for all of the local agency co-permittees, whether named or not, for the alleged new program or higher level of service imposed by the permit at issue) for increased costs to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the join test claim was filed."

Notice Letter, pp. 4-5, emphasis in original.

In response to item 1, the Joint Test Claimants have included evidence of the date of costs first incurred in the Declarations (see paragraph 6) and in the relevant section of the Section 5 Narrative Statement. This information establishes that costs were first incurred for the Joint Test Claimants in February 2010 (during FY 2009-10), and thus, the timeliness of the Joint Test Claim filing is established. *See* Cal. Code Regs., tit. 2, 1183.1(c) ("For purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred."). Additionally, information is provided in each Declaration as to the amount of the costs incurred in response to the mandates in the Permit.

In response to item 2, and notwithstanding the addition in 2014 of 2 CCR § 1183.1(b), which necessitated designation of one claimant representative for joint test claimants, the Joint Test Claimants herewith file new test claim forms signed in Section 8 by the Auditor-Controller for the District and the County and city managers for the city Claimants. The names, addresses and contact information for these individuals are set forth in Section 2 of the forms. Additionally, as noted above, I am designated as the Claimant Representative for all Joint Test Claimants in Section 3 of the forms.

In response to item 3, both the Declarations and the Section 5 Narrative Statement (in revised sections following the description of each mandated activity) set forth actual increased costs incurred in the relevant fiscal years covered by the Joint Test Claim. Also, the Joint Test Claimants' best estimate of total statewide costs associated with the Joint Test Claim are set forth in Section VII of the Narrative Statement and are supported by the Declarations.

New Sections I.A-D of the Narrative Statement sets forth various jurisdictional matters. Section I.D is provided in response to the Commission's letter of June 20, 2017, which responded to an inquiry by the District as to the Auditor-Controller's capacity to sign the District's test claim form. In that letter, the Commission advised that the Auditor-Controller was the correct signatory if the District qualified as a "local agency" subject to the tax and spend limitations of articles XIII A and B of the California Constitution. Section I.D confirms that the District is a local agency with taxing power conferred by the Legislature and is subject to the tax and spend limitations of the Constitution. Supporting documentation is provided in the Section 7 Supplemental Authorities, filed herewith.

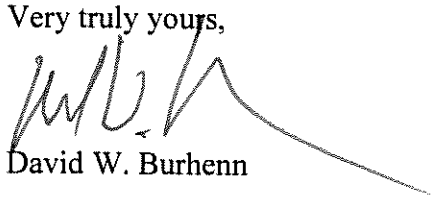
Neither the Department of Finance nor the Water Boards has yet commented on the Joint Test Claim. In light of that fact, and because the Joint Test Claimants wish to avoid further delays in consideration of the claim, we have included in the Narrative Statement a discussion of *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749. As you know, the Commission previously has requested special briefing on this important case. We have also updated other sections of the Narrative Statement to reflect developments occurring since the Joint Test Claim was filed in 2011, to avoid having to correct the record at a later time.

The Joint Test Claimants wish to thank you for your courtesy in extending the deadline for the submission of this response. While the Joint Test Claimants are responding by the July 31 deadline, we respectfully submit that this deadline is not jurisdictional, both because the regulatory authority cited in the Notice Letter applies only to the initial determination of test claim completeness and because the Executive Director has discretion to extend the 30-day time period within which to cure a returned test claim and still allow the test claimant to preserve the original claim filing date.

Nevertheless, we believe that the information and evidence submitted herewith fully address the issues identified in the Notice Letter. If there are any further concerns or issues regarding these matters, please contact the undersigned.

Thank you for your consideration of these matters.

Very truly yours,



David W. Burhenn

DB:dwb

1. TEST CLAIM TITLE

Santa Ana Region Water Permit – County of San Bernardino, 10-TC-10

2. CLAIMANT INFORMATION

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

Oscar Valdez
Claimant Contact

Auditor-Controller/Treasurer/Tax Collector
Title

268 West Hospitality Lane, Fourth Floor
Street Address

San Bernardino, CA 92415-0018
City, State, Zip

909-382-7000
Telephone Number

909-890-4045
Fax Number

oscar.valdez@atc.sbcounty.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave., Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036 (NPDES No. CAS 618036)

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

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

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

8. CLAIM CERTIFICATION

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

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

Oscar Valdez
Print or Type Name of Authorized Local Agency or School District Official

Auditor-Controller/Treasurer/Tax Collector
Print or Type Title

Signature of Authorized Local Agency or School District Official

July 27, 2017
Date

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

1. TEST CLAIM TITLE

Santa Ana Region Water Permit -- County of San Bernardino, 10-TC-10

2. CLAIMANT INFORMATION

County of San Bernardino
Name of Local Agency or School District

Oscar Valdez
Claimant Contact

Auditor-Controller/Treasurer/Tax Collector
Title

268 West Hospitality Lane, Fourth Floor
Street Address

San Bernardino, CA 92415-0018
City, State, Zip

909-382-7000
Telephone Number

909-890-4045
Fax Number

oscar.valdez@atc.sbcounty.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave., Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

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7. Documentation: pages _____ to _____.

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Oscar Valdez
Print or Type Name of Authorized Local Agency or School District Official

Auditor-Controller/Treasurer/Tax Collector
Print or Type Title

Signature of Authorized Local Agency or School District Official

July 27, 2017
Date

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

Santa Ana Region Water Permit - County of San Bernardino, 10-TC-10

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

Jeff Mathieu
Claimant Contact

City Manager
Title

39707 Big Bear Blvd., P.O. Box 10000
Street Address

Big Bear Lake, CA 92315
City, State, Zip

909-866-5831
Telephone Number

909-866-6766
Fax Number

jmathieu@citybigbearlake.com
E-Mail Address

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

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Avenue, Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:

Test Claim #:

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

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036 (NPDES No. CAS 618036)

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

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6. Declarations: pages _____ to _____.
7. Documentation: pages _____ to _____.

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

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

Jeff Mathieu
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

July 12, 2017
Date

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

[redacted]

Santa Ana Region Water Permit - County of San Bernardino, 10-TC-10

[redacted]

City of Chino
Name of Local Agency or School District

Matthew Ballantyne
Claimant Contact

City Manager
Title

13220 Central Ave.
Street Address

Chino, CA 91710
City, State, Zip

909-334-3304
Telephone Number

909-334-3720
Fax Number

mballantyne@cityofchino.org
E-Mail Address

[redacted]

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

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Avenue, Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

[redacted]

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

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036 (NPDES No. CAS 618036)

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[redacted]

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Matthew Ballantyne
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

July 13, 2017
Date

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

1. TEST CLAIM TITLE

Santa Ana Region Water Permit - County of San Bernardino, 10-TC-10

2. CLAIMANT INFORMATION

City of Chino Hills
Name of Local Agency or School District

Konradt Bartlam
Claimant Contact

City Manager
Title

14000 City Center Drive
Street Address

Chino Hills, CA 91709
City, State, Zip

909/364-2610
Telephone Number

909/364-2695
Fax Number

kbartlam@chinohills.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Avenue, Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213/629-8788
Telephone Number

213/624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036 (NPDES No. CAS 618036)

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

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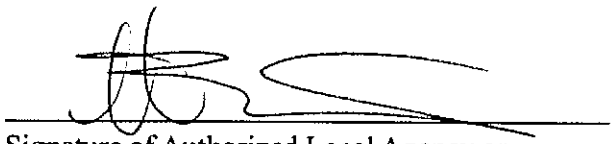
Konradt Bartlam
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title


Signature of Authorized Local Agency or School District Official

July 18, 2017
Date

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

1. TEST CLAIM TITLE

Santa Ana Region Water Permit - County of San Bernardino, 10-TC-10

2. CLAIMANT INFORMATION

City of Fontana
Name of Local Agency or School District

Kenneth R. Hunt
Claimant Contact

City Manager
Title

8353 Sierra Avenue
Street Address

Fontana, CA 92335
City, State, Zip

909-350-7653
Telephone Number

909-350-6613
Fax Number

khunt@fontana.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Avenue, Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036 (NPDES No. CAS 618036)

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

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

July 19, 2017
Date

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

1. TEST CLAIM TITLE

Santa Ana Region Water Permit - County of San Bernardino, 10-TC-10

2. CLAIMANT INFORMATION

City of Highland
Name of Local Agency or School District

Joseph Hughes
Claimant Contact

City Manager
Title

27215 Base Line
Street Address

Highland, CA 92346
City, State, Zip

909-864-6861, ext. 221
Telephone Number

909-862-3180
Fax Number

jhughes@cityofhighland.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Avenue, Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

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California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036 (NPDES No. CAS 618036)

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

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

July 13, 2017
Date

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

1. TEST CLAIM TITLE

Santa Ana Region Water Permit - County of San Bernardino, 10-TC-10

2. CLAIMANT INFORMATION

City of Montclair
Name of Local Agency or School District

Edward C. Starr
Claimant Contact

City Manager
Title

5111 Benito Street
Street Address

Montclair, CA 91763
City, State, Zip

909-625-9405
Telephone Number

909-621-1584
Fax Number

ecstarr@cityofmontclair.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

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Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only

Filing Date:

Test Claim #:

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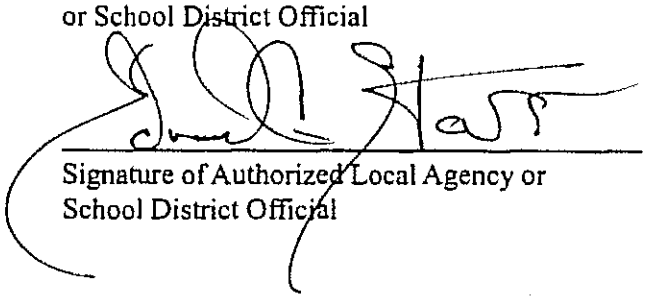
Edward C. Starr
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title



Signature of Authorized Local Agency or School District Official

July 25, 2017
Date

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

1. TEST CLAIM TITLE

Santa Ana Region Water Permit - County of San Bernardino, 10-TC-10

2. CLAIMANT INFORMATION

City of Ontario
Name of Local Agency or School District

Al C. Boling
Claimant Contact

City Manager
Title

303 E. 'B' Street
Street Address

Ontario, CA 91764
City, State, Zip

909-395-2354
Telephone Number

Fax Number

aboling@ontarioca.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
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213-629-8788
Telephone Number

213-624-1376
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E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036 (NPDES No. CAS 618036)

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

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

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

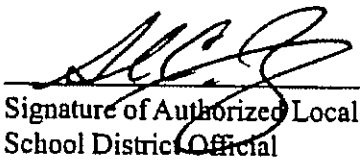
8. CLAIM CERTIFICATION

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

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

Al C. Boling
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title


Signature of Authorized Local Agency or School District Official

July 12, 2017
Date

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

1. TEST CLAIM TITLE

Santa Ana Region Water Permit - County of San Bernardino, 10-TC-10

2. CLAIMANT INFORMATION

City of Rancho Cucamonga
Name of Local Agency or School District

John R. Gillison
Claimant Contact

City Manager
Title

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Rancho Cucamonga, CA 91730
City, State, Zip

(909) 477-2700
Telephone Number

(909) 477-2846
Fax Number

John.Gillison@cityofrc.us
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

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

David W. Burhenn
Claimant Representative Name

Partner
Title

Burhenn & Gest LLP
Organization

624 S. Grand Avenue, Suite 220
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E-Mail Address

For CSM Use Only
Filing Date:
Test Claim #:

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

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

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036 (NPDES No. CAS 618036)

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

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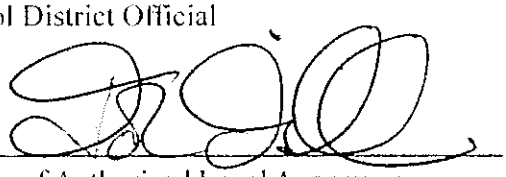
*Read, sign, and date this section and insert at the end of the test claim submission.**

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

John R. Gillison
Print or Type Name of Authorized Local Agency or School District Official



Signature of Authorized Local Agency or School District Official

City Manager
Print or Type Title

July 13, 2017
Date

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

SECTION FIVE

NARRATIVE STATEMENT

In Support of Joint Test Claim –

Santa Ana Region Water Permit – County of San Bernardino, 10-TC-10

TABLE OF CONTENTS

NARRATIVE STATEMENT IN SUPPORT OF JOINT TEST CLAIMS

I. INTRODUCTION

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

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

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

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

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

C. Requirements relating to the incorporation of Total Maximum Daily Loads ("TMDLs") or proposed TMDLs into the Permit set forth in Section V, and in the Monitoring and Reporting Program ("MRP") associated with the Permit;

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

E. Requirements relating to the development and implementation of a program to enhance existing Illicit Connections/Illegal Discharges programs contained in Section VIII, and in the MRP;

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

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

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

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

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

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

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

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

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

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

A. Statement of Interest of Joint Test Claimants

This Test Claim is filed by Claimants District, County and the Cities of Big Bear Lake, Chino, Chino Hills, Fontana, Highland, Montclair, Ontario, and Rancho Cucamonga. The Claimants are filing this Test Claim jointly and, pursuant to 2 Cal. Code Regs. § 1183.1(g), attest to the following:

1. The Claimants allege state-mandated costs resulting from the same Executive Order, *i.e.*, the Permit;

2. The Claimants agree on all issues of the Test Claim (*see* Section 6 Declarations attached hereto, ¶ 9); and

3. The Claimants have designated one contact person to act as a resource for information regarding the Test Claim in Section 3 of their Test Claim forms.

4. All Test Claim forms have been executed, respectively, by the Auditor-Controller (on behalf of the County and the District) and by City Managers (on behalf of the City Claimants). All such individuals are authorized to sign on behalf of their respective Claimants. 2 Cal. Code Regs. § 1183.1(a)(5).

B. Statement of Actual and/or Estimated Costs Exceeding $1,000

The Claimants further state that, as set forth below and in the attached Section 6 Declarations filed herewith in support, the actual and/or estimated costs from the state mandates set forth in this Test Claim exceed $1,000 for each of the Claimants. This Narrative Statement sets forth actual and/or estimated amounts expended by the Claimants as determined from the review of pertinent records and as disclosed in the Section 6 Declarations filed herewith. Such amounts reflect, in many cases, costs associated with the development of programs, and not their later implementation by the Claimants. In addition, there may be costs that have not yet been identified or determined. The Claimants respectfully reserve the right to modify such amounts when or if additional information is received and to provide additional evidence of costs if required in the course of the Test Claim.

C. The Test Claim Was Timely Filed

As set forth in the Section 6 Declarations filed herewith in support, the City Claimants first incurred costs relating to the issues set forth in this Test Claim on or about February 17, 2010 and the District and County claimants first incurred such costs in or about early February 2010. Section 6 Declarations, ¶ 6. Thus, the first costs were incurred in Fiscal Year ("FY") 2009-10. This Test Claim was filed on June 30, 2011, within the next fiscal year after the costs were first incurred. The Test Claim is thus timely. 2 Cal. Code Regs. § 1183.1(c).

D. Capacity of District as Local Agency

The District is a "local agency" subject to the tax and spend limitations of articles XIII A and B of the California Constitution. First, the District has taxing authority through operation of the San Bernardino County Flood Control Act, Water Code App. § 43 *et seq.* (West). *See* Water Code App. § 43-2 (12): The District has power "[t]o cause taxes and assessments to be levied and collected for the purpose of paying any obligation of the district, and to carry out any of the purposes of this act, in the manner provided in this act." *See also* Water Code App. § 43-7, which authorizes the San Bernardino County Board of Supervisors (which are designated in the Act as the ex officio board of supervisors of the District) to levy taxes or assessments upon taxable property in the District and in various zones of the District. *See also* Water Code App. § 43-7.5 (setting forth that all exemptions provided in article XIII of the California Constitution apply "to taxes levied pursuant to the act in the same manner and to the same extent as though said taxes were levied for general county purposes"); § 43-15 (authorizing the levy and collection of tax to pay principal and interest on bonds); and § 43-17 (incorporating State law on the levying,

assessing, equalizing and collecting of county property taxes). A copy of these statutory provisions is attached as exhibit SA-1 to the Section 7 Supplemental Authorities filed herewith. Second, the District is subject to the tax and spend limitations of articles XIII A and B of the Constitution. The annual spending limit resolutions adopted by the Board of Supervisors for the District for FYs 2009-10 through 2016-17 are included as exhibit SA-2.

II. BACKGROUND

This Test Claim concerns the choice made by the RWQCB, acting under its authority granted by California law, to impose requirements under the Permit that go beyond those required by the federal Clean Water Act ("CWA"). The RWQCB has such authority because, under the CWA, a regional board may impose additional requirements on a permittee covered by a federal National Pollutant Discharge Elimination System ("NPDES") permit, such as the Permit. *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613, 619. As the California Supreme Court found,

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

35 Cal.4th at 627-28. The source of those additional requirements is the Porter-Cologne Water Quality Act, Water Code § 13000 *et seq.*, ("Porter-Cologne Act") which was adopted *prior* to the CWA and whose scope is in fact broader than the CWA's, as noted in Section IV below.

The Commission previously has found, in two test claims brought regarding MS4 permits issued by the Los Angeles RWQCB and the San Diego RWQCB, that those regional boards had issued permit requirements that exceeded the requirements of federal law and regulation and represented unfunded state mandates. *In re Test Claim on: Los Angeles Regional Quality Control Board Order No. 01-192*, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 ("Los Angeles County Test Claim"); *In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2007-0001*, Case No. 07-TC-09 ("San Diego County Test Claim").[3]

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

The Commission's reasoning in the Los Angeles County Test Claim was reversed by the Los Angeles County Superior Court, which held that the appropriate test for determining the presence of a federal, as opposed to state, mandate was whether the provision at issue exceeded the "maximum extent practicable" ("MEP") standard in the CWA for MS4 permits. 33 U.S.C. § 1342(p)(3)(B)(iii) (discussed in Section III below). The California Court of Appeal affirmed that

[3] The Statement of Decisions in these test claims are included as exhibits SA-3 and SA-4 to the Section 7 Supplemental Authorities filed herewith.

decision on different grounds. The California Supreme Court, in *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749, reversed the Court of Appeal, finding that the mandates in the Los Angeles County MS4 permit were in fact state, not federal, in nature. *Dept. of Finance* is discussed in Section V.B below.

III. FEDERAL LAW

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

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

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

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

33 U.S.C. § 1342(p)(3)(B).

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

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

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

In addition, the State Water Resources Control Board ("State Board") had issued two state-wide general NPDES stormwater permits covering construction sites (SWRCB Order 2009-0009 DWQ, as amended by Order 2010-0014 DWQ) and certain industrial facilities (SWRCB Order 97-03 DWQ).[4] The responsibility to enforce these permits has been delegated by the State Board to the regional boards. *See* Order 2009-0009 DWQ, paragraph 6; Order 2; Order 97-03 DWQ, paragraph 13 (Exhibit C to Section 7). In addition, permittees covered by the general construction and general industrial stormwater permits are required to pay fees to the State Board, which are authorized under Water Code § 13260(d)(2)(B)(i)-(iii). As will be discussed below, however, the Permit requires the permittees to inspect sites and facilities and to conduct enforcement activities with respect to these general permits, which represents a transfer of a state obligation to local agencies. The Commission itself has already found, in the Los Angeles County Test Claim, that such obligations represent state mandates. Los Angeles County Test Claim at 40-48. This finding was upheld by the Supreme Court in *Dept. of Finance.* 1 Cal. 5th at 771-72.

IV. CALIFORNIA LAW

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

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

[4] Since the Claimants filed this Test Claim, the State Board has issued a new General Industrial Stormwater Permit, Order No. 2014-0057-DWQ ("2014 GISP"), which took effect July 1, 2015. The 2014 GISP still provides that enforcement of the permit's terms are the responsibility of regional boards. *See* 2014 GISP at XIX.B ("The Regional Water Boards have the authority to enforce the provisions and requirements of this General Permit. This includes, but is not limited to, Industrial General Permit, Order No. 2014-0057-DWQ, reviewing SWPPPs, Monitoring Implementation Plans, ERA Reports, and Annual Reports, conducting compliance inspections, and taking enforcement actions.") The 2014 GISP is attached as exhibit SA-5 in the Section 7 Supplemental Authorities filed herewith.

The California Supreme Court, in *City of Burbank,* expressly held that a regional board has authority to issue a permit that exceeds the requirements of the CWA and its accompanying federal regulations. The State Board, which supervises all regional boards in the state, including the RWQCB, has acknowledged that since NPDES permits are adopted as waste discharge requirements, they can more broadly protect "waters of the State" rather than be limited to "waters of the United States," which do not include groundwater. *In re Building Industry Assn. of San Diego County and Western States Petroleum Assn.,* State Board Order WQ 2001-15. *See also Rice v. Harken Exploration Co.* (5th Cir. 2001) 250 F.3d 264, 269 (jurisdiction of CWA does not extend to groundwater).

V. STATE MANDATE LAW

A. Overview

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

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

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

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

> (a) The claim is submitted by a local agency . . . that requested legislative authority for that local agency . . . to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. . . .
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

(c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. . . .

(d) The local agency . . . has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies . . . that result in no net costs to the local agencies or . . . includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in, a ballot measure approved by the voters in a statewide or local election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

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

None of these exceptions bars reimbursement for the state mandates identified in this Test Claim. First, the exceptions identified in Govt. Code §§ 17556(a), (b), (e), (f), and (g) are not relevant to this Test Claim, and are not discussed further. The exceptions identified in Govt. Code § 17556(c), relating to federal mandates, and (d), relating to fee assessments, are expected to be raised in potential opposition to the Test Claim and are discussed further below. In particular, the question of whether a mandate in a stormwater permit represents a federal, as opposed to state, mandate, was addressed by the California Supreme Court in *Dept. of Finance*. Also, as will be demonstrated below, the mandates identified in this Test Claim represent "unique requirements on local government" and not requirements that fall equally upon local governments and private parties, so as to obviate the need for a subvention of state funds under article XIII B, section 6.

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

municipalities as opposed to performing the obligation itself. *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-94 ("*Hayes*").

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

The Commission already has determined that provisions in MS4 permits issued to municipal agencies by the Los Angeles and San Diego RWQCBs represent unfunded state mandates for which a subvention of funds is required. In making that determination, the Commission focused on whether the provisions were supported either by the language of the CWA or by provisions in the CWA stormwater permit regulations, found at 40 CFR § 122.26. To illustrate that the provisions set forth below are not required by federal law or regulation, the Claimants separately discuss that issue with respect to each provision of the Permit at issue in this Test Claim.

While existing mandates law supported the decision of the Commission in the Los Angeles County and San Diego County Test Claims, the recent decision of the California Supreme Court in *Dept. of Finance* provides clear and definitive guidance as to how the Commission must consider whether mandates in a test claim are state or federal in nature.

B. In *Department of Finance,* the California Supreme Court Established Definitive Guidance as to How the Commission Must Assess Requirements in MS4 Permits as State or Federal Mandates

In *Dept. of Finance,* the Court found that the requirements in the Los Angeles County MS4 permit to install trash receptacles at transit stops and to inspect various sites and facilities were state, not federal, mandates. In so doing, the Supreme Court set forth this test:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.

1 Cal. 5th at 765.

Dept. of Finance involved a challenge to the Commission's determination in the Los Angeles County Test Claim that certain provisions in the LA County MS4 permit constituted state

mandates and, concerning a provision requiring the installation and maintenance of trash receptacles at transit stops, required a subvention of state funds. In the San Diego County Test Claim, the Commission similarly found that a number of provisions in the 2007 San Diego County MS4 permit also constituted state mandates. That test claim is presently before the Court of Appeal, as discussed in Section IX.B below.

Significantly, the analysis followed by the Supreme Court in *Dept. of Finance* validates the process by which the Commission itself evaluated the issues in the Los Angeles County Test Claim, a process which involved the examination of federal statutory or regulatory authority for the MS4 permit provisions at issue, the text of previous permits, evidence of other permits issued by the federal government and evidence from the permit development process. In affirming the Commission's decision, the Court explicitly rejected the argument which has been repeatedly raised by the State in both Test Claim comments and in court filings: that the provisions were simply expressions of the MEP standard required of stormwater permittees in the CWA, and thus represented purely federal mandated requirements, exempt from consideration as state mandates pursuant to Govt. Code § 17756(c).

1. The Supreme Court Applied Mandates Case Law in Reaching Its Decision

Key to the Supreme Court's decision was its careful application of existing mandate jurisprudence in determining whether an MS4 permit provision was a federal, as opposed to state, mandate. The Commission must also apply those key cases in its determination of this Test Claim.

The question posed by the Court was this:

> [H]ow to apply [the federal mandate] exception when federal law requires a local agency to obtain a permit, authorizes the state to issue the permit, and provides the state discretion in determining which conditions are necessary to achieve a general standard established by federal law, and when state law allows the imposition of conditions that exceed the federal standard.

1 Cal. 5th at 763.

To answer that question, the Court considered three cases, starting with *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51. In *City of Sacramento*, the Court found that a state law requiring local governments to participate in the State's unemployment insurance program was in fact compelled by federal law, since the failure to do so would result in the loss of federal subsidies and federal tax credits for California corporations. The Court found that because of the "certain and severe federal penalties" that would accrue, the State was left "*without discretion"* (italics added by Supreme Court) and thus the State "'acted in response to a federal "mandate.'" *Dept. of Finance*, 1 Cal. 5th at 764, quoting *City of Sacramento*, 50 Cal. 3d at 74.

The Court next reviewed *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, in which the county alleged that a state requirement to provide funding for defense experts for indigent criminal defendants was a state mandate. The court disagreed, finding that because this requirement reflected a binding Supreme Court precedent interpreting the federal Constitution (*Gideon v. Wainwright* (1963) 372 U.S. 335), even absent the state law, the county

still would have been bound to fund defense experts. Thus, the legislation "merely codified an existing federal mandate." 1 Cal. 5th at 764.

The Court finally considered *Hayes, supra*, where a state plan adopted under a federal special education law required local school districts to provide disabled children with certain educational opportunities. While the state argued that the plan was federally mandated, the *Hayes* court found that this was merely the "starting point" of its analysis, which was whether the "'manner of implementation of the federal program was left to the *true discretion* of the state.'" *Dept. of Finance*, 1 Cal. 5th at 765, quoting *Hayes* at 1593 (emphasis added by Supreme Court). *Hayes* held that if the State "'freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.'" 1 Cal. 5th at 765, quoting *Hayes* at 1594.

From these cases, the Supreme Court distilled the "federally compelled" test set forth above, holding that "if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated." 1 Cal. 5th at 765. The Court also held that it is the State, not the test claimants, which has the burden to show that a challenged permit condition was mandated by federal law. *Id.* at 769.

Thus, the Commission must employ this test, and allocate to the State the burden of proving that the provision in question represents a federal, as opposed to state, mandate.

2. The Supreme Court Examined the Nature of Clean Water Act MS4 Permitting and Determined that Water Boards Have Great Discretion in Establishing MS4 Permit Requirements

In *Dept. of Finance*, the Supreme Court reviewed the interplay between federal CWA and California law set forth in the Water Code (1 Cal. 5th at 767-69) and determined that with respect to the adoption of MS4 permits, the State had chosen to administer its own permitting program to implement CWA requirements. 1 Cal. 5th at 767 (*citing* Water Code § 13370(d)). Thus, an action involving a permit issued under the CWA was different from a situation where the State was compelled to administer its own permitting system.

The Court (at 1 Cal. 5th 767-68) found that the State's permitting authority under the CWA was similar to that in *Division of Occupational Safety & Health v. State Bd. of Control* (1987) 189 Cal.App.3d 794. There, the State had the choice of being covered by federal occupational safety and health ("OSHA") requirements or adopting its own OSHA program, which had to meet federal minimums and had to extend its standards to State and local employees. In that case, state OSHA requirements called for three-person firefighting teams instead of the two-person teams allowed under the federal program. The court found that because the State had freely exercised its option to adopt a state OSHA program, and was not compelled to do so by federal law, the three-person requirement was a state mandate.

The Supreme Court also distinguished the broad discretion provided to the State under the federal CWA stormwater permitting regulations with the facts in *City of Sacramento, supra,* where the State risked the loss of subsidies and tax credits if it failed to comply with federal law:

> Here, the State was not compelled by federal law to impose any particular requirement. Instead, as in *Hayes, supra* . . . the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.

1 Cal. 5th at 768 (citation omitted). The Court held that the EPA regulations "gave the board discretion to determine which specific controls were necessary to meet the [MEP] standard." *Id.* at 767-68.

3. The Court Rejected the State's Argument That the Commission Must Defer to the Water Board's Determination of What Constitutes a Federal Mandate

The Supreme Court rejected another of the State's key arguments, that the Commission should defer to a regional board's determination of what components of a stormwater permit constitute a federal, versus state, mandate. 1 Cal. 5th at 768-69.

The Court first addressed whether the Commission had ignored "the flexibility in the CWA's regulatory scheme, which conferred discretion on the State and regional boards in deciding what conditions were necessary to comply with the CWA" and whether the Los Angeles County MS4 permit "itself is the best indication of what requirements *would have been imposed* by the EPA if the Regional Board had not done so," such that the Commission "should have deferred to the board's determination of what conditions federal law required." 1 Cal. 5th at 768 (emphasis in original).

The Court flatly rejected these arguments, finding that, in issuing the permit, "the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. [citation omitted]. It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law." *Id.* The Court (at 1 Cal. 5th 768) cited as authority *City of Burbank, supra,* where it held that a federal NPDES permit issued by a water board (such as the Permit) may contain State-imposed conditions that are more stringent than federal law requirements. 35 Cal. 4th at 627-28.

The Court next addressed the Water Boards' argument that the Commission should have deferred to the regional board's conclusion that the challenged requirements in the Los Angeles County MS4 permit were federally mandated. Finding that this determination "is largely a question of law," the Court distinguished the question of the regional board's authority to impose specific permit conditions from the question of who would pay for such conditions. In the former situation, "the board's findings regarding what conditions satisfied the federal [MEP] standard would be entitled to deference." 1 Cal. 5th at 768.

But, the Court held,

> Reimbursement proceedings before the Commission are different. The question here was not whether the Regional Board had authority to impose the challenged requirements. It did. The narrow question here was who will pay for them. In answering that legal question, the Commission applied California's constitutional, statutory, and common law to the single issue of reimbursement. In the context of these proceedings, the State has the burden to show the challenged conditions were mandated by federal law.

Id. at 769.

The Court explained that "the State must explain why federal law mandated these requirements, rather than forcing the Operators to prove the opposite." *Id.* In placing that burden on the State, the Court held that because article XIII B, section 6 of the Constitution established a "general rule requiring reimbursement of all state-mandated costs," a party claiming an exception to that general rule, such as the federal mandate exception in Govt. Code § 17556(c), "bears the burden of demonstrating that it applies." *Id.* at 769.

The Supreme Court concluded that the State's proposed rule of "requiring the Commission to defer to the Regional Board" would "leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature's intent in creating the Commission." *Id.* In doing so, the Court looked to the policies underlying article XIII B section 6, and concluded that the Constitution "would be undermined if the Commission were required to defer to the Regional Board on the federal mandate question." *Id.*

The Court noted that the "central purpose" of article XIII B is to rein in local government spending (citing *City of Sacramento, supra,* 50 Cal. 3d at 58-59) and that the purpose of section 6 "is to protect local governments from state attempts *to impose or shift the costs* of new programs or increased levels of service by entitling local governments to reimbursement" (citing *County of San Diego v. State of California* (1997) 15 Cal. 4th 68, 81), 1 Cal. 5th at 769, emphasis supplied). Requiring the State to establish that a permit requirement is federally mandated, the Court found, "serves those purposes." *Id.*

4. Applying Its Test, the Court Upheld the Commission's Determination that Inspection and Trash Receptacle Requirements in the Los Angeles County MS4 Permit Were State Mandates

Applying the "federally compelled" test, the Supreme Court reviewed and upheld the Commission's determination that the inspection and trash receptacle requirements in the Los Angeles County MS4 Permit were state mandates.

a. The Inspection Requirements

The test claimants had argued in *Dept. of Finance* that a permit requirement that MS4 operators inspect certain industrial facilities and construction sites was a state mandate. The Commission agreed and the Supreme Court upheld that determination, citing the grounds employed by the Commission.

First, the Court noted that there was no requirement in the CWA, including the MEP provision, which "expressly required the Operators to inspect these particular facilities or construction sites." 1 Cal. 5th at 770. While the CWA made no mention of inspections, the implementing federal regulations required inspections of certain industrial facilities and construction sites (not at issue at the test claim) but did not mention commercial facility inspections "at all." *Id.* Second, the Court agreed with the appellants that state law gave the regional board itself "an overarching mandate" to inspect the facilities and sites. *Id.*

The Court further found that with respect to the requirement of the operators to inspect facilities covered by general industrial and general construction stormwater permits, "the State Board had placed responsibility for inspecting facilities and sites on the *Regional Board"* and that in fact the State Board was authorized to charge a fee for permittees, part of which "was earmarked to pay the Regional Board for 'inspection and regulatory compliance issues.'" *Id.* (emphasis in original) (*citing* Water Code §§ 13260(d) and 13260(d)(2)(B)(iii)). The Court further cited evidence before the Commission that the regional board had offered to pay the County to inspect industrial facilities, an offer that made no sense "if federal law required the County to inspect those facilities." *Id.*

The Court, citing *Hayes, supra,* found that the regional board had primary responsibility for inspecting the facilities and sites and "shifted that responsibility to the Operators by imposing these Permit conditions." 1 Cal. 5th at 771. The Court further rejected the State's argument that the inspections were federally mandated "because the CWA required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required." *Id.* The Court held that the mere fact that federal regulations "contemplated some form of inspections, however, does not mean that federal law required *the scope and detail* of inspections required by the Permit conditions." *Id.* (emphasis supplied).

b. The Trash Receptacle Requirement

The Supreme Court also upheld the Commission's determination that a requirement for certain Los Angeles County MS4 permittees to place trash receptacles at transit stops represented a state mandate.

The Court first found, as did the Commission, that while MS4 operators were required to "include a description of practices and procedures in their permit application" (*citing* 40 CFR § 122.26(d)(2)(iv)), the permitting agency had "discretion whether to make those practices conditions of the permit." *Id.* at 771-72. As the Commission found, there was no CWA regulation cited by the State which required trash receptacles at transit stops, and there was evidence that EPA-issued permits in other cities did not require trash receptacles at transit stops. *Id.* at 772. This latter fact, that "the EPA itself had issued permits in other cities, but did not include the trash receptacle condition," in the Court's view, "undermines the argument that the requirement was federally mandated." *Id.*

C. Application of *Dept. of Finance* to Claimants' Test Claim

The Claimants respectfully submit that *Dept. of Finance* answers the question of whether the mandates identified in this Test Claim are federal or state in nature. As set forth below, each

requirement represents the "true choice" of the RWQCB to impose the conditions at issue and to specify the means of compliance with general federal requirements. In some cases, the requirements are not even linked to federal law or regulation but rather to the RWQCB's concurrent state law powers under the Porter-Cologne Act. Nowhere in the Permit is there any RWQCB finding that the specific requirements at issue in this Test Claim were determined to be the only way in which the MEP standard could be achieved. As the Supreme Court held, a regional board cannot simply argue that the imposition of such requirements *ipso facto* represents the board's imposition of the federal MEP standard, thus rendering those requirements as federal.

As discussed in more detail below, under *Department of Finance,* and the other mandate jurisprudence cited above, the requirements in this Test Claim are state, not federal, mandates.

VI. STATE MANDATED ACTIVITIES

A. Local Implementation Plan Requirement

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

The Sections listed below relate to specific LIP requirements found in the Permit. The majority of those requirements are found in Section III, but LIP requirements are also found in Sections VII (relating to legal authority and enforcement), VIII (relating to the illicit connection/illegal discharge program), IX (relating to sewage spills), X (relating to inspections), XI (relating to new development), XIII (relating to permittee facilities) and XVI (relating to training). These provisions are discussed in this section. Additional LIP requirements are discussed in Section VI.C, below.

1. Applicable Requirements in the Permit[5]

SECTION III

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

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

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

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

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

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

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

SECTION VII

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

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

SECTION VIII

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

SECTION IX

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

SECTION X

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

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

SECTION XI

H.

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

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

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

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

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

5. A procedure to work cooperatively with the local vector control district to address any vector problems associated with the water quality control systems. If not properly designed and maintained, some of the BMPs implemented to treat urban runoff could create a habitat

for vectors (e.g., mosquitoes and rodents) and become a nuisance. The WQMP review, approval, and closure processes shall include consultation and collaboration with the local vector control districts on BMP design, installation, and operation and maintenance to prevent or minimize vector issues. If vector or nuisance problems are identified during inspections, the local vector control district should be notified.

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

SECTION XIII

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

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

SECTION XIV

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

SECTION XVI

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

2. Requirements of Federal Law

No federal statute, regulation, or policy requires the preparation of a LIP. The LIP was included in the Permit as an initiative of RWQCB staff. Neither the Permit findings, nor the Fact Sheet prepared by RWQCB staff to explain the basis for the Permit requirements,[6] cite to the CWA or its regulations as authority for the LIP, but instead indicate that the LIP requirement was added at the RWQCB staff's initiative regarding a perceived "lack of a written procedure on how to implement various elements of the MSWMP" (Finding C.4, Permit at 11) and to "promote transparency and consistency within the permitted area" (Fact Sheet at 26).

[6] The Permit Fact Sheet is an important document for the Commission's consideration because it must contain, *inter alia*, a "brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions . . . ." 40 CFR § 124.8(b)(4). Fact Sheets are required to accompany various draft permits issued under federal law, including NPDES permits. 40 CFR § 124.8(a). A copy of this regulation is exhibit SA-6 to the Section 7 Supplemental Authorities, filed herewith.

The CWA regulations, 40 CFR § 122.26(d)(2)(iv), require that permittees set forth a management program to address discharges from the MS4 system. This requirement was satisfied with the completion of the MSWMP under the 2002 Permit. The regulations do not, however, 1) require the preparation of or implementation of a LIP document, or 2) require program documentation in the level of detail as required by the LIP provisions in the Permit. As the Supreme Court held in *Dept. of Finance*, the management program regulations do not require the "scope and detail" of the Permit requirements. Here, the RWQCB was given the discretion to set forth "particular implementing requirement" that it chose. Hence, Section IV of the Permit is not a federal mandate but rather represents a state initiative requiring a new program and/or a higher level of service.

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

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

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

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

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

5. Increased Costs of Mandate

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

As set forth in the Section 6 Declarations, ¶ 7(a), Claimants incurred increased costs of $152,843.01 during FY 2009-10 and $165,332.67 in FY 2010-11 to address these mandated requirements.

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

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

1. Applicable Requirement in Permit

SECTION V

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

a. Prohibit the discharge from entering the MS4; or

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

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

2. Requirements of Federal Law

The CWA requires MS4 NPDES permits to "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." 33 U.S.C. § 1342(p)(3)(B)(ii). The CWA regulations, in 40 CFR § 122.26(d)(2)(iv)(B)(1), do not require a municipality to address certain specified categories of non-stormwater discharges into the MS4 (including those categories set forth in Section V.A.1-15) unless the municipality determines that such discharges are sources of pollutants to "waters of the United States."

The CWA regulations do not, moreover, require a municipality *to affirmatively evaluate* those discharges to determine if they are such a source of pollutants, as required by Section V.A.16 of the Permit. Also, the regulations refer to the discharges as sources of pollutants to "waters of the United States," not to storm drain systems, which may or may not ultimately discharge to waters of the United States. Because this Permit requirement goes beyond the requirements set forth in the federal CWA regulations, it is a state mandate requiring a new program and/or higher level of service.

Further, in these requirements, the RWQCB has mandated the scope and detail of the particular implement requirements. Such a mandate is state, not federal, in nature because federal law and regulation do not impose these requirements, but instead give discretion to the RWQCB "whether to impose a particular implement requirement. *Dept. of Finance,* 1 Cal. 5th at 765.

3. Requirements of 2002 Permit

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

4. Mandated Activities

Section V.A.16 of the Permit required the permittees, including Claimants, to evaluate various categories of non-stormwater discharges to determine their status as significant sources of pollutants to the MS4. Such evaluation would include monitoring and analysis of samples and other steps. The Permit required that, based on what the investigation revealed, the permittees, including Claimants were then required to prohibit the discharge from entering the MS4, authorize it but require source control BMPs or treatment controls or require the source to obtain coverage under a separate permit.

5. Increased Costs of Mandate

As set forth in the Section 6 Declarations, ¶ 7(b), Claimants incurred increased costs of $2,672.00 in FY 2009-10 and $16,039.54 in FY 2010-11 to address the requirements of this mandate.

C. Incorporation of TMDLs

Section V.D of the Permit contains several requirements regarding Water Quality Based Effluent Limitations ("WQBELs") and other steps to implement TMDLs either previously adopted by the RWQCB or proposed for later adoption. TMDLs are required to be established, for each waterbody that is listed, pursuant to 33 U.S.C. § 1313(d), as "impaired" for a pollutant or pollutants that exceed applicable water quality standards. The TMDLs establish "wasteload allocations" ("WLAs") for point sources of the pollutants at issue and "load allocations" for non-point sources, with such allocations together (along with a margin of safety) are designed to achieve the water quality standard. *See* 40 CFR § 130.2(i) (definition of "TMDL").

In the area covered by the Permit, the RWQCB established TMDLs for bacterial indicators in the Middle Santa Ana River ("MSAR") Watershed and for nutrients during dry hydrological

conditions for Big Bear Lake ("BBL"). WLAs have been established for both the MSAR and BBL TMDLs. The BBL TMDL permittees (County, District and City of Big Bear Lake) are in compliance with the urban WLA for Phosphorus for that TMDL (Finding F.15, Permit at 26). In addition, the RWQCB had planned for, but not developed, a TMDL for mercury in BBL and required the City of Big Bear Lake to conduct monitoring for pathogens in Knickerbocker Creek.

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

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

1. Applicable Requirements in Permit

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

2. Requirements of Federal Law

The Permit Fact Sheet states that, pursuant to 40 CFR § 122.44(d)(1)(vii)(B), "NPDES permits be consistent with the applicable wasteload allocations in the TMDLs." (Fact Sheet at 15.) This regulation provides that an NPDES permit must ensure that WQBELs "developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7." Assuming, *arguendo*, that this regulation applies to MS4 permits (*see* analysis to the contrary below), it requires WQBELs that are consistent with the applicable WLA. The regulation does not authorize the state to incorporate requirements intended to implement TMDLs, such as non-MS4 monitoring or addressing non-MS4 related discharges, into an NPDES permit. If such requirements are imposed in a MS4 permit, as they are in Section V.D, they represent state-imposed a new program or higher level service.

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

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

Even if 40 CFR § 122.44(d)(1)(vii)(B) were applicable to MS4 permits, implementation of TMDL WLAs still is subject to the MEP standard, the overarching compliance standard for MS4 permits (including, expressly, the Permit), as discussed above. Implementation of the WLAs also is subject to jurisdictional limitations set forth in the Permit itself. In either case, consistent with the plain language of 33 U.S.C. § 1342(p)(3)(B) and *Browner,* EPA or the State can, as *a discretionary matter*, require MS4 discharges to comply with WLAs based on water quality standards. However, such requirements are subject to the MEP standard. If the RWQCB imposes WLAs in a manner not reflecting MEP, such as strict numeric effluent limits, such an imposition represents a choice by the RWQCB to ignore MEP requirements.

Relevant to this analysis is the State Board's adoption of Order No. WQ 2015-0075, *In the Matter of Review of Order No. R4-2010-0176*, NPDES Permit No. CAS004001 ("Los Angeles Order").[7] In addition to recognizing that water boards can implement requirements "under the Porter-Cologne Act that are not compelled by federal law" and that the State Board has "discretion under federal law to determine whether to require strict compliance" with water quality standards, *id.* at 6, the State Board further recognized that it and the regional boards have *discretion* to express WQBELs for TMDLs incorporated into a stormwater permit "either as numeric effluent limitations or as BMPs [Best Management Practices]." *Id.* at 57. Where the RWQCB exercises its "true choice" to incorporate non-federally required provisions, it has created a state mandate. *Dept. of Finance,* 1 Cal. 5th at 765.

a. MSAR TMDL Requirements: In the course of implementing the MSAR TMDL WLAs in the Permit, the RWQCB threatened to ignore MEP requirements. First, a key requirement in the implementation of the final WQBELs for the MSAR bacterial indicator TMDL under dry weather conditions is the preparation and implementation of a Comprehensive Bacteria Reduction Plan ("CBRP"), describing the specific actions that have been taken or will be taken to achieve compliance with the urban WLAs under dry weather conditions. That CBRP was approved by the

[7] Included as exhibit SA-7 in the Section 7 Supplemental Authorities, filed herewith.

RWQCB for indicator bacteria in dry weather, meaning that it is incorporated into the Permit as the final WQBELs for indicator bacteria, with updates required based on an analysis of BMP effectiveness. Permit, Section V.D.2.b(ii)-(iii).

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

The RWQCB's position represents a continuing threat that the RWQCB could choose to require TMDL implementation efforts that go beyond MEP, which would be an exercise of its discretion to require strict compliance with numeric MSAR bacterial indicator WLAs and, thus a state mandate. And, while the RWQCB has accepted the CBRP as the final dry weather WQBELs for indicator bacteria, the Permit still contains wet weather indicator bacteria WLA numeric effluent limits in Section V.D.3 (assuming that the Permit still is in effect as of January 1, 2026). This inclusion represents the affirmative discretionary choice of the RWQCB, and is not a federal requirement.

Under *Browner* and as recognized by the State Board in the LA Order, the CWA does *not* require municipalities to attain numeric water quality standards, including numeric effluent limits, with respect to MS4 discharges. 191 F.3d at 1166. Instead, municipal permittees are allowed to attain those standards through the installation of BMPs, an approach consistent with the MEP standard. This is the approach set forth in Section V.D.2 with respect to the MSAR TMDL. However, any implementation approach where the RWQCB ignored the MEP standard and made it impossible for permittees to achieve the WLAs through BMPs would be imposing the WLAs as numeric effluent limits. Such an approach would represent the RWQCB's "true choice" to impose requirements on the permittees that are not required under federal law. *Dept. of Finance,* 1 Cal. 5th at 765. *See also Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, in which the Court of Appeal found:

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

124 Cal. App.4th at 874.

The specific question of whether the CWA requires WLAs to be incorporated into stormwater permits as numeric effluent limitations also was addressed by the Oregon Court of Appeals in *Tualatin Riverkeepers, et al. v. Oregon Dept. of Environ. Quality,* 235 Ore. App. 132 (2010). In that case, an environmental group had challenged stormwater permits that did not include numeric waste load allocations. *Tualatin,* 235 Ore. App. at 147. The Oregon Court of

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

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

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

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

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

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

If a regional board includes other requirements relating to TMDL implementation, requirements which may be unrelated to discharges from the MS4 into waters of the United States, it does so as a matter of its own discretion, not in response to the requirements of federal law. In the case of the BBL TMDL, the RWQCB has expressly indicated that "[r]equirements of the TMDL implementation plan tasks are incorporated into this Order." Permit, Finding F.7, page 23. Such incorporation is a discretionary act by the RWQCB, and not in response to the CWA or federal stormwater regulations, with respect to the following provisions of the Permit:

> Sections V.D.4.a-b: These provisions require the BBL TMDL permittees to assure continued compliance with the urban WLA for phosphorus and to implement BMPs

in the watershed so as not to exceed the WLA. Since the permittees already are in compliance with the WLA, to the extent that the Permit requires additional BMPs to meet the WLA, such requirement is a higher level of service (as well as not legally required).

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

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

Section V.D.4.g: This provision requires submission of a plan for in-lake sediment nutrient reduction. Again, this requirement is unrelated to the maintenance of the urban WLA for phosphorus or discharges from the MS4. Moreover, it addresses a non-point source, sediment, not a pollutant associated with MS4 discharges. The permittees are not required to address non-point sources. *See* Permit, Section I.B ("This Order regulates the *discharges of pollutants* . . . in Urban Runoff from anthropogenic (generated from non-agricultural human activities) sources *from MS4s* that are either under the jurisdiction of the Permittees, and/or where the Permittees have MS4 maintenance responsibility, or have authority to approve modifications of the MS4.")(emphasis supplied). Additionally, the lake bottom is the responsibility of the Big Bear Municipal Water District, which is a special district established under state law. As set forth in the Permit, the RWQCB recognizes that the MS4 permittees "should not be held responsible for such facilities and/or discharges," which include discharges from "special districts." Permit, Section I.B.

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

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

Section V.D.4.l: This provision requires the permittees to revise the MSWMP, the WQMP and the LIP[8] as necessary to implement the plans submitted pursuant to Sections V.D.4.c-g. Please see comments on those sections, above.

Section V.D.4.m: This provision requires that if monitoring data or modeling analyses indicate that the urban WLAs for phosphorus was being exceeded during dry weather conditions despite implementation of the Lake Management Plan and the MSWMP and other Permit requirements, the BBL TMDL permittees must evaluate and characterize discharges from significant outfall locations upstream of monitoring locations where exceedances are occurring and to submit a report to the RWQCB Executive Officer discussing BMPs that are being implemented and any additional BMPs needed to reduce controllable sources of phosphorus. This requirement imposes a new program and/or higher level of service to the extent that it requires the permittees to address discharges from entities over which they do not have jurisdiction. *See* Section I.B of the Permit, which states that the Permit regulates "the discharge of pollutants . . . from MS4s that are either under the jurisdiction of the Permittees, and/or where Permittees have MS4 maintenance responsibility, or have authority to approve modifications of the MS4s. That jurisdiction does not extend to such discharges from other MS4s not under the permittees' control.

Section V.D.4.n: This provision requires the permittees that discharge into BBL (the City of Big Bear Lake and the County) to revise their LIP to incorporate the

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

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

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

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

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

While no BBL Mercury TMDL has been adopted by the RWQCB, Claimants note that neither the CWA nor its implementing regulations require an MS4 permittee to develop "monitoring programs and control measures" in anticipation of the adoption of a TMDL. Moreover, as set forth in comments made by permittees during development of the TMDL, and as determined through the RWQCB's own data and analysis, there is no known anthropogenic source of Mercury in the urban runoff from the permittees' jurisdictions. The Permit expressly states that it does not require the permittees to control such non-anthropogenic sources. Permit, Section I.B. The requirement in Section V.D.6 of the Permit is thus a new program which is not authorized by federal law and is a state mandate. To date, the Mercury TMDL effort has been put on hold pending development of a Mercury policy by the State Board. *See* Declaration of Arlene B. Chun, P.E., ¶ 8, included in Section 6.

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

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

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

-- Submit the CBRP to the RWQCB for approval;

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

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

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

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

5. Increased Costs of Mandate

The costs of these TMDL-related provisions are shared among all permittees under the Implementation Agreement. As set forth in the Section 6 Declarations, ¶ 7(c), Claimants incurred increased costs to address the requirements of these mandates of $213,554.44 in FY 2009-10 and $199,053.02 in FY 2010-11.

D. Promulgation and Implementation of Ordinances to Address Bacteria Sources

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

1. Applicable Requirements in Permit

SECTION VII

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

2. Requirements of Federal Law

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

None of these requirements requires or even addresses the need to adopt an ordinance addressed at a specific pollutant. As such, these regulations do not require the "scope and detail" that the RWQCB required in Permit Section VII. As such, it is a state mandate. *Dept. of Finance*, 1 Cal. 5th at 771. Moreover, the requirements in Section VII.D of the Permit go beyond the requirements of the regulations and represents the "true choice" by the RWQCB to impose them. *Dept. of Finance,* 1 Cal. 5th at 765.

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

5. Increased Costs of Mandate

As set forth in the Section 6 Declarations, ¶ 7(d), Claimants incurred increased costs of $1,974.00 in FY 2009-10 and $11,200.99 in FY 2010-11 with respect to the requirements of this mandate.

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

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

1. Applicable Requirements in Permit

SECTION VIII

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

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

Attachment 5, Monitoring and Reporting Program

Section IV.B.3

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

b. The dry weather monitoring for nitrogen and total dissolved solids shall be included as part of an illegal discharge/illicit connection monitoring program. In light of the recently

adopted Nitrogen-TDS objectives for certain management zones, the Permittees shall, within 18 months of Permit adoption, submit a plan to determine baseline concentrations of these constituents in dry weather runoff, if any, from significant outfall locations (36 inches or larger in diameter).

2. Requirements of Federal Law

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

The RWQCB's own justification in the Fact Sheet demonstrates that the Board made the "true choice" to require the "particular implement requirements" represented by the IDDE program mandate. As such, it is a state mandate. *Dept. of Finance,* 1 Cal. 5th at 765. Moreover, even were the RWQCB to cite the federal regulations on illicit dischargers and improper disposal into storm sewers, those regulations do not require the "scope and detail" required in the Permit. *Id.* at 771.

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

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

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

for nitrogen and total dissolved solids as part of the IC/ID program and submit a plan to determine the baseline concentrations of these constituents in dry weather runoff.

5. Increased Costs of Mandate

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

As set forth in the Section 6 Declarations, ¶ 7(e), Claimants incurred increased costs of $13,915.00 in FY 2009-10 and $37,974.29 in FY 2010-11 with respect to the requirements of this mandate.

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

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

1. Applicable Requirements in Permit

SECTION IX

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

2. Requirements of Federal Law

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

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

Even were the federal regulation cited above to even arguably apply to Section IX.F, nothing in the regulation requires the "scope and detail" included in Section IX.F at the "true choice" of the RWQCB. As such, under *Dept. of Finance*, it is a state mandate.

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

5. Increased Costs of Mandate

As set forth in the Section 6 Declarations, ¶ 7(f), Claimants incurred increased costs of $13,066.00 in FY 2009-10 and $19,928.29 in FY 2010-11 to address the requirements of this mandate.

G. Permittee Inspection Requirements

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

1. Applicable Requirements in Permit

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

2. Requirements of Federal Law

The CWA regulations require the following categories of facilities to be inspected by a municipality acting under an MS4 NPDES permit: municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of Title III of the Superfund Amendment and Reauthorization Act of 1986, and industrial facilities determined by the municipality to be contributing a substantial pollutant loading to the MS4. 40 CFR § 122.26(d)(2)(iv)(C). The regulations do not obligate inspections of construction sites, much less

require the tasks outlined above, or the inspection of the categories of commercial facilities required by the Permit. The regulations do not obligate municipalities to require industrial or commercial facilities to adopt source control and pollution prevention measures consistent with BMP fact sheets. Additionally, the Permit itself indicates that the requirement to address pre-production plastic pellet transportation, storage and transfer facilities derives directly from state law, in particular Water Code § 13367, which requires the State Board and regional boards to "implement a program to control discharges of pre-production plastic from point and nonpoint sources." Permit, Finding E.16.

In adopting the inspection and control requirements set forth in the Permit, the RWQCB was acting under its inherent authority under the state Porter-Cologne Act. As such, the requirements are a state mandate.

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

> Structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implement such controls.

40 CFR § 122.26(d)(2)(iv)(A). This provision was cited by the RWQCB in the Fact Sheet as support for the requirement to address residential areas. Fact Sheet at 32. The regulation, does not mandate the requirements for the development of residential area program set forth in the Permit. As the Supreme Court held in *Dept. of Finance*, the regulations do not require the "scope and detail" of the Permit provisions. 1 Cal. 5th at 771. Here, the RWQCB exercised a "true choice" to adopt the "particular implementing requirements" set forth in the Permit. In so doing, it was imposing a state mandate. *Id.* at 765.

In addition, with respect to industrial and construction sites, the RWQCB already is required to inspect such sites, and is authorized under the Porter-Cologne Act to collect fees for such inspections. *See* discussion in Section III above. The shifting of this inspection requirement from the state to the municipalities is a state mandate, as was found by the Commission in the Los Angeles County Test Claim and which was affirmed by the Supreme Court in *Dept. of Finance.* 1 Cal. 5th at 771-72.

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

-- Document municipal inspection programs in an electronic database;

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

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

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

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

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

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

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

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

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

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

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

5. Increased Costs of Mandate

Specific costs associated with complying with these new mandated programs were shared among the permittees through the Implementation Agreement, such as the development of an electronic database, as well as were borne individually by the permittees, including Claimants.

As set forth in the Section 6 Declarations, ¶ 7(g), Claimants incurred increased costs of $542,145.03 in FY 2009-10 and $970,851.04 in FY 2010-11 in response to the requirements of this mandate. As noted in the discussion at Section VI.L(5) below, a portion of the City of

Ontario's costs to address this mandate of $48,515.90 in FY 2009-10 and $88,823.57 in FY 2010-11 are attributable to the costs of the mandate discussed in that section.

H. Enhanced New Development Requirements

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

1. Applicable Requirements in Permit

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

2. Requirements of Federal Law

The federal CWA regulations require that MS4 permits include a:

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

40 CFR § 122.26(d)(2)(iv)(A)(2). The preceding is the regulation cited by the RWQCB in the Fact Sheet (Fact Sheet at 32) as support for these provisions. However, these planning procedures were included in Section XII.A of the previous 2002 Permit.

The requirements in Permit Section XI either are not required by the CWA or the CWA regulations or represent the "true choice" of the RWQCB to incorporate those provisions into the Permit and, as such, represent state mandates. First, the requirements relating to the WAP and the incorporation of watershed protection principles into planning processes are not a federal mandate. Instead they stem from a determination by RWQCB staff, upon evaluating the management programs established under the 2002 Permit, that there was "a need for establishing a need for

improved integration between the watershed protection principles, including LID techniques, into the planning and approval processes of the Permittees." Fact Sheet at 33. Thus, the decision to require development and implementation of the WAP program and represented the free choice of the RWQCB, not a federal requirement. *Hayes, supra,* 11 Cal. App.4th at 1593-94.

Second, the incorporation of similar LID and hydromodification requirements on new development projects (which forms only a portion of the extensive requirements of Section XI) has previously been determined by the Commission, in the San Diego County Test Claim, to represent a state mandate. San Diego County Test Claim at 41-54.

However, the Commission found that the LID and hydromodification requirements were not *reimbursable* state mandates because the San Diego County test claimants were not under an obligation to construct projects that would trigger the permit requirements. San Diego County Test Claim at 46, 52. In support of this position, the Commission cited the California Supreme Court's decision in *Department of Finance v. Comm'n on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727. In that case, the Court held that certain hearing requirements imposed upon school district did not constitute a reimbursable state mandate because they were a requirement of a voluntary program that the districts had elected to participate in. The Court held that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement.

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

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

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

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

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

33 Cal.4th at 887-88.

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

A number of additional requirements in Section XI of the Permit do not involve even arguable "discretionary" projects, but rather the requirement to develop standard design and post-development procedures and standards, including incorporation of BMPs into the design for culvert projects (Section XI.A.7), the creation of the WAP itself (as well as the creation, maintenance and integration of the Watershed Geodatabase and the required evaluation of watershed conditions) (Section XI.B), the requirement for the principal permittee and other permittees to collaborate to resolve impediments to implement watershed protection principles during the planning and development process, including LID principles and management of hydrologic conditions of concern ("HCOC") (Section XI.C.3), the incorporation into the LIP of natural features (through GIS mapping) and in the WAP, inclusion in the LIP of tools to implement green infrastructure/LID principles and consideration and facilitation of landform grading techniques and revegetation in hillside areas (Section XI.C.4), the updating of the WQMP

Guidance and Template (Section XI.D.2), the promotion of LID (including the revision of the WQMP Guidance and Template) (Section XI.E), BMP guidance for road and highway projects (Section XI.F), the creation and maintenance of a database for tracking the operation and maintenance of structural and post-construction BMPs (Sections XI.J.2 and XI.K.2), and the inspection of structural post-construction BMPs owned by permittees (Section XI.K.1). These requirements, and others in Section XI, do not involve the "choice" of the permittees to build a project, but rather to develop a program to govern project development. Moreover, these requirements mandate the outlay of local funds without the ability to recover those funds through inspection fees, as might be the case for requirements relating to a private development project.

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

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

-- to develop a WAP, requiring review of watershed protection principles and policies in planning procedures, development of the WAP to describe and implement the permittees' approach to coordinated watershed management, including, in Phase 1, identifying program-specific objectives for the WAP, development of a structure for the WAP, identifying linkages between the WAP and other plans, identification of other relevant watershed efforts, ensuring that the HCOC Map/Watershed Geodatabase is made available to watershed stakeholders and has incorporated specified information, developing a schedule and procedure for maintaining the Geodatabase, reviewing the Geodatabase with RWQCB staff to verify attributes of the Geodatabase, identifying potential causes of identified stream degradation, conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and develop recommendations for retrofit studies, conduct a system wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification, invite participation and comments from stakeholders regarding the development and use of the Geodatabase and submit the Phase 1 elements to the RWQCB executive officer for approval. Further, in Phase 2, the permittees are required to specify procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs, develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation, develop and implement a HMP prioritized on specified bases (including with respect to protocols and modeling set forth in the MRP), conduct training workshops in the use of the Geodatabase, conduct demonstration workshops for the Geodatabase to be attended by senior permittee staff, develop recommendations for streamlining

regulatory agency approval of regional treatment control BMPs, implement applicable retrofit or regional treatment recommendations, and submit the Phase 2 components in a report to the Executive Officer. Further, each permittee must review watershed protection principles and policies in General Plan or related documents to determine consistent with the WAP and to include those findings in its annual report along with a schedule for necessary revisions;

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

-- for the principal permittee and the permittees to develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and management of HCOC, and to collaborate to develop common principles and policies necessary for water quality protection, including avoidance of disturbance of various features, conserving natural areas, protecting slopes and channels, minimizing impacts from stormwater and urban runoff on natural drainage systems and water bodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely impact downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce stormwater pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

-- for each permittee to incorporate into its LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green infrastructure/LID principles for public and private development projects and for hillside development projects, the consideration and facilitation of the application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

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

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

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

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

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

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

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

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

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

5. Increased Costs of Mandate

Certain activities required by the above-cited provisions, including the development of the WAP, development of criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of post-construction BMPs and a database for tracking those BMPs, were conducted jointly by the permittees, including Claimants, through the Implementation Agreement. Each permittee, however, was required to individually fund the local implementation of all of these programs, as well as carry out all other aspects of the requirements of Section XI of the Permit that apply to permittee-specific activities.

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

As set forth in the Section 6 Declarations, ¶ 7(h), the Claimants incurred increased costs of $122,438.52 in FY 2009-10 and $457,431.22 in FY 2010-11 in response to the requirements of this mandate.

I. Public Education and Outreach

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

1. Requirements of Permit

SECTION XII

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

2. Requirements of Federal Law

Neither the CWA nor the federal CWA regulations requires the assessment of public education efforts required in Section XII.A as an element of MS4 permits. The Permit Fact Sheet cites the basic requirement for MS4 operators to have a stormwater management program (40 CFR §122.26(d)(2)(iv)) but, as discussed above, this program does not require the assessment set forth in Permit Section XII.A. The Fact Sheet also cites 40 CFR § 122.26(d)(2)(iv)(B)(6), but this provision requires only that the management program describe "educational activities, public information activities and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials." This provision does not address the requirements of Section XII.A. The Fact Sheet finally cites 40 CFR § 122.26(d)(2)(v), which requires an assessment of "estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the [stormwater management] program." This general requirement does not require the "scope and detail" of the assessment required in Permit Section XII.A. *Dept. of Finance, supra,* 1 Cal. 5th at 771.

The Commission, in the San Diego County Test Claim, previously has determined that program assessment activities represent a state mandate. San Diego County Test Claim, 83-86. Thus, the requirements in Section XII.A is a state mandate, not a federal requirement.

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

5. Increased Costs of Mandate

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

As set forth in the Section 6 Declarations, ¶ 7(i), the Claimants incurred increased costs of $70,583.79 in FY 2009-10 and $201,791.96 in FY 2010-11 with respect to the requirements of this mandate.

J. New Permittee Facilities and Activities Requirements

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

1. Requirements of Permit

Section XIII

A. Each Permittee shall inventory its fixed facilities, field operations, and drainage facilities, and shall conduct inspections of these facilities on an annual basis to ensure that these facilities and activities do not contribute pollutants to receiving waters, consistent with the MEP standard. At a minimum, the following municipal facilities, that are owned and/or operated by the Permittees, shall be inspected. Records of these facilities and inspection findings shall be maintained in a database:

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

2. Parking facilities;

3. Fire fighting training facilities;

4. Flood management projects and flood control structures;

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

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

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

7. Solid waste transfer facilities;

8. Land application[9] sites;

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

10. Household hazardous waste collection facilities.

11. Municipal airfields.

12. Parks and recreation facilities.

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

14. Power washing.

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

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

I. Each Permittee shall annually evaluate the information provided to field staff during their maintenance activities to direct public outreach efforts and determine the need for revision of

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

existing maintenance procedures or schedules. The results of this evaluation shall be provided in the annual report.

2. Requirements of Federal Law

There is no requirement in the CWA or in the CWA regulations for the inventory/inspection requirements set forth in Section XIII.A or for the requirement to annually evaluate the inspection frequency for MS4 components or the information provided to field staff. The Permit Fact Sheet cites general requirements in 40 CFR § 122.26(d)(2)(iv)(A) relating to "a description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the [MS4]" but none of these requirements mandate the specified requirements in Permit Section XIII.A. Fact Sheet at 34-35. The Fact Sheet instead sets forth that those requirements were the result of "[p]rogram evaluations conducted during the third-term permit indicated varying degrees of compliance at public agency facilities and activities. This Order requires each Permittee to inventory and inspect its fixed facilities, field operations and drainage facilities to ensure that public agency facilities do not cause or contribute to a pollution or nuisance in receiving waters." Fact Sheet at 35.

Nothing in the federal regulations requires the "scope and detail" of the Section XIII.A requirements. *Dept. of Finance,* 1 Cal. 5th at 771. Additionally, the Commission has already ruled that program assessment, such as required in Sections XIII.E and XIII.I, represented state mandates. San Diego County Test Claim, 83-86. The requirements of Permit Section XIII.A are a state mandate.

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

5. Increased Costs of Mandate

As set forth in the Section 6 Declarations, ¶ 7(j), Claimants incurred increased costs of $468,901.13 in FY 2009-10 and $726,788.68 in FY 2010-11 to address the requirements of this mandate.

K. Training Requirements

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

1. Requirements of Permit

SECTION XVI

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

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

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

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

C. The training modules for each category of trainees (managers, inspectors, planners, engineers, contractors, public works crew, etc.) should define the required competencies, outline the curriculum, and include a testing procedure at the end of the training program and proof of completion of training (Certificate of Completion).

D. At least on an annual basis, the Principal Permittee shall provide and document training to applicable public agency staff on the updated Municipal Activities and Pollution Prevention Strategy (MAPPS), and any other applicable guidance and procedures developed by the Permittees to address Permittee activities in fixed facilities as well as field operations, including conveyance system maintenance. Each Permittee shall document training for its staff related to jurisdiction-specific responsibility, procedures and implementation protocols established in its

LIP. The field program training should include Model Integrated Pest Management pesticide and fertilizer guidelines. Appropriate staff from each municipality shall attend at least three of these training sessions during the term of this Order. The training sessions may be conducted in classrooms or using videos, DVDs, or other multimedia with appropriate documentation and a final test to verify that the material has been properly reviewed and understood. In instances where applicable municipal operations are performed by contract staff, each Permittee shall require evidence that contract staff have received a level of training equivalent to that listed above.

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

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

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

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

2. Requirements of Federal Law

Neither the CWA nor the federal CWA regulations requires the training required in Section XVI as an element of MS4 permits. No federal regulations or requirements are cited in the Fact Sheet as support for this program. Fact Sheet at 36. The requirements in Section XVI are state mandates, not federal requirements in that they represent the "true choice" of the RWQCB to impose them on the Claimants. *Dept. of Finance,* 1 Cal. 5th at 765.

3. Requirements of 2002 Permit

The 2002 Permit contained limited training requirements for Permittee staff, focused on training for persons conducting inspection of industrial and commercial sites. *See* 2002 Permit Sections IX.9; X.9. However, the requirements set forth in Section XVI of the Permit are specifically required to update the "existing training program" and to include provisions set forth for the first time in the Permit, such as training requirements for staff other than site inspectors. Thus, the requirements in Permit Section XVI represent both a new requirement, for provisions that go beyond the requirements of the 2002 Permit, and a higher level of service with regard to the enhancement of the 2002 Permit's industrial and commercial site training requirements.

4. Mandated Activities

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

5. Increased Costs of Mandate

The increased costs resulting from the development of training described in Paragraph K.1 were borne by the permittees, including Claimants, jointly through the Implementation Agreement, as well as individually.

As set forth in the Section 6 Declarations, ¶ 7(k), Claimants incurred increased costs of $50,603.25 in FY 2009-10 and $59,153.86 in FY 2010-11 to address the requirements of this mandate.

L. Reporting of Non-Compliant Facilities

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

1. Requirements of Permit

SECTION XVII

D. As specified in Section X.A.7, the Permittees shall deem facilities operating without a proper permit to be in significant non-compliance. These facilities shall be reported within 14 calendar days to the Regional Board by electronic mail or other written means. Permittees' notifications of facilities' failure to obtain required permits under the Construction Activities Storm Water General Permit (Construction Permit), Industrial Activities Storm Water General Permit (Industrial Permit), including Requirements to file a Notice of Intent or No Exposure Certification, Notice of Non-applicability, and/or 401 Certification must include, at a minimum, the following documentation:

1. Name of the facility;

2. Operator of the facility;

3. Owner of the facility;

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

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

2. Requirements of Federal Law

Nothing in the CWA or in the CWA stormwater regulations requires a municipality to act as an enforcement arm of the RWQCB with respect to facilities that may be operating without a proper stormwater permit. MS4 permittees are required to have a program, including inspections "to implement and enforce an ordinance, orders or similar means to prevent illicit discharges" to the MS4, as well as to inspect certain specified facilities (a category far smaller than the category of facilities set forth in Section XVII.D of the Permit) for the purpose of monitoring and controlling "pollutants in storm water discharges" to the MS4. 40 CFR 122.26(d)(2)(iv)(B)(1)(C). The Commission has previously found that these inspection requirements establish the bounds of federal requirement; inspection requirements that, for example, require inspections to comply with state general permits at facilities that are not included within the CWA regulatory list represents a state mandate, freely imposed by the RWQCB. Los Angeles County Test Claim Statement of Decision, 35-48. This determination was affirmed by the Supreme Court in *Dept. of Finance.* 1 Cal. 5th at 771.

In Permit Section XVII.D, the RWQCB took a further step, requiring the permittees, including Claimants, to divulge and report the results of the state-mandated inspections regarding the facility's obtaining of statewide general NPDES permits, an individual NPDES permit or a Section 401 certification (which is required under the CWA to be issued by a state when a project receives a Section 404 permit for the discharge of material into a water of the United States, certifying that the project complies with *state* law). The CWA regulations nowhere require that municipal inspections require either confirmation of permit status or the reporting of non-compliance. In fact, as noted above, both the industrial and commercial general permits adopted by the State Board require that the RWQCB, not permittees, enforce such permits. Section XVII.D transfers a state enforcement obligation to the permittees, an obligation which is a new program and/or higher level of service. Such a transferal of state obligations to local government represents a state mandate. *Hayes, supra.*

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

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

5. Increased Costs of Mandate

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

As set forth in the Section 6 Declarations, ¶ 7(l), Claimants incurred increased costs of $3,891.05 plus an as yet undetermined portion of the City of Ontario's costs of $48,515.90 to address Item VI.G in FY 2009-10 and $13,857.79 plus an as yet undetermined portion of the City of Ontario's costs of $88,823.57 to address Item VI.G in FY 2010-11 to address the requirements of this mandate.

M. Program Management Assessment/MSWMP Review

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

1. Requirements of Permit

SECTION XVIII

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

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

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

2. Requirements of Federal Law

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

However, the Commission already has determined in the San Diego County Test Claim that similar (albeit more elaborate) program assessment requirements in the San Diego County MS4 Permit were a state, not federal, mandate, because the federal regulatory requirements did not specify the detailed assessment set forth in that permit. San Diego County Test Claim, 83-86. Similarly, the requirements of Section XVIII.B.3 are far more detailed and specific than those general assessment requirements. The Permit requires assessment on an area-wide as well as jurisdiction-specific basis, and requires use of guidance that employs assessment measures at six outcome levels, targeting both water quality outcomes and the result of municipal enforcement activities. As the Supreme Court held in *Dept. of Finance,* where the federal regulations do not specify the "scope and detail" of MS4 permit requirements, those requirements are not federally mandated. 1 Cal. 5th at 771. None of the specificity in the is set forth in the federal regulations and the requirements of Section XVIII.B.3 and MRP Section VII.E.4 are therefore state, and not federal, mandates.

3. Requirements of 2002 Permit

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

4. Mandated Activities

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

5. Increased Costs of Mandate

As set forth in the Section 6 Declarations, ¶ 7(m), Claimants incurred increased costs of $12,007.67 in FY 2009-10 and $34,159.61 in FY 2010-11 in response to the requirements of this mandate.

VII. STATEWIDE COST ESTIMATE

This Test Claim concerns a municipal stormwater permit applicable only to local agencies located in a portion of San Bernardino County within the jurisdiction of the RWQCB. Therefore, any statewide cost estimate must, by virtue of this limitation, apply only to costs incurred by such local agencies. The Claimants estimate that, for all requirements set forth in the Permit that are the subject of this Test Claim, increased costs in the amount of $3,570,397.90 were spent in FY 2010-11. *See* Section 6 Claimant Declarations, ¶¶ 7(a)-(m); Declaration of Arlene B. Chun, ¶ 7 (setting forth non-Claimant permittee costs).

VIII. FUNDING SOURCES

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

IX. PRIOR MANDATE DETERMINATIONS

A. Los Angeles County Test Claim

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

The Commission, in the Los Angeles County Test Claim, determined that the trash receptacle requirement was a reimbursable state mandate. The Commission found that the portion of the test claims relating to the inspection requirement was a state mandate, but that the Los Angeles County claimants had fee authority sufficient to fund such inspections.

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

The Commission's decision was challenged by the Department of Finance, the State Water Resources Control Board and the Los Angeles Regional Water Quality Control Board in an action filed in superior court. In September 2011, the Los Angeles County Superior Court set aside the Statement of Decision issued by the Commission, ruling that the appropriate test for determining whether a requirement in the MS4 permit was a federal or state mandate was whether the requirement met the MEP standard. The Superior Court's ruling was affirmed by the California Court of Appeal on different grounds. In turn, the California Supreme Court reversed the Superior Court in *Dept. of Finance*, as discussed in Section V.B above. This case is presently before the Los Angeles County Superior Court.

B. San Diego County Test Claim

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

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

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

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

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

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

5. A requirement to conduct program effectiveness assessments;

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

7. A requirement for permittee collaboration.

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

On January 5, 2012, the Commission's decision was overturned by the Sacramento County Superior Court and remanded to the Commission as the result of an action for writ of mandate brought by the State Department of Finance, the State Board and the San Diego RWQCB. The San Diego County claimants appealed to the California Court of Appeal, which has not yet heard argument on the appeal.

X. CONCLUSION

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

Nonetheless, important elements of the Permit represent significant and expensive mandates, especially as Claimants, like other San Bernardino County municipalities, face many budget challenges. The Claimants submit that the mandates set forth in this Test Claim represent state mandates for which a subvention of funds is required, pursuant to article XIII B, section 6 of

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

SECTION 6 DECLARATIONS

In Support of Joint Test Claim –

Santa Ana Region Water Permit – County of San Bernardino,
10-TC-10

DECLARATION OF KEVIN BLAKESLEE, P.E.

SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT

I, Kevin Blakeslee, hereby declare and state as follows:

1. I am the Chief Flood Control Engineer for the San Bernardino County Flood Control District ("District") and Director of the San Bernardino County Department of Public Works. The Department of Public Works provides administrative oversight and support services and direction to the District. In that capacity, I share responsibility for the compliance of the District with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the District.

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

3. I have an understanding of the District's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the District, as the Principal Permittee, and other permittees under the Permit agreed to share certain costs of complying with the Permit.

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

5. In Section 5 and exhibits of the joint test claim filed by the District and other permittees under the Permit ("Joint Test Claim"), the specific sections of the Permit at issue in

the Joint Test Claim have been set forth. I hereby incorporate such provisions of Section 5 and the exhibits into this declaration as though fully set forth herein.

6. I am informed and believe and therefore state that the District first began to accrue costs with respect to the items in the Permit set forth below in early February 2010, when District personnel began to plan for a February 17, 2010 meeting with permittees to discuss Permit implementation requirements.

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

a. **Local Implementation Plan Requirement**: Permit Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, required permittees, including the District, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a District-specific LIP which sets forth in detail the specific programs, policies and procedures that will be implemented by the District for compliance with the Permit. These tasks required the creation of a model LIP and individual LIPs, with the identification of personnel, programs and other tasks and the review and periodic updating of those LIPs over the course of the Permit. Development of the model LIP was conducted by the District acting in its role as Principal Permittee under the Permit in part through funding provided by the permittees, including the District, pursuant to their obligations under the Implementation Agreement (included in Section 7 of the Joint Test Claim) entered into by the

permittees. I am informed and believe and therefore state that in Fiscal Year ("FY") 2009-10, the District's calculated share of such costs was $772.90. I am further informed and believe and therefore state that during FY 2009-10, the District incurred additional estimated direct costs of $40,362.00 and in FY 2010-11 of $15,187.00 with respect to this requirement.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Were Significant Sources of Pollutants**: Permit Section V.A.16 required permittees, including the District, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into the permittees' MS4, including that of the District, to determine whether such discharges were a significant source of pollutants to the MS4. This task involved monitoring, analysis of samples, and other followup tasks to evaluate monitored waters as sources of pollutants, as well as potential followup investigation and reporting to the RWQCB Executive Officer. Certain activities to monitor and assess these discharges were being jointly undertaken by permittees, including the District, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the calculated share of such costs to the District was $531.50 in FY 2010-11.

c. **Incorporation of TMDLs**: Permit Sections V.D.2-6, as well as MRP Sections I.F, V.A.2.a, and V.B.1.b, required various permittees to participate in activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also required the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL.

i. With respect to the MSAR TMDL, the Permit required that the permittees named in the MSAR TMDL achieve final dry weather Water Quality Based Effluent Limitations

("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, best management practices ("BMPs"), inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis. Moreover, if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL would become the final WQBELs for wet weather conditions, unless the RWQCB had adopted alternative final WQBELs. I am informed and believe that the RWQCB accepted the CBRP as the final dry weather WQBELs but no final wet weather WQBELs have yet been established;

ii. With respect to the BBL TMDL, the Permit and MRP required the permittees named in the BBL TMDL to, among other items, implement BMPs to attain compliance with the TMDL, even though the permittees were in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan for in-lake sediment nutrient reduction; with respect to Lake Management Plan (as that term is defined in the Permit) documents, to meet various requirements, including those relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identification of methodology for measuring changes in lake capacity, recommendations for short and long-term strategies to control and manage sediment and integration of a beneficial use map developed by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding

monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicated that the WLA was being exceeded; and, for permittees that discharge into BBL, to revise their LIPs to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA;

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

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

The cost of the provisions set forth above are being shared by all permittees under the Permit, including the District, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the District's calculated share of such costs was $14,112.65 in FY 2009-10 and $13,150.00 in FY 2010-11.

d. [reserved].

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Permit Sections VIII.A and B and MRP Section IV.B.3 required that permittees, including the District, develop and include a "pro-active" Illicit Discharge Detection

and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions required permittees, including the District, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; review aerial photograph to detect IC/IDs; inspect facilities, sites and MS4s; analyze monitoring data; conduct watershed education regarding illegal discharges; conduct pollution prevention for generating sites; and, conduct stream restoration efforts and opportunities and assess stream corridors to identify dry weather flows and illegal dumping. I am further informed and believe and therefore state that the District may have incurred direct costs with respect to these requirements, but that these costs cannot be quantified at this time.

f. [reserved].

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

and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding Permit requirements and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and, evaluating the residential program in the annual report. Certain aspects of these requirements, including the development of an electronic database, were conducted by the District as Principal Permittee through funding contributed by permittees, including the District, under the Implementation Agreement. I am informed and believe and therefore state that the District's calculated share of such costs was $6,600.00 in FY 2009-10 and $32,700.00 in FY 2010-11.

h. **New Development Requirements**: Permit Section XI, as well as MRP Sections IV.B.4, V.A.2.b and V.B.2, contained numerous new requirements relating to new development and significant re-development projects. The permittees were charged with various requirements, including the following:

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

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

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

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

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

iv. Develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and HCOC management and to collaborate to develop common principles and policies for water quality protection, including avoidance of disturbance, conserving natural areas, protecting slopes and channels, minimizing stormwater and urban runoff impacts on natural drainage systems and waterbodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely impact downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

v. Incorporate into the permittees' LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green infrastructure/LID principles for public and private development projects and for hillside development projects and the consideration and facilitation of the application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

vi. For the District as Principal Permittee, submit a revised WQMP Guidance and Template to incorporate new elements required by the Permit;

vii. Evaluate potential barriers to implement LID principles and promote green infrastructure/LID BMP implementation and identify applicable LID principles from a list in the Permit for project specific WQMPs; update landscape ordinances consistent with the requirements of AB 1881; address hydromodification and managing stormwater as a resource through site design BMPs that incorporated LID techniques in a specified manner; require priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; review and update the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensure that the WQMP specified methods for determining time of concentration; conduct a feasibility analysis to determine the feasibility of implement LID; integrate the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submit the updated WQMP Guidance and Template to the RWQCB Executive Officer and implement the Guidance

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

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

ix. Develop technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs;

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

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

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

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

xiv. For the District as Principal Permittee, to participate in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of certain of these requirements, including the WAP, criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of post-construction BMPs and a database for tracking those BMPs, was conducted by the District as Principal Permittee through funding provided by the permittees, including the District, through the Implementation Agreement. I am informed and believe and therefore state that the District's calculated share of such costs was $6,890.00 in FY 2009-10 and $27,782.30 in FY 2010-11.

i. **Public Education and Outreach**: Permit Section XII.A required permittees, including the District, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting was conducted by the District as Principal Permittee through funding contributed by permittees, including the District, under the Implementation Agreement. The implementation of changes identified through the assessment was implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the District. I am informed and believe and therefore state that the District's calculated share of such costs was $3,136.93 in FY 2009-10 and $12,214.72 in FY 2010-11. I am further informed and believe and therefore state that the District may have incurred direct costs with respect to these requirements, but that these costs cannot be quantified at this time.

j. **Permittee Facilities and Activities Requirements**: Permit Section XIII required permittees, including the District, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to set forth the results of the evaluation in the annual report. I am informed and believe and therefore state that the District may have incurred direct costs with respect to these requirements, but that these costs cannot be quantified at this time.

k. **Training Requirements**: Permit Section XVI required permittees, including the District, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training, through funding contributed by all permittees. Permittees, including the District, were required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, to train staff involved with stormwater related projects and implementation of the Permit and to provide such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. Certain of these costs were paid by permittees, including the District, through the Implementation Agreement. I am informed and believe and therefore state

that the District's calculated share of such costs was $375.00 in FY 2009-10 and $400.00 in FY 2010-11. I am further informed and believe and therefore state that the District may have incurred additional direct costs with respect to these requirements, but that these costs cannot be quantified at this time.

l. **Reporting of Non-Compliant Facilities**: Permit Section XVII.D required permittees, including the District, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to a specified set of requirements. Permittees, including the District, were required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements required permittees, including the District, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. I am informed and believe and therefore state that the District has not yet incurred costs with respect with respect to these requirements.

m. **Program Management Assessment/MSWMP Review**: Permit Section XVIII.B.3 and MRP Section VII.E.4 required permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality outcomes and the result of municipal enforcement activities. The results of the assessment were required to be incorporated into an amended MSWMP, pursuant to Permit Section XVIII.C. These provisions required permittees, including the City, to determine, to the extent practicable, water quality

improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. I am informed and believe and therefore state that the District may have incurred costs with respect to these requirements, but that these costs cannot be quantified at this time.

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

9. I am informed and believe that this Declaration is being offered in support of a Joint Test Claim filed with the Commission on State Mandates and further that the District is in agreement with all items in the Joint Test Claim.

10. This Declaration sets forth certain estimated amounts expended by the District as determined from the review of pertinent records. I am informed and believe that there may be

additional costs that have not yet been identified or determined/quantified.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 26, 2017, at San Bernardino, California.

KEVIN BLAKESLEE, P.E.

DECLARATION OF KEVIN BLAKESLEE, P.E.

COUNTY OF SAN BERNARDINO

I, Kevin Blakeslee, hereby declare and state as follows:

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

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

3. I have an understanding of the County's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the County and other permittees under the Permit agreed to share certain costs of complying with the Permit.

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

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

6. I am informed and believe and therefore state that the County first began to accrue costs with respect to the items in the Permit set forth below in or about early February 2010, when County personnel began to plan for a February 17, 2010 meeting with permittees to discuss Permit implementation requirements.

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

a. **Local Implementation Plan Requirement**: Permit Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, required permittees, including the County, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a County-specific LIP which sets forth in detail the specific programs, policies and procedures that will be implemented by the County for compliance with the Permit. These tasks required the creation of a model LIP and individual LIPs, with the identification of personnel, programs and other tasks and the review and periodic updating of those LIPs over the course of the Permit. Development of the model LIP was conducted by the San Bernardino County Flood Control District ("District") acting in its role as Principal Permittee under the Permit in part through funding provided by the permittees, including the County, pursuant to their obligations under the Implementation Agreement (included in Section 7 of the Joint Test Claim) entered into by the permittees. I am informed and believe and therefore state that in Fiscal Year ("FY") 2009-10, the County's calculated share of such costs was

$2,015.72. I am further informed and believe and therefore state that during FY 2009-10, the County incurred additional estimated direct costs of $94,178.00 and in FY 2010-11 of $24,994.00 with respect to this requirement.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Were Significant Sources of Pollutants**: Permit Section V.A.16 required permittees, including the County, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into the permittees' MS4, including that of the County, to determine whether such discharges were a significant source of pollutants to the MS4. This task involved monitoring, analysis of samples, and other followup tasks to evaluate monitored waters as sources of pollutants, as well as potential followup investigation and reporting to the RWQCB Executive Officer. Certain activities to monitor and assess these discharges were being jointly undertaken by permittees, including the County, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the calculated share of such costs to the County was $1,386.15 in FY 2010-11.

c. **Incorporation of TMDLs**: Permit Sections V.D.2-6, as well as MRP Sections I.F, V.A.2.a, and V.B.1.b, required various permittees to participate in activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also required the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL.

i. With respect to the MSAR TMDL, the Permit required that the permittees named in the MSAR TMDL achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs

through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, best management practices ("BMPs"), inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis. Moreover, if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL would become the final WQBELs for wet weather conditions, unless the RWQCB had adopted alternative final WQBELs. I am informed and believe that the RWQCB accepted the CBRP as the final dry weather WQBELs but no final wet weather WQBELs have yet been established;

ii. With respect to the BBL TMDL, the Permit and MRP required the permittees named in the BBL TMDL to, among other items, implement BMPs to attain compliance with the TMDL, even though the permittees were in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan for in-lake sediment nutrient reduction; with respect to Lake Management Plan (as that term is defined in the Permit) documents, to meet various requirements, including those relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identification of methodology for measuring changes in lake capacity, recommendations for short and long-term strategies to control and manage sediment and integration of a beneficial use map developed by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the

WLA using new modeling; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicated that the WLA was being exceeded; and, for permittees that discharge into BBL, to revise their LIPs to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA;

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

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

The cost of the provisions set forth above are being shared by all permittees under the Permit, including the County, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the County's calculated share of such costs was $36,805.79 in FY 2009-10 and $34,295.20 in FY 2010-11.

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

well the development of an enforcement strategy and the enforcement of the ordinances. I am informed and believe and therefore state that the County incurred estimated direct costs of $6,000.00 in FY 2010-11 with respect to these requirements.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Permit Sections VIII.A and B and MRP Section IV.B.3 required that permittees, including the County, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions required permittees, including the County, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; review aerial photograph to detect IC/IDs; inspect facilities, sites and MS4s; analyze monitoring data; conduct watershed education regarding illegal discharges; conduct pollution prevention for generating sites; and, conduct stream restoration efforts and opportunities and assess stream corridors to identify dry weather flows and illegal dumping. I am further informed and believe and therefore state that the County may have incurred direct costs with respect to these requirements, but that these costs cannot be quantified at this time.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Permit Section IX.F required permittees, including the County, with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems are minimized pending adoption of state septic system regulations, and to update a database as septic systems are added or removed from their jurisdictions. I am informed and believe and therefore state that the County has not incurred direct costs with respect to these requirements.

g. **Permittee Inspection Requirements**: Permit Section X required permittees to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of permittees included documenting municipal inspection programs in an electronic database; during inspections or prior to permit issuance, verifying whether a site had required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the state General Construction Permit, reviewing Erosion and Sediment Control Plans, making visual observations, checking compliance with ordinances, permits, WQMPs and assessing the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding Permit requirements and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and, evaluating the residential program in the annual report. Certain aspects of these requirements, including the development of an electronic

database, were conducted by the District as Principal Permittee through funding contributed by permittees, including the County, under the Implementation Agreement. I am informed and believe and therefore state that the County's calculated share of such costs was $17,212.80 in FY 2009-10 and $85,281.60 in FY 2010-11. In addition, I am informed and believe and therefore state that the County incurred additional estimated direct costs with regard to these requirements of $293,426.00 in FY 2009-10 and $191,948.88 in FY 2010-11.

h. **New Development Requirements**: Permit Section XI, as well as MRP Sections IV.B.4, V.A.2.b and V.B.2, contained numerous new requirements relating to new development and significant re-development projects. The permittees were charged with various requirements, including the following:

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

ii. Develop a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, to: identify program-specific objectives for the WAP; develop a structure for the WAP; identify linkages between the WAP and other plans; identify other relevant watershed efforts, ensure that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase was made available to watershed stakeholders and has incorporated specified information; develop a schedule and procedure for maintaining the Geodatabase; review the Geodatabase with RWQCB staff to verify attributes of the Geodatabase; identify potential causes of identified stream degradation; conduct a system-wide evaluation to identify opportunities to retrofit stormwater systems, parks and other recreational areas with water quality protections measures and develop

recommendations for retrofit studies; conduct a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; invite participation and comments from stakeholders regarding the development and use of the Geodatabase; and submit the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, permittees, including the County, were required to: specify procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; develop and implement a HMP prioritized on specified bases; conduct training workshops in the use of the Geodatabase; conduct Geodatabase demonstration workshops for senior permittee staff; develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implement applicable retrofit or regional treatment recommendations; and submit the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee was required to review watershed protection principles and policies in General Plan or related documents to determine consistency with the WAP and to include those findings in its annual report along with a schedule for necessary revisions;

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

iv. Develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and HCOC management and to collaborate to develop common principles and policies for water

quality protection, including avoidance of disturbance, conserving natural areas, protecting slopes and channels, minimizing stormwater and urban runoff impacts on natural drainage systems and waterbodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely impact downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

v. Incorporate into the permittees' LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green infrastructure/LID principles for public and private development projects and for hillside development projects and the consideration and facilitation of the application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

vi. For the District as Principal Permittee, submit a revised WQMP Guidance and Template to incorporate new elements required by the Permit;

vii. Evaluate potential barriers to implement LID principles and promote green infrastructure/LID BMP implementation and identify applicable LID principles from a list in the Permit for project specific WQMPs; update landscape ordinances consistent with the requirements of AB 1881; address hydromodification and managing stormwater as a resource through site design BMPs that incorporated LID techniques in a specified manner; require priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; review and update the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensure that the WQMP specified methods for determining time of concentration; conduct a feasibility analysis to determine the feasibility of implement LID; integrate the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submit the updated WQMP Guidance and Template to the RWQCB Executive Officer and implement the Guidance and Template after approval or, alternatively, require implementation of LID BMPs or determine the infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site conditions did not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, require implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis;

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

ix. Develop technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs;

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

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

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

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

xiv. For the District as Principal Permittee, to participate in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of certain of these requirements, including the WAP, criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of post-construction BMPs and a database for tracking those BMPs, was conducted by the District as Principal Permittee through funding provided by the permittees, including the County, through the Implementation Agreement. I am informed and believe and therefore state that the County's calculated share of such costs was $17,969.12 in FY 2009-10 and $72,456.24 in FY 2010-11.

i. **Public Education and Outreach**: Permit Section XII.A required permittees, including the County, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting was conducted by the District as Principal Permittee through funding contributed by permittees, including the County, under the Implementation Agreement. The implementation of changes identified through the assessment was implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the County. I am informed and believe and therefore state that the County's calculated share of such costs was $8,181.13 in FY 2009-10 and $31,855.99 in FY 2010-11. I am further informed and believe and therefore state that the County may have incurred direct costs with respect to these requirements, but that these costs cannot be quantified at this time.

j. **Permittee Facilities and Activities Requirements**: Permit Section XIII required permittees, including the County, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to set forth the results of the evaluation in the annual report. I am informed and believe and therefore state that the County may have incurred direct costs with respect to these requirements, but that these costs cannot be quantified at this time.

k. **Training Requirements**: Permit Section XVI required permittees, including the County, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training, through funding contributed by all permittees. Permittees, including the County, were required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, to train staff involved with stormwater related projects and implementation of the Permit and to provide such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. Certain of these costs were paid by permittees, including the County, through the Implementation Agreement. I am informed and believe and therefore state that the County's calculated share of such costs was $978.00 in FY 2009-10 and $1,043.20 in FY 2010-11. In addition, I am informed and believe and therefore state that the County incurred additional estimated direct costs with regard to these requirements of $7,400.00 in FY 2009-10 and $8,950.00 in FY 2010-11.

l. **Reporting of Non-Compliant Facilities**: Permit Section XVII.D required permittees, including the County, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to a specified set of requirements. Permittees, including the County, were required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act Section 401 certification, and any records

of communication with the facility operator regarding the violation, including an inspection report. These mandates required the permittees, including the County, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. I am informed and believe and therefore state that the County has not yet incurred costs with respect to these requirements.

m. **Program Management Assessment/MSWMP Review**: Permit Section XVIII.B.3 and MRP Section VII.E.4 required permittees, including the County, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality outcomes and the result of municipal enforcement activities. The results of the assessment were required to be incorporated into an amended MSWMP, pursuant to Permit Section XVIII.C. These provisions required the permittees, including the County, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. I am informed and believe and therefore state that the County may have incurred direct costs with respect to these requirements, but that these costs cannot be quantified at this time.

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

County would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only available source to for the County to pay for these new programs and activities is the County's general fund.

9. I am informed and believe that this Declaration is being offered in support of a Joint Test Claim filed with the Commission on State Mandates and further that the County is in agreement with all items in the Joint Test Claim.

10. This Declaration sets forth certain estimated amounts expended by the County as determined from the review of pertinent records. I am informed and believe that there may be additional costs that have not yet been identified or determined/quantified.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 26, 2017, at San Bernardino, California.

Kevin Blakeslee, P.E.

DECLARATION OF ARLENE B. CHUN, P.E.

COUNTY OF SAN BERNARDINO

I, ARLENE B. CHUN, hereby declare and state as follows:

1. I am the Stormwater Program Manager for the San Bernardino County Stormwater Program ("Program"). I am employed by the San Bernardino County Department of Public Works and I am assigned to the Environmental Management Division. The Environmental Management Division provides services to both the County and the San Bernardino County Flood Control District. My job responsibilities include serving to coordinate Program activities for the permittees covered by the requirements of California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036 (the "Permit").

2. I am familiar with the various sections of the Permit set forth in the Section 5 Narrative Statement accompanying the joint test claim filed by various permittees under the Permit (the "Joint Test Claim") and am familiar with such provisions and how they are implemented by the permittees, including the Claimants under this Joint Test Claim.

3. I have reviewed and have knowledge of financial records showing expenditures by the permittees, including Claimants, to comply with such Permit requirements through funds obtained by operation of an Implementation Agreement entered into by and between the permittees.

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

5. The Program coordinated and continues to coordinate the response to certain Permit requirements set forth in the Joint Test Claim using shared funding obtained from all

permittees, including the Claimants, through operation of an Implementation Agreement entered into by and between the permittees.

6. From my review of financial records and the Implementation Agreement, I calculated the share paid by each of the Claimants for each of the items in the Joint Test Claim for which there were shared costs paid by the permittees and created a spreadsheet setting forth such costs. I am informed and believe that such spreadsheet was provided to Claimant representatives.

7. Also, from my review of financial records and the Implementation Agreement, I have determined the amount of shared costs paid by non-Claimant permittees during Fiscal Years ("FY") 2009-10 and 2010-11. I understand and believe and therefore state that non-Claimant permittees incurred calculated costs of $241,321.41 in FY 2009-10 and $656,835.30 in FY 2010-11 with respect to the items in the Test Claim for which costs were shared by the permittees.

8. I am informed and believe and therefore state that a planned Total Maximum Daily Load for Mercury in Big Bear Lake has been put on hold pending adoption of a Mercury policy by the State Water Resources Control Board.

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

Executed July 31, 2017 at San Bernardino, California.

Arlene B. Chun, P.E.

DECLARATION OF ANDREW SIMMONS

CITY OF BIG BEAR LAKE

I, Andrew Simmons, hereby declare and state as follows:

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

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

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other permittees under the Permit agreed to share certain costs of complying with the Permit.

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

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

6. I am informed and believe and therefore state that the City first began to incur costs with respect to the Permit items set forth below on or about February 17, 2010, when City personnel attended a meeting at San Bernardino County Public Works to discuss Permit implementation requirements.

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

a. **Local Implementation Plan Requirement**: Permit Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, required permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which sets forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. These tasks required the creation of a model LIP and individual LIPs, with the identification of personnel, programs and other tasks and the review and periodic updating of those LIPs over the course of the Permit. Development of the model LIP was conducted by the San Bernardino County Flood Control District ("District") acting in its role as Principal Permittee under the Permit in part through funding provided by the permittees, including the City, pursuant to their obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees. I am informed and believe and therefore state that in Fiscal Year ("FY") 2009-10, the City's calculated share of such costs was $306.07. I am

further informed and believe and therefore state that the City incurred increased additional estimated direct costs of $200.00 in FY 2009-10 and $5,914.29 in FY 2010-11 with respect to these requirements.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Were Significant Sources of Pollutants**: Permit Section V.A.16 required permittees, including the City, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into the permittees' MS4, including that of the City, to determine whether such discharges were a significant source of pollutants to the MS4. This task involved monitoring, analysis of samples, and other followup tasks to evaluate monitored waters as sources of pollutants, as well as potential followup investigation and reporting to the RWQCB Executive Officer. Certain activities to monitor and assess these discharges was being jointly undertaken by permittees, including the City, pursuant to the Implementation Agreement. I am informed and believe that the calculated share of such costs for the City was $210.47 in FY 2010-11. I am further informed and believe and therefore state that the City incurred estimated additional direct costs with respect to these requirements of $200.00 in FY 2009-10 and $514.29 in FY 2010-11.

c. **Incorporation of TMDLs**: Permit Sections V.D.2-6, as well as MRP Sections I.F, V.A.2.a, and V.B.1.b, required various permittees to participate in activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also required the City to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL.

i. With respect to the MSAR TMDL, the Permit required that the permittees named in the MSAR TMDL achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, best management practices ("BMPs"), inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis. Moreover, if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL would become the final WQBELs for wet weather conditions, unless the RWQCB had adopted alternative final WQBELs. I am informed and believe that the RWQCB accepted the CBRP as the final dry weather WQBELs but no final wet weather WQBELs have yet been established;

ii. With respect to the BBL TMDL, the Permit and MRP required the permittees named in the BBL TMDL to, among other items, implement BMPs to attain compliance with the TMDL, even though the permittees were in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan for in-lake sediment nutrient reduction; with respect to Lake Management Plan (as that term is defined in the Permit) documents, to meet various requirements, including those relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identification of methodology for measuring changes in lake capacity, recommendations for short and long-term strategies to

control and manage sediment and integration of a beneficial use map developed by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicated that the WLA was being exceeded; and, for permittees that discharge into BBL, to revise their LIPs to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA;

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

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

The cost of the provisions set forth above are being shared by the permittees, including the City, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $5,588.61 in FY 2009-10 and $5,207.40 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional direct costs with regard to these requirements of $33,290.40 in FY 2009-10 and $30,308.42 in FY 2010-11.

d. **Promulgation and Implementation of Ordinance to Address Bacteria Sources**: Permit Section VII.D required permittees, including the City, to promulgate and implement ordinances that would control known pathogen or bacterial indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involved the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the ordinances. I am informed and believe and therefore state that the City incurred estimated costs of $1,150.00 in FY 2009-10 and $1,514.29 in FY 2010-11 with respect to these requirements.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Permit Sections VIII.A and B and MRP Section IV.B.3 required that permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions required permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; review aerial photograph to detect IC/IDs; inspect facilities, sites and MS4s; analyze monitoring data; conduct watershed education regarding illegal discharges; conduct pollution prevention for generating sites; and, conduct stream restoration efforts and opportunities and assess stream corridors to identify dry weather flows and illegal dumping. I am informed and believe and therefore state that the City incurred estimated costs with regard to these requirements of $200.00 in FY 2009-10 and $514.29 in FY 2010-11.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Permit Section IX.F required permittees, including the City, with septic

systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems were minimized pending adoption of state septic system regulations, and to update a database as septic systems are added or removed from their jurisdictions. I am informed and believe and therefore state that the City incurred estimated costs with regard to these requirements of $2,100.00 in FY 2009-10 and $514.29 in FY 2010-11.

g. **Permittee Inspection Requirements**: Permit Section X required permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of permittees, including the City, included documenting municipal inspection programs in an electronic database; during inspections or prior to permit issuance, verifying whether a site had required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the state General Construction Permit, reviewing Erosion and Sediment Control Plans, making visual observations, checking compliance with ordinances, permits, WQMPs and assessing the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding Permit requirements and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program,

including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and, evaluating the residential program in the annual report. Certain aspects of these requirements, including the development of an electronic database, were conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such shared costs was $2,613.60 in FY 2009-10 and $12,949.20 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with regard to these requirements of $200.00 in FY 2009-10 and $19,803.37 in FY 2010-11.

h. **New Development Requirements**: Permit Section XI, as well as MRP Sections IV.B.4, V.A.2.b and V.B.2, contained numerous new requirements relating to new development and significant re-development projects. The permittees are required to undertake various activities, including the following:

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

ii. Develop a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, to: identify program-specific objectives for the WAP; develop a structure for the WAP; identify linkages between the WAP and other plans; identify other relevant watershed efforts, ensure that

the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase was made available to watershed stakeholders and has incorporated specified information; develop a schedule and procedure for maintaining the Geodatabase; review the Geodatabase with RWQCB staff to verify attributes of the Geodatabase; identify potential causes of identified stream degradation; conduct a system-wide evaluation to identify opportunities to retrofit stormwater systems, parks and other recreational areas with water quality protections measures and develop recommendations for retrofit studies; conduct a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; invite participation and comments from stakeholders regarding the development and use of the Geodatabase; and submit the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, permittees, including the City, were required to: specify procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; develop and implement a HMP prioritized on specified bases; conduct training workshops in the use of the Geodatabase; conduct Geodatabase demonstration workshops for senior permittee staff; develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implement applicable retrofit or regional treatment recommendations; and submit the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee was required to review watershed protection principles and policies in General Plan or related documents to determine consistent with the WAP and to include those findings in its annual report along with a schedule for necessary revisions;

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

iv. Develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and HCOC management and to collaborate to develop common principles and policies for water quality protection, including avoidance of disturbance, conserving natural areas, protecting slopes and channels, minimizing stormwater and urban runoff impacts on natural drainage systems and waterbodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

v. Incorporate into the permittees' LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green

infrastructure/LID principles for public and private development projects and for hillside development projects and the consideration and facilitation of the application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

vi. For the Principal Permittee, submit a revised WQMP Guidance and Template to incorporate new elements required by the Permit;

vii. Evaluate potential barriers to implement LID principles and promote green infrastructure/LID BMP implementation and identify applicable LID principles from a list in the Permit for project specific WQMPs; update landscape ordinances consistent with the requirements of AB 1881; address hydromodification and managing stormwater as a resource through site design BMPs that incorporated LID techniques in a specified manner; require priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; review and update the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensure that the WQMP specified methods for determining time of concentration; conduct a feasibility analysis to determine the feasibility of implement LID; integrate the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submit the updated WQMP Guidance and Template to the RWQCB Executive Officer and implement the Guidance and Template after approval or, alternatively, require implementation of LID BMPs or determine the infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site conditions did not permit infiltration, harvesting and

use, and/or evapotranspiration and/or bio-treatment of the design capture volume, require implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis;

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

ix. Develop technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs;

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

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

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

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

xiv. For the Principal Permittee, to participate in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of certain of these requirements, including the WAP, criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of post-construction BMPs and a database for tracking those BMPs, was conducted by the District as Principal Permittee through funding provided by the permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $2,728.44 in FY 2009-10 and $11,001.79 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with regard to these requirements of $10,600.00 in FY 2009-10 and $19,514.29 in FY 2010-11.

i. **Public Education and Outreach**: Permit Section XII.A required permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting was conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. The implementation of changes identified through the assessment was implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. I am informed and believe and therefore state that the City's calculated share of such costs was $1,242.23 in FY 2009-10 and $4,837.03 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with regard to these requirements of $3,175.00 in FY 2009-10 and $6,464.29 in FY 2010-11.

j. **Permittee Facilities and Activities Requirements**: Permit Section XIII required permittees, including the City, to inventory their fixed facilities, field operation and drainage

facilities, and to annually inspect those facilities, with the records of the facilities and inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to set forth the results of the evaluation in the annual report. I am informed and believe and therefore state that the City incurred estimated costs with regard to these requirements of $150,200.00 in FY 2009-10 and $150,514.29 in FY 2010-11.

k. **Training Requirements**: Permit Section XVI required permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training, through funding contributed by all permittees, including the City. Permittees, including the City, were required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, to train staff involved with stormwater related projects and implementation of the Permit and to provide such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. Certain of these costs were paid by permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $148.50 in FY 2009-10 and $158.40 in FY 2010-11. In addition, I am informed and believe and therefore state that

the City incurred additional estimated direct costs with regard to these requirements of $200.00 in FY 2009-10 and $5,020.29 in FY 2010-11.

l. **Reporting of Non-Compliant Facilities**: Permit Section XVII.D required permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to a specified set of requirements. Permittees, including the City, were required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements required permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. I am informed and believe and therefore state that the City incurred estimated costs of $200.00 in FY 2009-10 and $514.29 in FY 2010-11 with respect to these requirements.

m. **Program Management Assessment/MSWMP Review**: Permit Section XVIII.B.3 and MRP Section VII.E.4 required permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality outcomes and the result of municipal enforcement activities. The results of the assessment were required to be incorporated into an amended MSWMP, pursuant to Permit Section XVIII.C. These provisions required permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program

elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. I am informed and believe and therefore state that the City incurred estimated costs of $200.00 in FY 2009-10 and $514.29 in FY 2010-11 with respect to these requirements.

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

9. I am informed and believe that this Declaration is being submitted in support of a Joint Test Claim with the Commission on State Mandates. I am informed and believe and therefore state that the City agrees with all items in the Joint Test Claim.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 19, 2017, at Big Bear Lake, California.

Andrew R. Simmons
Acting City Engineer

DECLARATION OF RUBEN VALDEZ

CITY OF CHINO

I, Ruben Valdez, hereby declare and state as follows:

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

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

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other Permittees under the Permit agreed to share certain costs of complying with the Permit.

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

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

6. I am informed and believe and therefore state that the City first began to accrue costs with respect to the items in the Permit set forth below on or about February 17, 2010, when City personnel attended a meeting at San Bernardino County Public Works to discuss Permit implementation requirements.

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

a. **Local Implementation Plan Requirement**: Permit Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, required permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which sets forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. These tasks required the creation of a model LIP and individual LIPs, with the identification of personnel, programs and other tasks, and the review and periodic updating of those LIPs over the course of the Permit. Development of the model LIP was conducted by the San Bernardino County Flood Control District ("District") acting in its role as Principal Permittee under the Permit in part through funding provided by the permittees, including the City, pursuant to their obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees. I am informed and believe and therefore state that in Fiscal Year ("FY") 2009-10, the City's calculated share of such costs was $709.52. I am

further informed and believe and therefore state that during FY 2010-11, the City incurred additional estimated direct costs of $3,108.00 with respect to this requirement.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Were Significant Sources of Pollutants**: Permit Section V.A.16 required permittees, including the City, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into the permittees' MS4, including that of the City, and to determine whether such discharges were a significant source of pollutants to the MS4. This task involved monitoring, analysis of samples, and other followup tasks to evaluate monitored waters as sources of pollutants, as well as potential followup investigation and reporting to the RWQCB Executive Officer. Certain activities to monitor and assess these discharges was jointly undertaken by permittees, including the City, pursuant to the Implementation Agreement. I am informed and believe that the calculated share of such costs to the City was $487.92 in FY 2010-11.

c. **Incorporation of TMDLs**: Permit Sections V.D.2-6, as well as MRP Sections I.F, V.A.2.a, and V.B.1.b, required various permittees to participate in activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also required the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL.

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

best management practices ("BMPs"), inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis. Moreover, if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL would become the final WQBELs for wet weather conditions, unless the RWQCB had adopted alternative final WQBELs. I am informed and believe that the RWQCB accepted the CBRP as the final dry weather WQBELs but no final wet weather WQBELs have yet been established;

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

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

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

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

The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $12,955.41 in FY 2009-10 and $12,071.70 in FY 2010-11.

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

informed and believe and therefore state that the City incurred direct costs of an estimated $721.65 in FY 2011-12 and $5,018.00 in FY 2012-13 with respect to these requirements.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Permit Sections VIII.A and B and MRP Section IV.B.3 required that permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions required permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; review aerial photography to detect IC/IDs; inspect facilities, sites and MS4s; analyze monitoring data; conduct watershed education regarding illegal discharges; conduct pollution prevention for generating sites; and, conduct stream restoration efforts and opportunities and assess stream corridors to identify dry weather flows and illegal dumping. I am informed and believe and therefore state that the City incurred costs with respect to these requirements in fiscal years after FYs 2009-10 and 2010-11.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Permit Section IX.F required permittees with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems were minimized pending adoption of state septic system regulations, and to update a database as septic systems are added or removed from their jurisdictions. I am informed and believe and therefore state that the City has not yet incurred costs with respect to these requirements.

g. **Permittee Inspection Requirements**: Permit Section X required permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of permittees, including the City, included documenting municipal inspection programs in an electronic database; during inspections or prior to permit issuance, verifying whether a site had required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the state General Construction Permit, reviewing Erosion and Sediment Control Plans, making visual observations, checking compliance with ordinances, permits, WQMPs and assessing the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding Permit requirements and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and, evaluating the residential program in the annual report. Certain aspects of these

requirements, including the development of an electronic database, were conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $6,058.80 in FY 2009-10 and $30,018.60 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional direct costs, net of inspection fees, with respect to these requirements but that these costs cannot be quantified at this time.

h. **New Development Requirements**: Permit Section XI, as well as MRP Sections IV.B.4, V.A.2.b and V.B.2, contained numerous new requirements relating to new development and significant re-development projects. The permittees were charged with various requirements, including the following:

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

ii. Develop a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, to: identify program-specific objectives for the WAP; develop a structure for the WAP; identify linkages between the WAP and other plans; identify other relevant watershed efforts, ensure that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase was made available to watershed stakeholders and has incorporated specified information; develop a schedule and procedure for maintaining the Geodatabase; review the Geodatabase with RWQCB staff to verify attributes of the Geodatabase; identify potential causes of identified stream degradation; conduct a system-wide evaluation to identify opportunities to retrofit stormwater

systems, parks and other recreational areas with water quality protections measures and develop recommendations for retrofit studies; conduct a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; invite participation and comments from stakeholders regarding the development and use of the Geodatabase; and submit the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, permittees, including the City, were required to: specify procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; develop and implement a HMP prioritized on specified bases; conduct training workshops in the use of the Geodatabase; conduct Geodatabase demonstration workshops for senior permittee staff; develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implement applicable retrofit or regional treatment recommendations; and submit the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee was required to review watershed protection principles and policies in General Plan or related documents to determine consistency with the WAP and to include those findings in its annual report along with a schedule for necessary revisions;

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

iv. Develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and

HCOC management and to collaborate to develop common principles and policies for water quality protection, including avoidance of disturbance, conserving natural areas, protecting slopes and channels, minimizing stormwater and urban runoff impacts on natural drainage systems and waterbodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely impact downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

v. Incorporate into the permittees' LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green infrastructure/LID principles for public and private development projects and for hillside development projects and the consideration and facilitation of the application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

vi. For the Principal Permittee, submit a revised WQMP Guidance and Template to incorporate new elements required by the Permit;

vii. Evaluate potential barriers to implement LID principles and promote green infrastructure/LID BMP implementation and identify applicable LID principles from a list in the Permit for project specific WQMPs; update landscape ordinances consistent with the requirements of AB 1881; address hydromodification and managing stormwater as a resource through site design BMPs that incorporated LID techniques in a specified manner; require priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; review and update the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensure that the WQMP specified methods for determining time of concentration; conduct a feasibility analysis to determine the feasibility of implement LID; integrate the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submit the updated WQMP Guidance and Template to the RWQCB Executive Officer and implement the Guidance and Template after approval or, alternatively, require implementation of LID BMPs or determine the infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site conditions did not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, require implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis;

viii. Develop standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submit the draft guidance to the RWQCB Executive Officer; ensure that the guidance followed certain principles contained

in U.S. EPA guidance; and implement the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs;

ix. Develop technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs;

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

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

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

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

xiv. For the Principal Permittee, to participate in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of certain of these requirements, including the WAP, criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of post-construction BMPs and a database for tracking those BMPs, was conducted by the District as Principal Permittee through funding provided by the permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's

calculated share of such costs was $6,325.02 in FY 2009-10 and $25,504.15 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs of $745.00 in FY 2009-10 and $1,554.00 in FY 2010-11 with respect to these requirements.

i. **Public Education and Outreach**: Permit Section XII.A required permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting was conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. The implementation of changes identified through the assessment was implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. I am informed and believe and therefore state that the City's calculated share of such costs was $2,879.71 in FY 2009-10 and $11,213.11 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with regard to these requirements of $16,040.00 in FY 2009-10 and $12,610.00 in FY 2010-11.

j. **Permittee Facilities and Activities Requirements**: Permit Section XIII required permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and inspections maintained in a database; to annually evaluate the inspection and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules,

and to set forth the results of the evaluation in the annual report. I am informed and believe and therefore state that the City incurred direct costs with regard to these requirements of $178,566.00 in FY 2009-10 and $172,363.00 in FY 2010-11.

k. **Training Requirements**: Permit Section XVI required permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training, through funding contributed by all permittees, including the City. Permittees, including the City, were required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, to train staff involved with stormwater related projects and implementation of the Permit and to provide such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training for municipal contractors to assist in their training of contractor staff. Certain of these costs were paid by permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $344.25 in FY 2009-10 and $367.20 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with regard to these requirements of $8,301.00 in FY 2009-10 and $3,757.00 in FY 2010-11.

l. **Reporting of Non-Compliant Facilities**: Permit Section XVII.D required permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to a specified set of requirements. Permittees, including the City, were required to report to the RWQCB within 14 calendar days

detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements required permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. I am informed and believe and therefore state that the City has not yet incurred costs with respect to this requirement.

m. **Program Management Assessment/MSWMP Review**: Permit Section XVIII.B.3 and MRP Section VII.E.4 required permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality outcomes and the result of municipal enforcement activities. The results of the assessment were required to be incorporated into an amended MSWMP, pursuant to Permit Section XVIII.C. These provisions required permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. I am informed and believe and therefore state that the City has incurred costs with respect to these requirements but that the amount of those costs cannot be quantified at this time.

8. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and

activities set forth in this Declaration. The City imposes a fee related to the inspection of industrial and commercial facilities. I am informed and believe that this fee does not, however, recover the entire cost associated with the inspection program. The City also imposes a charge on residential and commercial/industrial property owners for storm drain use. That charge may be used to fund capital improvement projects and Permit activities. However, on information and belief, the charge is not sufficient to cover all requirements of the Permit set forth in this declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only other available source to pay for these new programs and activities is the City's general fund.

9. I am informed and believe that this Declaration is being offered in support of a Joint Test Claim filed with the Commission on State Mandates and further that the City is in agreement with all items in the Joint Test Claim.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 28, 2017, at Las Cruces, New Mexico.

Ruben Valdez

DECLARATION OF TAD GARRETY

CITY OF CHINO HILLS

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

1. I am a Management Analyst for the City of Chino Hills ("City"). At other times relevant to this declaration, I served as Environmental Program Coordinator for the City. In both capacities, I shared responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), Order No. R8-2010-0036 ("the Permit") as they apply to the City.

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

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other Permittees under the Permit agreed to share certain costs of complying with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein. I have knowledge regarding the estimates of the City's direct costs set forth below to the extent that I worked on many of the City's NPDES projects and thus had a basis to make estimates of my and other staff members' time worked on each project. Except as otherwise noted below, I estimated the City's direct costs set forth below by multiplying the hours I estimated for each project by the

departmental charge rate for the City's Community Services, which at that time included Code Enforcement, the Department to which I was assigned from approximately 2008 through 2012.

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

6. I and other City personnel attended a meeting on or about February 17, 2010 at San Bernardino County Public Works to discuss Permit implementation requirements. I am informed and believe and therefore state that the City first began to accrue costs with respect to the items in the Permit set forth below, on or about February 17, 2010 when City personnel, including myself, attended that meeting.

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

a. **Local Implementation Plan Requirement**: Permit Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, required permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which sets forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. These tasks required the creation of a model LIP and individual LIPs, with the

identification of personnel, programs and other tasks and the review and periodic updating of those LIPs over the course of the Permit. Development of the model LIP was conducted by the San Bernardino County Flood Control District ("District") acting in its role as Principal Permittee under the Permit in part through funding provided by the permittees, including the City, pursuant to their obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees. I am informed and believe and therefore state that in Fiscal Year ("FY") 2009-10, the City's calculated share of such costs was $785.27. I am further informed and believe and therefore state that the City incurred additional estimated direct costs of $8,240.00 in FY 2009-10 and $31,698.00 in FY 2010-11 with respect to these requirements.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Were Significant Sources of Pollutants**: Permit Section V.A.16 required permittees, including the City, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into the permittees' MS4, including that of the City, to determine whether such discharges were a significant source of pollutants to the MS4. This task involved monitoring, analysis of samples, and other follow-up tasks to evaluate monitored waters as sources of pollutants, as well as potential follow-up investigation and reporting to the RWQCB Executive Officer. Certain activities to monitor and assess these discharges was being jointly undertaken by permittees, including the City, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the calculated share of such costs to the City was $540.00 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated costs direct costs of $2,472.00 in FY 2009-10 and $9,064.00 in FY 2010-11 with respect to these requirements.

c. **Incorporation of TMDLs**: Permit Sections V.D.2-6, as well as MRP Sections I.F, V.A.2.a, and V.B.1.b, required various permittees to participate in activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). I am informed and believe that the Permit also required the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL. I am informed and believe as follows:

i. With respect to the MSAR TMDL, the Permit required that the permittees named in the MSAR TMDL achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, best management practices ("BMPs"), inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis. Moreover, if the Permit still is in effect on December 31, 2025, the waste-load allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL would become the final WQBELs for wet weather conditions, unless the RWQCB had adopted alternative final WQBELs. I am informed and believe that the RWQCB accepted the CBRP as the final dry weather WQBELs but no final wet weather WQBELs have yet been established;

ii. With respect to the BBL TMDL, the Permit and MRP required the permittees named in the BBL TMDL to, among other items, implement BMPs to attain compliance with the TMDL, even though the permittees were in compliance with the WLAs applicable to them; to

implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan for in-lake sediment nutrient reduction; with respect to Lake Management Plan (as that term is defined in the Permit) documents, to meet various requirements, including those relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identification of methodology for measuring changes in lake capacity, recommendations for short and long-term strategies to control and manage sediment and integration of a beneficial use map developed by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicated that the WLA was being exceeded; and, for permittees that discharge into BBL, to revise their LIPs to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA;

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

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

The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $14,338.45 in FY 2009-10 and $13,360.40 in FY 2010-11 with respect to these requirements.

d. **Promulgation and Implementation of Ordinance to Address Bacteria Sources**: Permit Section VII.D required the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or bacterial indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involved the development, drafting and necessary passage of City ordinances to address such wastes, as well as the development of an enforcement strategy and the enforcement of the ordinances. I am informed and believe and therefore state that the City incurred estimated costs of $824.00 in FY 2009-10 and $3,090.00 in FY 2010-11 with respect to these requirements.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Permit Sections VIII.A and B. and MRP Section IV.B.3 required that permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions required permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; review aerial photograph to detect IC/IDs; inspect facilities, sites and

MS4s; analyze monitoring data; conduct watershed education regarding illegal discharges; conduct pollution prevention for generating sites; and, conduct stream restoration efforts and opportunities and assess stream corridors to identify dry weather flows and illegal dumping. The development of a Decision Chart and related instructions were necessary to create an IDDE program that could be utilized by all operating department/divisions in the City. The development of the IDDE program required research, meetings, and multiple coordinating sessions with operating departments before being finalized. I am informed and believe and therefore state that the City incurred estimated direct costs with respect to these requirements of $5,768.00 in FY 2009-10 and $25,750.00 in FY 2010-11.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Permit Section IX.F required permittees, including the City, with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems were minimized pending adoption of state septic system regulations, and to update a database as septic systems are added or removed from their jurisdictions. The septic system program required coordination with the City Community Development Department. The Community Development Department collected all addresses with septic systems in the City to create a total inventory. Code enforcement staff reviewed and edited the inventory list based on existing records pertaining enforcement cases. I am informed and believe and therefore state that the City incurred estimated costs of $4,532.00 in FY 2009-10 and $16,480.00 in FY 2010-11 with respect to these requirements.

g. **Permittee Inspection Requirements**: Permit Section X of the Permit required the permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of the permittees,

including the City, included documenting municipal inspection programs in an electronic database; verifying during inspections or prior to permit issuance, verifying whether a site had required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the state General Construction Permit, reviewing Erosion and Sediment Control Plans, making visual observations, checking compliance with ordinances, permits, WQMPs and assessing the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding Permit requirements and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and evaluating the residential program in the annual report. Certain aspects of these requirements, including the development of an electronic database, were conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. I am informed and believe and therefore state that the

City's calculated share of such costs was $7,705.60 in FY 2009-10 and $33,223.20 in FY 2010-11. I am informed and believe and therefore state that these inspection requirements constituted a significant compliance element in the City's NPDES program. I am informed and believe that the inspection program was designed with consideration for risk assessment, electronic tracking, attention to BMP implementation, enforcement procedures, and dedication of a staff person to carry out annual inspections. I am informed and believe and therefore state that in performing these tasks, the City incurred additional estimated direct costs of $37,574.80 in FY 2009-10 and $85,202.00 in FY 2010-11.

h. **New Development Requirements**: Permit Section XI, as well as MRP Sections IV.B.4, V.A.2.b and V.B.2, contained numerous new requirements relating to new development and significant re-development projects. Permittees were required to do numerous tasks, including the following:

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

ii. Develop a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, identify program-specific objectives for the WAP; develop a structure for the WAP; identify linkages between the WAP and other plans; identify other relevant watershed efforts, ensuring that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase was made available to watershed stakeholders and has incorporated specified information; develop a schedule and procedure for maintaining the Geodatabase; review the Geodatabase with RWQCB staff to verify attributes of the Geodatabase; identify potential causes of identified stream degradation;

conducting a system-wide evaluation to identify opportunities to retrofit storm water systems, parks and other recreational areas with water quality protections measures and developing recommendations for retrofit studies; conduct a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; invite participation and comments from stakeholders regarding the development and use of the Geodatabase; and submitting the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, permittees, including the City, were required to: specify procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; develop and implement a HMP prioritized on specified bases; conduct training workshops in the use of the Geodatabase; conduct demonstration workshops for the Geodatabase for senior permittee staff; develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implement applicable retrofit or regional treatment recommendations; and submit the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee was required to review watershed protection principles and policies in General Plan or related documents to determine consistent with the WAP and to include those findings in its annual report along with a schedule for necessary revisions;

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

iv. Develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and HCOC management and to collaborate to develop common principles and policies for water quality protection, including avoidance of disturbance, conserving natural areas, protecting slopes and channels, minimizing stormwater and urban runoff impacts on natural drainage systems and waterbodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

v. Incorporate into the permittees' LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green infrastructure/LID principles for public and private development projects and for hillside development projects and the consideration and facilitation of the application of landform

grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

vi. For the Principal Permittee, submit a revised WQMP Guidance and Template to incorporate new elements required by the Permit;

vii. Evaluate potential barriers to implement LID principles and to promote green infrastructure/LID BMP implementation and identify applicable LID principles from a list in the Permit for project specific WQMPs; update landscape ordinances consistent with the requirements of AB 1881; address hydromodification and managing stormwater as a resource through site design BMPs that incorporated LID techniques in a specified manner; require priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; review and update the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensure that the WQMP specified methods for determining time of concentration; conduct a feasibility analysis to determine the feasibility of implement LID; integrate the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submit the updated WQMP Guidance and Template to the RWQCB Executive Officer and implement the Guidance and Template after approval or, alternatively, require implementation of LID BMPs or determine the infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site conditions did not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, require implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis;

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

ix. Develop technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs;

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

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

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

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

xiv. For the Principal Permittee, participate in a monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of certain of these requirements, including the WAP, criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of

post-construction BMPs and a database for tracking those BMPs, was conducted by the District as Principal Permittee through funding provided by the permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $7,000.24 in FY 2009-10 and $28,226.82 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred estimated additional direct costs with respect to these requirements of $15,656.00 in FY 2009-10 and $72,100.00 in FY 2010-11.

i. **Public Education and Outreach**: Permit Section XII.A required permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting was conducted by the District, as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. The implementation of changes identified through the assessment was implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. I am informed and believe and therefore state that the City's calculated share of such costs was $3,187.00 in FY 2009-10 and $12,207.00 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with respect to these requirements of $8,446.00 in FY 2009-10 and $23,278.00 in FY 2010-11.

j. **Permittee Facilities and Activities Requirements**: Permit Section XIII required permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage

facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to set forth the results of the evaluation in the annual report. I am informed and believe and therefore state that the City incurred estimated direct costs with respect to these requirements of $18,337.00 in FY 2009-10 and $25,125.00 in FY 2010-11.

k. **Training Requirements**: Permit Section XVI required permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training, through funding contributed by all permittees, including the City. Permittees, including the City, were required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, to train staff involved with stormwater related projects and implementation of the Permit and to provide such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. Certain of these costs were jointly paid by permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $406.40 in FY 2009-10 and $391.16 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with regard to these requirements of $12,354.00 in FY 2009-10 and $21,630.00 in FY 2010-11 with respect to these requirements.

l. **Reporting of Non-Compliant Facilities**: Permit Section XVII.D required permittees, including the City, to deem facilities operating without a permit to be insignificant non-compliance and be reported to the RWQCB pursuant to a specified set of requirements. Permittees, including the City, were required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements required permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. I am informed and believe and therefore state that the City estimated direct costs of $3,296.00 in FY 2009-10 and $12,360.00 in FY 2010-11 with respect to these requirements.

m. **Program Management Assessment/MSWMP Review**: Permit Section XVIII.B.3 and MRP Section VII.E.4 required permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality outcomes and the result of municipal enforcement activities. The results of the assessment were required to be incorporated into an amended MSWMP, pursuant to Permit Section XVIII.C. These provisions required permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. I am informed and believe and therefore state that the

City incurred estimated direct costs with regard to these requirements of $11,124.00 in FY 2009-10 and $32,960.00 in FY 2010-11.

8. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. The City imposes development fees associated with new development within its jurisdiction. Such existing development fees only reimburse the City's costs associated with reviewing various aspects of development projects, including initial and final WQMP review for all development projects requiring such a plan. The existing development fees do not, on information and belief, fully cover the requirements related to new development set forth herein or other requirements in the Permit. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only other available source to pay for these new programs and activities is the City's general fund.

9. I understand and believe that this Declaration is being offered in support of a Joint Test Claim with the Commission on State Mandates and further that the City agrees with all issues set forth in the Joint Test Claim.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 20, 2017, at Chino Hills, California.

Tad Garrety

DECLARATION OF DAN CHADWICK

CITY OF FONTANA

I, Dan Chadwick, hereby declare and state as follows:

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

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

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other Permittees under the Permit agreed to share certain costs of complying with the Permit.

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

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

6. I am informed and believe and therefore state that the City first began to accrue costs with respect to the items in the Permit set forth below on or about February 17, 2010, when City personnel attended a meeting at San Bernardino County Public Works to discuss Permit implementation requirements.

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

a. **Local Implementation Plan Requirement**: Permit Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, required permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which sets forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. These tasks required the creation of a model LIP and individual LIPs, with the identification of personnel, programs and other tasks and the review and periodic updating of those LIPs over the course of the Permit. Development of the model LIP was conducted by the San Bernardino County Flood Control District ("District") acting in its role as Principal Permittee under the Permit in part through funding provided by the permittees, including the City, pursuant to their obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees. I am informed and believe and therefore state that in Fiscal Year ("FY") 2009-10, the City's calculated share of such costs was $1,152.62. I

am further informed and believe and therefore state that during FY 2010-11, the City incurred additional direct costs of $31,455.38 with respect to this requirement.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Were Significant Sources of Pollutants**: Permit Section V.A.16 required permittees, including the City, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into the permittees' MS4, including that of the City, to determine whether such discharges were a significant source of pollutants to the MS4. This task involved monitoring, analysis of samples, and other followup tasks to evaluate monitored waters as sources of pollutants, as well as potential followup investigation and reporting to the RWQCB Executive Officer. Certain activities to monitor and assess these discharges was being jointly undertaken by permittees, including the City, pursuant to the Implementation Agreement. Agreement. I am informed and believe and therefore state that the calculated share of such costs to the City was $791.94 in FY 2010-11.

c. **Incorporation of TMDLs**: Permit Sections V.D.2-6, as well as MRP Sections I.F, V.A.2.a, and V.B.1.b, required various permittees to participate in activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also required the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL.

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

best management practices ("BMPs"), inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis. Moreover, if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL would become the final WQBELs for wet weather conditions, unless the RWQCB had adopted alternative final WQBELs. I am informed and believe that the RWQCB accepted the CBRP as the final dry weather WQBELs but no final wet weather WQBELs have yet been established;

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

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

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

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

The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $21,027.85 in FY 2009-10 and $19,593.50 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated directed costs of approximately $1,000 in FY 2009-10 and approximately $1,000 in FY 2010-11 with respect to these requirements.

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

the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the ordinances. I am informed and believe and therefore state that the City has not yet incurred costs with respect to these requirements.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Permit Sections VIII.A and B and MRP Section IV.B.3 required that permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions required permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; review aerial photograph to detect IC/IDs; inspect facilities, sites and MS4s; analyze monitoring data; conduct watershed education regarding illegal discharges; conduct pollution prevention for generating sites; and, conduct stream restoration efforts and opportunities and assess stream corridors to identify dry weather flows and illegal dumping. I am informed and believe and therefore state that the City's incurred estimated direct costs to implement such requirements of $7,200.00 in FY 2009-10 and $7,600.00 in FY 2010-11.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Permit Section IX.F required permittees, including the City, with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems were minimized pending adoption of state septic system regulations, and to update a database as septic systems are added or removed from their

jurisdictions. I am informed and believe and therefore state that the City incurred estimated direct costs of $6,434.00 in FY 2009-10 with respect to these requirements.

g. **Permittee Inspection Requirements**: Permit Section X required permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of permittees, including the City, included documenting municipal inspection programs in an electronic database; during inspections or prior to permit issuance, verifying whether a site had required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the state General Construction Permit, reviewing Erosion and Sediment Control Plans, making visual observations, checking compliance with ordinances, permits, WQMPs and assessing the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding Permit requirements and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and

evaluating the applicability of programs to encourage efficient water use and minimize runoff; and, evaluating the residential program in the annual report. Certain aspects of these requirements, including the development of an electronic database, were conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $9,834.00 in FY 2009-10 and $48,723.00 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs, net of inspection revenue, of $17,300.28 in FY 2009-10 and $69,220.29 in FY 2010-11 with respect to these requirements.

h. **New Development Requirements**: Permit Section XI, as well as MRP Sections IV.B.4, V.A.2.b and V.B.2, contained numerous new requirements relating to new development and significant re-development projects. The permittees were required to undertake various requirements, including the following:

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

ii. Develop a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, to: identify program-specific objectives for the WAP; develop a structure for the WAP; identify linkages between the WAP and other plans; identify other relevant watershed efforts, ensure that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase was made available to watershed stakeholders and has incorporated specified information; develop a schedule and procedure for maintaining the Geodatabase; review the Geodatabase with RWQCB

staff to verify attributes of the Geodatabase; identify potential causes of identified stream degradation; conduct a system-wide evaluation to identify opportunities to retrofit stormwater systems, parks and other recreational areas with water quality protections measures and develop recommendations for retrofit studies; conduct a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; invite participation and comments from stakeholders regarding the development and use of the Geodatabase; and submit the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, permittees, including the City, were required to: specify procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; develop and implement a HMP prioritized on specified bases; conduct training workshops in the use of the Geodatabase; conduct Geodatabase demonstration workshops for senior permittee staff; develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implement applicable retrofit or regional treatment recommendations; and submit the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee was required to review watershed protection principles and policies in General Plan or related documents to determine consistent with the WAP and to include those findings in its annual report along with a schedule for necessary revisions;

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

iv. Develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and HCOC management and to collaborate to develop common principles and policies for water quality protection, including avoidance of disturbance, conserving natural areas, protecting slopes and channels, minimizing stormwater and urban runoff impacts on natural drainage systems and waterbodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

v. Incorporate into the permittees' LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green infrastructure/LID principles for public and private development projects and for hillside development projects and the consideration and facilitation of the application of landform

grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

vi. For the Principal Permittee, submit a revised WQMP Guidance and Template to incorporate new elements required by the Permit;

vii. Evaluate potential barriers to implement LID principles and promote green infrastructure/LID BMP implementation and identify applicable LID principles from a list in the Permit for project specific WQMPs; update landscape ordinances consistent with the requirements of AB 1881; address hydromodification and managing stormwater as a resource through site design BMPs that incorporated LID techniques in a specified manner; require priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; review and update the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensure that the WQMP specified methods for determining time of concentration; conduct a feasibility analysis to determine the feasibility of implement LID; integrate the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submit the updated WQMP Guidance and Template to the RWQCB Executive Officer and implement the Guidance and Template after approval or, alternatively, require implementation of LID BMPs or determine the infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site conditions did not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, require implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis;

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

ix. Develop technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs;

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

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

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

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

xiv. For the Principal Permittee to participate in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of certain of these requirements, including the WAP, criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of

post-construction BMPs and a database for tracking those BMPs, was conducted by the District as Principal Permittee through funding provided by the permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $10,266.10 in FY 2009-10 and $41,395.63 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs of $2,000.00 in FY 2009-10 and $2,000.00 in FY 2010-11 with respect to these requirements.

i. **Public Education and Outreach**: Permit Section XII.A required permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting was conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. The implementation of changes identified through the assessment was implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. I am informed and believe and therefore state that the City's calculated share of such costs was $4,674.03 in FY 2009-10 and $18,199.93 in FY 2010-11.

j. **Permittee Facilities and Activities Requirements**: Permit Section XIII required permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to

annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to set forth the results of the evaluation in the annual report. I am informed and believe and therefore state that the City incurred direct costs with regard to these requirements of $205,035.00 in FY 2010-11.

k. **Training Requirements**: Permit Section XVI required permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training, through funding contributed by all permittees, including the City. Permittees, including the City, were required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, to train staff involved with stormwater related projects and implementation of the Permit and to provide such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. Certain of these costs were paid by permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $558.75 in FY 2009-10 and $596.00 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional direct costs of $6,897.00 in FY 2009-10 and $18,048.00 in FY 2010-11 with respect to these requirements.

l. **Reporting of Non-Compliant Facilities**: Permit Section XVII.D required permittees, including the City, to deem facilities operating without a permit to be in significant

non-compliance and be reported to the RWQCB pursuant to a specified set of requirements. Permittees, including the City, were required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements required permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. I am informed and believe and therefore state that the City has not yet incurred costs with respect to these requirements.

m. **Program Management Assessment/MSWMP Review**: Permit Section XVIII.B.3 and MRP Section VII.E.4 required permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality outcomes and the result of municipal enforcement activities. The results of the assessment were required to be incorporated into an amended MSWMP, pursuant to Permit Section XVIII.C. These provisions required permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. I am informed and believe and therefore state that the City has not yet incurred costs with respect to these requirements.

8. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and

activities set forth in this Declaration. I am aware that the City has established and collects Stormwater Compliance fees for: Water Quality Management Plan Review and Plan Check; Stormwater Inspection of Commercial and Industrial Sites; Stormwater Reinspections; and Construction Site Inspections. These fees are imposed on applications for new, private development, and inspections of private facilities. They were adopted within the fee limitations of California's Proposition 13 and Proposition 218 and do not cover the cost of general program administration or program development. They provide limited funding for specific program elements. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only available source to pay for these new programs and activities other than the above mentioned fees is the City's general fund.

9. I am informed and believe that this Declaration is being offered in support of a Joint Test Claim filed with the Commission on State Mandates and further that the City is in agreement with all items in the Joint Test Claim.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 20, 2017, at Fontana, California.

Dan Chadwick

DECLARATION OF MELISSA MORGAN

CITY OF HIGHLAND

I, Melissa Morgan, hereby declare and state as follows:

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

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

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other Permittees under the Permit agreed to share certain costs of complying with the Permit.

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

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

6. I am informed and believe and therefore state that the City first began to accrue costs with respect to the items in the Permit set forth below on or about February 17, 2010, when City personnel attended a meeting at San Bernardino County Public Works to discuss Permit implementation requirements.

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

a. **Local Implementation Plan Requirement**: Permit Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, required permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which sets forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. These tasks required the creation of a model LIP and individual LIPs, with the identification of personnel, programs and other tasks and the review and periodic updating of those LIPs over the course of the Permit. Development of the model LIP was conducted by the San Bernardino County Flood Control District ("District") acting in its role as Principal Permittee under the Permit in part through funding provided by the permittees, including the City, pursuant to their obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees. I am informed and believe and therefore state that in Fiscal Year ("FY") 2009-10, the City's calculated share of such costs was $341.62. I am

further informed and believe and therefore state that during FY 2010-11, the City incurred additional estimated direct costs of $5,712.60 with respect to this requirement.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Were Significant Sources of Pollutants**: Permit Section V.A.16 required permittees, including the City, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into the permittees' MS4, including that of the City, to determine whether such discharges were a significant source of pollutants to the MS4. This task involved monitoring, analysis of samples, and other followup tasks to evaluate monitored waters as sources of pollutants, as well as potential followup investigation and reporting to the RWQCB Executive Officer. Certain activities to monitor and assess these discharges was being jointly undertaken by permittees, including the City, pursuant to the Implementation Agreement. Agreement. I am informed and believe and therefore state that the calculated share of such costs to the City was $234.92 in FY 2010-11.

c. **Incorporation of TMDLs**: Permit Sections V.D.2-6, as well as MRP Sections I.F, V.A.2.a, and V.B.1.b, required various permittees to participate in activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also required the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL.

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

best management practices ("BMPs"), inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis. Moreover, if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL would become the final WQBELs for wet weather conditions, unless the RWQCB had adopted alternative final WQBELs. I am informed and believe that the RWQCB accepted the CBRP as the final dry weather WQBELs but no final wet weather WQBELs have yet been established;

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

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

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

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

The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $6,237.79 in FY 2009-10 and $5,812.30 in FY 2010-11.

d. [reserved.]

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Permit Sections VIII.A and B and MRP Section IV.B.3 required that permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions required permittees, including the City, to specify procedures to conduct field

investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; review aerial photograph to detect IC/IDs; inspect facilities, sites and MS4s; analyze monitoring data; conduct watershed education regarding illegal discharges; conduct pollution prevention for generating sites; and, conduct stream restoration efforts and opportunities and assess stream corridors to identify dry weather flows and illegal dumping. I am informed and believe and therefore state that the City incurred estimated direct costs of $747.00 in FY 2009-10 with respect to these requirements.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Permit Section IX.F required permittees, including the City, with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems were minimized pending adoption of state septic system regulations, and to update a database as septic systems are added or removed from their jurisdictions. I am informed and believe and therefore state that the City incurred estimated direct costs of $1,494.20 in FY 2011-12 with respect to these requirements.

g. **Permittee Inspection Requirements**: Permit Section X required permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of permittees, including the City, included documenting municipal inspection programs in an electronic database; during inspections or prior to permit issuance, verifying whether a site had required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the state

General Construction Permit, reviewing Erosion and Sediment Control Plans, making visual observations, checking compliance with ordinances, permits, WQMPs and assessing the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding Permit requirements and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and, evaluating the residential program in the annual report. Certain aspects of these requirements, including the development of an electronic database, were conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $2,917.20 in FY 2009-10 and $14,453.40 in FY 2010-11.

h. **New Development Requirements**: Permit Section XI, as well as MRP Sections IV.B.4, V.A.2.b and V.B.2, contained numerous new requirements relating to new development

and significant re-development projects. The permittees were charged with various requirements, including the following:

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

ii. Develop a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, to: identify program-specific objectives for the WAP; develop a structure for the WAP; identify linkages between the WAP and other plans; identify other relevant watershed efforts, ensure that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase was made available to watershed stakeholders and has incorporated specified information; develop a schedule and procedure for maintaining the Geodatabase; review the Geodatabase with RWQCB staff to verify attributes of the Geodatabase; identify potential causes of identified stream degradation; conduct a system-wide evaluation to identify opportunities to retrofit stormwater systems, parks and other recreational areas with water quality protections measures and develop recommendations for retrofit studies; conduct a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; invite participation and comments from stakeholders regarding the development and use of the Geodatabase; and submit the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, permittees, including the City, were required to: specify procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed

most susceptible to degradation; develop and implement a HMP prioritized on specified bases; conduct training workshops in the use of the Geodatabase; conduct Geodatabase demonstration workshops for senior permittee staff; develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implement applicable retrofit or regional treatment recommendations; and submit the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee was required to review watershed protection principles and policies in General Plan or related documents to determine consistent with the WAP and to include those findings in its annual report along with a schedule for necessary revisions;

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

iv. Develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and HCOC management and to collaborate to develop common principles and policies for water quality protection, including avoidance of disturbance, conserving natural areas, protecting slopes and channels, minimizing stormwater and urban runoff impacts on natural drainage systems and waterbodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project

site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

v. Incorporate into the permittees' LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green infrastructure/LID principles for public and private development projects and for hillside development projects and the consideration and facilitation of the application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

vi. For the Principal Permittee, submit a revised WQMP Guidance and Template to incorporate new elements required by the Permit;

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

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

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

ix. Develop technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs;

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

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

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

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

xiv. For the Principal Permittee, participate in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of certain of these requirements, including the WAP, criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of post-construction BMPs and a database for tracking those BMPs, was conducted by the District as Principal Permittee through funding provided by the permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $3,045.38 in FY 2009-10 and $12,279.78 in FY 2010-11.

i. **Public Education and Outreach**: Permit Section XII.A required permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting was conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. The implementation of changes identified through the assessment was implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. I am informed and believe and therefore state that

the City's calculated share of such costs was $1,386.53 in FY 2009-10 and $5,398.91 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs with respect to these requirements of $1,494.00 in FY 2009-10 and $1,494.00 in FY 2010-11.

j. **Permittee Facilities and Activities Requirements**: Permit Section XIII required permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to set forth the results of the evaluation in the annual report. I am informed and believe and therefore state that the City incurred estimated direct costs of $14,647.14 in FY 2009-10 and $15,731.01 in FY 2010-11 with respect to these requirements.

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

annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. Certain of these costs were paid by permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $165.75 in FY 2009-10 and $176.80 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional direct estimated costs with respect to these requirements of $3,337.00 in FY 2009-10 and $1,360.00 in FY 2010-11.

l. **Reporting of Non-Compliant Facilities**: Permit Section XVII.D required permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to a specified set of requirements. Permittees, including the City, were required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements required permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. I am informed and believe and therefore state that the City has not yet incurred costs with respect to these requirements.

m. **Program Management Assessment/MSWMP Review**: Permit Section XVIII.B.3 and MRP Section VII.E.4 required permittees, including the City, to assess program

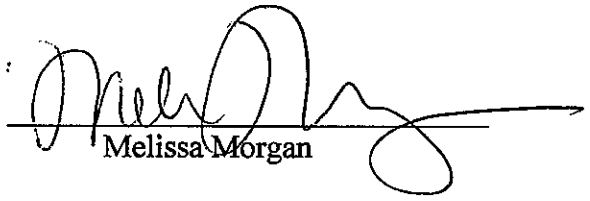
effectiveness on an area-wide and jurisdictional basis, targeting both water quality outcomes and the result of municipal enforcement activities. The results of the assessment were required to be incorporated into an amended MSWMP, pursuant to Permit Section XVIII.C. These provisions required permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. I am informed and believe and therefore state that the City has not yet incurred costs with respect to these requirements.

8. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. The City imposes a fee to cover the cost of inspections of industrial and commercial facilities. I am informed and believe that this fee does not cover the cost of residential programs or other programmatic requirements related to inspections under the Permit. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I am further informed and believe that the only other available source to pay for the new programs and activities set forth in this declaration is the City's general fund.

9. I am informed and believe that this Declaration is being offered in support of a Joint Test Claim filed with the Commission on State Mandates and further that the City is in

agreement with all items in the Joint Test Claim.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 21, 2017, at Highland, California.



Melissa Morgan

DECLARATION OF JOSEPH ROSALES

CITY OF MONTCLAIR

I, Joseph Rosales, hereby declare and state as follows:

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

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

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other Permittees under the Permit agreed to share certain costs of complying with the Permit.

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

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

6. I am informed and believe and therefore state that the City first began to accrue costs with respect to the items in the Permit set forth below on or about February 17, 2010, when City personnel attended a meeting at San Bernardino County Public Works to discuss Permit implementation requirements.

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

a. **Local Implementation Plan Requirement**: Permit Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, required permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which sets forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. These tasks required the creation of a model LIP and individual LIPs, with the identification of personnel, programs and other tasks and the review and periodic updating of those LIPs over the course of the Permit. Development of the model LIP was conducted by the San Bernardino County Flood Control District ("District") acting in its role as Principal Permittee under the Permit in part through funding provided by the permittees, including the City, pursuant to their obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees. I am informed and believe and therefore state that in Fiscal Year ("FY") 2009-10, the City's calculated share of such costs was $338.53. I am

further informed and believe and therefore state that during FY 2010-11, the City incurred additional estimated direct costs of $1,070.00 with respect to these requirements.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Were Significant Sources of Pollutants**: Permit Section V.A.16 required permittees, including the City, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into the permittees' MS4, including that of the City, to determine whether such discharges were a significant source of pollutants to the MS4. This task involved monitoring, analysis of samples, and other followup tasks to evaluate monitored waters as sources of pollutants, as well as potential followup investigation and reporting to the RWQCB Executive Officer. Certain activities to monitor and assess these discharges was being jointly undertaken by permittees, including the City, pursuant to the Implementation Agreement. Agreement. I am informed and believed that the calculated share of such costs to the City was $232.80 in FY 2010-11.

c. **Incorporation of TMDLs**: Permit Sections V.D.2-6, as well as MRP Sections I.F, V.A.2.a, and V.B.1.b, required various permittees to participate in activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also required the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL.

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

best management practices ("BMPs"), inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis. Moreover, if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL would become the final WQBELs for wet weather conditions, unless the RWQCB had adopted alternative final WQBELs. I am informed and believe that the RWQCB accepted the CBRP as the final dry weather WQBELs but no final wet weather WQBELs have yet been established;

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

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

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

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

The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $6,181.34 in FY 2009-10 and $5,759.70 in FY 2010-11.

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

informed and believe and therefore state that the City incurred estimated costs of $500.00 in FY 2010-11 with respect to these requirements.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Permit Sections VIII.A and B and MRP Section IV.B.3 required that permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions required permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; review aerial photograph to detect IC/IDs; inspect facilities, sites and MS4s; analyze monitoring data; conduct watershed education regarding illegal discharges; conduct pollution prevention for generating sites; and, conduct stream restoration efforts and opportunities and assess stream corridors to identify dry weather flows and illegal dumping. I am informed and believe and therefore state that the City incurred estimated costs of $4,110.00 in FY 2010-11 with respect to these requirements.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Permit Section IX.F required permittees, including the City, with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems were minimized pending adoption of state septic system regulations, and to update a database as septic systems are added or removed from their jurisdictions. I am informed and believe and therefore state that the City incurred estimated costs of $1,000.00 in FY 2010-11 with respect to these requirements.

g. **Permittee Inspection Requirements**: Permit Section X required permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of permittees, including the City, included documenting municipal inspection programs in an electronic database; during inspections or prior to permit issuance, verifying whether a site had required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the state General Construction Permit, reviewing Erosion and Sediment Control Plans, making visual observations, checking compliance with ordinances, permits, WQMPs and assessing the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding Permit requirements and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and, evaluating the residential program in the annual report. Certain aspects of these

requirements, including the development of an electronic database, were conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $2,890.80 in FY 2009-10 and $14,322.60 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with regard to these requirements of $35,734.00 in FY 2009-10 and $71,468.00 in FY 2010-11.

h. **New Development Requirements**: Permit Section XI, as well as MRP Sections IV.B.4, V.A.2.b and V.B.2, contained numerous new requirements relating to new development and significant re-development projects. The permittees were required to undertake various tasks, including the following:

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

ii. Develop a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, to: identify program-specific objectives for the WAP; develop a structure for the WAP; identify linkages between the WAP and other plans; identify other relevant watershed efforts, ensure that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase was made available to watershed stakeholders and has incorporated specified information; develop a schedule and procedure for maintaining the Geodatabase; review the Geodatabase with RWQCB staff to verify attributes of the Geodatabase; identify potential causes of identified stream degradation; conduct a system-wide evaluation to identify opportunities to retrofit stormwater

systems, parks and other recreational areas with water quality protections measures and develop recommendations for retrofit studies; conduct a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; invite participation and comments from stakeholders regarding the development and use of the Geodatabase; and submit the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, permittees, including the City, were required to: specify procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; develop and implement a HMP prioritized on specified bases; conduct training workshops in the use of the Geodatabase; conduct Geodatabase demonstration workshops for senior permittee staff; develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implement applicable retrofit or regional treatment recommendations; and submit the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee was required to review watershed protection principles and policies in General Plan or related documents to determine consistent with the WAP and to include those findings in its annual report along with a schedule for necessary revisions;

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

iv. Develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and

HCOC management and to collaborate to develop common principles and policies for water quality protection, including avoidance of disturbance, conserving natural areas, protecting slopes and channels, minimizing stormwater and urban runoff impacts on natural drainage systems and waterbodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

v. Incorporate into the permittees' LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green infrastructure/LID principles for public and private development projects and for hillside development projects and the consideration and facilitation of the application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

vi. For the Principal Permittee, submit a revised WQMP Guidance and Template to incorporate new elements required by the Permit;

vii. Evaluate potential barriers to implement LID principles and promote green infrastructure/LID BMP implementation and identify applicable LID principles from a list in the Permit for project specific WQMPs; update landscape ordinances consistent with the requirements of AB 1881; address hydromodification and managing stormwater as a resource through site design BMPs that incorporated LID techniques in a specified manner; require priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; review and update the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensure that the WQMP specified methods for determining time of concentration; conduct a feasibility analysis to determine the feasibility of implement LID; integrate the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submit the updated WQMP Guidance and Template to the RWQCB Executive Officer and implement the Guidance and Template after approval or, alternatively, require implementation of LID BMPs or determine the infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site conditions did not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, require implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis;

viii. Develop standard design and post-development BMPs guidance to incorporate into public streets, roads, highways and freeway improvement projects and submit the draft guidance to the RWQCB Executive Officer; ensure that the guidance followed certain principles contained

in U.S. EPA guidance; and implement the design and BMP guidance for all road projects, requiring both construction and ongoing maintenance for such BMPs;

ix. Develop technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs;

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

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

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

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

xiv. For the Principal Permittee, participate in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of certain of these requirements, including the WAP, criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of post-construction BMPs and a database for tracking those BMPs, was conducted by the District as Principal Permittee through funding provided by the permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's

calculated share of such costs was $3,017.82 in FY 2009-10 and $12,168.65 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs with respect to these requirements of $250.00 in FY 2009-10 and $5,452.60 in FY 2010-11.

i. **Public Education and Outreach**: Permit Section XII.A required permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting was conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. The implementation of changes identified through the assessment was implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. I am informed and believe and therefore state that the City's calculated share of shared costs was $1,373.98 in FY 2009-10 and $5,350.05 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs with respect to these requirements of $750.00 in FY 2009-10 and $1,500.00 in FY 2010-11.

j. **Permittee Facilities and Activities Requirements**: Permit Section XIII required permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct

public outreach efforts and determine the need for revision of existing procedures or schedules, and to set forth the results of the evaluation in the annual report. I am informed and believe and therefore state that the City incurred estimated costs with regard to these requirements of $2,865.00 in FY 2009-10 and $4,505.00 in FY 2010-11.

k. **Training Requirements**: Permit Section XVI required permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training, through funding contributed by all permittees, including the City. Permittees, including the City, were required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, to train staff involved with stormwater related projects and implementation of the Permit and to provide such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. Certain of these costs were paid by permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $164.25 in FY 2009-10 and $175.20 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with regard to these requirements of $615.00 in FY 2009-10 and $1,231.00 in FY 2010-11.

l. **Reporting of Non-Compliant Facilities**: Permit Section XVII.D required permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to a specified set of requirements.

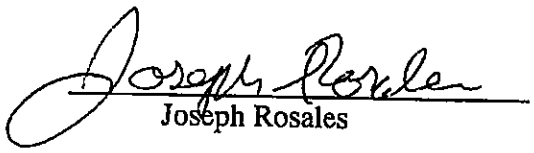
Permittees, including the City, were required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements required permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. I am informed and believe and therefore state that the City incurred estimated costs with respect to these requirements of $250.00 in FY 2009-10 and $500.00 in FY 2010-11.

m. **Program Management Assessment/MSWMP Review**: Permit Section XVIII.B.3 and MRP Section VII.E.4 required permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality outcomes and the result of municipal enforcement activities. The results of the assessment were required to be incorporated into an amended MSWMP, pursuant to Permit Section XVIII.C. These provisions required permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. I am informed and believe and therefore state that the City incurred estimated costs with respect to these requirements of $200.00 in FY 2009-10 and $250.00 in FY 2010-11.

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

9. I am informed and believe that this Declaration is being offered in support of a Joint Test Claim filed with the Commission on State Mandates and further that the City is in agreement with all items in the Joint Test Claim.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 20, 2017, at Montclair, California.



Joseph Rosales

DECLARATION OF STEPHEN WILSON

CITY OF ONTARIO

I, Stephen Wilson, hereby declare and state as follows:

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

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

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other Permittees under the Permit agreed to share certain costs of complying with the Permit.

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

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

6. I am informed and believe and therefore state that the City first began to accrue costs with respect to the items in the Permit set forth below on or about February 17, 2010, when City personnel attended a meeting at San Bernardino County Public Works to discuss Permit implementation requirements.

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

a. **Local Implementation Plan Requirement**: Permit Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, required permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which sets forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. These tasks required the creation of a model LIP and individual LIPs, with the identification of personnel, programs and other tasks and the review and periodic updating of those LIPs over the course of the Permit. Development of the model LIP was conducted by the San Bernardino County Flood Control District ("District") acting in its role as Principal Permittee under the Permit in part through funding provided by the permittees, including the City, pursuant to their obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees. I am informed and believe and therefore state that in Fiscal Year ("FY") 2009-10, the City's calculated share of such costs was $1,853.41. I

am further informed and believe and therefore state that during FY 2010-11, the City incurred additional estimated direct costs of $37,324.00 with respect to this requirement.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Were Significant Sources of Pollutants**: Permit Section V.A.16 required permittees, including the City, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into the permittees' MS4, including that of the City, to determine whether such discharges were a significant source of pollutants to the MS4. This task involved monitoring, analysis of samples, and other followup tasks to evaluate monitored waters as sources of pollutants, as well as potential followup investigation and reporting to the RWQCB Executive Officer. Certain activities to monitor and assess these discharges was being jointly undertaken by permittees, including the City, pursuant to the Implementation Agreement. Agreement. I am informed and believe and therefore state that the calculated share of such costs was $1,274.54 in FY 2010-11.

c. **Incorporation of TMDLs**: Permit Sections V.D.2-6, as well as MRP Sections I.F, V.A.2.a, and V.B.1.b, required various permittees to participate in activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also requires the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL.

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

best management practices ("BMPs"), inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis. Moreover, if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL would become the final WQBELs for wet weather conditions, unless the RWQCB had adopted alternative final WQBELs. I am informed and believe that the RWQCB accepted the CBRP as the final dry weather WQBELs but no final wet weather WQBELs have yet been established;

ii. With respect to the BBL TMDL, the Permit and MRP required the permittees named in the BBL TMDL to, among other items, implement BMPs to attain compliance with the TMDL, even though the permittees were in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan for in-lake sediment nutrient reduction; with respect to Lake Management Plan (as that term is defined in the Permit) documents, to meet various requirements, including those relating to lake capacity, biological resources, recreational opportunities, development of bio-criteria, identification of methodology for measuring changes in lake capacity, recommendations for short and long-term strategies to control and manage sediment and integration of a beneficial use map developed by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to revise the Municipal Storm Water Management Plan

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

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

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

The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $33,842.13 in FY 2009-10 and $31,533.70 in FY 2010-11.

d. [reserved.]

e. <u>Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program</u>: Permit Sections VIII.A and B and MRP Section IV.B.3 required that permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions required permittees, including the City, to specify procedures to conduct field

investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; review aerial photograph to detect IC/IDs; inspect facilities, sites and MS4s; analyze monitoring data; conduct watershed education regarding illegal discharges; conduct pollution prevention for generating sites; and, conduct stream restoration efforts and opportunities and assess stream corridors to identify dry weather flows and illegal dumping. I am informed and believe and therefore state that the City incurred estimated costs of $449.33 in FY 2011-12, in response to this requirement.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Permit Section IX.F required permittees, including the City, with septic systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems were minimized pending adoption of state septic system regulations, and to update a database as septic systems are added or removed from their jurisdictions. I am informed and believe and therefore state that the City incurred estimated costs of $500.00 in FY 2011-12 with respect to this requirement.

g. **Permittee Inspection Requirements**: Permit Section X required permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of permittees, including the City, included documenting municipal inspection programs in an electronic database; during inspections or prior to permit issuance, verifying whether a site had required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the state

General Construction Permit, reviewing Erosion and Sediment Control Plans, making visual observations, checking compliance with ordinances, permits, WQMPs and assessing the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding Permit requirements and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program, including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and, evaluating the residential program in the annual report. Certain aspects of these requirements, including the development of an electronic database, were conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $15,826.80 in FY 2009-10 and $78,414.60 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs of $48,515.90 in FY 2009-10 and $88,823.57 in FY 2010-11 with respect to these requirements, net of fee revenue.

h. **New Development Requirements**: Permit Section XI, as well as MRP Sections IV.B.4, V.A.2.b and V.B.2, contained numerous new requirements relating to new development and significant re-development projects. The permittees were required to undertake various tasks, including the following:

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

ii. Develop a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, to: identify program-specific objectives for the WAP; develop a structure for the WAP; identify linkages between the WAP and other plans; identify other relevant watershed efforts, ensure that the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase was made available to watershed stakeholders and has incorporated specified information; develop a schedule and procedure for maintaining the Geodatabase; review the Geodatabase with RWQCB staff to verify attributes of the Geodatabase; identify potential causes of identified stream degradation; conduct a system-wide evaluation to identify opportunities to retrofit stormwater systems, parks and other recreational areas with water quality protections measures and develop recommendations for retrofit studies; conduct a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; invite participation and comments from stakeholders regarding the development and use of the Geodatabase; and submit the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, permittees, including the City, were required to: specify procedures and a schedule to integrate the Geodatabase into implementation

of the MSWMP, the WQMP and TMDLs; develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; develop and implement a HMP prioritized on specified bases; conduct training workshops in the use of the Geodatabase; conduct Geodatabase demonstration workshops for senior permittee staff; develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implement applicable retrofit or regional treatment recommendations; and submit the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee was required to review watershed protection principles and policies in General Plan or related documents to determine consistent with the WAP and to include those findings in its annual report along with a schedule for necessary revisions;

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

iv. Develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and HCOC management and to collaborate to develop common principles and policies for water quality protection, including avoidance of disturbance, conserving natural areas, protecting slopes and channels, minimizing stormwater and urban runoff impacts on natural drainage systems and waterbodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of

permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

v. Incorporate into the permittees' LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green infrastructure/LID principles for public and private development projects and for hillside development projects and the consideration and facilitation of the application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

vi. For the Principal Permittee, submit a revised WQMP Guidance and Template to incorporate new elements required by the Permit;

vii. Evaluate potential barriers to implement LID principles and promote green infrastructure/LID BMP implementation and identify applicable LID principles from a list in the Permit for project specific WQMPs; update landscape ordinances consistent with the requirements of AB 1881; address hydromodification and managing stormwater as a resource through site design BMPs that incorporated LID techniques in a specified manner; require priority development projects, including permittee development projects, to infiltrate, harvest

and use, evapotranspire and/or bio-treat the 85th percentile storm event; review and update the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensure that the WQMP specified methods for determining time of concentration; conduct a feasibility analysis to determine the feasibility of implement LID; integrate the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submit the updated WQMP Guidance and Template to the RWQCB Executive Officer and implement the Guidance and Template after approval or, alternatively, require implementation of LID BMPs or determine the infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site conditions did not permit infiltration, harvesting and use, and/or evapotranspiration and/or bio-treatment of the design capture volume, require implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis;

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

ix. Develop technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs;

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

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

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

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

xiv. For the Principal Permittee, participate in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of certain of these requirements, including the WAP, criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of post-construction BMPs and a database for tracking those BMPs, was conducted by the District as Principal Permittee through funding provided by the permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such funding was $16,522.22 in FY 2010-11 and $66,621.96 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs of $5,905.00 in FY 2009-10 and $3,748.15 in FY 2010-11, in both cases net of fee revenue, with respect to these requirements.

i. **Public Education and Outreach**: Permit Section XII.A required permittees, including the City, to annually review their public education and outreach efforts and to revise

those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting was conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. The implementation of changes identified through the assessment was implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. I am informed and believe and therefore state that the City's calculated share of such costs was $7,522.37 in FY 2009-10 and $29,290.90 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs of $698.18 in FY 2009-10 and an estimated $500.00 in FY 2010-11 with respect to these requirements.

j. **Permittee Facilities and Activities Requirements**: Permit Section XIII required permittees, including the City, to inventory their fixed facilities, field operation and drainage facilities, and to annually inspect those facilities, with the records of the facilities and inspections maintained in a database; to annually evaluate the inspect and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to set forth the results of the evaluation in the annual report. I am informed and believe and therefore state that the City incurred estimated costs of $103,176.45 in FY 2009-10 and $108,903.55 in FY 2010-11, in both cases net of fee revenue, with respect to these requirements.

k. **Training Requirements**: Permit Section XVI required permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and

also for the District, as Principal Permittee, to conduct additional training, through funding contributed by all permittees, including the City. Permittees, including the City, were required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, to train staff involved with stormwater related projects and implementation of the Permit and to provide such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. Certain of these costs were paid by permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $899.25 in FY 2009-10 and $959.20 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs of $5,584.00 in FY 2009-10 and $2,111.75 in FY 2010-11, with respect to such requirements.

l. **Reporting of Non-Compliant Facilities**: Permit Section XVII.D required permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to a specified set of requirements. Permittees, including the City, were required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements required permittees, including the City, to spend staff time to develop

information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. I am informed and believe and therefore state that the City incurred estimated direct costs of as-yet undetermined portions of $48,515.90 in FY 2009-10 and $88,823.57 in FY 2010-11 with respect to these requirements.

m. **Program Management Assessment/MSWMP Review**: Permit Section XVIII.B.3 and MRP Section VII.E.4 required permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality outcomes and the result of municipal enforcement activities. The results of the assessment were required to be incorporated into an amended MSWMP, pursuant to Permit Section XVIII.C. These provisions required permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. I am informed and believe and therefore state that the City has not yet incurred costs with respect to these requirements.

8. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. The City collects a stormwater abatement program fee that covers Permit compliance activities, including staff time. It is my information and belief that this fee cannot be raised due to the provisions of Proposition 218. The City also collects a user fee as a function of business license renewal activities. To my information and belief, these fees cover some costs of inspections of commercial and industrial facilities, but not residential areas, or other inspection-related costs imposed by the Permit. The City also collects fees

connected with property development, a portion of which are used for inspecting construction sites. I am informed and believe that such fees do not cover all increased costs set forth in this Declaration. I further am informed and believe that the only other available source to pay for the new programs and activities set forth in this Declaration is the City's general fund.

9. I am informed and believe that this Declaration is being offered in support of a Joint Test Claim filed with the Commission on State Mandates and further that the City is in agreement with all items in the Joint Test Claim.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 19, 2017, at Ontario, California.

Stephen Wilson

Stephen Wilson

DECLARATION OF LINDA CEBALLOS

CITY OF RANCHO CUCAMONGA

I, Linda Ceballos, hereby declare and state as follows:

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

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

3. I have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other Permittees under the Permit agreed to share certain costs of complying with the Permit.

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

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

6. I am informed and believe and therefore state that the City first began to accrue costs with respect to the items in the Permit set forth below on or about February 17, 2010, when City personnel attended a meeting at San Bernardino County Public Works to discuss Permit implementation requirements.

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

a. **Local Implementation Plan Requirement**: Permit Sections III.A.1.o, A.2.a, A.2.h, A.2.i, B.1, B.3.g, VII.F and H, VIII.C, IX.D, X.A.8, E.3, XI.H, XIII.F, J, XIV and XVI.I, among other sections, required permittees, including the City, to create a model Local Implementation Plan ("LIP") for submission to the RWQCB's Executive Officer and, after approval of that template, to develop a City-specific LIP which sets forth in detail the specific programs, policies and procedures that will be implemented by the City for compliance with the Permit. These tasks required the creation of a model LIP and individual LIPs, with the identification of personnel, programs and other tasks and the review and periodic updating of those LIPs over the course of the Permit. Development of the model LIP was conducted by the San Bernardino County Flood Control District ("District") acting in its role as Principal Permittee under the Permit in part through funding provided by the permittees, including the City, pursuant to their obligations under the Implementation Agreement (included in Section 7 of the Test Claim) entered into by the permittees. I am informed and believe and therefore state that in Fiscal Year ("FY") 2009-10, the City's calculated share of such costs was $1,516.43. 1

am further informed and believe and therefore state that during FY 2009-10, the City incurred additional estimated direct costs of $242.50 and in FY 2010-11 of $8,896.40 with respect to these requirements.

b. **Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Were Significant Sources of Pollutants**: Permit Section V.A.16 required permittees, including the City, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into the permittees' MS4, including that of the City, to determine whether such discharges were a significant source of pollutants to the MS4. This task involved monitoring, analysis of samples, and other followup tasks to evaluate monitored waters as sources of pollutants, as well as potential followup investigation and reporting to the RWQCB Executive Officer. Certain activities to monitor and assess these discharges was being jointly undertaken by permittees, including the City, pursuant to the Implementation Agreement. Agreement. I am informed and believe that the calculated share of such costs to the City was $1,042.80 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs of $242.50 in FY 2010-11 with respect to these requirements.

c. **Incorporation of TMDLs**: Permit Sections V.D.2-6, as well as MRP Sections I.F, V.A.2.a, and V.B.1.b, required various permittees to participate in activities to incorporate and implement Total Maximum Daily Loads ("TMDLs") for bacterial indicators in the Middle Santa Ana River ("MSAR") and for phosphorus in Big Bear Lake ("BBL"). The Permit also required the City of Big Bear Lake to participate in activities relating to a study of pathogens in Knickerbocker Creek and regarding a potential mercury TMDL for BBL.

i. With respect to the MSAR TMDL, the Permit required that the permittees named in the MSAR TMDL achieve final dry weather Water Quality Based Effluent Limitations ("WQBELs") for bacterial indicators by December 31, 2015 or to develop such final WQBELs through a Comprehensive Bacteria Reduction Plan ("CBRP"), which must include ordinances, best management practices ("BMPs"), inspection criteria, treatment facilities, documentation, schedules, metrics and other requirements, and to submit that CBRP to the RWQCB Executive Officer and incorporate the CBRP into the 2010 Permit as the final WQBELs for dry weather bacterial indicators, with updating required, if necessary, based on BMP effectiveness analysis. Moreover, if the Permit still is in effect on December 31, 2025, the wasteload allocations ("WLAs") for bacterial indicators in wet weather contained in the MSAR TMDL would become the final WQBELs for wet weather conditions, unless the RWQCB had adopted alternative final WQBELs. I am informed and believe that the RWQCB accepted the CBRP as the final dry weather WQBELs but no final wet weather WQBELs have yet been established;

ii. With respect to the BBL TMDL, the Permit and MRP required the permittees named in the BBL TMDL to, among other items, implement BMPs to attain compliance with the TMDL, even though the permittees were in compliance with the WLAs applicable to them; to implement an in-lake nutrient monitoring plan and watershed-wide nutrient monitoring plan; to submit a plan to evaluate the applicability and feasibility of in-lake treatment technologies to control noxious and nuisance aquatic plants; to submit a plan for in-lake sediment nutrient reduction; with respect to Lake Management Plan (as that term is defined in the Permit) documents, to meet various requirements, including those relating to lake capacity, biological resources, recreational opportunities, development of biocriteria, identification of methodology for measuring changes in lake capacity, recommendations for short and long-term strategies to

control and manage sediment and integration of a beneficial use map developed by the RWQCB; to require implementation of the Lake Management Plan and to submit annual reports regarding monitoring programs and the Lake Management Plan, and evaluation of compliance with the WLA using new modeling; to revise the Municipal Storm Water Management Plan ("MSWMP"), the Water Quality Management Plan ("WQMP") and the LIP to implement various plans related to BBL TMDL compliance; to evaluate and propose the need for additional BMPs if monitoring data and modeling indicated that the WLA was being exceeded; and, for permittees that discharge into BBL, to revise their LIPs to incorporate results of monitoring, evaluation of control measure effectiveness, any additional control measures and a progress report evaluating progress toward meeting the WLA;

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

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

The cost of the provisions set forth above are being shared by all permittees under the Permit, including the City, pursuant to the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $27,689.02 in FY 2009-10 and $25,800.30 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with regard to these requirements of $485.00 in FY 2009-10 and $1,160.40 in FY 2010-11.

d. **Promulgation and Implementation of Ordinance to Address Bacteria Sources**: Permit Section VII.D requires the permittees, including the City, to promulgate and implement ordinances that would control known pathogen or bacterial indicator sources such as animal wastes, if such sources are present within their jurisdictions. This requirement involves the development, drafting and necessary passage of City ordinances to address such wastes, as well the development of an enforcement strategy and the enforcement of the ordinances. I am informed and believe and therefore state that the City incurred estimated direct costs of $96.70 in FY 2010-11 with respect to these requirements.

e. **Enhancement of Illicit Connections/Illegal Discharges Requirements With IDDE Program**: Permit Sections VIII.A and B and MRP Section IV.B.3 required that permittees, including the City, develop and include a "pro-active" Illicit Discharge Detection and Elimination ("IDDE") program as part of their illicit connections/illegal discharges program. These provisions required permittees, including the City, to specify procedures to conduct field investigations, outfall surveys, indicator monitoring and tracking of discharges and to link the IDDE program to urban watershed protection efforts, including through the use of GIS maps of the MS4 to track sources; review aerial photograph to detect IC/IDs; inspect facilities, sites and MS4s; analyze monitoring data; conduct watershed education regarding illegal discharges; conduct pollution prevention for generating sites; and, conduct stream restoration efforts and opportunities and assess stream corridors to identify dry weather flows and illegal dumping. I am informed and believe and therefore state that the City incurred estimated direct costs of $8,941.28 in FY 2012-13 with respect to these requirements.

f. **Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program**: Permit Section IX.F required permittees, including the City, with septic

systems in their jurisdictions to inventory such systems and to establish a program to ensure that failure rates from such systems were minimized pending adoption of state septic system regulations, and to update a database as septic systems are added or removed from their jurisdictions. I am informed and believe and therefore state that the City incurred estimated direct costs of $1,934.00 in FY 2010-11 with respect to these requirements.

g. **Permittee Inspection Requirements**: Permit Section X required permittees, including the City, to undertake numerous activities relating to the inspections of facilities and areas, including residential areas. The activities required of permittees, including the City, included documenting municipal inspection programs in an electronic database; during inspections or prior to permit issuance, verifying whether a site had required permits; implementing enforcement proceedings against facilities operating without a proper permit; maintaining copies of records related to inspections, including inspection reports and enforcement actions; during construction site inspections, verifying coverage under the state General Construction Permit, reviewing Erosion and Sediment Control Plans, making visual observations, checking compliance with ordinances, permits, WQMPs and assessing the effectiveness of BMPs or need for additional BMPs; requiring industrial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; developing BMPs for each of several categories of commercial facilities and including facilities in an inspection database; requiring commercial facilities to implement source control and pollution prevention measures consistent with BMP fact sheets; identifying and notifying all mobile businesses regarding Permit requirements and source control and pollution prevention measures they must adopt, and to develop an enforcement strategy and fact sheets and a training program to address such businesses and wastes generated therefrom; developing a residential program,

including identification of residential areas and activities that are potential sources of pollutants and developing fact sheets/BMPs, developing and implementing control measures for common interest areas and areas managed by homeowner associations or management companies, and evaluating the applicability of programs to encourage efficient water use and minimize runoff; and, evaluating the residential program in the annual report. Certain aspects of these requirements, including the development of an electronic database, were conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $12,949.20 in FY 2009-10 and $64,157.40 in FY 2010-11. In addition, I am informed and believe and therefore state that the City incurred additional estimated direct costs with regard to these requirements of $24,785.75 in FY 2009-10 and $30,151.33 in FY 2010-11.

h. **New Development Requirements**: Permit Section XI, as well as MRP Sections IV.B.4, V.A.2.b and V.B.2, contained numerous new requirements relating to new development and significant re-development projects. The permittees were charged with various requirements, including the following:

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

ii. Develop a Watershed Action Plan ("WAP"), requiring review of watershed protection principles and policies in planning procedures; developing the WAP to describe and implement the permittees' approach to coordinated watershed management; including, in Phase 1, to: identify program-specific objectives for the WAP; develop a structure for the WAP; identify linkages between the WAP and other plans; identify other relevant watershed efforts, ensure that

the Hydrologic Conditions of Concern ("HCOC") Map/Watershed Geodatabase was made available to watershed stakeholders and has incorporated specified information; develop a schedule and procedure for maintaining the Geodatabase; review the Geodatabase with RWQCB staff to verify attributes of the Geodatabase; identify potential causes of identified stream degradation; conduct a system-wide evaluation to identify opportunities to retrofit stormwater systems, parks and other recreational areas with water quality protections measures and develop recommendations for retrofit studies; conduct a system-wide evaluation to identify opportunities for joint or coordinated development to address stream segments vulnerable to hydromodification; invite participation and comments from stakeholders regarding the development and use of the Geodatabase; and submit the Phase 1 elements to the RWQCB Executive Officer for approval. Further, in Phase 2, permittees, including the City, were required to: specify procedures and a schedule to integrate the Geodatabase into implementation of the MSWMP, the WQMP and TMDLs; develop and implement a Hydromodification Monitoring Plan ("HMP") to evaluate hydromodification impacts for drainage channels deemed most susceptible to degradation; develop and implement a HMP prioritized on specified bases; conduct training workshops in the use of the Geodatabase; conduct Geodatabase demonstration workshops for senior permittee staff; develop recommendations for streamlining regulatory agency approval of regional treatment control BMPs; implement applicable retrofit or regional treatment recommendations; and submit the Phase 2 components in a report to the RWQCB Executive Officer. Further, each permittee was required to review watershed protection principles and policies in General Plan or related documents to determine consistency with the WAP and to include those findings in its annual report along with a schedule for necessary revisions;

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

iv. Develop recommendations to resolve impediments to implementing watershed protection principles during the planning and development process, including LID principles and HCOC management and to collaborate to develop common principles and policies for water quality protection, including avoidance of disturbance, conserving natural areas, protecting slopes and channels, minimizing stormwater and urban runoff impacts on natural drainage systems and waterbodies, minimizing changes in hydrology and pollutant loading, mitigation of projected increases in pollutant loads and flows, ensuring that post-development runoff rates and velocities do not adversely impact downstream erosion or stream habitat, minimizing the quantity of stormwater directed to impermeable surfaces and the MS4s, maximizing the percentage of permeable surfaces to allow more percolation of stormwater, preserving wetlands, riparian corridors and buffer zones and establishing limits on the clearing of vegetation from a project site, using properly designed and maintained wetlands, biofiltration swales and other measures where likely to be effective and technically and economically feasible, providing for permanent measures to reduce pollutant loads in stormwater from the development site, establishing development guidelines for areas particularly susceptible to erosion and sediment loss and considering pollutants of concern and proposing appropriate control measures;

v. Incorporate into the permittees' LIP the identification and incorporation into GIS format of natural channels, wetlands, riparian corridors and buffer zones, as well as conservation and maintenance measures for these features, with information in the WAP, as well as inclusion in the LIP of tools such as ordinances, design standards and procedures used to implement green

infrastructure/LID principles for public and private development projects and for hillside development projects and the consideration and facilitation of the application of landform grading techniques and revegetation as an alternative to traditional approaches, particularly in areas susceptible to erosion and sediment loss;

vi. For the Principal Permittee, submit a revised WQMP Guidance and Template to incorporate new elements required by the Permit;

vii. Evaluate potential barriers to implement LID principles and promote green infrastructure/LID BMP implementation and identify applicable LID principles from a list in the Permit for project specific WQMPs; update landscape ordinances consistent with the requirements of AB 1881; address hydromodification and managing stormwater as a resource through site design BMPs that incorporated LID techniques in a specified manner; require priority development projects, including permittee development projects, to infiltrate, harvest and use, evapotranspire and/or bio-treat the 85th percentile storm event; review and update the WQMP Guidance and Template to incorporate LID principles, with specified elements including Site Design BMPs, Source Control BMPs, Treatment Control BMPs and HCOC elements; ensure that the WQMP specified methods for determining time of concentration; conduct a feasibility analysis to determine the feasibility of implement LID; integrate the WAP and TMDL implementation plans into project-specific WQMPs in affected watersheds; submit the updated WQMP Guidance and Template to the RWQCB Executive Officer and implement the Guidance and Template after approval or, alternatively, require implementation of LID BMPs or determine the infeasibility for LID BMPs for each project through a project-specific analysis, certified by a Professional Civil Engineer; and, if site conditions did not permit infiltration, harvesting and

use, and/or evapotranspiration and/or bio-treatment of the design capture volume, require implementation of LID at a nearby project site, on a sub-regional basis or on a regional basis;

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

ix. Develop technically based feasibility criteria for project evaluation to determine the feasibility of implementing LID BMPs;

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

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

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

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

xiv. For the Principal Permittee, to participate in a regional monitoring project entitled, "Quantifying the Effectiveness of Site Design/Low Impact Development Best Management Practices in Southern California."

The development of certain of these requirements, including the WAP, criteria for HCOC, development of a geodatabase, development of a GIS reference library, development of post-construction BMPs and a database for tracking those BMPs, was conducted by the District as Principal Permittee through funding provided by the permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $13,518.18 in FY 2009-10 and $54,508.87 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs with respect to these requirements of $1,116.00 in FY 2010-11.

i. **Public Education and Outreach**: Permit Section XII.A required permittees, including the City, to annually review their public education and outreach efforts and to revise those efforts to adapt to needs identified in the annual reassessment. The work of reviewing public education and outreach efforts and reporting was conducted by the District as Principal Permittee through funding contributed by permittees, including the City, under the Implementation Agreement. The implementation of changes identified through the assessment was implemented both through a joint effort funded through the Implementation Agreement and by individual permittees, including the City. I am informed and believe and therefore state that the City's calculated share of such costs was $6,154.67 in FY 2009-10 and $23,965.28 in FY 2010-11. I am further informed and believe and therefore state that the City incurred additional estimated direct costs with respect to these requirements of $241.92 in FY 2009-10 and $1,209.60 in FY 2010-11.

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

maintained in a database; to annually evaluate the inspection and cleanout frequency of drainage facilities, including catch basins, using various specified factors, and revise inspection and cleanout schedules and frequency, and include this information in their annual reports; and, to annually evaluate information provided to field staff during maintenance activities to direct public outreach efforts and determine the need for revision of existing procedures or schedules, and to set forth the results of the evaluation in the annual report. I am informed and believe and therefore state that the City incurred estimated direct costs with regard to these requirements of $6,717.54 in FY 2009-10 and $47,706.83 in FY 2010-11.

k. **Training Requirements**: Permit Section XVI required permittees, including the City, to conduct formal training of their employees responsible for implementing the Permit, and also for the District, as Principal Permittee, to conduct additional training, through funding contributed by all permittees, including the City. Permittees, including the City, were required to update their training programs to meet the requirements of the Permit, to provide and document training to public agency staff on guidance and procedures to address permittee facilities and field operations, including with respect to pest management, to train staff involved with stormwater related projects and implementation of the Permit and to provide such training annually prior to the rainy season, and for the District to provide and document training for public employees and interested consultants regarding the Permit and training municipal contractors to assist in their training of contractor staff. Certain of these costs were paid by permittees, including the City, through the Implementation Agreement. I am informed and believe and therefore state that the City's calculated share of such costs was $735.75 in FY 2009-10 and $784.80 in FY 2010-11. In addition, I am informed and believe and therefore state that

the City incurred additional estimated direct costs with regard to these requirements of $1,134.35 in FY 2009-10 and $1,987.06 in FY 2010-11.

l. **Reporting of Non-Compliant Facilities**: Permit Section XVII.D required permittees, including the City, to deem facilities operating without a permit to be in significant non-compliance and be reported to the RWQCB pursuant to a specified set of requirements. Permittees, including the City, were required to report to the RWQCB within 14 calendar days detailed information concerning facilities operating without a proper permit, including the facility's name, its operator and owner, the activity being conducted at the facility subject to either a general permit or a Clean Water Act Section 401 certification, and any records of communication with the facility operator regarding the violation, including an inspection report. These requirements required permittees, including the City, to spend staff time to develop information regarding a non-compliant facility, including information regarding any inspections of the facility, to organize that information into a report, and to report the information within a specified time frame. I am informed and believe and therefore state that the City incurred estimated direct costs of $145.05 in FY 2009-10 and $483.50 in FY 2010-11 with respect to these requirements.

m. **Program Management Assessment/MSWMP Review**: Permit Section XVIII.B.3 and MRP Section VII.E.4 required permittees, including the City, to assess program effectiveness on an area-wide and jurisdictional basis, targeting both water quality outcomes and the result of municipal enforcement activities. The results of the assessment were required to be incorporated into an amended MSWMP, pursuant to Permit Section XVIII.C. These provisions required permittees, including the City, to determine, to the extent practicable, water quality improvements and pollutant load reductions resulting from implementation of various program

elements, including each program element required under the Permit, the expected outcome, and the measures used to assess the outcome. I am informed and believe and therefore state that the City incurred estimated direct costs of $483.67 in FY 2009-10 and $435.32 in FY 2010-11 with respect to these requirements.

8. I am informed and believe that there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities, with the exception of an integrated waste fund, which funds staff expenses but not the programs and activities under the Permit set forth in this Declaration. On information and belief, the only source of funding for such programs and activities is the City's general fund.

9. I am informed and believe that this Declaration is being offered in support of a Joint Test Claim filed with the Commission on State Mandates and further that the City is in agreement with all items in the Joint Test Claim.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 25, 2017, at Rancho Cucamonga, California.

Linda Ceballos

Linda Ceballos

SECTION 7 DOCUMENTATION

In Support of Joint Test Claim –

Santa Ana Region Water Permit – County of San Bernardino, 10-TC-10

Supplemental Authorities

Exhibit Number	Document Title
SA-1	Excerpts of Water Code App. § 43
SA-2	Resolutions of San Bernardino County Board of Supervisors, acting as Board of Directors, San Bernardino County Flood Control District
SA-3	Commission on State Mandates, Statement of Decision, *In Re Test Claim on Los Angeles Regional Water Quality Control Board Order No. 01-182,* Case Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21
SA-4	Commission on State Mandates, Statement of Decision, *In Re Test Claim on San Diego Regional Water Quality Control Board Order No. R9-2007-0001,* Case No. 07-TC-09
SA-5	State Water Resources Control Board, Order No. 2014-0057-DWQ (2014 General Industrial Stormwater Permit)
SA-6	40 Code of Federal Regulations § 124.8
SA-7	State Water Resources Control Board, Order WQ 2015-0075

SA-1

of general circulation within the zone. If there is no newspaper of general circulation within the zone, notice of the hearing shall be posted in at least seven places within the zone. The notice shall describe the proposed changes to the boundaries of the zone and contain a general statement of the reasons for the proposed change. At the hearing, any interested person may appear and protest the proposed boundary change.

(Added by Stats.1994, c. 1166 (A.B.786), § 10, eff. Sept. 29, 1994.)

§ 43–2. Objects and purposes; nature of district; powers

Sec. 2. **Objects and purposes.** The objects and purposes of this act are to provide for the control of the flood and storm waters of the district and the flood and storm waters of streams that have their source outside of the district, but which streams and the flood waters thereof flow into the district, and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining, and causing to percolate into the soil within the district, or without the district, the waters, or to save or conserve in any manner all or any of the waters and protect from flood or storm waters, the watercourses, watersheds, public highways, life, and property in the district, and to prevent waste of water or diminution of the water supply in, or exportation of water from the district, and to obtain, retain, and reclaim drainage, storm, flood, and other waters for beneficial use in the district.

Nature of district; powers. San Bernardino County Flood Control District is hereby declared to be a body corporate and politic and has all of the following powers:

1. **Succession.** To have perpetual succession.

2. **Actions.** To sue and be sued in the name of the district in all actions and proceedings in all courts and tribunals of competent jurisdiction.

3. **Seal.** To adopt a seal and alter it at pleasure.

4. **Necessary or convenient property.** To take by grant, purchase, gift, devise, or lease, or otherwise, and to hold, use, enjoy, and to lease or dispose of real or personal property of every kind within or without the district necessary or convenient to the full exercise of its powers.

5. **Works and improvements.** To acquire, by purchase, lease, construction, or otherwise, or contract to acquire, lands, rights-of-way, easements, privileges, and property of every kind, whether real or personal, and to construct, maintain, and operate any and all works or improvements within or without the district necessary or proper to carry out any of the objects or purposes of this act, and to complete, extend, add to, repair, or otherwise improve any works or improvements or property acquired by it as authorized by this act.

6. **Water conservation; water rights; litigation.** To store water in surface or underground reservoirs within or outside of the district for the common benefit of the district; to conserve and reclaim water for present and future use within the district; to appropriate and acquire water and water rights, and import water into the district and to conserve within or outside of the district, water and water rights for any useful purpose to the district; to commence,

maintain, intervene in, and compromise, in the name of the district, or otherwise, and to assume the costs and expenses of any action or proceeding involving or affecting the ownership or use of waters or water rights within the district used or useful for any purpose of the district or of common benefit to any land situated therein, or involving the wasteful use of water therein; to commence, maintain, intervene in, defend, and compromise and to assume the cost and expenses of any and all actions and proceedings now or hereafter begun; to prevent interference with or diminution of, or to declare rights in, the natural flow of any stream or surface or subterranean supply of waters used or useful for any purpose of the district or of common benefit to the lands within the district or to its inhabitants; to prevent unlawful exportation of water from the district; to prevent contamination, pollution, or otherwise rendering unfit for beneficial use the surface or subsurface water used in the district, and to commence, maintain, and defend actions and proceedings to prevent any interference with the waters as may endanger or damage the inhabitants, lands, or use of water in the district; provided, however, that the district may not intervene or take part in, or pay the costs or expenses of, actions or controversies between the owner of lands or water rights within the boundaries of the district and which do not involve taking water outside of or away from the district; and provided further, that the district may not transport the waters of the Mojave River to any other zone of said district.

7. Flood control. To control the flood and storm waters of the district and the flood and storm waters of streams that have their source outside of the district, but which streams and the flood waters thereof, flow into the district, and to conserve those waters for beneficial and useful purposes within the district by spreading, storing, retaining, and causing to percolate into the soil within or without the district, or to save or conserve in any manner all or any of those waters and protect from damage from those flood or storm waters the watercourses, watersheds, public highways, life, and property in the district.

8. Eminent domain. To exercise the right of eminent domain, either within or without the district, to take any property necessary to carry out any of the objects or purposes of this act. Nothing in this act authorizes the district or any person or persons to divert the waters of any river, creek, stream, irrigation system, canal, or ditch from its channel to the detriment of any person or persons having any interest in the river, creek, stream, irrigation system, canal, or ditch, or the waters thereof or therein, unless previous compensation is first ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public uses.

9. Surveys; stock of water companies; cooperation with state or federal agencies. To enter upon any land, to make surveys, and locate the necessary works of improvement and the lines for channels, conduits, canals, pipelines, roadways, and other rights-of-way; to acquire by purchase, lease, contract, or other legal means all lands and water and water rights and other property necessary or convenient for the construction, use, supply, maintenance, repair, and improvement of those works, whether in this or in other states, including works constructed and being constructed by private owners, lands for reservoirs for storage of necessary water, and all necessary appurtenances, and also

where necessary or convenient to this end, and for those purposes and uses, to acquire and hold the stock of corporations, domestic or foreign, owning water or water rights, canals, waterworks, powerplants, franchises, concessions, or rights; to enter into and do any acts necessary or proper for the performance of any agreement with the United States, or any state, county, district of any kind, public or private corporation, association, firm, or individual, or any number of them, for the joint acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair, or operation of any rights, works, or other property of a kind which might be lawfully acquired or owned by the San Bernardino County Flood Control District; to acquire the right to store water in any reservoirs, or to carry water through any canal, ditch, or conduit not owned or controlled by the district; to grant to any owner or lessee the right to the use of any water or the right to store water in any reservoir of the district, or to carry the water through any tunnels, canal, ditch, or conduit of the district; to enter into and do any acts necessary or proper for the performance of any agreement with any district, public or private corporation, association, firm, or individual, or any number of them for the transfer or delivery to any district, corporation, association, firm, or individual of any water right or water pumped, stored, appropriated, or otherwise acquired or secured for the use of the San Bernardino County Flood Control District, or for the purpose of exchanging the water or water right for other water, water right, or water supply to be delivered to the district by the other party to the agreement; to cooperate with and to act in conjunction with the State of California, or any of its engineers, officers, boards, commissions, departments, or agencies, or with the government of the United States, or any of its engineers, officers, boards, commissions, departments, or agencies, or with any public or private corporation, in the construction of any work for the controlling of flood or storm waters of the district, or for the protection of life or property therein, or for the purpose of conserving those waters for beneficial use within the district, or in any other works, acts, or purposes provided for herein, and to adopt and carry out any definite plan or system of work for any such purpose.

10. Technical investigations. To carry on technical and other investigations of all kinds, make measurements, collect data, and make analyses, studies, and inspections pertaining to water supply, water rights, control of floods, and use of water, both within and without the district, and for this purpose the district has the right of access through its authorized representative to all properties within the district.

11. Indebtedness. To incur indebtedness, and to issue bonds in the manner provided in this act.

12. Taxation. To cause taxes and assessments to be levied and collected for the purpose of paying any obligation of the district, and to carry out any of the purposes of this act, in the manner provided in this act.

13. Contracts; employment. To make contracts, and to employ labor, and to do all acts necessary for the full exercise of all powers vested in the district, or any of the officers thereof, by this act.

(Stats.1939, c. 73, p. 1025, § 2. Amended by Stats.1975, c. 1276, p. 3494, § 19; Stats.1987, c. 1055, § 3.)

(B) The city or county zoning ordinances, regulations, and policies adopted for the area within which the property is located.

(C) The city or county building regulations and policies adopted for the area within which the property is located.

(c) Notwithstanding subdivisions (a) and (b), no property shall be acquired by the district for purposes of development or management pursuant to Article 7.5 (commencing with Section 25515) of Chapter 5 of Part 2 of Division 2 of Title 3 of the Government Code.

(Stats.1939, c. 73, p. 1030, § 6. Amended by Stats.1991, c. 834 (A.B.865), § 1.)

Library References

Water Law ⇐2871.
Westlaw Topic No. 405.

§ 43–7. Tax levies

Sec. 7. The board of supervisors of the district shall have power, in any year:

1. To levy and collect a tax or assessment upon all taxable property in the district to pay the costs and expenses of the San Bernardino County Flood Control District and to carry out any of the objects or purposes of this act of common benefit to the district as a whole, and

2. To levy and collect a tax or assessment upon all taxable property in each or any of the zones, according to the benefits derived or to be derived by the respective zones, to pay the costs and expenses of carrying out any of the objects or purposes of this act of special benefit to the respective zones, including the constructing, maintaining, operating, extending, repairing, or otherwise improving any or all works or improvements within the respective zones.

The taxes and assessments shall be levied and collected together with, and not separately from, taxes for county purposes, and the revenues derived from the taxes and assessments shall be paid into the county treasury to the credit of the district, and the board of supervisors shall control and order the expenditure thereof for those purposes; provided, however, that no revenues, or portions thereof, derived in any of the several zones from the taxes and assessments levied under subdivision 2 of this section shall be expended for constructing, maintaining, operating, extending, repairing, or otherwise improving any works or improvements not of special benefit to the respective zones; and provided further, however, that the aggregate taxes and assessments levied under this act for any one fiscal year shall not exceed thirty cents ($0.30) on each one hundred dollars ($100) of the assessed valuation of the taxable property in the zones exclusive of any tax levied to meet the bonded indebtedness of the zones and the interest thereon.

(Stats.1939, c. 73, p. 1030, § 7. Amended by Stats.1955, c. 1397, p. 2510, § 1, eff. June 28, 1955; Stats.1956, 1st Ex.Sess., c. 37, p. 366, § 2, eff. April 16, 1956; Stats.1987, c. 1055, § 6.)

Cross References

Collection of tax, see Revenue and Taxation Code § 2501 et seq.

Levy of tax, see Revenue and Taxation Code § 2151 et seq.

Library References

Water Law ⇐2887.
Westlaw Topic No. 405.

§ 43–7.5. Exemptions

Sec. 7.5. All of the exemptions provided in Article XIII of the Constitution shall apply to the taxes levied pursuant to this act in the same manner and to the same extent as though said taxes were levied for general county purposes.
(Added by Stats.1961, c. 826, p. 2106, § 1.)

§ 43–8. Claims for money or damages; law governing

Sec. 8. All claims for money or damages against the district are governed by Part 3 (commencing with Section 900) and Part 4 (commencing with Section 940) of Division 3.6 of Title 1 of the Government Code except as provided therein, or by other statutes or regulations expressly applicable thereto.
(Added by Stats.1959, c. 1728, p. 4164, § 26. Amended by Stats.1963, c. 1715, p. 3418, § 129.)

Historical and Statutory Notes

Applicability of Stats.1963, c. 1715, p. 3369, see Historical and Statutory Notes under Government Code § 900.

Library References

Westlaw Topic No. 405.
Water Law ⇐2866.
Claims, actions and judgments against public entities and public employees; recommendation. Cal.Law Revision Comm. (1963) Vol. 4, p. 1007 et seq.

§ 43–9. Joint projects by contiguous zones

Sec. 9. The board of supervisors of said district may institute joint projects by any two contiguous zones for financing, constructing, maintaining, operating, extending, repairing or otherwise improving any work or improvement located or to be located in either or both of said zones and of common benefit to said two zones. For the purpose of acquiring authority to proceed with any such joint project, the board of supervisors shall adopt a resolution specifying its intention to undertake such joint project, together with the engineering estimates of the cost of same and the proportionate costs to be borne by the participating zones and fixing a time and place for public hearing of said resolution and which shall refer to a map or maps showing the general location and general construction of said project. Notice of such hearing shall be given by publication once a week for two consecutive weeks prior to said hearing, the last publication of which notice must be at least seven (7) days before said hearing, in a newspaper of general circulation, circulated in each of said zones, and if there be no such newspaper then by posting notice for two consecutive weeks prior to said hearing in five public places in each of said zones. Said

recited in the resolution calling the election. When those purposes have been accomplished, any moneys remaining in the construction fund shall be transferred to the fund to be used for the payment of principal of, and interest on, the bonds. When those purposes have been accomplished and all principal of, and interest on, the bonds have been paid, any balance of money then remaining shall be transferred to that fund of the district established for the purpose of containing taxes collected for the special benefit of the zone pursuant to Section 7.

(Added by Stats.1956, 1st Ex.Sess., c. 37, p. 369, § 8, eff. April 16, 1956. Amended by Stats.1987, c. 1055, § 9.)

Historical and Statutory Notes

Former Notes

Former § 43–14, enacted by Stats.1939, c. 73, p. 1034, § 14, relating to sale of bonds and disposition of proceeds, was repealed by Stats. 1956, 1st Ex.Sess., c. 37, p. 367, § 3.

Library References

Water Law ⇐2904.
Westlaw Topic No. 405.

§ 43–15. Levy and collection of tax to pay principal and interest

Sec. 15. The board of supervisors shall, at the time of fixing the general tax levy and in the manner for such tax levy provided, levy and collect annually each year until said bonds are paid or until there shall be a sum in the treasury of the county to the credit of said district and set apart for that purpose sufficient to meet all sums coming due for principal and interest on said bonds, a tax upon all taxable property in the zone for which said bonds were issued sufficient to pay the interest on such bonds as the same becomes due and also such part of the principal thereof as shall become due before the proceeds of a tax levied at the time for making the next general tax levy can be made available for the payment of such principal. The taxes required to be levied and collected by this Section 15 shall be in addition to all other taxes levied pursuant to other provisions of this act and shall be levied and collected at the time and in the same manner as other taxes are levied and collected and be used for no other purpose than the payment of said bonds and the interest accruing thereon.

(Added by Stats.1956, 1st Ex.Sess., c. 37, p. 369, § 9, eff. April 16, 1956.)

Historical and Statutory Notes

Former Notes

Former § 43–15, enacted by Stats.1939, c. 73, p. 1034, § 15, relating to bond lien and revenue for payment of bonds, was repealed by Stats. 1956, 1st Ex.Sess., c. 37, p. 367, § 3.

Library References

Water Law ⇐2891, 2904.
Westlaw Topic No. 405.

§ 43–16. Issuance of bonds as conclusive evidence of regularity of proceedings; effect of errors in procedure

Sec. 16. All bonds issued under this act shall by their issuance be conclusive evidence of the regularity, validity and legal sufficiency of all proceedings, acts and determinations that are made under this act. No error, defect, irregularity, informality and no neglect or omission of any officer of the district in any procedure taken hereunder which does not affect the constitutional rights of the qualified voters of the zone in which a bond election is held, shall avoid or invalidate such proceedings or any bonds issued hereunder.

(Added by Stats.1956, 1st Ex.Sess., c. 37, p. 370, § 10, eff. April 16, 1956.)

Historical and Statutory Notes

Former Notes

Former § 43–16, enacted by Stats.1939, c. 73, p. 1034, § 16, relating to annual tax for bond payments, etc., was repealed by Stats.1956, 1st Ex.Sess., c. 37, p. 367, § 3.

Library References

Water Law ⇐2904.
Westlaw Topic No. 405.

§ 43–17. Bonds; tax levy; law applicable

Sec. 17. The provisions of law of this State, prescribing the time and manner of levying, assessing, equalizing and collecting county property taxes, including the sale of property for delinquency, and the redemption from such sale, and the duties of the several county officers with respect thereto, are, so far as they are applicable, and not in conflict with the specific provisions of this act, hereby adopted and made a part hereof. Such officers shall be liable upon their several official bonds for the faithful discharge of the duties imposed upon them by this act.

(Stats.1939, c. 73, p. 1035, § 17.)

Cross References

Assessment, see Revenue and Taxation Code § 201 et seq.
Collection, see Revenue and Taxation Code § 2501 et seq.
Equalization, see Revenue and Taxation Code § 1601 et seq.
Levy of tax, see Revenue and Taxation Code § 2151 et seq.

Library References

Water Law ⇐2891, 2904.
Westlaw Topic No. 405.

§ 43–17.1. Delinquent taxes on unsecured property; small amounts not justifying cost of collection; discharge from accountability

Sec. 17.1. The provisions of Sections 2923, 2924, 2925, and 2926 of the Revenue and Taxation Code apply to all taxes levied under this act.

(Added by Stats.1959, c. 1674, p. 4064, § 5.)

Library References

Water Law ⇐2894. Westlaw Topic No. 405.

SA-2

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS
OF SAN BERNARDINO COUNTY, CALIFORNIA
FLOOD CONTROL DISTRICT
AND RECORD OF ACTION

March 16, 2010

FROM: **GRANVILLE M. BOWMAN, Flood Control Engineer**
Flood Control District

SUBJECT: **FLOOD CONTROL DISTRICT FINAL APPROPRIATION LIMITS**

RECOMMENDATION(S)

1. Adopt **Resolution No.2010-44** pertaining to the Fiscal Year 2009-10 final appropriation limits for the San Bernardino County Flood Control District (Flood Control District).
2. Approve the report of the Auditor-Controller/Recorder/Treasurer/Tax Collector (Attachment A) for the Flood Control District Fiscal Year 2009-10 final appropriation limits pursuant to Article XIII B of the California State Constitution.

(Affected Districts: All)
(Presenter: Granville M. Bowman, Flood Control Engineer, 387-7906)

BACKGROUND INFORMATION

Approval of this item will establish the Fiscal Year (FY) 2009-10 final appropriation limits for the San Bernardino County Flood Control District as required by Article XIII B of the California State Constitution. These limits are required for all agencies receiving tax proceeds. Proposition 111, approved by the voters on June 6, 1990, allows governmental entities to use an alternative computation to determine appropriation limits when such calculation is of benefit to the entity.

On June 16, 2009 (Item No. 80), the Board of Directors (Board) approved the preliminary appropriation limits for FY 2009-10 for the Flood Control District which includes funds RFA, RFF, RFL, RFQ, RFT, RFV and RFZ. During the preparation of the preliminary limits, data on one optional factor, the change in non-residential new construction, was not available.

Data on the change in the non-residential new construction factor is available now, permitting recalculation of the FY 2009-2010 appropriation limits. The recalculation has been performed and use of the Percentage Change in California Per-Capita Personal Income factor has been chosen as most beneficial to the County. This choice is consistent with the preliminary appropriation limit adopted on June 16, 2009. Adoption of the final appropriation limits will not increase the FY 2009-10 budget.

w/ resolution
cc: Flood-Bowman
County Counsel-Runyan
ACR-Gen Acct Mgr
ACR/TTC-Cousineau
CAO-Valdez
File - Flood w/ resolution
jll 03/25/10

Rev 07/08R1

ITEM 67

Record of Action of the Board of Directors

APPROVED (CONSENT CALENDAR)
COUNTY OF SAN BERNARDINO
County Flood Control District

MOTION	SECOND	AYE	ABSENT	AYE
	1	2	4	5

LAURA H. WELCH, SECRETARY
BY
DATED: March 16, 2010

FINANCIAL IMPACT

Approval of this item will not result in any costs to the County General Fund. This action will establish final appropriation limits for FY 2009-10 needed by the Flood Control District as required by Article XIII B of the California Constitution.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Scott M. Runyan, Deputy County Counsel, 387-9022) on February 22, 2010; Auditor-Controller/Recorder/Treasurer/Tax Collector (Mark Cousineau, Chief Deputy Controller, 386-8856) on March 2, 2010; and the County Administrative Office (Beatriz Valdez, Principal Administrative Analyst, 387-5301) on March 1, 2010.

RESOLUTION NO. 2010-44

RESOLUTION OF BOARD OF DIRECTORS OF THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, ESTABLISHING THE FISCAL YEAR 2009-2010 FINAL APPROPRIATION LIMITS FOR THE RFA, RFF, RFL, RFQ, RFT, RFV and RFZ FUNDS

On Tuesday, March 16, 2010, on motion of Supervisor Biane, duly seconded by Supervisor Mitzelfelt and carried, the following resolution is adopted by the Board of Directors of the San Bernardino County Flood Control District (Flood Control District):

WHEREAS, Article XIII B of the California State Constitution imposes a limitation on appropriations by local governmental entities; and

WHEREAS, the Board of Directors acted on June 16, 2009 (Item No. 80) to establish the fiscal year 2009-10 appropriation limits for Flood Control District; and

WHEREAS, proposition 111, as adopted by the voters on June 6, 1990, changed the manner of calculating the appropriations limits of the Flood Control District; and

WHEREAS, information has now become available to recalculate the appropriation limits for fiscal year 2009-10 in conformance with the new options provided by Proposition 111; and

WHEREAS, the County has the option to select either (A), the Percentage Change in California Per Capita Personal Income or (B) the Percentage Change in the Local Assessment Roll Due to the Addition of Local Non-Residential New Construction; and

WHEREAS, the recalculation of appropriation limits for fiscal year 2009-10 has been performed and the use of option (A) the Percentage Change in California Per Capita Personal Income has been chosen as most beneficial to the County;

NOW, THEREFORE, BE IT RESOLVED, the Board of Directors of the Flood Control District hereby finds, determines, declares and resolves as follows:

Section 1. All of the above recitals are true and correct.

Section 2. Fiscal Year 2009-2010 final appropriation limit for Flood Control District funds RFA, RFF, RFL, RFQ, RFT, RFV and RFZ as set for in the Schedule of Appropriation Limits attached hereto are hereby adopted.

Section 3. This resolution shall take effect from and after its adoption.

PASSED AND ADOPTED by the Board of Directors of the Flood Control District, State of California, by the following vote:

AYES: DIRECTORS: Mitzelfelt;Biane;Derry;Gonzales

NOES: DIRECTORS: None

ABSENT: DIRECTORS: Ovitt

* * * * *

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, **LAURA H. WELCH**, Secretary of the Board of Directors of the San Bernardino County Flood Control District, State of California, hereby certify the foregoing to be a full, true and correct copy of the record of the action taken by the Board of Directors, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of March 16, 2010. item #67 jll

LAURA H. WELCH
Secretary of the Board of Directors

By _____
Deputy

FINAL LIMIT
FY 2009-10

County of San Bernardino
Office of the Auditor-Controller/Recorder/Treasurer/Tax Collector
Local Agencies' Annual Appropriations Limit (GANN Limit)
(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2006-07 Change Factor Adopted		2006-07 Appropriation Limit Adopted	2007-08 Change Factor Adopted		2007-08 Appropriation Limit Adopted	2008-09 Change Factor Adopted		2008-09 Appropriation Limit Adopted	2009-10 Change Factor Adopted		2009-10 Appropriation Limit Adopted
Board of Supervisors															
County General	1, 2a	AAA	81,474,070	1.1323	B	5,123,076,129	1.1556	B	5,920,129,436	1.3470	B	7,974,691,955	1.0162	A	8,103,780,345
Library	2b	SAP	2,551,240	1.1323	B	171,519,972	1.1471	B	196,753,306	1.2789	B	251,631,737	1.0162	A	255,708,171
Board-Governed County Service Areas															
CSA 17 Apple Valley		SFV-185	23,893	1.0636	A	238,708	1.0753	A	256,683	1.0594	A	271,930	1.0162	A	276,335
CSA 18 Cedar Pines		SFY-190	55,906	1.0636	A	1,294,896	1.0753	A	1,392,401	1.0594	A	1,475,110	1.0162	A	1,499,007
CSA 20 Joshua Tree		SGD-200	236,750	1.0636	A	6,902,517	1.0753	A	3,711,138	1.0594	A	3,931,580	1.0162	A	3,995,272
CSA 29 Lucerne Valley		SGG-245	-	-	A	-	1.0763	A	1,954,470	1.1102	B	2,169,833	1.0162	A	2,204,984
CSA 30 Red Mountain		SGJ-250	3,082	1.0636	A	84,965	1.0753	A	69,857	1.0594	A	74,006	1.0162	A	75,205
CSA 40 Elephant Mountain		SIS-300	111,030	1.0700	B	27,958,482	1.0993	B	30,735,594	1.0937	B	33,614,289	1.5997	B	53,772,106
CSA 42 Oro Grande		SIV/SIY/EAP/EAS	53,017	1.0635	A	488,184	1.0753	A	524,944	1.0594	A	556,126	1.0162	A	565,135
CSA 54 Crest Forest		SJV-370	7,582	1.0636	A	203,499	1.0753	A	218,823	1.0594	A	231,821	1.0162	A	235,577
CSA 56 Wrightwood		SKD-380	26,774	1.0636	A	357,390	1.0753	A	384,301	1.0594	A	407,129	1.0162	A	413,724
CSA 59 Deer Lodge		SKJ-395	17,564	1.0636	A	333,841	1.0753	A	358,979	1.0594	A	380,302	1.0162	A	386,463
CSA 60 Apple Valley Airport		EBJ-400	250,819	1.0671	B	2,258,816	1.0763	A	2,428,906	1.3587	B	3,324,321	1.0162	A	3,378,176
CSA 63 Yucaipa		SKM-415	398,174	1.0636	A	7,401,756	1.0753	A	7,959,109	1.0636	B	8,465,228	1.0162	A	8,602,365
CSA 64 Spring Valley Lake - Sanitation		EBM-420	65,684	1.0636	A	269,117	1.1166	B	300,498	1.0594	A	318,347	1.0162	A	323,604
CSA 64 Spring Valley Lake - Water		ECB-420	65,684	1.0636	A	216,527	1.1166	B	241,775	1.0594	A	256,137	1.0162	A	260,288
CSA 64 Spring Valley Lake - Street Sweeping		ECB-420	-	1.0636	A	119,039	1.1166	B	132,919	1.0594	A	140,814	1.0162	A	143,095
CSA 68 Valley of the Moon		SKP-440	74,982	1.0636	A	1,830,236	1.0753	A	1,968,053	1.0594	A	2,084,955	1.0162	A	2,118,731
CSA 69 Lake Arrowhead		SKS-445	33,353	1.0636	A	1,945,140	1.0753	A	2,091,609	1.0594	A	2,216,851	1.0297	B	2,281,573
CSA 70 CG Cedar Glen Water	6	ELL-563	-	1.0636	A	213,889	1.0753	A	229,995	1.0594	A	243,657	1.0162	A	514,136
CSA 70 D-1 Lake Arrowhead Dam	6	SLA-130	226,042	1.0636	A	4,822,832	1.0753	A	5,185,991	1.0594	A	5,494,039	1.0162	A	5,583,842
CSA 70 F Morongo Valley Lake	6	EBY-135	7,055	1.0636	A	121,401	1.0753	A	130,543	1.0594	A	138,297	1.0162	A	140,537
CSA 70 G Wrightwood	7	SLG-155	1,708	1.0636	A	146,738	1.0753	A	157,787	1.2322		194,425	1.0162	A	197,575
CSA 70 J Oak Hills	6	ECA-165	25,213	1.0636	A	45,105	1.0753	A	486,074	1.0594	A	513,887	1.0162	A	522,212
CSA 70 R-2 Twin Peaks Road	6	SMA-225	2,025	1.0636	A	25,227	1.0753	A	27,127	1.0594	A	87,002	1.0162	A	88,414
CSA 70 R-3 Erwin Lake Road	6	SMD-230	5,638	1.0636	A	170,938	1.0753	A	183,807	1.0594	A	194,725	1.0162	A	197,885
CSA 70 R-22 Twin Peaks Road	6	SOB-543	-	1.0636	A	23,714	1.0753	A	25,500	1.0594	A	27,016	1.0162	A	27,453
CSA 70 R-40 Upper North Bay Lake Arrowhead	6	RGW-553	-	1.0636	A	23,459	1.0753	A	25,225	1.0594	A	26,724	1.0162	A	27,157
CSA 70 R-42 Windy Pass	6	RHL-559	-	1.0636	A	50,084	1.0753	A	53,834	1.0594	A	57,032	1.0162	A	57,956
CSA 70 R-44 Saw Pit Canyon	6	SYT-562	-	1.0636	A	62,478	1.0753	A	67,180	1.0594	A	71,171	1.0162	A	72,324
CSA 70 TV-2 Morongo Valley	6	SLO-330	25,420	1.0636	A	316,527	1.0753	A	340,469	1.0594	A	360,692	1.0162	A	366,535
CSA 70 TV-4 Mesa	4	SLF-332	40,000	1.0636	A	72,878	1.0753	A	78,148	1.0594	A	82,790	1.0162	A	84,131
CSA 70 TV-5 Wonder Valley	3	SLE-331	158,685	1.0636	A	289,387	1.0753	A	311,178	1.0594	A	329,662	1.0162	A	335,003
CSA 70 Zone M - Wonder Valley - Park		SYR-205	-	1.0636	A	59,088	1.0753	A	63,538	1.0594	A	67,312	1.0162	A	68,402
CSA 70 Zone M - Wonder Valley - Road		SLP-180	-	1.0636	A	154,182	1.0753	A	165,781	1.0594	A	175,639	1.0162	A	178,484
CSA 70 Zone P - 6 El Mirage	6	SYP-212	-	1.0636	A	254,843	1.0753	A	274,033	1.0594	A	290,311	1.0162	A	295,014

FINAL LIMIT
FY 2009-10

County of San Bernardino
Office of the Auditor-Controller/Recorder/Treasurer/Tax Collector
Local Agencies' Annual Appropriations Limit (GANN Limit)
(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2006-07 Change Factor Adopted		2006-07 Appropriation Limit Adopted	2007-08 Change Factor Adopted		2007-08 Appropriation Limit Adopted	2008-09 Change Factor Adopted		2008-09 Appropriation Limit Adopted	2009-10 Change Factor Adopted		2009-10 Appropriation Limit Adopted
CSA 70 Zone W Hinkley	6	SLT-335	-	1.0636	A	36,004	1.0753	A	38,726	1.0594	A	41,552	1.6815	B	70,059
CSA 70 Zone W-1 Goat Mountain	6	ECS-345	1,844	1.0636	A	22,974	1.0753	A	24,704	1.0594	A	26,171	1.0162	A	26,595
CSA 70 Zone W-3 Hacienda	6	ECY-350	12,017	1.0636	A	149,679	1.0753	A	160,950	1.0594	A	170,510	1.0162	A	173,272
CSA 82 Searles Valley	6	EFY - 495	38,147	1.0636	A	476,166	1.0753	A	510,935	1.0594	A	541,284	1.0162	A	550,053
CSA SL-1 Countywide Streetlights		SQV-575	617,864	1.0636	A	8,423,249	2.8415	B	23,934,374	1.0594	A	25,356,076	1.0162	A	25,766,844
County Flood Control District															
Zone 1		RFA-091	4,332,646	1.1834	B	176,209,394	1.2047	B	211,056,347	1.3741	B	290,015,716	1.0162	A	294,713,970
Zone 2		RFF-092	2,216,316	1.1231	B	748,189,478	1.1769	B	880,553,175	1.3197	B	1,162,039,508	1.0162	A	1,180,864,650
Zone 3		RFL-093	552,637	1.1968	B	18,591,165	1.2480	B	23,201,773	1.5011	B	34,827,960	1.0162	A	35,392,163
Zone 4		RFQ-094	692,563	1.0672	B	60,666,963	1.0753	A	65,234,217	1.3520	B	88,850,309	1.0162	A	90,289,684
Zone 6		RFV-096	715,114	1.0636	A	38,940,532	1.0753	A	41,872,754	1.0746	B	44,992,693	1.4802	B	66,598,634
Crestline Sanitation District															
Crestline Sanitation District		EGS/EGY	421,730	1.0636	A	3,785,544	1.0753	A	4,070,595	1.0594	A	4,312,389	1.0162	A	4,382,250
San Bernardino County Fire Protection District															
San Bernardino County Fire Protection District		SKX-106	552,345	1.0636	A	79,329,041	1.0753	A	76,771,336	1.0594	A	81,331,553	1.0162	A	82,649,124
Valley Service Zone		FVZ-580	-	-	A	-	-	A	41,770,028	1.0594	A	44,251,168	1.0162	A	44,968,037
Mountain Service Zone		FMZ-600	-	-	A	-	-	A	18,279,043	1.0594	A	19,364,818	1.0162	A	19,678,528
North Desert Service Zone		FNZ-590	-	-	A	-	-	A	23,160,243	1.0594	A	24,535,961	1.0162	A	24,933,444
South Desert Service Zone		FSZ-610	-	-	A	-	-	A	17,024,477	1.0594	A	18,035,731	1.0162	A	18,327,910
Service Zone FP-1 Red Mountain		SGM-250	-	1.0636	A	974,725	1.0753	A	1,048,121	1.0594	A	1,110,380	1.0162	A	1,128,358
Service Zone FP-2 Windy Acres		SLJ-435	-	1.0636	A	440,019	1.0753	A	473,163	1.0594	A	501,268	1.0162	A	509,378
Service Zone FP-3 El Mirage		SHS-293	-	1.0792	B	1,067,766	1.0753	A	1,148,169	1.1139	B	1,278,945	1.0162	A	1,299,664
Service Zone FP-4 Wonder Valley	5	SLM-294	19,671	1.0636	A	246,803	1.0753	A	406,584	1.0594	A	430,735	1.0162	A	437,713
Service Zone FP-5 Helendale/Silver Lake		SLR-201	-	-	A	886,744	1.0753	A	953,516	1.0594	A	1,010,155	1.0162	A	1,026,520
Service Zone FP-6 Havasu Lake	6	SIZ-296	-	-	A	-	-	A	-	-	A	-	-	A	135,000
Service Zone PM-1 Lake Arrowhead Paramedic		SND-220	-	1.0636	A	1,017,977	1.0753	A	1,094,631	1.0594	A	1,159,652	1.0162	A	1,178,438
Service Zone PM-2 Highland Paramedic		SHV-291	-	1.0636	A	2,501,494	1.0753	A	2,689,857	1.0696	B	2,877,071	1.0162	A	2,923,680
Service Zone PM-3 Yucaipa Paramedic		SHP-292	-	1.0636	A	47,712	1.1535	B	55,035	1.0594	A	58,304	1.0162	A	59,249
CFD No. 2002-2 Central Valley CFD		SFE-580	-	1.1684	B	1,998,050	1.3046	B	2,606,636	1.0594	A	2,761,470	1.0162	A	2,806,295
Big Bear Valley Recreation and Park District															
Big Bear Valley Recreation and Park District		SSA-620	458,651	1.0723	B	7,059,552	1.1010	B	7,773,219	1.0694	A	8,234,948	1.0162	A	8,368,354
Bloomington Recreation and Park Disctrict															
Bloomington Recreation and Park Disctrict		SSD-625	93,683	1.1201	B	2,304,915	1.0753	A	2,478,475	1.2057	B	2,988,173	1.0162	A	3,036,581

FINAL LIMIT
FY 2009-10

County of San Bernardino

Office of the Auditor-Controller/Recorder/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limits (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Article XIII B of the California Constitution was amended by Proposition 111 to change the price and population factors used by the county in setting the appropriation limit.

CHANGE FACTOR COMPONENTS
PRICE FACTOR: The County has the option to select either (A) the Percentage Change in California Per Capita Personal Income or (B) the Percentage Change in the Local Assessment Roll Due to the Addition of Local Non-Residential New Construction.

POPULATION FACTOR: The County may choose the percentage change in one of the following: (1) the population within its jurisdiction, (2) the population within its jurisdiction combined with the population within all county borders contiguous to the County, or (3) the change in population within the incorporated portion of the County. For 2006-07, 2007-08 and 2008-09 the County has selected (3) For 2009-2010 the County has selected to use option (2).

NOTES

1. The general fund base year adjustments, listed below, were made in 1988-89 to correct errors and incorporate omissions and interpretations by the Courts, County Counsel and the State Controller's Office:

   * $600,000 increase for cigarette tax revenue, inadvertently omitted as other state revenue.
   * $2,551,240 increase due to the addition of County Library's base year limit.
   * $95,000 decrease due to aid for agriculture included as tax proceeds.
   * $1,442,444 decrease due to the exclusion of federally restricted Public Assistance Revenues included in the base year as tax proceeds.

2a. The Library's limit was subsequently separated from that of the General Fund in 1996-97 because each fund had a separate percentage change in the local assessment roll due to the addition of local non-residential new construction.

2b. The base year limit of $2,551,240 for the library was established, and separated from that of the General Fund in 1996-97 due to each fund having separate percentage change in the local assessment roll due to the addition of local non-residential new construction.

3. Resolution No. 95-161, July 11, 1995, approved the formation of CSA 70 Improvement Zone TV-5. Voters approved a base-year appropriations limit on November 7, 1995.

4. Resolution No. 96-148 approved the formation of CSA 70 Improvement Zone TV-4. Voters approved a base-year appropriations limit November 6, 1996.

5. Service Zone FP-4 appropriation limit was increased by $141,187 to $406,584 in 2007-08 to account for special tax adopted by election in June 2005.

6. The following Board-governed entities were added to the GANN Limit schedule during 2009-10:

* CSA 70 CG Cedar Glen Water
CSA 70 D-1 Lake Arrowhead Dam
CSA 70 F Morongo Valley Lake
CSA 70 J Oak Hills
CSA 70 R-2 Twin Peaks Road
CSA 70 R-3 Erwin Lake Road
CSA 70 R- 22 Twin Peaks Road
CSA 70 R- 40 Upper North Bay - Lake Arrowhead
CSA 70 R- 42 Windy Pass
CSA 70 R- 44 Saw Pit Canyon
CSA 70 TV-2 Morongo Valley
CSA 70 Zone P - 6 El Mirage
CSA 70 Zone W Hinkley
CSA 70 Zone W-1 Goat Mountain
CSA 70 Zone W-3 Hacienda
CSA 82 Searles Valley
Service Zone FP-6 (Havasu Lake)

* Additionally, CSA 70 CG Cedar Glen includes an increase of $266,532 to $514,136 in 2009-10 to account for a special tax adopted by election in September 2009.

7. CSA 70 G Wrightwood appropriation limit increased by $120,294 to $127,614 in 2004-05 to account for a special tax adopted by election in June 2003.

Data Sources:
San Bernardino County Budget
San Bernardino County Special Districts Budget
Auditor/Controller-Recorder, County of San Bernardino

REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY, CALIFORNIA
AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY, CALIFORNIA
FLOOD CONTROL DISTRICT
AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY, CALIFORNIA
BOARD GOVERNED COUNTY SERVICE AREAS
AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS
OF SAN BERNARDINO COUNTY, CALIFORNIA
SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT
AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS
OF SAN BERNARDINO COUNTY, CALIFORNIA
BIG BEAR VALLEY RECREATION AND PARK DISTRICT
AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS
OF SAN BERNARDINO COUNTY, CALIFORNIA
BLOOMINGTON RECREATION AND PARK DISTRICT
AND RECORD OF ACTION

April 19, 2011

FROM: **LARRY WALKER, Auditor-Controller/Treasurer/Tax Collector**
Auditor-Controller/Treasurer/Tax Collector

SUBJECT: **FINAL APPROPRIATION LIMITS**

RECOMMENDATION(S)

1. Acting as the Board of Supervisors, adopt **Resolution No. 2011-54** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2010-2011 for the County General Fund and Library County BLOOMINGTON

cc: **w/resolutions:**
ACR-Walker
County Counsel-Norris, Messer & Runyan
Special Districts-Booker
Fire-Montag
Public Works-Valdez
CAO-Welty
File - Auditor-Controller/Treasurer/Tax Collector-General w/resolutions & attachment
ml 05/03/11
ITEM 15

Rev 1-19-11

Record of Action of the Board of Supervisors and Directors
APPROVED (CONSENT CALENDAR)
COUNTY OF SAN BERNARDINO
San Bernardino County Flood Control District
Board Governed County Service Areas
San Bernardino County Fire Protection District
Big Bear Valley Recreation and Park District
Bloomington Recreation and Park District

MOTION	SECOND	AYE	MOVE	AYE	AYE	AYE
	1		3	4	5	

LAURA H. WELCH, CLERK OF THE BOARD/SECRETARY

BY: _____

DATED: April 19, 2011

2. Acting as the Board of Supervisors of the San Bernardino County Flood Control District, adopt **Resolution No. 2011-55** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2010-2011.
3. Acting as the governing board of all County Service Areas and their Zones, adopt **Resolution No. 2011-56** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2010-2011.
4. Acting as the Board of Directors of the San Bernardino County Fire Protection District, adopt **Resolution 2011-57** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2010-2011.
5. Acting as the Board of Directors of the Big Bear Valley Recreation and Park District, adopt **Resolution No. 2011-58** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2010-2011.
6. Acting as the Board of Directors of the Bloomington Recreation and Park District adopt **Resolution No. 2011-59** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2010-2011.

(Affected Districts: All)
(Presenter: Larry Walker, Auditor-Controller/Treasurer/Tax Collector, 386-9000)

BOARD OF SUPERVISORS COUNTY GOALS AND OBJECTIVES
Operate in a Fiscally-Responsible and Business-Like Manner.
Ensure Development of a Well-Planned, Balanced, and Sustainable County.
Pursue County Goals and Objectives by Working with Other Governmental Agencies.

FINANCIAL IMPACT
This action will provide additional appropriation authority needed by San Bernardino County and all Board-Governed local agencies to continue operations at normal levels. The additional limits will not increase the fiscal year 2010-2011 budget.

BACKGROUND INFORMATION
Limits on the appropriation of the proceeds of tax revenues are required to be established annually by Article XIII B of the California Constitution. These limits are required for all agencies receiving tax proceeds. Proposition 111, approved by the voters on June 6, 1990, allows governmental entities to use an alternative computation to determine appropriation limits when such calculation is of benefit to the entity.

On June 28, 2010 (Item Nos. 3, 8-11 and 13), the Board approved the preliminary appropriation limits for fiscal year 2010-2011. During the preparation of the preliminary limits, data on one optional factor, the change in non-residential new construction, was not available.

Data on the change in the non-residential new construction factor is available now, permitting recomputation of the fiscal year 2010-2011 appropriation limits. The recomputed limits will increase the appropriation limits of some agencies. Adoption of the recomputed appropriation limits for fiscal year 2010-2011 will enable agencies to continue to provide necessary levels of service this fiscal year and succeeding years. The recomputed limits will not increase the fiscal year 2010-2011 budget.

Based on a review of those figures in determining the preliminary appropriation limits for 2010-2011, it was determined that four additional agencies require appropriation limits.

Consequently, Attachment A (note 7) includes the calculation of the appropriation limits for these additional agencies for approval with the final appropriation limit calculation changes.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Kevin Norris, Deputy County Counsel, 387-5441; Dawn Messer, Deputy County Counsel, 387-4322 and Scott Runyan, Deputy County Counsel, 387-9022) on March 23, 2011; Special Districts (Randy Booker, Division Manager-Fiscal Services, 387-5971) on March 23, 2011; County Fire (Carol Montag, Division Manager-Fiscal Services, 387-5944) on March 23, 2011; Public Works (Beatriz Valdez, Principal Administrative Analyst, 387-1852) on March 17, 2011; and the County Administrative Office (Kelly Welty, Administrative Analyst, 387-5426) on March 30, 2011.

ANNUAL LIMIT
FY 2010-11

County of San Bernardino
Office of the Auditor- Controller/Treasurer/Tax Collector
Local Agencies' Annual Appropriations Limit (GANN Limit)
(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2007-08 Change Factor Adopted		2007-08 Appropriation Limit Adopted	2008-09 Change Factor Adopted		2008-09 Appropriation Limit Adopted	2009-10 Change Factor Adopted		2009-10 Appropriation Limit Adopted	2010-11 Change Factor Adopted		2010-11 Appropriation Limit Adopted
Board of Supervisors															
County General	1 , 2a	AAA	81,474,070	1.1556	B	5,920,129,436	1.3470	B	7,974,591,955	1.0162	A	8,103,780,345	0.9839	A	7,973,309,481
Library	2b	SAP	2,551,240	1.1471	B	196,753,305	1.2789	B	251,631,737	1.0162	A	255,708,171	0.9839	A	251,591,269
Board-Governed County Service Areas															
CSA 17 Apple Valley		SFV-185	23,893	1.0753	A	256,683	1.0594	A	271,930	1.0162	A	276,335	0.9839	A	271,885
CSA 18 Cedar Pines		SFY-190	55,906	1.0753	A	1,392,401	1.0594	A	1,475,110	1.0162	A	1,499,807	0.9839	A	1,474,873
CSA 20 Joshua Tree		SGD-200	236,750	1.0753	A	3,711,138	1.0594	A	3,931,580	1.0162	A	3,995,272	1.0004	B	3,996,710
CSA 29 Lucerne Valley		SGG-245	-	-	A	1,954,470	1.1102	B	2,169,833	1.0162	A	2,204,964	1.0092	B	2,225,264
CSA 30 Red Mountain		SGJ-250	3,082	1.0753	A	69,857	1.0594	A	74,006	1.0162	A	75,205	0.9839	A	73,994
CSA 40 Elephant Mountain		SIS-300	111,030	1.0993	B	30,735,594	1.0937	B	33,614,289	1.5997	B	53,772,106	0.9839	A	52,906,375
CSA 42 Oro Grande		SIVISIYEAPHEAS	53,017	1.0753	A	524,944	1.0594	A	556,126	1.0162	A	565,135	0.9839	A	556,037
CSA 54 Crest Forest		SJV-370	7,582	1.0753	A	218,823	1.0594	A	231,821	1.0162	A	235,577	0.9885	B	232,858
CSA 56 Wrightwood		SKD-380	26,774	1.0753	A	384,381	1.0594	A	407,129	1.0162	A	413,724	0.9839	A	407,063
CSA 59 Deer Lodge		SKJ-395	17,554	1.0753	A	358,979	1.0594	A	380,302	1.0162	A	386,463	0.9839	A	380,241
CSA 60 Apple Valley Airport		EBJ-480	250,819	1.0753	A	2,428,906	1.3687	B	3,324,321	1.0162	A	3,378,175	0.9844	B	3,325,306
CSA 63 Yucaipa		SKM-415	358,174	1.0753	A	7,959,109	1.0635	B	8,465,228	1.0162	A	8,602,365	0.9839	A	8,463,867
CSA 64 Spring Valley Lake - Sanitation		EBM-420	65,684	1.1166	B	300,498	1.0594	A	318,347	1.0162	A	323,504	0.9839	A	318,296
CSA 64 Spring Valley Lake - Water		ECB-420	65,684	1.1166	B	241,775	1.0594	A	256,137	1.0162	A	260,286	0.9839	A	256,095
CSA 64 Spring Valley Lake - Street Sweeping		ECB-420	-	1.1166	B	132,919	1.0594	A	140,814	1.0162	A	143,095	0.9839	A	140,791
CSA 68 Valley of the Moon		SKP-440	74,982	1.0753	A	1,968,053	1.0594	A	2,084,965	1.0162	A	2,118,731	0.9839	A	2,084,829
CSA 69 Lake Arrowhead		SKS-445	33,353	1.0753	A	2,091,609	1.0594	A	2,215,851	1.0297	B	2,281,573	1.0348	B	2,360,858
CSA 70 DB-2 Big Bear Improvement Zone	6	EIB-570	-	-	A	-	-	A	-	-	A	-	-	A	16,532
CSA 70 CG Cedar Glen Water		ELL-563	-	1.0753	A	229,995	1.0594	A	243,657	1.0162	A	514,136	0.9839	A	505,858
CSA 70 D-1 Lake Arrowhead Dam		SLA-130	226,042	1.0753	A	5,185,991	1.0594	A	5,494,039	1.0162	A	5,583,042	0.9839	A	5,493,155
CSA 70 F Morongo Valley Lake		EBY-135	7,055	1.0753	A	130,543	1.0594	A	138,297	1.0162	A	140,537	0.9839	A	138,275
CSA 70 G Wrightwood		SLG-156	1,708	1.0753	A	157,787	1.2322		194,425	1.0162	A	197,675	0.9839	A	194,394
CSA 70 J Oak Hills		ECA-165	26,213	1.0753	A	485,074	1.0594	A	513,887	1.0162	A	522,212	1.0023	B	523,387
CSA 70 R-2 Twin Peaks Road		SMA-225	2,025	1.0753	A	27,127	1.0594	A	87,002	1.0162	A	88,414	0.9839	A	86,961
CSA 70 R-3 Erwin Lake Road		SMD-230	5,638	1.0753	A	183,867	1.0594	A	194,725	1.0162	A	197,885	0.9839	A	194,699
CSA 70 R-16 Running Springs	7	SOJ-285	-	1.0753	A	32,667	1.0594	A	34,628	1.0162	A	35,189	0.9839	A	34,623
CSA 70 R- 22 Twin Peaks Road		SOB-543	-	1.0753	A	25,500	1.0594	A	27,015	1.0162	A	27,453	0.9839	A	27,011
CSA 70 R- 23 Mile High Park	7	RCA-531	-	1.0753	A	23,239	1.0594	A	24,619	1.0162	A	25,018	0.9839	A	24,615
CSA 70 R-40 Upper North Bay Lake Arrowhead		RGW-553	-	1.0753	A	25,225	1.0594	A	26,724	1.0162	A	27,157	0.9839	A	26,720
CSA 70 R-42 Windy Pass		RHL-559	-	1.0753	A	53,834	1.0594	A	57,032	1.0162	A	57,956	0.9839	A	57,023
CSA 70 R- 44 Saw Pit Canyon		SYT-562	-	1.0753	A	67,180	1.0594	A	71,171	1.0162	A	72,324	0.9839	A	71,158
CSA 70 R- 45 South Fairway Drive	7	SYX-566	-	1.0753	A	-	-	A	-	-	A	-	-	A	5,850
CSA 70 TV-2 Morongo Valley		SLD-330	25,420	1.0753	A	340,469	1.0594	A	360,692	1.0162	A	366,535	0.9839	A	360,634
CSA 70 TV-4 Mesa	4	SLF-332	40,000	1.0753	A	78,148	1.0594	A	82,790	1.0162	A	84,131	0.9839	A	82,777
CSA 70 TV-5 Wonder Valley	3	SLE-331	158,685	1.0753	A	311,178	1.0594	A	329,662	1.0162	A	335,003	0.9839	A	329,609
CSA 70 Zone M - Wonder Valley - Park		SYR-205	-	1.0753	A	63,538	1.0594	A	67,312	1.0162	A	68,402	0.9839	A	67,301

ANNUAL LIMIT
FY 2010-11

County of San Bernardino
Office of the Auditor-Controller/Treasurer/Tax Collector
Local Agencies' Annual Appropriations Limit (GANN Limit)
(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2007-08 Change Factor Adopted		2007-08 Appropriation Limit Adopted	2008-09 Change Factor Adopted		2008-09 Appropriation Limit Adopted	2009-10 Change Factor Adopted		2009-10 Appropriation Limit Adopted	2010-11 Change Factor Adopted		2010-11 Appropriation Limit Adopted
CSA 70 Zone M - Wonder Valley - Road		SLP-180	-	1.0753	A	165,791	1.0594	A	175,639	1.0162	A	178,484	0.9839	A	175,611
CSA 70 Zone P - 6 El Mirage		SYP-212	-	1.0753	A	274,033	1.0594	A	290,311	1.0162	A	296,014	0.9839	A	290,264
CSA 70 Zone W Hinkley		SLT-335	-	1.0753	A	39,326	1.0594	A	41,662	1.6816	B	70,059	0.9839	A	68,931
CSA 70 Zone W-1 Goat Mountain		ECS-345	1,844	1.0753	A	24,704	1.0594	A	26,171	1.0162	A	26,595	0.9839	A	26,167
CSA 70 Zone W-3 Hacienda		ECY-350	12,017	1.0753	A	160,950	1.0594	A	170,510	1.0162	A	173,272	0.9839	A	170,483
CSA 79 R-1 Green Valley Lake	7	RCP-485	-	1.0753	A	33,848	1.0594	A	35,858	1.0162	A	36,439	0.9839	A	35,853
CSA 82 Searles Valley		EFY-495	38,147	1.0753	A	510,935	1.0594	A	541,284	1.0162	A	550,053	0.9839	A	541,197
CSA SL-1 Countywide Streetlights		SQV-575	517,654	2.8415	B	23,934,374	1.0594	A	25,356,076	1.0162	A	25,786,844	0.9839	A	25,381,958
County Flood Control District															
Zone 1		RFA-091	4,332,646	1.2047	B	211,068,347	1.3741	B	290,015,715	1.0162	A	294,713,970	0.9839	A	289,989,075
Zone 2		RFF-092	2,216,316	1.1769	B	880,553,175	1.3197	B	1,162,039,608	1.0162	A	1,180,864,650	0.9839	A	1,161,852,729
Zone 3		RFL-093	552,637	1.2480	B	23,201,773	1.5011	B	34,827,950	1.0162	A	35,392,163	0.9839	A	34,822,349
Zone 4		RFQ-094	692,563	1.0753	A	65,234,217	1.3820	B	88,850,389	1.0162	A	90,289,684	0.9839	A	88,836,020
Zone 6		RFV-096	715,114	1.0753	A	41,872,754	1.0745	B	44,992,693	1.4802	B	66,598,634	0.9988	B	66,516,718
San Bernardino County Fire Protection District															
San Bernardino County Fire Protection District		SKX-106	552,345	1.0753	A	76,771,336	1.0594	A	81,331,553	1.0162	A	82,649,124	0.9839	A	81,318,473
Valley Service Zone		FVZ-580	-	-	A	41,770,028	1	A	44,251,168	1.0162	A	44,968,037	0.9839	A	44,244,051
Mountain Service Zone		FMZ-600	-	-	A	18,279,043	1	A	19,364,818	1.0162	A	19,678,528	0.9839	A	19,361,704
North Desert Service Zone		FNZ-590	-	-	A	23,160,243	1	A	24,535,961	1.0162	A	24,933,444	0.9839	A	24,532,016
South Desert Service Zone		FSZ-610	-	-	A	17,024,477	1	A	18,035,731	1.0162	A	18,327,910	0.9839	A	18,032,830
Service Zone FP-1 Red Mountain		SGM-250	-	1.0753	A	1,048,121	1.0594	A	1,110,389	1.0162	A	1,128,368	0.9839	A	1,110,201
Service Zone FP-2 Windy Acres		SLJ-435	-	1.0753	A	473,153	1.0594	A	501,258	1.0162	A	509,378	0.9839	A	501,177
Service Zone FP-3 El Mirage		SHS-293	-	1.0753	A	1,148,159	1.1139	B	1,278,945	1.0162	A	1,299,564	0.9839	A	1,278,740
Service Zone FP-4 Wonder Valley	5	SLM-294	19,671	1.0753	A	406,584	1.0594	A	430,735	1.0162	A	437,713	0.9839	A	430,666
Service Zone FP-5 Helendale/Silver Lake		SLR-201	-	-	A	953,516	1.0594	A	1,010,155	1.0162	A	1,026,520	0.9839	A	1,009,993
Service Zone FP-6 Havasu Lake		SIZ-296	-	-	A	-	-	A	-	-	A	135,000	0.9839	A	132,827
Service Zone PM-1 Lake Arrowhead Paramedic		SND-220	-	1.0753	A	1,094,631	1.0594	A	1,159,652	1.0162	A	1,178,438	0.9839	A	1,159,465
Service Zone PM-2 Highland Paramedic		SHV-291	-	1.0753	A	2,689,857	1.0696	B	2,877,071	1.0162	A	2,923,680	0.9839	A	2,876,608
Service Zone PM-3 Yucaipa Paramedic		SHP-292	-	1.1535	B	55,035	1.0594	A	58,304	1.0162	A	59,243	0.9839	A	58,295
CFD No. 2002-2 Central Valley CFD		SFE-580	-	1.3046	B	2,606,636	1.0594	A	2,761,470	1.0162	A	2,806,206	0.9839	A	2,761,025
Big Bear Valley Recreation and Park District															
Big Bear Valley Recreation and Park District		SSA-620	458,651	1.1010	B	7,773,219	1.0594	A	8,234,948	1.0162	A	8,368,354	0.9875	B	8,263,917
Bloomington Recreation and Park Disctrict															
Bloomington Recreation and Park Disctrict		SSD-625	93,583	1.0753	A	2,478,475	1.2057	B	2,988,173	1.0162	A	3,036,581	0.9839	A	2,987,692

RESOLUTION NO. 2011-55

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, ESTABLISHING THE FISCAL YEAR 2010-2011 APPROPRIATION LIMITS

On Tuesday April 19, 2011, on motion of Supervisor Derry, duly seconded by Supervisor Mitzelfelt and carried, the following resolution is adopted by the Board of Supervisors of the San Bernardino County Flood Control District.

WHEREAS, Article XIII B of the California State Constitution imposes a limitation on appropriations by local governmental entities; and

WHEREAS, the Board of Supervisors acted on June 28, 2010 to establish the fiscal year 2010-11 appropriation limits; and

WHEREAS, Proposition 111, as adopted by the voters on June 6, 1990, changed the manner of calculating the appropriations limits under Article XIII B of the California State Constitution; and

WHEREAS, Section 1 of Article XIII B of the California State Constitution generally provides that the total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population; and

WHEREAS, information has now become available to recalculate the appropriation limits for fiscal year 2010-11 in conformance with the options provided by Proposition 111; specifically, the options identified in Section 8(e)(2) of Article XIII B of the California State Constitution; and

WHEREAS, in determining "change in the cost of living" pursuant to Section 8(e)(2) of Article XIII B of the California State Constitution, an entity of local government, other than a school district or a community college district, has the option to select either (A) the percentage change in California per capita personal income from the preceding year, or (B) the percentage change in the local assessment roll from the preceding year due to the addition of local non-residential new construction; and

WHEREAS, the recalculation of appropriation limits for fiscal year 2010-11 is desirable in that this action will provide additional appropriation authority to continue operations at normal levels.

NOW, THEREFORE, BE IT RESOLVED that the fiscal year 2010-11 appropriation limits established by the Board of Supervisors on June 28, 2010, are hereby amended to reflect the San Bernardino County Flood Control District's selected option for determining the "change in the cost of living", as reflected in Attachment "A", attached hereto and incorporated herein by this reference.

BE IT FURTHER RESOLVED that said Attachment "A" presents the fiscal year 2010-11 appropriation limits now adopted by the Board of Supervisors.

PASSED AND ADOPTED by the Board of Supervisors of the San Bernardino County Flood Control District, State of California, by the following vote:

AYES: SUPERVISORS: Mitzelfelt, Rutherford, Derry, Ovitt, Gonzales

NOES: SUPERVISORS: None

ABSENT: SUPERVISORS: None

* * * * *

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, **LAURA H. WELCH**, Clerk of the Board of Supervisors of the San Bernardino County Flood Control District, State of California, hereby certify the foregoing to be a full, true and correct copy of the record of the action taken by the Board of Supervisors, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of April 29, 2011. Item #15, ml.

LAURA H. WELCH
Clerk of the Board of Supervisors

By _____
Deputy

SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT 1939 CALIFORNIA

#27A6108

REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS SITTING AS THE GOVERNING BOARD OF THE FOLLOWING:
COUNTY OF SAN BERNARDINO
COUNTY FLOOD CONTROL DISTRICT
BOARD GOVERNED COUNTY SERVICE AREAS
AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS OF THE FOLLOWING:
SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT
BIG BEAR VALLEY RECREATION AND PARK DISTRICT
BLOOMINGTON RECREATION AND PARK DISTRICT
AND RECORD OF ACTION

May 8, 2012

FROM: **LARRY WALKER**
Auditor-Controller/Treasurer/Tax Collector

SUBJECT: **FINAL APPROPRIATION LIMITS**

RECOMMENDATION(S)

1. Acting as the governing body of the County of San Bernardino, adopt **Resolution No. 2012-56** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2011-2012 for the County General Fund and Library (County).
2. Acting as the governing body of the San Bernardino County Flood Control District, adopt **Resolution No. 2012-57** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2011-2012.
3. Acting as the governing body of all County Service Areas and their Zones, adopt **Resolution No. 2012-58** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2011-2012.
4. Acting as the governing body of the San Bernardino County Fire Protection District, adopt **Resolution No. 2012-59** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2011-2012.
5. Acting as the governing body of the Big Bear Valley Recreation and Park District, adopt **Resolution No. 2012-60** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2011-2012.

w/resolutions:
cc: Auditor-Controller/Treasurer/Tax Collector-Walker
Special Districts-Wildes & Watkins
County Fire-Montag
Public Works-Valdez
CAO-Welty & Brown
File - Auditor-Controller/Treasurer/Tax Collector w/resolutions
ml 05/17/12
ITEM 53

Rev 4-19-11

Record of Action of the Board of Supervisors and Directors

APPROVED (CONSENT CALENDAR)
County of San Bernardino
San Bernardino County Flood Control District
Board Governed County Service Areas
San Bernardino County Fire Protection District
Big Bear Valley Recreation and Park District
Bloomington Recreation and Park District

MOTION	SECOND	ABSENT	MOVER	ABSENT	AYE
	1	2		4	5

LAURA H. WELCH, CLERK OF THE BOARD/SECRETARY

BY

DATED: May 08, 2012

6. Acting as the governing body of the Bloomington Recreation and Park District adopt **Resolution No. 2012-61** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2011-2012.

(Affected Districts: All)
(Presenter: Larry Walker, Auditor-Controller/Treasurer/Tax Collector, 386-9000)

BOARD OF SUPERVISORS COUNTY GOALS AND OBJECTIVES
Operate in a Fiscally-Responsible and Business-Like Manner.
Ensure Development of a Well-Planned, Balanced, and Sustainable County.
Pursue County Goals and Objectives by Working with Other Governmental Agencies.

FINANCIAL IMPACT
This action will provide additional appropriation authority needed by San Bernardino County and all Board-Governed local agencies to continue to operate at normal levels. The additional limits will not increase the fiscal year 2011-2012 budget.

BACKGROUND INFORMATION
Limits on the appropriation of the proceeds of tax revenues are required to be established annually by Article XIII B of the California Constitution. These limits are required for all agencies receiving tax proceeds. Proposition 111, approved by the voters on June 6, 1990, allows governmental entities to use an alternative computation to determine the appropriation limits when such calculation is of benefit to the entity.

On June 28, 2011 (Item No. 20), the Board approved the preliminary appropriation limits for fiscal year 2011-2012. During the preparation of the preliminary limits, data on one optional factor, the change in non-residential new construction, was not available.

Data on the change in the non-residential new construction factor is available now, permitting re-computation of the fiscal year 2011-2012 appropriation limits. The recomputed limits will increase the appropriation limits of some agencies. Adoption of the recomputed appropriation limits for fiscal year 2011-2012 will enable agencies to continue providing necessary levels of service this fiscal year and succeeding years. The recomputed limits will not increase the fiscal year 2011-2012 budget.

REVIEW BY OTHERS
This item has been reviewed by County Counsel (Kevin Norris, Deputy County Counsel, 387-5441) on April 17, 2012 and (Charles Scolastico, Principal Assistant County Counsel, 387-5281), on April 18, 2012; Special Districts (Michael Wildes, Principal Budget Officer, 387-5938) on April 23, 2012; County Fire (Carol Montag, Manager-Budget/Fiscal Services, 387-5944) on April 18, 2012; Public Works (Beatriz Valdez, Public Works Chief Financial Officer, 387-1852) on April 20, 2012; and the County Administrative Office (Kelly Welty, Administrative Analyst, 387-5426) on April 23, 2012 and (Jessica Brown, Administrative Analyst, 387-5510) on April 24, 2012.

ANNUAL LIMIT
FY 2011-12

County of San Bernardino
Office of the Auditor- Controller/Treasurer/Tax Collector
Local Agencies' Annual Appropriations Limit (GANN Limit)
(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2008-09 Change Factor Adopted		2008-09 Appropriation Limit Adopted	2009-10 Change Factor Adopted		2009-10 Appropriation Limit Adopted	2010-11 Change Factor Adopted		2010-11 Appropriation Limit Adopted	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted
Board of Supervisors															
County General	1, 2a	AAA	81,474,070	1.3470	B	7,974,591,955	1.0162	A	8,103,780,345	0.9839	A	7,973,309,481	1.0362	A	8,261,704,085
Library	2b	SAP	2,551,240	1.2789	B	251,631,737	1.0162	A	255,708,171	0.9839	A	251,591,269	1.0362	A	260,691,325
Board-Governed County Service Areas															
CSA 18 Cedar Pines		SFY-190	55,906	1.0594	A	1,475,110	1.0162	A	1,499,007	0.9839	A	1,474,873	1.0362	A	1,528,219
CSA 20 Joshua Tree		SGD-200	236,750	1.0594	A	3,931,580	1.0162	A	3,995,272	1.0004	B	3,996,710	1.0362	A	4,141,271
CSA 29 Lucerne Valley		SGG-245	-	1.1102	B	2,169,833	1.0162	A	2,204,984	1.0092	B	2,225,204	1.0362	A	2,305,690
CSA 30 Red Mountain		SGJ-250	3,082	1.0594	A	74,606	1.0162	A	75,205	0.9839	A	73,994	1.0362	A	76,670
CSA 40 Elephant Mountain		SIS-300	111,030	1.0937	B	33,614,289	1.5997	B	53,772,106	0.9839	A	52,906,375	1.0362	A	54,819,999
CSA 42 Oro Grande		SIV/SIY/EAP/EAS	53,017	1.0594	A	556,126	1.0162	A	565,135	0.9839	A	556,037	1.0362	A	576,149
CSA 54 Crest Forest		SJV-370	7,582	1.0594	A	231,821	1.0162	A	235,577	0.9885	B	232,858	1.0362	A	241,280
CSA 56 Wrightwood		SKD-380	26,774	1.0594	A	407,128	1.0162	A	413,724	0.9839	A	407,063	1.0837	B	441,126
CSA 59 Deer Lodge		SKJ-396	17,564	1.0594	A	380,382	1.0162	A	386,463	0.9839	A	380,241	1.0362	A	393,994
CSA 60 Apple Valley Airport		EBJ-400	250,819	1.3687	B	3,324,321	1.0162	A	3,378,175	0.9844	B	3,325,306	1.0362	A	3,445,582
CSA 63 Yucaipa		SKM-415	398,174	1.0636	B	8,465,228	1.0162	A	8,602,365	0.9839	A	8,463,867	1.4359	B	12,153,605
CSA 64 Spring Valley Lake - Sanitation		EBM-420	65,684	1.0594	A	318,347	1.0162	A	323,504	0.9839	A	318,296	1.0362	A	329,809
CSA 64 Spring Valley Lake - Water		ECB-420	65,684	1.0594	A	266,137	1.0162	A	260,288	0.9839	A	256,095	1.0362	A	265,358
CSA 64 Spring Valley Lake - Street Sweeping		ECB-420	-	1.0594	A	140,814	1.0162	A	143,095	0.9839	A	140,791	1.0362	A	145,883
CSA 68 Valley of the Moon		SKP-440	74,982	1.0594	A	2,084,955	1.0162	A	2,118,731	0.9839	A	2,084,629	1.0362	A	2,160,021
CSA 69 Lake Arrowhead		SKS-445	33,353	1.0594	A	2,215,851	1.0297	B	2,281,573	1.0348	B	2,360,858	1.0362	A	2,446,250
CSA 70 DB-2 Big Bear Improvement Zone	5	EIB-670	-	-	A	-	-	A	-	-	A	16,532.00	1.0362	A	17,130
CSA 70 CG Cedar Glen Water		ELL-563	-	1.0594	A	243,657	1.0162	A	514,136	0.9839	A	505,858	1.0362	A	524,155
CSA 70 D-1 Lake Arrowhead Dam		SLA-130	226,042	1.0594	A	5,494,639	1.0162	A	5,583,042	0.9839	A	5,493,155	1.0362	A	5,691,842
CSA 70 F Morongo Valley Lake		EBY-135	7,056	1.0594	A	138,287	1.0162	A	140,537	0.9839	A	138,275	1.0362	A	143,276
CSA 70 G Wrightwood		SLG-155	1,708	1.2322		194,425	1.0162	A	197,575	0.9839	A	194,394	1.0362	A	201,425
CSA 70 J Oak Hills		ECA-165	26,213	1.0594	A	513,887	1.0162	A	522,212	1.0023	B	523,387	1.0362	A	542,318
CSA 70 R-2 Twin Peaks Road		SMA-225	2,025	1.0594	A	87,082	1.0162	A	88,414	0.9839	A	86,991	1.0362	A	90,137
CSA 70 R-3 Erwin Lake Road		SMD-230	5,638	1.0594	A	194,725	1.0162	A	197,885	0.9839	A	194,699	1.0362	A	201,741
CSA 70 R-15 Running Springs		SOJ-285	-	1.0594	A	34,628	1.0162	A	35,189	0.9839	A	34,623	1.0362	A	35,876
CSA 70 R-22 Twin Peaks Road		SOB-543	-	1.0594	A	27,015	1.0162	A	27,453	0.9839	A	27,011	1.0362	A	27,988
CSA 70 R-23 Mile High Park		RCA-531	-	1.0594	A	24,619	1.0162	A	25,018	0.9839	A	24,615	1.0362	A	25,505
CSA 70 R-40 Upper North Bay Lake Arrowhead		RGW-553	-	1.0594	A	26,724	1.0162	A	27,157	0.9839	A	26,720	1.0362	A	27,686
CSA 70 R-42 Windy Pass		RHL-559	-	1.0594	A	57,032	1.0162	A	57,956	0.9839	A	57,023	1.0362	A	59,086
CSA 70 R-44 Saw Pit Canyon		SYT-562	-	1.0594	A	71,171	1.0162	A	72,324	0.9839	A	71,160	1.0362	A	73,734
CSA 70 R-46 South Fairway Drive		SYX-566	-	0.0000	A	-	-	A	-	-	A	5,850.00	1.0362	A	6,062
CSA 70 TV-2 Morongo Valley		SLD-330	25,420	1.0594	A	360,692	1.0162	A	366,535	0.9839	A	360,834	1.0362	A	373,678
CSA 70 TV-4 Mesa	4	SLF-332	40,000	1.0594	A	82,790	1.0162	A	84,131	0.9839	A	82,777	1.0362	A	85,771
CSA 70 TV-5 Wonder Valley	3	SLE-331	158,685	1.0594	A	329,662	1.0162	A	335,003	0.9839	A	329,609	1.0362	A	341,531
CSA 70 Zone M - Wonder Valley - Park		SYR-285	-	1.0594	A	67,312	1.0162	A	68,402	0.9839	A	67,301	1.0362	A	69,735

ANNUAL LIMIT
FY 2011-12

County of San Bernardino
Office of the Auditor-Controller/Treasurer/Tax Collector
Local Agencies' Annual Appropriations Limit (GANN Limit)
(As Required Under Article XII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2008-09 Change Factor Adopted		2008-09 Appropriation Limit Adopted	2009-10 Change Factor Adopted		2009-10 Appropriation Limit Adopted	2010-11 Change Factor Adopted		2010-11 Appropriation Limit Adopted	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted
CSA 70 Zone M - Wonder Valley - Road		SLP-180	-	1.0594	A	175,639	1.0162	A	178,484	0.9839	A	175,611	1.0362	A	181,963
CSA 70 Zone P - 6 El Mirage		SYP-212	-	1.0594	A	290,311	1.0162	A	295,014	0.9839	A	290,264	1.0362	A	300,763
CSA 70 Zone W Hinkley		SLT-335	-	1.0594	A	41,662	1.6816	B	70,059	0.9839	A	68,931	1.0362	A	71,424
CSA 70 Zone W-1 Goat Mountain		ECS-345	1,844	1.0594	A	26,171	1.0162	A	26,595	0.9839	A	26,167	1.0362	A	27,113
CSA 70 Zone W-3 Hacienda		ECY-350	12,017	1.0594	A	170,510	1.0162	A	173,272	0.9839	A	170,483	1.0362	A	176,649
CSA 79 R-1 Green Valley Lake		RCP-485	-	1.0594	A	35,858	1.0162	A	36,440	0.9839	A	35,853	1.0362	A	37,150
CSA 82 Searles Valley		EFY - 495	38,147	1.0594	A	541,284	1.0162	A	550,053	0.9839	A	541,197	1.0362	A	560,772
CSA SL-1 Countywide Streetlights		SQV-675	517,854	1.0594	A	25,356,076	1.0162	A	25,765,844	0.9839	A	25,351,998	1.0362	A	26,268,980
San Bernardino County Fire Protection District															
San Bernardino County Fire Protection District		FPD/FHZ/FHH/FES	552,346	1.0594	A	81,331,553	1.0162	A	82,649,124	0.9839	A	81,318,473	1.0362	A	84,259,762
Valley Service Zone		FVZ-580	-	1.0594	A	44,251,168	1.0162	A	44,968,037	0.9839	A	44,244,051	1.0362	A	45,844,358
Mountain Service Zone		FMZ-600	-	1.0594	A	19,364,818	1.0162	A	19,678,528	0.9839	A	19,361,764	1.0362	A	20,062,017
North Desert Service Zone		FNZ-590	-	1.0594	A	24,535,961	1.0162	A	24,933,444	0.9839	A	24,532,015	1.0362	A	25,419,339
South Desert Service Zone		FSZ-610	-	1.0594	A	18,035,731	1.0162	A	18,327,910	0.9839	A	18,032,830	1.0362	A	18,685,077
Service Zone FP-1 Red Mountain		FNZ-590	-	1.0594	A	1,110,380	1.0162	A	1,128,368	0.9839	A	1,110,201	1.0362	A	1,150,357
Service Zone FP-2 Windy Acres		FNZ-590	-	1.0594	A	501,256	1.0162	A	509,378	0.9839	A	501,177	1.0362	A	519,305
Service Zone FP-3 El Mirage		FNZ-590	-	1.1138	B	1,278,945	1.0162	A	1,299,684	0.9839	A	1,278,740	1.0362	A	1,324,992
Service Zone FP-4 Wonder Valley		FSZ-610	19,671	1.0594	A	430,735	1.0162	A	437,713	0.9839	A	430,666	1.0362	A	446,243
Service Zone FP-5 Helendale/Silver Lake		FNZ-590	-	1.0594	A	1,010,155	1.0162	A	1,026,520	0.9839	A	1,009,993	1.0362	A	1,046,524
Service Zone FP-6 Havasu Lake		FSZ-610	-	-	A	-	-	A	135,000	0.9839	A	132,827	1.0362	A	137,631
Service Zone PM-1 Lake Arrowhead Paramedic		FMZ-600	-	1.0594	A	1,159,652	1.0162	A	1,178,438	0.9839	A	1,159,465	1.0362	A	1,201,403
Service Zone PM-2 Highland Paramedic		FVZ-580	-	1.0696	B	2,877,071	1.0162	A	2,923,680	0.9839	A	2,876,608	1.0362	A	2,980,655
Service Zone PM-3 Yucaipa Paramedic		FVZ-580	-	1.0594	A	58,304	1.0162	A	59,249	0.9839	A	58,295	1.0362	A	60,404
CFD No. 2002-2 Central Valley CFD		SFE-580	-	1.0594	A	2,751,470	1.0162	A	2,796,206	0.9839	A	2,761,026	1.0362	A	2,860,892
County Flood Control District															
Zone 1		RFA-091	4,332,646	1.3741	B	290,015,715	1.0162	A	294,713,970	0.9839	A	289,969,075	1.0362	A	300,457,256
Zone 2		RFF-092	2,216,316	1.3197	B	1,162,039,808	1.0162	A	1,180,864,650	0.9839	A	1,161,852,729	1.0362	A	1,203,876,942
Zone 3		RFL-093	552,637	1.5011	B	34,827,960	1.0162	A	35,392,163	0.9839	A	34,822,349	1.0362	A	36,081,873
Zone 4		RFQ-094	692,563	1.3620	B	88,856,309	1.0162	A	90,289,684	0.9839	A	88,836,020	1.0362	A	92,049,219
Zone 6		RFV-096	715,114	1.0745	B	44,992,693	1.4802	B	66,596,634	0.9988	B	66,516,718	1.0362	A	68,922,628
Big Bear Valley Recreation and Park District															
Big Bear Valley Recreation and Park District		SSA-620	458,651	1.0594	A	8,234,948	1.0162	A	8,368,354	0.9875	B	8,263,917	1.0362	A	8,562,823
Bloomington Recreation and Park District															
Bloomington Recreation and Park District		SSD-625	93,583	1.2057	B	2,988,173	1.0162	A	3,036,581	0.9839	A	2,987,692	1.0362	A	3,095,757

FINAL LIMIT
FY 2011-12

County of San Bernardino

Office of the Auditor- Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriation Limits (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Article XIII B of the California Constitution was amended by Proposition 111 to change the price and population factors used by the county in setting the appropriation limit.

CHANGE FACTOR COMPONENTS

PRICE FACTOR: The County has the option to select either (A) the Percentage Change in California Per Capita Personal Income or (B) the Percentage Change in the Local Assessment Roll Due to the Addition of Local Non-Residential New Construction.

POPULATION FACTOR: The County may choose the percentage change in one of the following: (1) the population within its jurisdiction, (2) the population within its jurisdiction combined with the population within all county borders contiguous to the County, or (3) the change in population within the incorporated portion of the County. For 2008-09 the County has selected to use option (3) For 2009-2010, 2010- 2011 and 2011-2012, the County has selected to use option (2).

NOTES

1. The general fund base year adjustments, listed below, were made in 1988-89 to correct errors and incorporate omissions and interpretations by the Courts, County Counsel and the State Controller's Office:

   * $600,000 increase for cigarette tax revenue, inadvertently omitted as other state revenue.
   * $2,551,240 increase due to the addition of County Library's base year limit.
   * $95,000 decrease due to aid for agriculture included as tax proceeds.
   * $1,442,444 decrease due to the exclusion of federally restricted Public Assistance Revenues included in the base year as tax proceeds.

2a. The Library's limit was subsequently separated from that of the General Fund in 1996-97 because each fund had a separate percentage change in the local assessment roll due to the addition of local non-residential new construction.

2b. The base year limit of $2,551,240 for the library was established, and separated from that of the General Fund in 1996-97 due to each fund having separate percentage change in the local assessment roll due to the addition of local non-residential new construction.

3. Resolution No. 95-161, July 11, 1995, approved the formation of CSA 70 Improvement Zone TV-5. Voters approved a base-year appropriations limit on November 7, 1995.

4. Resolution No. 96-148 approved the formation of CSA 70 Improvement Zone TV-4. Voters approved a base-year appropriations limit November 6, 1996.

5. CSA 70 DB-2 Big Bear Improvement Area formation and apropriation limit approved by the Board of Supervisors in April 2010

Data Sources:
San Bernardino County Budget
San Bernardino County Special Districts Budget
Local Agency Formation Commission, County of San Bernardino
Auditor-Controller/Treasurer/Tax Collector, County of San Bernardino
California Department of Finance

RESOLUTION NO. 2012-57

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, ESTABLISHING THE FISCAL YEAR 2011-2012 FINAL APPROPRIATION LIMITS

On Tuesday May 8, 2012, on motion of Supervisor Derry, duly seconded by Supervisor Mitzelfelt and carried, the following resolution is adopted by the Board of Supervisors of the San Bernardino County Flood Control District.

WHEREAS, Article XIII B of the California State Constitution imposes a limitation on appropriations by local governmental entities; and

WHEREAS, the Board of Supervisors acted on June 28, 2011 to establish the fiscal year 2010-11 appropriation limits; and

WHEREAS, Proposition 111, as adopted by the voters on June 6, 1990, changed the manner of calculating the appropriations limits under Article XIII B of the California State Constitution; and

WHEREAS, Section 1 of Article XIII B of the California State Constitution generally provides that the total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population; and

WHEREAS, information has now become available to recalculate the appropriation limits for fiscal year 2011-12 in conformance with the options provided by Proposition 111; specifically, the options identified in Section 8(e)(2) of Article XIII B of the California State Constitution; and

WHEREAS, in determining "change in the cost of living" pursuant to Section 8(e)(2) of Article XIII B of the California State Constitution, an entity of local government, other than a school district or a community college district, has the option to select either (A) the percentage change in California per capita personal income from the preceding year, or (B) the percentage change in the local assessment roll from the preceding year due to the addition of local non-residential new construction; and

WHEREAS, the recalculation of appropriation limits for fiscal year 2011-12 is desirable in that this action will provide additional appropriation authority to continue operations at normal levels.

NOW, THEREFORE, BE IT RESOLVED that the fiscal year 2011-12 appropriation limits established by the Board of Supervisors on June 28, 2011, are hereby amended to reflect the San Bernardino County Flood Control District's selected option for determining the "change in the cost of living", as reflected in Attachment "A", attached hereto and incorporated herein by this reference.

BE IT FURTHER RESOLVED that said Attachment "A" presents the fiscal year 2011-12 final appropriation limits now adopted by the Board of Supervisors.

PASSED AND ADOPTED by the Board of Supervisors of the San Bernardino County Flood Control District, State of California, by the following vote:

AYES: SUPERVISORS: Mitzelfelt, Derry, Gonzales

NOES: SUPERVISORS: None

ABSENT: SUPERVISORS: Rutherford

* * * * *

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, **LAURA H. WELCH**, Clerk of the Board of Supervisors of the San Bernardino County Flood Control District, State of California, hereby certify the foregoing to be a full, true and correct copy of the record of the action taken by the Board of Supervisors, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of May 8, 2012. Item no. 53, ml.

LAURA H. WELCH
Clerk of the Board of Supervisors

By _____
Deputy

SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT CALIFORNIA

#27A6108

REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS SITTING AS THE GOVERNING BOARD OF THE FOLLOWING: COUNTY OF SAN BERNARDINO SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT BOARD GOVERNED COUNTY SERVICE AREAS AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS OF THE FOLLOWING: SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT BIG BEAR VALLEY RECREATION AND PARK DISTRICT BLOOMINGTON RECREATION AND PARK DISTRICT AND RECORD OF ACTION

May 7, 2013

FROM: **LARRY WALKER**
Auditor-Controller/Treasurer/Tax Collector

SUBJECT: **FINAL APPROPRIATION LIMITS**

RECOMMENDATION(S)

1. Acting as the governing body of the County of San Bernardino, adopt **Resolution No. 2013-67** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2012-2013 for the County General Fund and Library.
2. Acting as the governing body of the San Bernardino County Flood Control District, adopt **Resolution No. 2013-68** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2012-2013.
3. Acting as the governing body of all County Service Areas and their Zones, adopt **Resolution No. 2013-69** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2012-2013.
4. Acting as the governing body of the San Bernardino County Fire Protection District, adopt **Resolution No. 2013-70** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2012-2013.
5. Acting as the governing body of the Big Bear Valley Recreation and Park District, adopt **Resolution 20113-71** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2012-2013.
6. Acting as the governing body of the Bloomington Recreation and Park District, adopt **Resolution No. 2013-72** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2012-2013.

(Presenter: Larry Walker, Auditor-Controller/Treasurer/Tax Collector, 386-8600)

w/resolutions & attachment:
cc: Auditor-Controller/Treasurer/Tax Collector-Walker & General Accounting Manager
Special Districts-Wildes
County Fire-Rehbaum
SBCFCD-Blakeslee
CAO-Nelson
Flood Control-Valdez
CAO-Brown
File - Auditor-Controller/Treasurer/Tax Collector w/resolutions and attachment
ml 05/20/13
ITEM 104

Rev11-12

Record of Action of the Board of Supervisors and Directors

APPROVED (CONSENT CALENDAR)
COUNTY OF SAN BERNARDINO
San Bernardino County Flood Control District
Board Governed County Service Areas
San Bernardino County Fire Protection District
Big Bear Valley Recreation and Park District
Bloomington Recreation and Park District

MOTION BLOOMINGTON MOVED 2 AYE 3 SECOND 4 AYE 5

LAURA H. WELCH, CLERK OF THE BOARD/SECRETARY

BY _____

DATED: May 07, 2013

BOARD OF SUPERVISORS COUNTY GOALS AND OBJECTIVES
Operate in a Fiscally-Responsible and Business-Like Manner.
Ensure Development of a Well-Planned, Balanced, and Sustainable County.
Pursue County Goals and Objectives by Working with Other Governmental Agencies.

FINANCIAL IMPACT
This action will provide additional appropriation authority needed by San Bernardino County and all Board-Governed local agencies to continue to operate at normal levels. The additional limits will not increase the fiscal year 2012-2013 budget.

BACKGROUND INFORMATION
Limits on the appropriation of the proceeds of tax revenues are required to be established annually by Article XIII B of the California Constitution. These limits are required for all agencies receiving tax proceeds. Proposition 111, approved by the voters on June 6, 1990, allows governmental entities to use an alternative computation to determine the appropriation limits when such calculation is of benefit to the entity.

On June 26, 2012 (Item No. 79), the Board approved the preliminary appropriation limits for fiscal year 2012-2013. During the preparation of the preliminary limits, data on one optional factor, the change in non-residential new construction was not available.

Data on the change in the non-residential new construction factor is available now, permitting re-computation of the fiscal year 2012-2013 appropriation limits. The recomputed limits will increase the appropriation limits of some agencies. Adoption of the recomputed appropriation limits for fiscal year 2012-2013 will enable agencies to continue providing necessary levels of service this fiscal year and succeeding years. The recomputed limits will not increase the fiscal year 2012-2013 budget.

REVIEW BY OTHERS
This item has been reviewed by County Counsel (Kevin Norris, Deputy County Counsel, 387-5455) on April 29, 2013; (Charles Scolastico, County Counsel's Office, 387-5455) on April 16, 2013; (Carol A. Greene, Deputy County Counsel, 387-5455) on April 29, 2013; Special Districts (Michael Wildes, Principal Budget Officer, 387-5938) on April 30, 2013; County Fire (William Rehbaum, Budget Officer, 387-6128) on April 29, 2013; San Bernardino County Flood Control District (Kevin Blakeslee, Deputy Director, 387-7919) on April 29, 2013; County Administrative Office (Cory Nelson, Administrative Analyst, 387-4378) on April 30, 2013; San Bernardino County Flood Control District (Beatriz Valdez, Public Works Chief Financial Officer, 387-1852) on April 29, 2013; and County Administrative Office (Jessica Brown, Administrative Analyst, 387-5510) on April 29, 2013.

County of San Bernardino

Office of the Auditor- Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2009-10 Change Factor Adopted		2009-10 Appropriation Limit Adopted	2010-11 Change Factor Adopted		2010-11 Appropriation Limit Adopted	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted
Board of Supervisors															
County General	1, 2	AAA	81,474,070	1.0162	A	8,103,780,345	0.9839	A	7,973,309,481	1.0362	A	8,261,704,085	1.2125	B	10,017,068,352
Library	2	SAP	2,551,240	1.0162	A	255,708,171	0.9839	A	251,591,269	1.0362	A	260,691,325	1.1913	B	310,551,148
Board-Governed County Service Areas															
CSA 18 Cedar Pines		SFY-190	55,906	1.0162	A	1,499,007	0.9839	A	1,474,873	1.0362	A	1,528,219	1.0468	A	1,599,740
CSA 20 Joshua Tree		SGD-200	236,750	1.0162	A	3,995,272	1.0004	B	3,996,710	1.0362	A	4,141,271	1.0468	A	4,335,082
CSA 29 Lucerne Valley		SGG-245	-	1.0162	A	2,204,984	1.0092	B	2,225,204	1.0362	A	2,305,690	1.0468	A	2,413,596
CSA 30 Red Mountain		SGJ-250	3,082	1.0162	A	75,205	0.9839	A	73,994	1.0362	A	76,670	1.0468	A	80,258
CSA 40 Elephant Mountain		SIS-300	111,030	1.5997	B	53,772,106	0.9839	A	52,906,375	1.0362	A	54,819,999	1.0468	A	57,385,575
CSA 42 Oro Grande		SIV/ SIY/ EAP /EAS	53,017	1.0162	A	565,135	0.9839	A	556,037	1.0362	A	576,149	1.0468	A	603,113
CSA 54 Crest Forest		SJV-370	7,582	1.0162	A	235,577	0.9865	B	232,858	1.0362	A	241,280	1.0468	A	252,572
CSA 56 Wrightwood		SKD-380	26,774	1.0162	A	413,724	0.9839	A	407,063	1.0837	B	441,126	1.0468	A	461,771
CSA 59 Deer Lodge		SKJ-395	17,554	1.0162	A	386,463	0.9839	A	380,241	1.0362	A	393,994	1.0468	A	412,433
CSA 60 Apple Valley Airport		EBJ-400	250,819	1.0162	A	3,378,175	0.9844	B	3,325,306	1.0362	A	3,445,582	1.0468	A	3,606,835
CSA 63 Yucaipa		SKM-415	398,174	1.0162	A	8,602,365	0.9839	A	8,463,867	1.4359	B	12,153,605	1.2283	B	14,927,787
CSA 64 Spring Valley Lake - Sanitation		EBM-420	65,684	1.0162	A	323,504	0.9839	A	318,296	1.0362	A	329,809	1.0468	A	345,244
CSA 64 Spring Valley Lake - Water		ECB-420	65,684	1.0162	A	260,286	0.9839	A	256,095	1.0362	A	265,358	1.0468	A	277,777
CSA 64 Spring Valley Lake - Street Sweeping		ECB-420	-	1.0162	A	143,095	0.9839	A	140,791	1.0362	A	145,883	1.0468	A	152,710
CSA 68 Valley of the Moon		SKP-440	74,982	1.0162	A	2,118,731	0.9839	A	2,084,620	1.0362	A	2,160,021	1.0468	A	2,261,110
CSA 69 Lake Arrowhead		SKS-445	33,353	1.0297	B	2,281,573	1.0348	B	2,360,858	1.0362	A	2,446,250	1.0468	A	2,560,735
CSA 70 DB-2 Big Bear Improvement Zone		EIB-570	-	-	A	-	-	A	16,532	1.0362	A	17,130	1.0468	A	17,932
CSA 70 CG Cedar Glen Water		ELL-563	-	1.0162	A	514,136	0.9839	A	505,858	1.0362	A	524,155	1.0468	A	548,685
CSA 70 D-1 Lake Arrowhead Dam		SLA-130	226,042	1.0162	A	5,583,042	0.9839	A	5,493,155	1.0362	A	5,691,842	1.0468	A	5,958,220
CSA 70 F Morongo Valley Lake		EBY-135	7,055	1.0162	A	140,537	0.9839	A	138,275	1.0362	A	143,276	1.0468	A	149,981
CSA 70 G Wrightwood		SLG-155	1,708	1.0162	A	197,575	0.9839	A	194,394	1.0362	A	201,425	1.0468	A	210,852
CSA 70 J Oak Hills		ECA-165	26,213	1.0162	A	522,212	1.0023	B	523,387	1.0362	A	542,318	1.5215	B	825,126
CSA 70 R-2 Twin Peaks Road		SMA-225	2,025	1.0162	A	88,414	0.9839	A	86,991	1.0362	A	90,137	1.0468	A	94,355
CSA 70 R-3 Erwin Lake Road		SMD-230	5,638	1.0162	A	197,885	0.9839	A	194,699	1.0362	A	201,741	1.2089	B	243,875
CSA 70 R-15 Running Springs		SOJ-285	-	1.0162	A	35,189	0.9839	A	34,623	1.0362	A	35,876	1.0468	A	37,555
CSA 70 R- 22 Twin Peaks Road		SOB-543	-	1.0162	A	27,453	0.9839	A	27,011	1.0362	A	27,988	1.0468	A	29,298
CSA 70 R- 23 Mile High Park		RCA-531	-	1.0162	A	25,018	0.9839	A	24,615	1.0362	A	25,505	1.0468	A	26,699
CSA 70 R- 40 Upper North Bay Lake Arrowhead		RGW-553	-	1.0162	A	27,157	0.9839	A	26,720	1.0362	A	27,686	1.0468	A	28,982
CSA 70 R- 42 Windy Pass		RHL-559	-	1.0162	A	57,956	0.9839	A	57,023	1.0362	A	59,086	1.0468	A	61,851
CSA 70 R- 44 Saw Pit Canyon		SYT-562	-	1.0162	A	72,324	0.9839	A	71,160	1.0362	A	73,734	1.0468	A	77,185
CSA 70 R- 46 South Fairway Drive		SYX-566	-	-	A	-	-	A	5,850	1.0362	A	6,062	1.0468	A	6,346

County of San Bernardino

Office of the Auditor- Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2009-10 Change Factor Adopted		2009-10 Appropriation Limit Adopted	2010-11 Change Factor Adopted		2010-11 Appropriation Limit Adopted	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted
CSA 70 TV-2 Morongo Valley		SLD-330	25,420	1.0162	A	366,535	0.9839	A	360,634	1.0362	A	373,678	1.0468	A	391,166
CSA 70 TV-4 Mesa		SLF-332	40,000	1.0162	A	84,131	0.9839	A	82,777	1.0362	A	85,771	1.0468	A	89,785
CSA 70 TV-5 Wonder Valley		SLE-331	158,685	1.0162	A	335,003	0.9839	A	329,609	1.0362	A	341,531	1.0468	A	357,515
CSA 70 Zone M - Wonder Valley - Park		SYR-205	-	1.0162	A	68,402	0.9839	A	67,301	1.0362	A	69,735	1.0468	A	72,999
CSA 70 Zone M - Wonder Valley - Road		SLP-180	-	1.0162	A	178,484	0.9839	A	175,611	1.0362	A	181,963	1.0468	A	190,479
CSA 70 Zone P - 6 El Mirage		SYP-212	-	1.0162	A	295,014	0.9839	A	290,264	1.0362	A	300,763	1.0468	A	314,839
CSA 70 Zone W Hinkley		SLT-335	-	1.6816	B	70,059	0.9839	A	68,931	1.0362	A	71,424	1.0468	A	74,767
CSA 70 Zone W-1 Goat Mountain		ECS-345	1,844	1.0162	A	26,595	0.9839	A	26,167	1.0362	A	27,113	1.0468	A	28,382
CSA 70 Zone W-3 Hacienda		ECY-350	12,017	1.0162	A	173,272	0.9839	A	170,483	1.0362	A	176,649	1.0468	A	184,916
CSA 79 R-1 Green Valley Lake		RCP-485	-	1.0162	A	36,439	0.9838	A	35,853	1.0362	A	37,150	1.0468	A	38,889
CSA 82 Searles Valley		EFY - 495	38,147	1.0162	A	550,053	0.9839	A	541,197	1.0362	A	560,772	1.0468	A	587,016
CSA SL-1 Countywide Streetlights		SQV-575	517,854	1.0162	A	25,766,844	0.9839	A	25,351,998	1.0362	A	26,268,980	1.0991	B	28,872,761
San Bernardino County Fire Protection District															
San Bernardino County Fire Protection District		FPD/ FHZ / FHH / FES	552,345	1.0162	A	82,649,124	0.9839	A	81,318,473	1.0362	A	84,259,762	1.0984	B	92,551,765
Valley Service Zone		FVZ-580	-	1.0162	A	44,968,037	0.9839	A	44,244,051	1.0362	A	45,844,358	1.0468	A	47,989,674
Mountain Service Zone		FMZ-600	-	1.0162	A	19,678,528	0.9839	A	19,361,704	1.0362	A	20,062,017	1.0468	A	21,000,919
North Desert Service Zone		FNZ-590	-	1.0162	A	24,933,444	0.9839	A	24,532,016	1.0362	A	25,419,338	1.0468	A	26,608,964
South Desert Service Zone		FSZ-610	-	1.0162	A	18,327,910	0.9839	A	18,032,830	1.0362	A	18,685,077	1.0468	A	19,559,539
Service Zone FP-1 Red Mountain		FNZ-590	-	1.0162	A	1,128,368	0.9839	A	1,110,201	1.0362	A	1,150,357	1.0468	A	1,204,194
Service Zone FP-2 Windy Acres		FNZ-590	-	1.0162	A	508,378	0.9839	A	501,177	1.0362	A	519,305	1.0468	A	543,608
Service Zone FP-3 El Mirage		FNZ-590	-	1.0162	A	1,299,664	0.9839	A	1,278,740	1.0362	A	1,324,992	1.0468	A	1,387,002
Service Zone FP-4 Wonder Valley		FSZ-610	19,671	1.0162	A	437,713	0.9839	A	430,666	1.0362	A	446,243	1.0468	A	467,127
Service Zone FP-5 Helendale/Silver Lake		FNZ-590	-	1.0162	A	1,026,520	0.9839	A	1,009,993	1.0362	A	1,046,524	1.0468	A	1,095,501
Service Zone FP-6 Havasu Lake	3	FSZ-610	-	-	A	155,254	0.9839	A	152,754	1.0362	A	158,279	1.0468	A	165,686
Service Zone PM-1 Lake Arrowhead Paramedic		FMZ-600	-	1.0162	A	1,178,438	0.9839	A	1,159,465	1.0362	A	1,201,403	1.0468	A	1,257,629
Service Zone PM-2 Highland Paramedic		FVZ-580	-	1.0162	A	2,923,680	0.9839	A	2,876,608	1.0362	A	2,980,655	1.0468	A	3,120,150
Service Zone PM-3 Yucaipa Paramedic		FVZ-580	-	1.0162	A	59,249	0.9839	A	58,295	1.0362	A	60,404	1.0468	A	63,231
CFD No. 2002-2 Central Valley CFD		SFE-580	-	1.0162	A	2,806,206	0.9839	A	2,761,026	1.0362	A	2,860,892	1.0468	A	2,994,782
County Flood Control District															
Zone 1		RFA-091	4,332,648	1.0162	A	294,713,970	0.9839	A	289,969,075	1.0362	A	300,457,256	1.2197	B	366,467,715
Zone 2		RFF-092	2,216,316	1.0162	A	1,180,864,650	0.9839	A	1,161,852,729	1.0362	A	1,203,876,942	1.1480	B	1,382,002,574
Zone 3		RFL-093	552,637	1.0162	A	35,392,163	0.9839	A	34,822,349	1.0362	A	36,081,873	1.1861	B	42,796,349
Zone 4		RFQ-094	692,563	1.0162	A	90,289,684	0.9839	A	88,836,020	1.0362	A	92,049,219	1.0468	A	96,357,122
Zone 6		RFV-096	715,114	1.4602	B	66,598,634	0.9988	B	66,516,718	1.0362	A	68,922,628	1.0468	A	72,148,207

County of San Bernardino
Office of the Auditor- Controller/Treasurer/Tax Collector
Local Agencies' Annual Appropriations Limit (GANN Limit)
(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2009-10 Change Factor Adopted		2009-10 Appropriation Limit Adopted	2010-11 Change Factor Adopted		2010-11 Appropriation Limit Adopted	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted
Big Bear Valley Recreation and Park District															
Big Bear Valley Recreation and Park District		SSA-620	458,651	1.0162	A	8,368,354	0.9875	B	8,263,917	1.0362	A	8,562,823	1.1760	B	10,070,051
Bloomington Recreation and Park District															
Bloomington Recreation and Park District		SSD-625	93,583	1.0162	A	3,036,581	0.9839	A	2,987,692	1.0362	A	3,095,757	1.0468	A	3,240,638

Article XIII B of the California Constitution was amended by Proposition 111 to change the price and population factors used by the county in setting the appropriation limit.

CHANGE FACTOR COMPONENTS
PRICE FACTOR: The County has the option to select either (A) the Percentage Change in California Per Capita Personal Income or (B) the Percentage Change in the Local Assessment Roll Due to the Addition of Local Non-Residential New Construction.

POPULATION FACTOR: The County may choose the percentage change in one of the following: (1) the population within its jurisdiction, (2) the population within its jurisdiction combined with the population within all county borders contiguous to the County, or (3) the change in population within the incorporated portion of the County. For 2011-12 and 2012-13 the County has selected option (3) For 2009-2010 and 2010- 2011 the County has selected to use option (2).

NOTES

1. The general fund base year adjustments, listed below, were made in 1988-89 to correct errors and incorporate omissions and interpretations by the Courts, County Counsel and the State Controller's Office:

   * $600,000 increase for cigarette tax revenue, inadvertently omitted as other state revenue.
   * $2,551,240 increase due to the addition of County Library's base year limit.
   * $95,000 decrease due to aid for agriculture included as tax proceeds.
   * $1,442,444 decrease due to the exclusion of federally restricted Public Assistance Revenues included in the base year as tax proceeds.

2. The base year limit of $2,551,240 for the library was established, and separated from that of the General Fund in 1996-97 due to each fund having separate percentage change in the local assessment roll due to the addition of local non-residential new construction.

3 The adopted 2009-10 Appropriation Limit, which serves as this district's base year, has been increased by $20,254 to include taxes from certain parcels that had inadvertently been omitted. The 2010-11, 2011-12 and 2012-13 limits increased by $19,927, $20,648 and $21,614 respectively as a result of this base year limit adjustment.

Data Sources:
Auditor-Controller/Treasurer/Tax Collector, County of San Bernardino
San Bernardino County Budget
San Bernardino County Special Districts Budget
Local Agency Formation Commission, County of San Bernardino
California Department of Finance

RESOLUTION NO. 2013-68

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, ESTABLISHING THE FISCAL YEAR 2012-2013 FINAL APPROPRIATION LIMITS

On Tuesday May 7, 2013, on motion of Supervisor Lovingood, duly seconded by Supervisor Ovitt and carried, the following resolution is adopted by the Board of Supervisors of San Bernardino County, State of California.

WHEREAS, Article XIII B of the California State Constitution imposes a limitation on appropriations by local governmental entities; and

WHEREAS, the Board of Supervisors acted on June 26, 2012 to establish the fiscal year 2012-13 appropriation limits; and

WHEREAS, Proposition 111, as adopted by the voters on June 6, 1990, changed the manner of calculating the appropriations limits under Article XIII B of the California State Constitution; and

WHEREAS, Section 1 of Article XIII B of the California State Constitution generally provides that the total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population; and

WHEREAS, information has now become available to recalculate the appropriation limits for fiscal year 2012-13 in conformance with the options provided by Proposition 111; specifically, the options identified in Section 8(e)(2) of Article XIII B of the California State Constitution; and

WHEREAS, in determining "change in the cost of living" pursuant to Section 8(e)(2) of Article XIII B of the California State Constitution, an entity of local government, other than a school district or a community college district, has the option to select either (A) the percentage change in California per capita personal income from the preceding year, or (B) the percentage change in the local assessment roll from the preceding year due to the addition of local non-residential new construction; and

WHEREAS, the recalculation of appropriation limits for fiscal year 2012-13 is desirable in that this action will provide additional appropriation authority to continue operations at normal levels.

NOW, THEREFORE, BE IT RESOLVED that the fiscal year 2012-13 appropriation limits established by the Board of Supervisors on June 26, 2012, are hereby amended to reflect the San Bernardino County Flood Control District's selected option for determining the "change in the cost of living", as reflected in Attachment "A", attached hereto and incorporated herein by this reference.

BE IT FURTHER RESOLVED that said Attachment "A" presents the fiscal year 2012-13 final appropriation limits now adopted by the Board of Supervisors.

PASSED AND ADOPTED by the Board of Supervisors of the County of San Bernardino, State of California, by the following vote:

AYES: SUPERVISORS: Lovingood, Rutherford, Ramos, Ovitt, Gonzales

NOES: SUPERVISORS: None

ABSENT: SUPERVISORS: None

* * * * *

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, **LAURA H. WELCH**, Clerk of the Board of Supervisors of the County of San Bernardino, State of California, hereby certify the foregoing to be a full, true and correct copy of the record of the action taken by the Board of Supervisors, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of May 7, 2013. Item no. 104, ml.

LAURA H. WELCH
Clerk of the Board of Supervisors

By _____ Deputy

SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT 1939 CALIFORNIA

REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS SITTING AS THE GOVERNING BOARD OF THE FOLLOWING:
COUNTY OF SAN BERNARDINO
SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT
BOARD GOVERNED COUNTY SERVICE AREAS
AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS OF THE FOLLOWING:
SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT
BIG BEAR VALLEY RECREATION AND PARK DISTRICT
BLOOMINGTON RECREATION AND PARK DISTRICT
AND RECORD OF ACTION

May 6, 2014

FROM: **LARRY WALKER, Auditor-Controller/Treasurer/Tax Collector**
Auditor-Controller/Treasurer/Tax Collector

SUBJECT: **FINAL APPROPRIATIONS LIMITS**

RECOMMENDATION(S)

1. Acting as the governing body of the County of San Bernardino, adopt **Resolution No.2014-92** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2013-2014 for the County General Fund and Library.
2. Acting as the governing body of the San Bernardino County Flood Control District, adopt **Resolution No. 2014-93** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2013-2014.
3. Acting as the governing body of all County Service Areas and their Zones, adopt **Resolution No. 2014-94** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2013-2014.
4. Acting as the governing body of the San Bernardino County Fire Protection District, adopt **Resolution No. 2014-95** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2013-2014.
5. Acting as the governing body of the Big Bear Valley Recreation and Park District, adopt **Resolution No. 2014-96** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2013-2014.
6. Acting as the governing body of the Bloomington Recreation and Park District adopt **Resolution No. 2014-97** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2013-2014.

(Presenter: Larry Walker, Auditor-Controller/Treasurer/Tax Collector, 386-9000)

cc: **w/Reso(s)**
ATC-Walker
SDD-Wildes
County Fire-Rehbaum
SBCFCD-Blakeslee
PW-Valdez
CAO-Porter, Pacot, Brown
File - w/Attach in Separate Entities
ss 5/27/14

Rev 2-25-14

ITEM 74

Record of Action of the Board of Supervisors and Directors

APPROVED (CONSENT CALENDAR)
COUNTY OF SAN BERNARDINO
San Bernardino County Flood Control District
Board Governed County Service Areas
San Bernardino County Fire Protection District
Big Bear Valley Recreation and Park District
Bloomington Recreation and Park District

MOTION: BLOOMINGTON ABSENT: 1 AYE: 2 AYE: 3 MOVED: 4 SECOND: 5

LAURA H. WELCH, CLERK OF THE BOARD OF DIRECTORS/SECRETARY

BY:

DATED: May 06, 2014

BOARD OF SUPERVISORS COUNTY GOALS AND OBJECTIVES
Operate in a Fiscally-Responsible and Business-Like Manner.
Ensure Development of a Well-Planned, Balanced, and Sustainable County.
Pursue County Goals and Objectives by Working with Other Governmental Agencies.

FINANCIAL IMPACT
This action will provide additional appropriation authority needed by San Bernardino County and all Board-Governed local agencies to continue to operate at normal levels. The additional limits will not increase the fiscal year 2013-2014 budget.

BACKGROUND INFORMATION
Limits on the appropriation of the proceeds of tax revenues are required to be established annually by Article XIII B of the California Constitution. These limits are required for all agencies receiving tax proceeds. Proposition 111, approved by the voters on June 6, 1990, allows governmental entities to use an alternative computation to determine the appropriation limits when such calculation is of benefit to the entity.

On June 18, 2013 (Item No. 104), the Board approved the preliminary appropriation limits for fiscal year 2013-2014. During the preparation of the preliminary limits, data on one optional factor, the change in non-residential new construction, was not available.

Data on the change in the non-residential new construction factor is available now, permitting re-computation of the fiscal year 2013-2014 appropriation limits. The recomputed limits will increase the appropriation limits of some agencies. Adoption of the recomputed appropriation limits for fiscal year 2013-2014 will enable agencies to continue providing necessary levels of service this fiscal year and succeeding years. The recomputed limits will not increase the fiscal year 2013-2014 budget.

REVIEW BY OTHERS
This item has been reviewed by County Counsel (Kevin Norris, Deputy County Counsel, 387-5455) on April 7, 2014, (Dawn Messer, Deputy County Counsel, 387-5455) on April 2, 2014, (Mitchell Norton, Deputy County Counsel, 387-5455) on April 9, 2014, and (Carol Greene, Deputy County Counsel, 387-5455) on April 2, 2014; Special Districts (Michael Wildes, Principal Budget Officer, 387-5938) on April 7, 2014; County Fire (William Rehbaum, Budget Officer, 387-6128) on April 10, 2014; San Bernardino County Flood Control District (Kevin Blakeslee, Deputy Director, 387-7919) on April 2, 2014; Public Works (Beatriz Valdez, Public Works Chief Financial Officer, 387-1852) on April 2, 2014; and the County Administrative Office (Ginger Porter, Administrative Analyst, 387-4883) on April 2, 2014, (Carlo Pacot, Administrative Analyst, 387-5944) on April 10, 2014, and (Jessica Brown, Administrative Analyst, 387-5510) on April 10, 2014; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on April 22, 2014.

County of San Bernardino

Office of the Auditor- Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Attachment A

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2010-11 Change Factor Adopted		2010-11 Appropriation Limit Adopted	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted	2013-2014 Change Factor Adopted		2013-2014 Appropriation Limit Adopted
Board of Supervisors.															
County General	1 , 2	AAA	81,474,070	0.9839	A	7,973,309,481	1.0362	A	8,261,704,085	1.2125	B	10,017,068,352	1.1515	B	11,534,654,207
Library	2	SAP	2,551,240	0.9839	A	251,591,269	1.0362	A	260,691,325	1.1913	B	310,551,148	1.1179	B	347,165,128
Board-Governed County Service Areas															
CSA 18 Cedar Pines		SFY-190	55,906	0.9839	A	1,474,873	1.0362	A	1,528,219	1.0468	A	1,599,740	1.0606	A	1,696,684
CSA 20 Joshua Tree		SGD-200	236,750	1.0004	B	3,996,710	1.0362	A	4,141,271	1.0468	A	4,335,082	1.0606	A	4,597,768
CSA 29 Lucerne Valley		SGG-245	-	1.0092	B	2,225,204	1.0362	A	2,305,690	1.0468	A	2,413,596	1.0606	A	2,559,860
CSA 30 Red Mountain		SGJ-250	3,082	0.9839	A	73,994	1.0362	A	76,670	1.0468	A	80,258	1.0606	A	85,122
CSA 40 Elephant Mountain		SIS-300	111,030	0.9839	A	52,906,375	1.0362	A	54,819,999	1.0468	A	57,385,575	1.0606	A	60,863,141
CSA 42 Oro Grande		SIV/ SIY/ EAP /EAS	53,017	0.9839	A	556,037	1.0362	A	576,149	1.0468	A	603,113	1.0606	A	639,662
CSA 54 Crest Forest		SJV-370	7,582	0.9885	B	232,858	1.0362	A	241,280	1.0468	A	252,572	1.0606	A	267,878
CSA 56 Wrightwood		SKD-380	26,774	0.9839	A	407,063	1.0837	B	441,126	1.0468	A	461,771	1.0606	A	489,754
CSA 59 Deer Lodge		SKJ-395	17,554	0.9839	A	380,241	1.0362	A	393,994	1.0468	A	412,433	1.0606	A	437,426
CSA 60 Apple Valley Airport		EBJ-400	250,819	0.9844	B	3,325,305	1.0362	A	3,445,582	1.0468	A	3,606,835	1.1471	B	4,137,400
CSA 63 Yucaipa		SKM-415	398,174	0.9839	A	8,463,867	1.4359	B	12,153,605	1.2283	B	14,927,787	1.0640	B	15,883,165
CSA 64 Spring Valley Lake - Sanitation		EBM-420	65,684	0.9839	A	318,296	1.0362	A	329,809	1.0468	A	345,244	1.0606	A	366,166
CSA 64 Spring Valley Lake - Water		ECB-420	65,684	0.9839	A	256,095	1.0362	A	265,358	1.0468	A	277,777	1.0606	A	294,610
CSA 64 Spring Valley Lake - Street Sweeping		ECB-420	-	0.9839	A	140,791	1.0362	A	145,883	1.0468	A	152,710	1.0606	A	161,964
CSA 68 Valley of the Moon		SKP-440	74,982	0.9839	A	2,084,620	1.0362	A	2,160,021	1.0468	A	2,261,110	1.0606	A	2,398,133
CSA 69 Lake Arrowhead		SKS-445	33,353	1.0348	B	2,360,858	1.0362	A	2,446,250	1.0468	A	2,560,735	1.0606	A	2,715,915
CSA 70 DB-2 Big Bear Improvement Zone		EIB-570	-	-	A	16,532.00	1.0362	A	17,130	1.0468	A	17,932	1.0606	A	19,019
CSA 70 CG Cedar Glen Water		ELL-563	-	0.9839	A	505,858	1.0362	A	524,155	1.0468	A	548,685	1.0606	A	581,935
CSA 70 D-1 Lake Arrowhead Dam		SLA-130	226,042	0.9839	A	5,493,155	1.0362	A	5,691,842	1.0468	A	5,958,220	1.0606	A	6,319,288
CSA 70 F Morongo Valley Lake		EBY-135	7,055	0.9839	A	138,276	1.0362	A	143,276	1.0468	A	149,981	1.0606	A	159,070
CSA 70 G Wrightwood		SLG-155	1,798	0.9839	A	194,394	1.0362	A	201,425	1.0468	A	210,852	1.0606	A	223,630
CSA 70 J Oak Hills		ECA-165	25,213	1.0023	B	523,387	1.0362	A	542,318	1.5215	B	825,126	1.0606	A	875,129
CSA 70 R-2 Twin Peaks Road		SMA-225	2,025	0.9839	A	86,991	1.0362	A	90,137	1.0468	A	94,355	1.0606	A	100,073
CSA 70 R-3 Erwin Lake Road		SMD-230	5,638	0.9839	A	194,699	1.0362	A	201,741	1.2089	B	243,875	1.0606	A	258,654
CSA 70 R-15 Running Springs		SOJ-285	-	0.9839	A	34,623	1.0362	A	35,876	1.0468	A	37,555	1.0606	A	39,831
CSA 70 R- 22 Twin Peaks Road		SOB-543	-	0.9839	A	27,011	1.0362	A	27,988	1.0468	A	29,298	1.0606	A	31,073
CSA 70 R- 23 Mile High Park		RCA-531	-	0.9839	A	24,615	1.0362	A	25,505	1.0468	A	26,699	1.0606	A	28,317
CSA 70 R- 40 Upper North Bay Lake Arrowhead		RGW-553	-	0.9839	A	26,720	1.0362	A	27,686	1.0468	A	28,982	1.0606	A	30,738
CSA 70 R- 42 Windy Pass		RHL-559	-	0.9839	A	57,023	1.0362	A	59,086	1.0468	A	61,851	1.0606	A	65,599
CSA 70 R- 44 Saw Pit Canyon		SYT-582	-	0.9839	A	71,160	1.0362	A	73,734	1.0468	A	77,185	1.0606	A	81,862
CSA 70 R- 46 South Fairway Drive		SYX-586	-	-	A	5,850	1.0362	A	6,062	1.0468	A	6,345	1.0606	A	6,731

County of San Bernardino

Office of the Auditor- Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Attachment A

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2010-11 Change Factor Adopted		2010-11 Appropriation Limit Adopted	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted	2013-2014 Change Factor Adopted		2013-2014 Appropriation Limit Adopted
CSA 70 TV-2 Morongo Valley		SLD-330	25,420	0.9839	A	360,634	1.0362	A	373,678	1.0468	A	391,166	1.0606	A	414,871
CSA 70 TV-4 Mesa		SLF-332	40,000	0.9839	A	82,777	1.0362	A	85,771	1.0468	A	89,785	1.0606	A	95,226
CSA 70 TV-5 Wonder Valley		SLE-331	158,685	0.9839	A	329,609	1.0362	A	341,531	1.0468	A	357,515	1.0606	A	379,180
CSA 70 Zone M - Wonder Valley - Park		SYR-205	-	0.9839	A	67,301	1.0362	A	69,735	1.0468	A	72,999	1.0606	A	77,423
CSA 70 Zone M - Wonder Valley - Road		SLP-180	-	0.9839	A	176,611	1.0362	A	181,963	1.0468	A	190,479	1.0606	A	202,022
CSA 70 Zone P - 6 El Mirage		SYP-212	-	0.9839	A	290,264	1.0362	A	300,763	1.0468	A	314,839	1.0606	A	333,918
CSA 70 Zone W Hinkley		SLT-335	-	0.9839	A	68,931	1.0362	A	71,424	1.0468	A	74,767	1.0606	A	79,298
CSA 70 Zone W-1 Goat Mountain		ECS-345	1,844	0.9839	A	26,167	1.0362	A	27,113	1.0468	A	28,382	1.0606	A	30,102
CSA 70 Zone W-3 Hacienda		ECY-350	12,017	0.9839	A	170,483	1.0362	A	176,649	1.0468	A	184,916	1.0606	A	196,122
CSA 79 R-1 Green Valley Lake		RCP-485	-	0.9839	A	35,853	1.0362	A	37,150	1.0468	A	38,889	1.0606	A	41,246
CSA 82 Searles Valley		EFY - 495	38,147	0.9839	A	541,197	1.0362	A	560,772	1.0468	A	587,016	1.0606	A	622,589
CSA SL-1 Countywide Streetlights		SQV-575	517,854	0.9839	A	25,351,998	1.0362	A	26,268,980	1.0991	B	28,872,761	1.0606	A	30,622,450
San Bernardino County Fire Protection District															
San Bernardino County Fire Protection District		FPD/ FHZ / FHH / FES	652,345	0.9839	A	81,318,473	1.0362	A	84,259,762	1.0984	B	92,551,765	1.0893	B	100,816,638
Valley Service Zone		FVZ-580	-	0.9839	A	44,244,051	1.0362	A	45,844,358	1.0468	A	47,989,874	1.0606	A	50,898,060
Mountain Service Zone		FMZ-600	-	0.9839	A	19,361,704	1.0362	A	20,062,017	1.0468	A	21,080,919	1.0606	A	22,273,575
North Desert Service Zone		FNZ-590	-	0.9839	A	24,532,016	1.0362	A	25,419,339	1.0468	A	26,608,964	1.0606	A	28,221,467
South Desert Service Zone		FSZ-610	-	0.9839	A	18,032,830	1.0362	A	18,685,077	1.0468	A	19,559,539	1.0606	A	20,744,647
Service Zone FP-1 Red Mountain		FNZ-590	-	0.9839	A	1,110,201	1.0362	A	1,150,357	1.0468	A	1,204,194	1.0606	A	1,277,168
Service Zone FP-2 Windy Acres		FNZ-590	-	0.9839	A	501,177	1.0362	A	519,305	1.0468	A	543,608	1.0606	A	576,551
Service Zone FP-3 El Mirage		FNZ-590	-	0.9839	A	1,278,740	1.0362	A	1,324,992	1.0468	A	1,387,002	1.0606	A	1,471,054
Service Zone FP-4 Wonder Valley		FSZ-610	19,671	0.9839	A	430,666	1.0362	A	446,243	1.0468	A	467,127	1.0606	A	495,435
Service Zone FP-5 Helendale/Silver Lake		FNZ-590	-	0.9839	A	1,009,993	1.0362	A	1,046,524	1.0468	A	1,095,501	1.0606	A	1,161,888
Service Zone FP-6 Havasu Lake	3	FSZ-610	-	1	A	152,754	1.0362	A	158,279	1.0468	A	165,686	1.0606	A	175,727
Service Zone PM-1 Lake Arrowhead Paramedic		FMZ-600	-	0.9839	A	1,159,465	1.0362	A	1,201,493	1.0468	A	1,257,629	1.0606	A	1,333,841
Service Zone PM-2 Highland Paramedic		FVZ-580	-	0.9839	A	2,876,608	1.0362	A	2,980,655	1.0468	A	3,120,150	1.0606	A	3,309,231
Service Zone PM-3 Yucaipa Paramedic		FVZ-580	-	0.9839	A	58,295	1.0362	A	60,404	1.0468	A	63,231	1.0606	A	67,063
CFD No. 2002-2 Central Valley CFD		SFE-580	-	0.9839	A	2,761,028	1.0362	A	2,860,892	1.0468	A	2,994,782	1.0606	A	3,176,266
County Flood Control District															
Zone 1		RFA-091	4,332,646	0.9839	A	289,969,075	1.0362	A	300,457,256	1.2197	B	366,467,715	1.1904	B	436,243,168
Zone 2		RFF-092	2,216,316	0.9839	A	1,161,852,729	1.0362	A	1,203,878,942	1.1480	B	1,382,602,574	1.0794	B	1,491,733,578
Zone 3		RFL-093	552,637	0.9839	A	34,822,349	1.0362	A	36,081,873	1.1861	B	42,796,349	1.3505	B	57,796,469
Zone 4		RFQ-094	592,563	0.9839	A	88,836,020	1.0362	A	92,049,219	1.0468	A	96,357,122	1.1618	B	111,947,704
Zone 6		RFV-096	715,114	0.9988	B	66,516,718	1.0362	A	68,922,628	1.0468	A	72,148,207	1.0606	A	76,520,388

County of San Bernardino

Office of the Auditor- Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2010-11 Change Factor Adopted		2010-11 Appropriation Limit Adopted	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted	2013-2014 Change Factor Adopted		2013-2014 Appropriation Limit Adopted
Big Bear Valley Recreation and Park District															
Big Bear Valley Recreation and Park District		SSA-620	458,651	0.9875	B	8,263,917	1.0362	A	8,562,823	1.1760	B	10,070,051	1.1324	B	11,403,326
Bloomington Recreation and Park District															
Bloomington Recreation and Park District		SSD-625	93,583	0.9839	A	2,987,692	1.0362	A	3,095,757	1.0468	A	3,240,638	1.0605	A	3,437,021

Article XIII B of the California Constitution was amended by Proposition 111 to change the price and population factors used by the county in setting the appropriation limit.

CHANGE FACTOR COMPONENTS
PRICE FACTOR: The County has the option to select either (A) the Percentage Change in California Per Capita Personal Income or (B) the Percentage Change in the Local Assessment Roll Due to the Addition of Local Non-Residential New Construction.

POPULATION FACTOR: The County may choose the percentage change in one of the following: (1) the population within its jurisdiction, (2) the population within its jurisdiction combined with the population within all county borders contiguous to the County, or (3) the change in population within the incorporated portion of the County. For 2011-2012, 2012-2013, and 2013-2014 the County has selected option (3) For 2010- 2011 the County has selected to use option (2).

NOTES

1. The general fund base year adjustments, listed below, were made in 1988-89 to correct errors and incorporate omissions and interpretations by the Courts, County Counsel and the State Controller's Office:

   * $600,000 increase for cigarette tax revenue, inadvertently omitted as other state revenue.
   * $2,551,240 increase due to the addition of County Library's base year limit.
   * $95,000 decrease due to aid for agriculture included as tax proceeds.
   * $1,442,444 decrease due to the exclusion of federally restricted Public Assistance Revenues included in the base year as tax proceeds.

2. The base year limit of $2,551,240 for the library was established, and separated from that of the General Fund in 1996-97 due to each fund having separate percentage change in the local assessment roll due to the addition of local non-residential new construction.

Data Sources:
Auditor-Controller/Treasurer/Tax Collector, County of San Bernardino
San Bernardino County Budget
San Bernardino County Special Districts Budget
Local Agency Formation Commission, County of San Bernardino
California Department of Finance

RESOLUTION NO. 2014-93

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, ESTABLISHING THE FISCAL YEAR 2013-2014 FINAL APPROPRIATION LIMITS

On Tuesday May 6, 2014, on motion of Supervisor Ovitt, duly seconded by Supervisor Gonzales and carried, the following resolution is adopted by the Board of Supervisors of the San Bernardino County Flood Control District.

WHEREAS, Article XIII B of the California State Constitution imposes a limitation on appropriations by local governmental entities; and

WHEREAS, the Board of Supervisors acted on June 18, 2013 to establish the fiscal year 2013-14 appropriation limits; and

WHEREAS, Proposition 111, as adopted by the voters on June 6, 1990, changed the manner of calculating the appropriations limits under Article XIII B of the California State Constitution; and

WHEREAS, Section 1 of Article XIII B of the California State Constitution generally provides that the total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population; and

WHEREAS, information has now become available to recalculate the appropriation limits for fiscal year 2013-14 in conformance with the options provided by Proposition 111; specifically, the options identified in Section 8(e)(2) of Article XIII B of the California State Constitution; and

WHEREAS, in determining "change in the cost of living" pursuant to Section 8(e)(2) of Article XIII B of the California State Constitution, an entity of local government, other than a school district or a community college district, has the option to select either (A) the percentage change in California per capita personal income from the preceding year, or (B) the percentage change in the local assessment roll from the preceding year due to the addition of local non-residential new construction; and

WHEREAS, the recalculation of appropriation limits for fiscal year 2013-14 is desirable in that this action will provide additional appropriation authority to continue operations at normal levels.

NOW, THEREFORE, BE IT RESOLVED that the fiscal year 2013-14 appropriation limits established by the Board of Supervisors on June 18, 2013, are hereby amended to reflect the San Bernardino County Flood Control District's selected option for determining the "change in the cost of living", as reflected in Attachment "A", attached hereto and incorporated herein by this reference.

BE IT FURTHER RESOLVED that said Attachment "A" presents the fiscal year 2013-14 final appropriation limits now adopted by the Board of Supervisors.

PASSED AND ADOPTED by the Board of Supervisors of the County of San Bernardino, State of California, by the following vote:

AYES:	SUPERVISORS:	Rutherford, Ramos, Ovitt, Gonzales
NOES:	SUPERVISORS:	NONE
ABSENT:	SUPERVISORS:	Lovingood

* * * * *

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, **LAURA H. WELCH**, Clerk of the Board of Supervisors of the County of San Bernardino, State of California, hereby certify the foregoing to be a full, true and correct copy of the record of the action taken by the Board of Supervisors, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of May 6, 2014. #74ss

LAURA H. WELCH
Clerk of the Board of Supervisors

By _____
Deputy

SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT CALIFORNIA

REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS SITTING AS THE GOVERNING BOARD OF THE FOLLOWING: COUNTY OF SAN BERNARDINO BOARD GOVERNED COUNTY SERVICE AREAS SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS OF THE FOLLOWING: SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT BIG BEAR VALLEY RECREATION AND PARK DISTRICT BLOOMINGTON RECREATION AND PARK DISTRICT AND RECORD OF ACTION

May 5, 2015

FROM: **LARRY WALKER, Auditor-Controller/Treasurer/Tax Collector**
Auditor-Controller/Treasurer/Tax Collector

SUBJECT: **FINAL APPROPRIATIONS LIMITS**

RECOMMENDATION(S)

1. Acting as the governing body of the County of San Bernardino, adopt **Resolution No. 2015-42** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2014-2015 for the County General Fund and Library.
2. Acting as the governing body of the San Bernardino County Flood Control District, adopt **Resolution No. 2015-43** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2014-2015.
3. Acting as the governing body of all County Service Areas and their Zones, adopt **Resolution No. 2015-44** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2014-2015.
4. Acting as the governing body of the San Bernardino County Fire Protection District, adopt **Resolution No. 2015-45** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2014-2015.
5. Acting as the governing body of the Big Bear Valley Recreation and Park District, adopt **Resolution No. 2015-46** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2014-2015.
6. Acting as the governing body of the Bloomington Recreation and Park District, adopt **Resolution No. 2015-47** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2014-2015.

(Presenter: Larry Walker, Auditor-Controller/Treasurer/Tax Collector, 386-9000)

cc: w/Reso's
ATC-Walker ;Gen. Acct. Mgr.
SDD- Edmisten ;Reception
County Fire - Rehbaum
FCD- Blakeslee
PW- Valdez
CAO- Porter ;Brown ;Forster
LAFCO
File - ATC w/Attach.
File - BGCSA w/Attach.
File - SBCFCD w/Attach.
File - SBCFPD w/Attach.
File - BBVRPD w/Attach.
File - BRPD w/Attach.
ss 5/11/15

Rev 7-29-14

ITEM 59

Record of Action of the Board of Supervisors & Directors
APPROVED (CONSENT CALENDAR)
COUNTY OF SAN BERNARDINO
Board of Supervisors
Board Governed County Service Areas
San Bernardino County Flood Control District
Board of Directors
San Bernardino County Fire Protection District
Big Bear Valley Recreation and Park District
Bloomington Recreation and Park District
MOTION SECOND AYE AYE MOVE AYE
LAURA H. WELCH, CLERK OF THE BOARD
BY
DATED: May 05, 2015

BOARD OF SUPERVISORS COUNTY GOALS AND OBJECTIVES
Operate in a Fiscally-Responsible and Business-Like Manner.
Ensure Development of a Well-Planned, Balanced, and Sustainable County.
Pursue County Goals and Objectives by Working with Other Governmental Agencies.

FINANCIAL IMPACT
Approval of the item will not result in the use of additional Discretionary General Funding (Net County Cost). This action will provide additional appropriation authority needed by San Bernardino County and Board-Governed agencies to continue to operate at normal levels. The additional limits will not increase the 2014-2015 budgets for the respective entities.

BACKGROUND INFORMATION
Limits on the appropriation of the proceeds of tax revenues are required to be established annually by Article XIII B of the California Constitution for all agencies receiving tax proceeds. Proposition 111, approved by the voters on June 6, 1990, allows governmental entities to use an alternative computation to determine the appropriations limit when such calculations are of benefit to the entity. These factors include the percentage change in per-capita personal income and the change in non-residential new construction.

On June 24, 2014 (Item No. 113), the Board approved the preliminary appropriation limits for fiscal year 2014-2015. During the preparation of the preliminary limits, data on one optional factor (the change in non-residential new construction) was not available and as such was not considered or used in the calculation of appropriation limits.

Data on the change in the non-residential new construction factor is available now, permitting re-computation of the fiscal year 2014-2015 appropriation limits. The recomputed limits will increase the appropriation limits of some agencies. Adoption of the recomputed appropriation limits for fiscal year 2014-2015 will enable agencies to continue providing necessary levels of service this fiscal year and succeeding years. The recomputed limits will not increase the fiscal year 2014-2015 budget.

REVIEW BY OTHERS
This item has been reviewed by County Counsel (Phebe W. Chu, Deputy County Counsel, 387-5455) on March 16, 2015, (Dawn Messer, Deputy County Counsel, 387-5455) on March 16, 2015, (Mitchell Norton, Deputy County Counsel, 387-5455) on April 10, 2015, and (Carol Greene, Deputy County Counsel, 387-5455) on March 16, 2015; Special Districts (Allison Edmisten, Principal Budget Officer, 387-5938) on April 9, 2015; County Fire (William Rehbaum, Budget Officer, 387-6128) on March 18, 2015; San Bernardino County Flood Control District (Kevin Blakeslee, Deputy Director, 387-7919) on March 17, 2015; Public Works (Beatriz Valdez, Public Works Chief Financial Officer, 387-1852) on March 16, 2015; and Finance (Ginger Porter, 387-4883, Jessica Brown, 387-4919, and Tom Forster, 387-4635, Administrative Analysts) on March, 2015, March 17, 2015, and April 7, 2015, respectively; and County Finance and Administration (Katrina Turnburro, Deputy Executive Officer, 387-5423) on April 20, 2015.

RESOLUTION NO. 2015-43

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, ESTABLISHING THE FISCAL YEAR 2014-2015 FINAL APPROPRIATION LIMITS

On Tuesday May 5, 2015, on motion of Supervisor Hagman, duly seconded by Supervisor Lovingood and carried, the following resolution is adopted by the Board of Supervisors of the San Bernardino County Flood Control District.

WHEREAS, Article XIII B of the California State Constitution imposes a limitation on appropriations by local governmental entities; and

WHEREAS, the Board of Supervisors acted on June 24, 2014, to establish the fiscal year 2014-15 appropriation limits as required by Government Code section 7910; and

WHEREAS, Proposition 111, as adopted by the voters on June 6, 1990, changed the manner of calculating the appropriations limits under Article XIII B of the California State Constitution; and

WHEREAS, Section 1 of Article XIII B of the California State Constitution generally provides that the total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population; and

WHEREAS, information has now become available to recalculate the appropriation limits for fiscal year 2014-15 in conformance with the options provided by Proposition 111; specifically, the options identified in Section 8(e)(2) of Article XIII B of the California State Constitution; and

WHEREAS, in determining "change in the cost of living" pursuant to Section 8(e)(2) of Article XIII B of the California State Constitution, an entity of local government, other than a school district or a community college district, has the option to select either (A) the percentage change in California per capita personal income from the preceding year, or (B) the percentage change in the local assessment roll from the preceding year due to the addition of local non-residential new construction; and

WHEREAS, the recalculation of appropriation limits for fiscal year 2014-15 is desirable in that this action will provide additional appropriation authority to continue operations at normal levels.

NOW, THEREFORE, BE IT RESOLVED that the fiscal year 2014-15 appropriation limits established by the Board of Supervisors on June 24, 2014, are hereby amended to reflect the San Bernardino County Flood Control District's selected option for determining the "change in the cost of living", as reflected in Attachment "A", attached hereto and incorporated herein by this reference.

BE IT FURTHER RESOLVED that said Attachment "A" presents the fiscal year 2014-15 final appropriation limits now adopted by the Board of Supervisors.

PASSED AND ADOPTED by the Board of Supervisors of the County of San Bernardino, State of California, by the following vote:

AYES:	SUPERVISORS:	Lovingood, Rutherford, Ramos, Hagman, Gonzales
NOES:	SUPERVISORS:	None
ABSENT:	SUPERVISORS:	None

* * * * *

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, **LAURA H. WELCH**, Clerk of the Board of Supervisors of the County of San Bernardino, State of California, hereby certify the foregoing to be a full, true and correct copy of the record of the action taken by the Board of Supervisors, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of May 5, 2015. #59ss

LAURA H. WELCH
Clerk of the Board of Supervisors

By _____
Deputy

County of San Bernardino

Office of the Auditor- Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted	2013-14 Change Factor Adopted		2013-14 Appropriation Limit Adopted	2014-2015 Change Factor Adopted		2014-2015 Appropriation Limit Adopted
Board of Supervisors															
County General	1 , 2	AAA	81,474,070	1.0362	A	8,261,704,085	1.2125	B	10,017,068,352	1.1515	B	11,534,654,207	1.1676	B	13,467,862,252
Library	2	SAP	2,551,240	1.0362	A	260,691,325	1.1913	B	310,551,148	1.1179	B	347,165,128	1.2192	B	423,263,724
Board-Governed County Service Areas															
CSA 18 Cedar Pines		SFY-190	55,906	1.0362	A	1,528,219	1.0468	A	1,599,740	1.0606	A	1,696,684	1.0223	B	1,734,520
CSA 20 Joshua Tree		SGD-200	236,750	1.0362	A	4,141,271	1.0468	A	4,335,082	1.0606	A	4,597,788	1.0198	B	4,688,824
CSA 29 Lucerne Valley		SGG-245	-	1.0362	A	2,305,690	1.0468	A	2,413,596	1.0606	A	2,559,860	1.0189	B	2,608,241
CSA 30 Red Mountain		SGJ-250	3,082	1.0362	A	76,670	1.0468	A	80,258	1.0606	A	85,122	1.0088	B	85,871
CSA 40 Elephant Mountain		SIS-300	111,030	1.0362	A	54,819,999	1.0468	A	57,385,575	1.0606	A	60,863,141	1.0065	A	61,258,751
CSA 42 Oro Grande		SIV/ SIY/ EAP/ EAS	53,017	1.0362	A	576,149	1.0468	A	603,113	1.0606	A	639,662	1.0088	B	645,291
CSA 54 Crest Forest		SJV-370	7,582	1.0362	A	241,280	1.0468	A	252,572	1.0606	A	267,878	1.0105	B	270,691
CSA 56 Wrightwood		SKD-380	26,774	1.0837	B	441,126	1.0468	A	461,771	1.0606	A	489,754	1.0089	B	494,113
CSA 59 Deer Lodge		SKJ-395	17,554	1.0362	A	393,994	1.0468	A	412,433	1.0606	A	437,426	1.0088	B	441,275
CSA 60 Apple Valley Airport		EBJ-400	250,819	1.0362	A	3,445,582	1.0468	A	3,606,835	1.1471	B	4,137,400	1.0366	B	4,288,829
CSA 63 Yucaipa		SKM-415	398,174	1.4359	B	12,153,605	1.2283	B	14,927,787	1.0640	B	15,883,165	1.0476	B	16,639,204
CSA 64 Spring Valley Lake - Sanitation		EBM-420	65,684	1.0362	A	329,809	1.0468	A	345,244	1.0606	A	366,166	1.0089	B	369,425
CSA 64 Spring Valley Lake - Water		ECB-420	65,684	1.0362	A	265,358	1.0468	A	277,777	1.0606	A	294,610	1.0089	B	297,232
CSA 64 Spring Valley Lake - Street Sweeping		ECB-420	-	1.0362	A	145,883	1.0468	A	152,710	1.0606	A	161,964	1.0089	B	163,405
CSA 68 Valley of the Moon		SKP-440	74,982	1.0362	A	2,160,021	1.0468	A	2,261,110	1.0606	A	2,398,133	1.0088	B	2,419,237
CSA 69 Lake Arrowhead		SKS-445	33,353	1.0362	A	2,446,250	1.0468	A	2,560,735	1.0606	A	2,715,916	1.0098	B	2,742,532
CSA 70 DB-2 Big Bear Improvement Zone		EIB-570	-	1.0362	A	17,130	1.0468	A	17,932	1.0606	A	19,019	1.0088	B	19,186
CSA 70 CG Cedar Glen Water		ELL-563	-	1.0362	A	524,155	1.0468	A	548,685	1.0606	A	581,935	1.0088	B	587,056
CSA 70 D-1 Lake Arrowhead Dam		SLA-130	226,042	1.0362	A	5,691,842	1.0468	A	5,958,220	1.0606	A	6,319,288	1.0161	B	6,421,029
CSA 70 F Morongo Valley Lake		EBY-135	7,055	1.0362	A	143,276	1.0468	A	149,981	1.0606	A	159,070	1.0088	B	160,470
CSA 70 G Wrightwood		SLG-155	1,708	1.0362	A	201,425	1.0468	A	210,852	1.0606	A	223,630	1.0088	B	225,598
CSA 70 J Oak Hills		ECA-165	26,213	1.0362	A	542,318	1.5215	B	825,126	1.0606	A	875,129	1.0562	B	924,311
CSA 70 R-2 Twin Peaks Road		SMA-225	2,025	1.0362	A	90,137	1.0468	A	94,355	1.0606	A	100,073	1.0088	B	100,954
CSA 70 R-3 Erwin Lake Road		SMD-230	5,638	1.0362	A	201,741	1.2089	B	243,875	1.0606	A	258,654	1.0088	B	260,930
CSA 70 R-16 Running Springs		SOJ-285	-	1.0362	A	35,876	1.0468	A	37,555	1.0606	A	39,831	1.0088	B	40,182
CSA 70 R- 22 Twin Peaks Road		SOB-543	-	1.0362	A	27,988	1.0468	A	29,298	1.0606	A	31,073	1.0088	B	31,346
CSA 70 R- 23 Mile High Park		RCA-531	-	1.0362	A	25,505	1.0468	A	26,699	1.0606	A	28,317	1.0088	B	28,566
CSA 70 R- 40 Upper North Bay Lake Arrowhead		RGW-553	-	1.0362	A	27,686	1.0468	A	28,982	1.0606	A	30,738	1.0088	B	31,008
CSA 70 R- 42 Windy Pass		RHL-559	-	1.0362	A	59,086	1.0468	A	61,851	1.0606	A	65,599	1.0088	B	66,176
CSA 70 R- 44 Saw Pit Canyon		SYT-562	-	1.0362	A	73,734	1.0468	A	77,185	1.0606	A	81,862	1.0088	B	82,582
CSA 70 R- 46 South Fairway Drive		SYX-566	-	1.0362	A	6,062	1.0468	A	6,346	1.0606	A	6,731	1.0088	B	6,790

County of San Bernardino

Office of the Auditor- Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted	2013-14 Change Factor Adopted		2013-14 Appropriation Limit Adopted	2014-2015 Change Factor Adopted		2014-2015 Appropriation Limit Adopted
CSA 70 TV-2 Morongo Valley		SLD-330	25,420	1.0362	A	373,678	1.0468	A	391,166	1.0606	A	414,871	1.0113	B	419,559
CSA 70 TV-4 Wonder Valley		SLF-332	40,000	1.0362	A	85,771	1.0468	A	89,785	1.0606	A	95,226	1.0088	B	96,064
CSA 70 TV-5 Mesa		SLE-331	158,685	1.0362	A	341,531	1.0468	A	357,515	1.0606	A	379,180	1.0088	B	382,517
CSA 70 Zone M - Wonder Valley - Park		SYR-205	-	1.0362	A	69,735	1.0468	A	72,999	1.0606	A	77,423	1.0088	B	78,104
CSA 70 Zone M - Wonder Valley - Road		SLP-180	-	1.0362	A	181,963	1.0468	A	190,479	1.0606	A	202,022	1.0088	B	203,800
CSA 70 Zone P-6 El Mirage		SYP-212	-	1.0362	A	300,763	1.0468	A	314,839	1.0606	A	333,918	1.0088	B	336,856
CSA 70 Zone W Hinkley		SLT-335	-	1.0362	A	71,424	1.0468	A	74,767	1.0606	A	79,298	1.0088	B	79,996
CSA 70 Zone W-1 Goat Mountain		ECS-345	1,844	1.0362	A	27,113	1.0468	A	28,382	1.0606	A	30,102	1.0088	B	30,367
CSA 70 Zone W-3 Hacienda		ECY-350	12,017	1.0362	A	176,649	1.0468	A	184,916	1.0606	A	196,122	1.0088	B	197,848
CSA 79 R-1 Green Valley Lake		RCP-485	-	1.0362	A	37,150	1.0468	A	38,889	1.0606	A	41,246	1.0151	B	41,869
CSA 82 Searles Valley		EFY-495	38,147	1.0362	A	560,772	1.0468	A	587,016	1.0606	A	622,589	1.0088	B	628,068
CSA SL-1 Countywide Streetlights		SQV-575	517,854	1.0362	A	26,268,980	1.0991	B	28,872,761	1.0606	A	30,622,450	1.0469	B	32,058,643
San Bernardino County Fire Protection District															
San Bernardino County Fire Protection District		FPD/ FHZ/ FHH/ FES	552,345	1.0362	A	84,259,762	1.0984	B	92,551,765	1.0893	B	100,816,638	1.0742	B	108,297,233
Valley Service Zone		FVZ-580	-	1.0362	A	45,844,358	1.0468	A	47,989,874	1.0606	A	50,898,060	1.0088	B	51,345,963
Mountain Service Zone		FMZ-600	-	1.0362	A	20,062,017	1.0468	A	21,000,919	1.0606	A	22,273,575	1.0088	B	22,469,582
North Desert Service Zone		FNZ-590	-	1.0362	A	25,419,339	1.0468	A	26,608,964	1.0606	A	28,221,467	1.0088	B	28,469,816
South Desert Service Zone		FSZ-610	-	1.0362	A	18,685,077	1.0468	A	19,559,539	1.0606	A	20,744,847	1.0088	B	20,927,402
Service Zone FP-1 Red Mountain		FNZ-590	-	1.0362	A	1,150,357	1.0468	A	1,204,194	1.0606	A	1,277,168	1.0088	B	1,288,407
Service Zone FP-2 Windy Acres		FNZ-590	-	1.0362	A	519,305	1.0468	A	543,608	1.0606	A	576,551	1.0088	B	581,625
Service Zone FP-3 El Mirage		FNZ-590	-	1.0362	A	1,324,992	1.0468	A	1,387,002	1.0606	A	1,471,054	1.0088	B	1,483,999
Service Zone FP-4 Wonder Valley		FSZ-610	19,671	1.0362	A	446,243	1.0468	A	467,127	1.0606	A	495,435	1.0088	B	499,795
Service Zone FP-5 Helendale/Silver Lake		FNZ-590	-	1.0362	A	1,046,524	1.0468	A	1,095,501	1.0606	A	1,161,888	1.0088	B	1,172,113
Service Zone FP-6 Havasu Lake		FSZ-610	-	1.0362	A	158,279	1.0468	A	165,686	1.0606	A	175,727	1.0088	B	177,273
Service Zone PM-1 Lake Arrowhead Paramedic		FMZ-600	-	1.0362	A	1,201,403	1.0468	A	1,257,629	1.0606	A	1,333,841	1.0088	B	1,345,579
Service Zone PM-2 Highland Paramedic		FVZ-580	-	1.0362	A	2,980,655	1.0468	A	3,120,150	1.0606	A	3,309,231	1.0088	B	3,338,352
Service Zone PM-3 Yucaipa Paramedic		FVZ-580	-	1.0362	A	60,404	1.0468	A	63,231	1.0606	A	67,063	1.0088	B	67,653
CFD No. 2002-2 Central Valley CFD		SFE-580	-	1.0362	A	2,860,892	1.0468	A	2,994,782	1.0606	A	3,176,266	1.0088	B	3,204,217
County Flood Control District															
Zone 1		RFA-091	4,332,646	1.0362	A	300,457,256	1.2197	B	366,467,715	1.1904	B	436,243,168	1.1102	B	484,317,165
Zone 2		RFF-092	2,216,316	1.0362	A	1,203,876,942	1.1480	B	1,382,002,574	1.0794	B	1,491,733,578	1.3625	B	2,032,487,000
Zone 3		RFL-093	552,637	1.0362	A	36,081,873	1.1861	B	42,796,349	1.3505	B	57,796,469	1.1352	B	65,610,552
Zone 4		RFQ-094	692,563	1.0362	A	92,049,219	1.0468	A	96,357,122	1.1618	B	111,947,704	1.0456	B	117,052,519
Zone 6		RFV-096	715,114	1.0362	A	68,922,628	1.0468	A	72,148,207	1.0606	A	76,520,388	1.0241	B	78,364,529

County of San Bernardino

Office of the Auditor- Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2011-12 Change Factor Adopted		2011-12 Appropriation Limit Adopted	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted	2013-14 Change Factor Adopted		2013-14 Appropriation Limit Adopted	2014-2015 Change Factor Adopted		2014-2015 Appropriation Limit Adopted
Big Bear Valley Recreation and Park District															
Big Bear Valley Recreation and Park District		SSA-620	458,651	1.0362	A	8,562,823	1.1760	B	10,070,051	1.1324	B	11,403,326	1.0207	B	11,639,375
Bloomington Recreation and Park District															
Bloomington Recreation and Park District		SSD-625	93,583	1.0362	A	3,095,757	1.0468	A	3,240,638	1.0606	A	3,437,021	1.0121	B	3,478,609

Article XIII B of the California Constitution was amended by Proposition 111 to change the price and population factors used by the county in setting the appropriation limit.

CHANGE FACTOR COMPONENTS
PRICE FACTOR: The County has the option to select either (A) the Percentage Change in California Per Capita Personal Income or (B) the Percentage Change in the Local Assessment Roll Due to the Addition of Local Non-Residential New Construction.

POPULATION FACTOR: The County may choose the percentage change in one of the following: (1) the population within its jurisdiction, (2) the population within its jurisdiction combined with the population within all county borders contiguous to the County, or (3) the change in population within the incorporated portion of the County. For 2011-12, 2012-13, and 2013-14 the County has selected option (3) For 2014-2015 the County has selected to use option (2).

NOTES

1. The general fund base year adjustments, listed below, were made in 1988-89 to correct errors and incorporate omissions and interpretations by the Courts, County Counsel and the State Controller's Office:

   * $600,000 increase for cigarette tax revenue, inadvertently omitted as other state revenue.
   * $2,551,240 increase due to the addition of County Library's base year limit.
   * $95,000 decrease due to aid for agriculture included as tax proceeds.
   * $1,442,444 decrease due to the exclusion of federally restricted Public Assistance Revenues included in the base year as tax proceeds.

2. The base year limit of $2,551,240 for the library was established, and separated from that of the General Fund in 1996-97 due to each fund having separate percentage change in the local assessment roll due to the addition of local non-residential new construction.

Data Sources:
Auditor-Controller/Treasurer/Tax Collector, County of San Bernardino
San Bernardino County Budget
San Bernardino County Special Districts Budget
Local Agency Formation Commission, County of San Bernardinc
California Department of Finance

REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS SITTING AS THE GOVERNING BOARD OF THE FOLLOWING: COUNTY OF SAN BERNARDINO BOARD OF GOVERNED COUNTY SERVICE AREAS SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS OF THE FOLLOWING: SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT BIG BEAR VALLEY RECREATION AND PARK DISTRICT BLOOMINGTON RECREATION AND PARK DISTRICT AND RECORD OF ACTION

May 24, 2016

FROM: **OSCAR VALDEZ, Auditor-Controller/Treasurer/Tax Collector**
Auditor-Controller/Treasurer/Tax Collector

SUBJECT: **FINAL APPROPRIATIONS LIMITS**

RECOMMENDATION(S)

1. Acting as the governing body of the County of San Bernardino, adopt **Resolution No. 2016-83** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2015-2016 for the County General Fund and Library.
2. Acting as the governing body of all County Service Areas and their Zones, adopt **Resolution No. 2016-84** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2015-2016.
3. Acting as the governing body of the San Bernardino County Flood Control District, adopt **Resolution No. 2016-85** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2015-2016.
4. Acting as the governing body of the San Bernardino County Fire Protection District, adopt **Resolution No. 2016-86** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2015-2016.
5. Acting as the governing body of the Big Bear Valley Recreation and Park District, adopt **Resolution No. 2016-87** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2015-2016.
6. Acting as the governing body of the Bloomington Recreation and Park District, adopt **Resolution No. 2016-88** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2015-2016.

(Presenter: Oscar Valdez, Auditor-Controller/Treasurer/Tax Collector, 382-7000)

cc: w/Reso.'s
ATC - Valdez
ATC - Gen. Acct. Mgr.
SDD - Edmisten
SDD - Reception
SBCFCD - Blakeslee
SBCFPD - Pacot
Public Works - Valdez
LAFCO
CAO - Shea; Trussell; Forster
File - Various Entities w/Attach

Rev 7-14-15

ss **ITEM 196**

Record of Action of the Board of Supervisors
APPROVED (CONSENT CALENDAR)
COUNTY OF SAN BERNARDINO
Board of Supervisors
Board Governed County Service Areas
San Bernardino County Flood Control District
Board of Directors
San Bernardino County Fire Protection District
Big Bear Valley Recreation and Park District
Bloomington Recreation and Park District
MOTION: AYE: 2 AYE: 3
LAURA H. WELCH, CLERK OF THE BOARD AND SECRETARY
Dated: May 24, 2016

BOARD OF SUPERVISORS COUNTY GOALS AND OBJECTIVES
Operate in a Fiscally-Responsible and Business-Like Manner.
Ensure Development of a Well-Planned, Balanced, and Sustainable County.
Pursue County Goals and Objectives by Working with Other Agencies.

FINANCIAL IMPACT
Approval of the item will not result in the use of additional Discretionary General Funding (Net County Cost). This action will provide additional appropriation authority needed by San Bernardino County and Board-Governed agencies to continue to operate at normal levels. The additional limits will not increase the 2015-2016 budgets for the respective entities.

BACKGROUND INFORMATION
Limits on the appropriation of the proceeds of tax revenues are required to be established annually by Article XIII B of the California Constitution for all agencies receiving tax proceeds. Proposition 111, approved by the voters on June 6, 1990, allows governmental entities to use an alternative computation to determine the appropriations limit when such calculations are of benefit to the entity. These factors include the percentage change in per-capita personal income and the change in non-residential new construction.

On June 16, 2015 (Item No. 89), the Board approved the preliminary appropriation limits for fiscal year 2015-2016. During the preparation of the preliminary limits, data on one optional factor, (the change in non-residential new construction) was not available and as such was not considered or used in the calculation of appropriation limits.

Data on the change in the non-residential new construction factor is available now, permitting re-computation of the fiscal year 2015-2016 appropriation limits. The recomputed limits will increase the appropriation limits of some agencies. Adoption of the recomputed appropriation limits for fiscal year 2015-2016 will enable agencies to continue providing necessary levels of service this fiscal year and succeeding years. The recomputed limits will not increase the fiscal year 2015-2016 budget.

On June 25, 2015, the Local Agency Formation Commission (LAFCO) completed a change of organization resulting in the dissolution of the Crest Forest Fire Protection District and its Service Zone PM-A (LAFCO 3186). These were annexed into the San Bernardino County Fire Protection District. The result was the addition of $7,039,517 being added to the Mountain Service Zone's appropriation, and $1,875,000 assigned to the newly formed Service Zone PM-4.

PROCUREMENT
N/A

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Phebe W. Chu, Deputy County Counsel, 387-5455) on April 28, 2016, (Dawn Messer, Deputy County Counsel, 387-5455) on April 18, 2016, (Sophie Akins, Deputy County Counsel, 387-5455) on April 15, 2016, and (Carol Greene, Deputy County Counsel, 387-5455) on April 18, 2016; Special Districts (Allison Edmisten, Division Manager, 387-5938) on May 1, 2016; County Fire (Carlo Pacot, Finance Manager, 387-5944) on April 19, 2016; San Bernardino County Flood Control District (Kevin Blakeslee, Deputy Director, 387-7919) on April 15, 2016; Public Works (Beatriz Valdez, Public Works Chief Financial Officer, 387-1852) on April 18, 2016; and Finance (Stephenie Shea, 387-4919, Amanda Trussell,, 387-4773, and Tom Forster, 387-4635, Administrative Analysts) on April 25, 2016, May 3, 2016, and April 25, 2016, respectively; and County Finance and Administration (Katrina Turturro, Deputy Executive Officer, 387-5423) on Month DD, 2016.

RESOLUTION NO. 2016-85

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, ESTABLISHING THE FISCAL YEAR 2015-2016 FINAL APPROPRIATION LIMITS

On Tuesday May 24, 2016, on motion of Supervisor Hagman, duly seconded by Supervisor Lovingood and carried, the following resolution is adopted by the Board of Supervisors of the San Bernardino County Flood Control District.

WHEREAS, Article XIII B of the California State Constitution imposes a limitation on appropriations by local governmental entities; and

WHEREAS, the Board of Supervisors acted on June 16, 2015 to establish the fiscal year 2015-16 appropriation limits as required by Government Code Section 7910; and

WHEREAS, Proposition 111, as adopted by the voters on June 6, 1990, changed the manner of calculating the appropriations limits under Article XIII B of the California State Constitution; and

WHEREAS, Section 1 of Article XIII B of the California State Constitution generally provides that the total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population; and

WHEREAS, information has now become available to recalculate the appropriation limits for fiscal year 2015-16 in conformance with the options provided by Proposition 111; specifically, the options identified in Section 8(e)(2) of Article XIII B of the California State Constitution; and

WHEREAS, in determining "change in the cost of living" pursuant to Section 8(e)(2) of Article XIII B of the California State Constitution, an entity of local government, other than a school district or a community college district, has the option to select either (A) the percentage change in California per capita personal income from the preceding year, or (B) the percentage change in the local assessment roll from the preceding year due to the addition of local non-residential new construction; and

WHEREAS, the recalculation of appropriation limits for fiscal year 2015-16 is desirable in that this action will provide additional appropriation authority to continue operations at normal levels.

NOW, THEREFORE, BE IT RESOLVED that the fiscal year 2015-16 appropriation limits established by the Board of Supervisors on June 16, 2015, are hereby amended to reflect the San Bernardino County Flood Control District's selected option for determining the "change in the cost of living", as reflected in Attachment "A", attached hereto and incorporated herein by this reference.

BE IT FURTHER RESOLVED that said Attachment "A" presents the fiscal year 2015-16 final appropriation limits now adopted by the Board of Supervisors.

PASSED AND ADOPTED by the Board of Supervisors of the County of San Bernardino, State of California, by the following vote:

AYES:	SUPERVISORS:	Robert A. Lovingood, Janice Rutherford, James Ramos, Curt Hagman, Josie Gonzales
NOES:	SUPERVISORS:	None
ABSENT:	SUPERVISORS:	None

* * * * *

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, **LAURA H. WELCH**, Clerk of the Board of Supervisors of the County of San Bernardino, State of California, hereby certify the foregoing to be a full, true and correct copy of the record of the action taken by the Board of Supervisors, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of May 24, 2016. #196ss

LAURA H. WELCH
Clerk of the Board of Supervisors

By _____
Deputy

County of San Bernardino — Attachment A

Office of the Auditor-Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted	2013-14 Change Factor Adopted		2013-14 Appropriation Limit Adopted	2014-2015 Change Factor Adopted		2014-2015 Appropriation Limit Adopted	2015-2016 Change Factor Adopted		2015-2016 Appropriation Limit Adopted
Board of Supervisors															
County General	1, 2	AAA	81,474,070	1.2125	B	10,017,068,352	1.1515	B	11,534,654,207	1.1676	B	13,467,862,252	1.1084	B	14,927,778,520
Library	2	SAP	2,551,240	1.1913	B	310,551,148	1.1179	B	347,165,128	1.2192	B	423,263,724	1.1008	B	465,928,707
Board-Governed County Service Areas															
CSA 18 Cedar Pines		SFY-190	55,906	1.0468	A	1,599,740	1.0606	A	1,696,684	1.0223	B	1,734,529	1.0503	A	1,821,786
CSA 20 Joshua Tree		SGD-290	236,750	1.0468	A	4,335,082	1.0606	A	4,597,788	1.0198	B	4,688,824	1.0503	A	4,924,572
CSA 29 Lucerne Valley		SGG-245	-	1.0468	A	2,413,596	1.0606	A	2,559,860	1.0189	B	2,608,241	1.0503	A	2,739,436
CSA 30 Red Mountain		SGJ-250	3,082	1.0468	A	88,258	1.0606	A	85,122	1.0088	B	85,871	1.0503	A	90,199
CSA 40 Elephant Mountain		SIS-300	111,030	1.0468	A	57,385,575	1.0606	A	60,883,141	1.0065	A	61,258,751	1.0503	A	64,340,086
CSA 42 Oro Grande		SIV/ SIY/ EAP/ EAS	53,017	1.0468	A	603,113	1.0606	A	639,682	1.0088	B	645,291	1.0503	A	677,749
CSA 54 Crest Forest		SJV-370	7,582	1.0468	A	252,572	1.0606	A	267,878	1.0105	B	270,691	1.0503	A	284,307
CSA 56 Wrightwood		SKD-380	26,774	1.0468	A	461,771	1.0606	A	489,754	1.0089	B	494,113	1.0503	A	518,967
CSA 59 Deer Lodge		SKJ-395	17,554	1.0468	A	412,433	1.0606	A	437,426	1.0088	B	441,275	1.0503	A	463,471
CSA 60 Apple Valley Airport		EBJ-400	250,819	1.0468	A	3,966,835	1.1471	B	4,137,400	1.0368	B	4,288,829	1.0503	A	4,504,557
CSA 63 Yucaipa		SKM-415	398,174	1.2283	B	14,927,787	1.0640	B	15,883,165	1.0476	B	16,639,264	1.0503	A	17,476,156
CSA 64 Spring Valley Lake - Sanitation		EBM-420	65,684	1.0468	A	345,244	1.0606	A	366,166	1.0089	B	369,425	1.0503	A	388,007
CSA 64 Spring Valley Lake - Water		ECB-420	65,684	1.0468	A	277,777	1.0606	A	294,610	1.0089	B	297,232	1.0503	A	312,183
CSA 64 Spring Valley Lake - Street Sweeping		ECB-420	-	1.0468	A	152,710	1.0606	A	161,964	1.0089	B	163,405	1.0503	A	171,624
CSA 68 Valley of the Moon		SKP-440	74,982	1.0468	A	2,261,110	1.0606	A	2,398,133	1.0088	B	2,419,237	1.0503	A	2,540,925
CSA 69 Lake Arrowhead		SKS-445	33,353	1.0468	A	2,560,735	1.0606	A	2,715,916	1.0098	B	2,742,532	1.0503	A	2,880,481
CSA 70 DB-2 Big Bear Improvement Zone		EIB-570	-	1.0468	A	17,932	1.0606	A	19,019	1.0088	B	19,186	1.0503	A	20,151
CSA 70 CG Cedar Glen Water		ELL-563	-	1.0468	A	548,685	1.0606	A	581,935	1.0088	B	587,056	1.0503	A	616,585
CSA 70 D-1 Lake Arrowhead Dam		SLA-130	228,042	1.0468	A	5,958,220	1.0606	A	6,319,288	1.0161	B	6,421,029	1.0503	A	6,744,007
CSA 70 F Morongo Valley Lake		EBY-135	7,055	1.0468	A	149,981	1.0606	A	159,070	1.0088	B	160,470	1.0503	A	168,542
CSA 70 G Wrightwood		SLG-155	1,708	1.0468	A	210,852	1.0606	A	223,630	1.0088	B	225,598	1.0503	A	236,946
CSA 70 J Oak Hills		ECA-165	26,213	1.5215	B	825,128	1.0606	A	875,129	1.0562	B	924,311	1.0503	A	970,864
CSA 70 R-2 Twin Peaks Road		SMA-225	2,025	1.0468	A	94,355	1.0606	A	100,073	1.0088	B	100,954	1.0503	A	106,032
CSA 70 R-3 Erwin Lake Road		SMD-230	5,638	1.2089	B	243,875	1.0606	A	258,654	1.0088	B	260,930	1.0503	A	274,055
CSA 70 R-15 Running Springs		SOJ-285	-	1.0468	A	37,555	1.0606	A	39,831	1.0068	B	40,162	1.0503	A	42,203
CSA 70 R- 22 Twin Peaks Road		SOB-543	-	1.0468	A	29,296	1.0606	A	31,073	1.0088	B	31,346	1.0503	A	32,923
CSA 70 R- 23 Mile High Park		RCA-531	-	1.0468	A	26,699	1.0606	A	28,317	1.0088	B	28,566	1.0503	A	30,003
CSA 70 R- 40 Upper North Bay Lake Arrowhead		RGW-553	-	1.0468	A	28,982	1.0606	A	30,738	1.0088	B	31,008	1.0503	A	32,568
CSA 70 R- 42 Windy Pass		RHL-559	-	1.0468	A	61,851	1.0606	A	65,599	1.0088	B	66,176	1.0503	A	69,505
CSA 70 R- 44 Saw Pit Canyon		SYT-562	-	1.0468	A	77,185	1.0606	A	81,862	1.0088	B	82,582	1.0503	A	86,736
CSA 70 R- 45 South Fairway Drive		SYX-566	-	1.0468	A	6,346	1.0606	A	6,731	1.0088	B	6,790	1.0503	A	7,132

County of San Bernardino

Office of the Auditor- Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted	2013-14 Change Factor Adopted		2013-14 Appropriation Limit Adopted	2014-2015 Change Factor Adopted		2014-2015 Appropriation Limit Adopted	2015-2016 Change Factor Adopted		2015-2016 Appropriation Limit Adopted
CSA 70 TV-2 Morongo Valley		SLD-330	25,420	1.0468	A	391,186	1.0606	A	414,871	1.0113	B	419,569	1.0503	A	440,663
CSA 70 TV-4 Wonder Valley		SLF-332	40,000	1.0468	A	89,785	1.0606	A	95,228	1.0088	B	96,064	1.0503	A	100,896
CSA 70 TV-5 Mesa		SLE-331	158,585	1.0468	A	357,515	1.0606	A	379,180	1.0088	B	382,517	1.0503	A	401,758
CSA 70 Zone M - Wonder Valley - Park		SYR-205	-	1.0468	A	72,999	1.0606	A	77,423	1.0088	B	78,104	1.0503	A	82,033
CSA 70 Zone M - Wonder Valley - Road		SLP-180	-	1.0468	A	190,478	1.0606	A	202,022	1.0088	B	203,800	1.0503	A	214,051
CSA 70 Zone P-6 El Mirage		SYP-212	-	1.0468	A	314,839	1.0606	A	333,818	1.0088	B	336,856	1.0503	A	353,800
CSA 70 Zone W Hinkley		SLT-335	-	1.0468	A	74,767	1.0606	A	79,298	1.0088	B	79,996	1.0503	A	84,020
CSA 70 Zone W-3 Hacienda		ECY-350	12,017	1.0468	A	184,916	1.0606	A	196,122	1.0088	B	197,848	1.0503	A	207,800
CSA 70 R-1 Green Valley Lake		RCP-485	-	1.0468	A	38,889	1.0606	A	41,248	1.0151	B	41,868	1.0503	A	43,975
CSA 82 Searles Valley		EFY-495	38,147	1.0468	A	587,016	1.0606	A	622,589	1.0088	B	628,068	1.0503	A	659,660
CSA SL-1 Countywide Streetlights		SQV-575	517,854	1.0991	B	28,672,761	1.0606	A	30,422,450	1.0469	B	32,058,643	1.0580	B	33,918,044
San Bernardino County Fire Protection District															
San Bernardino County Fire Protection District		FPD/ FHZ/ FHH/ FES	552,345	1.0984	B	82,551,785	1.0893	B	100,816,638	1.0742	B	108,297,233	1.0574	B	114,513,494
Valley Service Zone		FVZ-580	-	1.0468	A	47,989,874	1.0606	A	50,898,060	1.0088	B	51,345,963	1.0503	A	53,928,665
Mountain Service Zone	3	FMZ-590	-	1.0468	A	21,000,919	1.0606	A	22,273,575	1.0088	B	22,469,582	1.0503	A	30,639,319
North Desert Service Zone		FNZ-590	-	1.0468	A	26,608,964	1.0606	A	28,221,467	1.0088	B	28,469,816	1.0503	A	29,901,848
South Desert Service Zone		FSZ-610	-	1.0468	A	19,559,539	1.0606	A	20,744,847	1.0088	B	20,927,402	1.0503	A	21,988,050
Service Zone FP-1 Red Mountain		FNZ-590	-	1.0468	A	1,204,194	1.0606	A	1,277,188	1.0088	B	1,288,487	1.0503	A	1,353,214
Service Zone FP-2 Windy Acres		FNZ-590	-	1.0468	A	543,608	1.0606	A	576,551	1.0088	B	581,625	1.0503	A	610,881
Service Zone FP-3 El Mirage		FNZ-590	-	1.0468	A	1,387,002	1.0606	A	1,471,054	1.0088	B	1,483,999	1.0503	A	1,558,644
Service Zone FP-4 Wonder Valley		FSZ-610	19,671	1.0468	A	467,127	1.0606	A	495,435	1.0088	B	499,795	1.0503	A	524,935
Service Zone FP-5 Helendale/Silver Lake		FNZ-590	-	1.0468	A	1,095,501	1.0606	A	1,161,888	1.0088	B	1,172,113	1.0503	A	1,231,070
Service Zone FP-6 Havasu Lake		FSZ-610	-	1.0468	A	165,886	1.0606	A	175,727	1.0088	B	177,273	1.0503	A	186,190
Service Zone PM-1 Lake Arrowhead Paramedic		FMZ-600	-	1.0468	A	1,257,629	1.0606	A	1,333,841	1.0088	B	1,345,578	1.0503	A	1,413,262
Service Zone PM-2 Highland Paramedic		FVZ-580	-	1.0468	A	3,128,150	1.0606	A	3,309,231	1.0088	B	3,338,352	1.0503	A	3,506,271
Service Zone PM-3 Yucaipa Paramedic		FVZ-580	-	1.0468	A	63,231	1.0606	A	67,063	1.0088	B	67,653	1.0503	A	71,056
Service Zone PM-4 Crestline Paramedics	4	FMZ-600	-	-		-	-		-	-		-	-		1,275,000
CFD No. 2002-2 Central Valley CFD		SFE-106	-	1.0468	A	2,994,782	1.0606	A	3,176,288	1.0088	B	3,204,217	1.0503	A	3,365,389
County Flood Control District															
Zone 1		RFA-091	4,332,646	1.2197	B	366,487,715	1.1904	B	436,243,188	1.1102	B	484,317,165	1.1273	B	545,970,740
Zone 2		RFF-092	2,216,316	1.1460	B	1,382,002,574	1.0794	B	1,491,733,578	1.3625	B	2,032,487,900	1.1620	B	2,361,748,894
Zone 3		RFL-093	552,637	1.1861	B	42,796,349	1.3505	B	57,796,468	1.1352	B	65,610,562	1.0503	A	68,910,783
Zone 4		RFQ-094	692,563	1.0468	A	96,357,122	1.1618	B	111,947,704	1.0456	B	117,052,519	1.0503	A	122,940,261
Zone 5		RFV-096	715,114	1.0468	A	72,148,207	1.0606	A	76,520,388	1.0241	B	78,364,529	1.2307	B	96,443,226

County of San Bernardino

Office of the Auditor-Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2012-13 Change Factor Adopted		2012-13 Appropriation Limit Adopted	2013-14 Change Factor Adopted		2013-14 Appropriation Limit Adopted	2014-2015 Change Factor Adopted		2014-2015 Appropriation Limit Adopted	2015-2016 Change Factor Adopted		2015-2016 Appropriation Limit Adopted
Big Bear Valley Recreation and Park District															
Big Bear Valley Recreation and Park District		SSA-620	458,851	1.1760	B	10,070,051	1.1324	B	11,403,326	1.0207	B	11,639,375	1.0583	A	12,224,836
Bloomington Recreation and Park District															
Bloomington Recreation and Park District		SSD-625	93,583	1.0468	A	3,240,638	1.0606	A	3,437,021	1.0121	B	3,478,609	1.0583	A	3,653,583

Article XIII B of the California Constitution was amended by Proposition 111 to change the price and population factors used by the county in setting the appropriation limit.

CHANGE FACTOR COMPONENTS

PRICE FACTOR: The County has the option to select either (A) the Percentage Change in California Per Capita Personal Income or (B) the Percentage Change in the Local Assessment Roll Due to the Addition of Local Non-Residential New Construction.

POPULATION FACTOR: The County may choose the percentage change in one of the following: (1) the population within its jurisdiction, (2) the population within its jurisdiction combined with the population within all county borders contiguous to the County, or (3) the change in population within the incorporated portion of the County. For 2012-13 and 2013-14 the County has selected option (3). For 2014-2015 the County selected to use option (2). For 2015-16 the County has selected option (3).

NOTES

1. The general fund base year adjustments, listed below, were made in 1988-89 to correct errors and incorporate omissions and interpretations by the Courts, County Counsel and the State Controller's Office:
   * $800,000 increase for cigarette tax revenue, inadvertently omitted as other state revenue.
   * $2,551,240 increase due to the addition of County Library's base year limit.
   * $95,000 decrease due to aid for agriculture included as tax proceeds.
   * $1,442,444 decrease due to the exclusion of federally restricted Public Assistance Revenues included in the base year as tax proceeds.
2. The base year limit of $2,551,240 for the library was established, and separated from that of the General Fund in 1996-97 due to each fund having separate percentage change in the local assessment roll due to the addition of local non-residential new construction.
3. Mountain Service Zone appropriation limit for 2015-16 was increased by $7,039,517, for the annexation of the dissolved Crest Forest Fire Protection District to San Bernardino Fire Protection District effective 7/1/15, per LAFCO No. 3186 through Resolution No. 3196.
4. Newly formed Service Zone PM-4 Crestline Paramedics was assigned an appropriation limit of $1,675,000, as part of the annexation of the dissolved Crest Forest Fire Protection District to San Bernardino Fire Protection District effective 7/1/15, per LAFCO No. 3186 through Resolution No. 3196.

Data Sources:
Auditor-Controller/Treasurer/Tax Collector, County of San Bernardino
San Bernardino County Budget
San Bernardino County Special Districts Budget
Local Agency Formation Commission, County of San Bernardino
California Department of Finance

REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS SITTING AS THE GOVERNING BOARD OF THE FOLLOWING: SAN BERNARDINO COUNTY, CALIFORNIA BOARD GOVERNED COUNTY SERVICE AREAS SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT AND RECORD OF ACTION

REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS OF THE FOLLOWING: SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT BIG BEAR VALLEY RECREATION AND PARK DISTRICT BLOOMINGTON RECREATION AND PARK DISTRICT AND RECORD OF ACTION

May 23, 2017

FROM: **OSCAR VALDEZ, Auditor-Controller/Treasurer/Tax Collector**
Auditor-Controller/Treasurer/Tax Collector

SUBJECT: **FINAL APPROPRIATIONS LIMITS**

RECOMMENDATION(S)

1. Acting as the governing body of the County of San Bernardino adopt **Resolution No. 2017-105** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2016-17 for the County General Fund and Library.
2. Acting as the governing body of all Board Governed County Service Areas and Zones, adopt Resolution **No. 2017-106** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2016-17.
3. Acting as the governing body of the San Bernardino County Flood Control District, adopt **Resolution No. 2017-107** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2016-17.
4. Acting as the governing body of the San Bernardino County Fire Protection District, adopt **Resolution No. 2017-108** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2016-17.
5. Acting as the governing body of the Big Bear Valley Recreation and Park District, adopt **Resolution No. 2017-109** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2016-17.
6. Acting as the governing body of the Bloomington Recreation and Park District, adopt **Resolution No. 2017-110** and approve and adopt the report of the Auditor-Controller/Treasurer/Tax Collector on final appropriation limits for fiscal year 2016-17.

cc: **w/resolutions**
ATC - Valdez
ATC - Gen. Acct. Mgr.
SDD – Edmisten
SDD – Reception
SBCFPD – Pacot
Flood – Blakeslee
LAFCO
CAO – Garth
CAO-Forster
File – ATC w/attach
File - Various Entities w/Attach

Rev 7-12-16 jr **ITEM 155**

Record of Action of the Board of Supervisors and Directors

APPROVED (CONSENT CALENDAR)
COUNTY OF SAN BERNARDINO
Board Governed County Service Areas
San Bernardino County Flood Control District
San Bernardino County Fire Protection District
Big Bear Valley Recreation and Park District
Bloomington Recreation and Park District

MOTION 1 AYE 1 AYE 2 SECOND 3 4 BLOOMINGTON 5

LAURA H. WELCH, CLERK OF THE BOARD OF SECRETARY

BY:

DATED: May 23, 2017

(Presenter: Oscar Valdez, Auditor-Controller/Treasurer/Tax Collector, 382-7000)
COUNTY AND CHIEF EXECUTIVE OFFICER GOALS AND OBJECTIVES
Operate in a Fiscally-Responsible and Business-Like Manner.
Ensure Development of a Well-Planned, Balanced, and Sustainable County.
Pursue County Goals and Objectives by Working with Other Agencies.

FINANCIAL IMPACT
Approval of the item will not result in the use of additional Discretionary General Funding (Net County Cost). This action will provide additional appropriation authority needed by San Bernardino County and Board-governed agencies to continue to operate at normal levels. The additional limits will not increase the 2016-17 budgets for the respective entities.

BACKGROUND INFORMATION
Limits on the appropriation of the proceeds of tax revenues are required to be established annually by Article XIII B of the California Constitution for all agencies receiving tax proceeds. Proposition 111, approved by the voters on June 6, 1990, allows governmental entities to use an alternative computation to determine the appropriations limit when such calculations are of benefit to the entity. These factors include the percentage change in per-capita personal income and the change in non-residential new construction.

On June 28, 2016 (Item No. 107), the Board approved the preliminary appropriation limits for fiscal year 2016-17. During the preparation of the preliminary limits, data on one optional factor (the change in non-residential new construction) was not available and, as such, was not considered or used in the calculation of appropriation limits.

Data on the change in the non-residential new construction factor is available now, permitting re-computation of the fiscal year 2016-17 appropriation limits. The recomputed limits will increase the appropriation limits of some agencies. Adoption of the recomputed appropriation limits for fiscal year 2016-17 will enable agencies to continue providing necessary levels of service this fiscal year and succeeding years. The recomputed limits will not increase the fiscal year 2016-17 budget.

On January 27, 2016, the Local Agency Formation Commission (LAFCO) completed a change of organization resulting in the Annexation of the City of San Bernardino to the San Bernardino County Fire Protection District's Valley Service Zone and Service Zone FP-5 (LAFCO 3198). The result was the addition of $21,596,954 to the Valley Service Zone's appropriation.

On February 17, 2016, LAFCO completed a change of organization resulting in the Annexation of Twentynine Palms Fire Department to the San Bernardino County Fire Protection District's South Desert Service Zone, the formation of Service Zone FP-5 Twentynine Palms, and the removal of the fire function from Twentynine Palms Water District (LAFCO 3200). The result was the addition of $2,061,532 to the newly formed Service Zone FP-5 Twentynine Palms' appropriation.

On April 20, 2016, LAFCO completed a change of organization resulting in the Annexation of the City of Needles to the San Bernardino County Fire Protection District's South Desert Service Zone and the formation of Service Zone FP-5 Needles (LAFCO 3206). The result was the addition of $183,870 to the South Desert Service Zone's appropriation and the addition of $435,076 to the newly formed Service Zone FP-5 Needles' appropriation.

PROCUREMENT
N/A

REVIEW BY OTHERS
This item has been reviewed by County Counsel (Phebe W. Chu, Dawn Martin, Sophie A. Akins, and Carol Greene, Deputy County Counsels, 387-5455) on April 28, 2017, April 17, 2017, April 17, 2017, and April 27, 2017, respectively; Special Districts (Allison Edmisten, Division Manager, 387-5938) on April 14, 2017; County Fire (Carlo Pacot, Finance Manager, 387-5944) on April 27, 2017; San Bernardino County Flood Control District (Kevin Blakeslee, Deputy Director, 387-7919) on April 14, 2017; Public Works (Jim Gillam, Public Works Chief Financial Officer, 387-1852) on April 14, 2017; Finance (Deborah Garth, 387-5426, Allegra Pajot, 387-5005, and Tom Forster, 387-4635, Administrative Analysts) on May 9, 2017, May 9, 2017, and April 27, 2017, respectively; and County Finance and Administration (Katrina Turturro, Deputy Executive Officer, 387-5423) on May 9, 2017.

RESOLUTION NO. 2017-107

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, ESTABLISHING THE FISCAL YEAR 2016- 2017 FINAL APPROPRIATION LIMITS

On Tuesday May 23, 2017, on motion of Supervisor Hagman, duly seconded by Supervisor Ramos and carried, the following resolution is adopted by the Board of Supervisors of the San Bernardino County Flood Control District.

WHEREAS, Article XIII B of the California State Constitution imposes a limitation on appropriations by local governmental entities; and

WHEREAS, the Board of Supervisors acted on June 28, 2016, to establish the fiscal year 2016-17 appropriation limits as required by Government Code Section 7910; and

WHEREAS, Proposition 111, as adopted by the voters on June 6, 1990, changed the manner of calculating the appropriations limits under Article XIII B of the California State Constitution; and

WHEREAS, Section 1 of Article XIII B of the California State Constitution generally provides that the total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population; and

WHEREAS, information has now become available to recalculate the appropriation limits for fiscal year 2016-17 in conformance with the options provided by Proposition 111; specifically, the options identified in Section 8(e)(2) of Article XIII B of the California State Constitution; and

WHEREAS, in determining "change in the cost of living" pursuant to Section 8(e)(2) of Article XIII B of the California State Constitution, an entity of local government other than a school district or a community college district has the option to select either (A) the percentage change in the California per capita personal income from the preceding year, or (B) the percentage change in the local assessment roll from the preceding year due to the addition of local non-residential new construction; and

WHEREAS, the recalculation of appropriation limits for fiscal year 2016-17 is desirable in that this action will provide additional appropriation authority to continue operations at normal levels;

NOW, THEREFORE, BE IT RESOLVED, that the fiscal year 2016-17 appropriation limits established by the Board of Supervisors on June 28, 2016, are hereby amended to reflect the San Bernardino County Flood Control District's selected option for determining the "change in the cost of living", as reflected in Attachment "A", attached hereto and incorporated herein by this reference.

BE IT FURTHER RESOLVED that said Attachment "A" presents the fiscal year 2016-17 final appropriation limits now adopted by the Board of Supervisors.

PASSED AND ADOPTED by the Board of Supervisors of the County of San Bernardino, State of California, by the following vote:

AYES:	SUPERVISORS:	Robert A. Lovingood, Janice Rutherford, James Ramos, Curt Hagman Josie Gonzales
NOES:	SUPERVISORS:	None
ABSENT:	SUPERVISORS:	None

* * * * *

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, **LAURA H. WELCH**, Clerk of the Board of Supervisors of the County of San Bernardino, State of California, hereby certify the foregoing to be a full, true and correct copy of the record of the action taken by the Board of Supervisors, by vote of the members present, as the same appears in the Official Minutes of said Board at its meeting of May 23, 2017. #155

LAURA H. WELCH
Clerk of the Board of Supervisors

By _____
Deputy

County of San Bernardino

Office of the Auditor-Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2013-14 Change Factor Adopted		2013-14 Appropriation Limit Adopted	2014-2015 Change Factor Adopted		2014-2015 Appropriation Limit Adopted	2015-2016 Change Factor Adopted		2015-2016 Appropriation Limit Adopted	2016-2017 Change Factor Adopted		2016-2017 Appropriation Limit Adopted
Board of Supervisors															
County General	1 , 2	AAA	81,474,070	1.1515	B	11,534,654,207	1.1676	B	13,467,852,252	1.1084	B	14,927,778,520	1.1166	B	16,668,357,495
Library	2	SAP	2,551,240	1.1179	B	347,165,128	1.2192	B	423,263,724	1.1008	B	465,928,707	1.1131	B	518,625,244
Board-Governed County Service Areas															
CSA 18 Cedar Pines		SFY-190	55,906	1.0606	A	1,696,684	1.0223	B	1,734,520	1.0503	A	1,821,768	1.0639	A	1,938,177
CSA 20 Joshua Tree		SGD-200	236,750	1.0606	A	4,597,788	1.0198	B	4,688,824	1.0503	A	4,924,672	1.0639	A	5,239,359
CSA 29 Lucerne Valley		SGG-245	-	1.0606	A	2,559,880	1.0189	B	2,608,241	1.0503	A	2,739,436	1.0639	A	2,914,486
CSA 30 Red Mountain		SGJ-250	3,082	1.0606	A	85,122	1.0088	B	85,871	1.0503	A	90,190	1.0639	A	95,953
CSA 40 Elephant Mountain		SIS-300	111,030	1.0606	A	60,853,141	1.0065	A	61,258,751	1.0503	A	64,346,066	1.0639	A	68,451,396
CSA 42 Oro Grande		SIW SIY/ EAP/ EAS	53,017	1.0606	A	639,662	1.0088	B	645,291	1.0503	A	677,749	1.0639	A	721,057
CSA 54 Crest Forest		SJV-370	7,582	1.0606	A	267,878	1.0105	B	270,691	1.0503	A	284,307	1.0639	A	302,474
CSA 56 Wrightwood		SKD-380	25,774	1.0606	A	489,754	1.0089	B	494,113	1.0503	A	518,967	1.0639	A	552,129
CSA 59 Deer Lodge		SKJ-395	17,554	1.0606	A	437,425	1.0088	B	441,275	1.0503	A	463,471	1.0639	A	493,087
CSA 60 Apple Valley Airport		EBJ-400	250,819	1.1471	B	4,137,400	1.0366	B	4,288,829	1.0503	A	4,504,567	1.0639	A	4,792,398
CSA 63 Yucaipa		SKM-415	398,174	1.0640	B	15,883,165	1.0476	B	16,639,204	1.0503	A	17,476,156	1.0639	A	18,592,882
CSA 64 Spring Valley Lake - Sanitation		EBM-420	65,584	1.0606	A	366,166	1.0089	B	369,425	1.0503	A	388,007	1.0639	A	412,801
CSA 64 Spring Valley Lake - Water		ECB-420	65,584	1.0606	A	294,610	1.0089	B	297,232	1.0503	A	312,183	1.0639	A	332,131
CSA 64 Spring Valley Lake - Street Sweeping		ECB-420	-	1.0606	A	161,954	1.0089	B	163,405	1.0503	A	171,624	1.0639	A	182,591
CSA 68 Valley of the Moon		SKP-440	74,982	1.0606	A	2,398,133	1.0088	B	2,419,237	1.0503	A	2,540,925	1.0639	A	2,703,290
CSA 69 Lake Arrowhead		SKS-445	33,353	1.0606	A	2,715,916	1.0098	B	2,742,532	1.0503	A	2,880,481	1.0639	A	3,064,544
CSA 70 DB-2 Big Bear Improvement Zone		EIB-570	-	1.0606	A	19,019	1.0088	B	19,186	1.0503	A	20,151	1.0639	A	21,439
CSA 70 CG Cedar Glen Water		ELL-563	-	1.0606	A	581,935	1.0088	B	587,056	1.0503	A	616,585	1.0639	A	655,985
CSA 70 D-1 Lake Arrowhead Dam		SLA-130	226,042	1.0606	A	6,319,288	1.0161	B	6,421,029	1.0503	A	6,744,007	1.0639	A	7,174,949
CSA 70 F Morongo Valley Lake		EBY-135	7,055	1.0606	A	159,070	1.0088	B	160,470	1.0503	A	168,542	1.1776	B	198,475
CSA 70 G Wrightwood		SLG-155	1,708	1.0606	A	223,630	1.0088	B	225,598	1.0503	A	236,946	1.0639	A	252,087
CSA 70 J Oak Hills		ECA-165	26,213	1.0606	A	875,129	1.0562	B	924,311	1.0503	A	970,804	1.0653	B	1,034,198
CSA 70 R-2 Twin Peaks Road		SMA-225	2,025	1.0606	A	100,073	1.0088	B	100,964	1.0503	A	106,032	1.0639	A	112,807
CSA 70 R-3 Erwin Lake Road		SMD-230	5,638	1.0606	A	258,654	1.0088	B	260,930	1.0503	A	274,055	1.0639	A	291,567
CSA 70 R-16 Running Springs		SOJ-285	-	1.0606	A	39,831	1.0088	B	40,182	1.0503	A	42,203	1.0639	A	44,900
CSA 70 R-22 Twin Peaks Road		SDB-543	-	1.0606	A	31,073	1.0088	B	31,346	1.0503	A	32,923	1.0639	A	35,027
CSA 70 R-23 Mile High Park		RCA-531	-	1.0606	A	28,317	1.0088	B	28,566	1.0503	A	30,003	1.0639	A	31,920
CSA 70 R-40 Upper North Bay Lake Arrowhead		RGW-553	-	1.0606	A	30,738	1.0088	B	31,008	1.0503	A	32,568	1.0639	A	34,649
CSA 70 R-42 Windy Pass		RHL-559	-	1.0606	A	65,599	1.0088	B	66,176	1.0503	A	69,506	1.0639	A	73,946
CSA 70 R-44 Saw Pit Canyon		SYT-562	-	1.0606	A	81,862	1.0088	B	82,582	1.0503	A	86,736	1.0639	A	92,278
CSA 70 R-46 South Fairway Drive		SYX-566	-	1.0606	A	6,731	1.0088	B	6,790	1.0503	A	7,132	1.0639	A	7,588

County of San Bernardino

Office of the Auditor-Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2013-14 Change Factor Adopted		2013-14 Appropriation Limit Adopted	2014-2015 Change Factor Adopted		2014-2015 Appropriation Limit Adopted	2015-2016 Change Factor Adopted		2015-2016 Appropriation Limit Adopted	2016-2017 Change Factor Adopted		2016-2017 Appropriation Limit Adopted
CSA 70 TV-2 Morongo Valley		SLD-330	25,420	1.0606	A	414,871	1.0113	B	419,559	1.0503	A	440,663	1.0639	A	468,821
CSA 70 TV-4 Wonder Valley		SLF-332	40,000	1.0606	A	95,226	1.0088	B	96,064	1.0503	A	100,896	1.0639	A	107,343
CSA 70 TV-5 Mesa		SLE-331	158,685	1.0606	A	379,180	1.0088	B	382,517	1.0503	A	401,758	1.0639	A	427,430
CSA 70 Zone M - Wonder Valley - Park		SYR-205	-	1.0606	A	77,423	1.0088	B	78,104	1.0503	A	82,033	1.0639	A	87,275
CSA 70 Zone M - Wonder Valley - Road		SLP-180	-	1.0606	A	202,022	1.0088	B	203,800	1.0503	A	214,051	1.0639	A	227,729
CSA 70 Zone P-6 El Mirage		SYP-212	-	1.0606	A	333,918	1.0088	B	336,856	1.0503	A	353,800	1.0639	A	376,408
CSA 70 Zone W Hinkley		SLT-335	-	1.0606	A	79,298	1.0088	B	79,996	1.0503	A	84,020	1.0639	A	89,389
CSA 70 Zone W-3 Hacienda		ECY-350	12,017	1.0606	A	196,122	1.0088	B	197,848	1.0503	A	207,800	1.0639	A	221,078
CSA 79 R-1 Green Valley Lake		RCP-485	-	1.0606	A	41,246	1.0151	B	41,869	1.0503	A	43,975	1.0639	A	46,785
CSA 82 Searles Valley		EFY-495	38,147	1.0606	A	622,589	1.0088	B	628,068	1.0503	A	659,568	1.0639	A	701,812
CSA SL-1 Countywide Streetlights		SQV-675	517,854	1.0606	A	30,622,450	1.0469	B	32,058,643	1.0580	B	33,918,044	1.0639	A	36,085,407
San Bernardino County Fire Protection District															
San Bernardino County Fire Protection District		FPD/ FHZ/ FHW FES	552,345	1.0893	B	100,816,638	1.0742	B	108,297,233	1.0574	B	114,513,494	1.3351	B	152,886,966
Valley Service Zone	3	FVZ-580	-	1.0606	A	50,898,060	1.0088	B	51,345,963	1.0503	A	53,928,665	1.0639	A	78,971,661
Mountain Service Zone	4	FMZ-600	-	1.0606	A	22,273,575	1.0088	B	22,469,582	1.0503	A	30,639,319	1.0639	A	32,597,171
North Desert Service Zone		FNZ-590	-	1.0606	A	28,221,467	1.0088	B	28,469,816	1.0503	A	29,901,848	1.0639	A	31,812,578
South Desert Service Zone	5	FSZ-610	-	1.0606	A	20,744,847	1.0088	B	20,927,402	1.0503	A	21,980,050	1.0639	A	23,568,445
Service Zone FP-1 Red Mountain		FNZ-590	-	1.0606	A	1,277,168	1.0088	B	1,288,407	1.0503	A	1,353,214	1.0639	A	1,439,684
Service Zone FP-2 Windy Acres		FNZ-590	-	1.0606	A	576,551	1.0088	B	581,625	1.0503	A	610,881	1.0639	A	649,916
Service Zone FP-3 El Mirage		FNZ-590	-	1.0606	A	1,471,054	1.0088	B	1,483,999	1.0503	A	1,558,644	1.0639	A	1,658,241
Service Zone FP-4 Wonder Valley		FSZ-610	19,671	1.0606	A	495,435	1.0088	B	499,795	1.0503	A	524,935	1.0639	A	558,478
Service Zone FP-5 Helendale/Silver Lake		FNZ-590	-	1.0606	A	1,161,888	1.0088	B	1,172,113	1.0503	A	1,231,070	1.0639	A	1,309,735
Service Zone FP-5 Needles	6	FND-610													435,076
Service Zone FP-5 Twentynine Palms	7	FTP-610													2,061,532
Service Zone FP-6 Havasu Lake		FSZ-610	-	1.0606	A	175,727	1.0088	B	177,273	1.0503	A	186,190	1.0639	A	198,088
Service Zone PM-1 Lake Arrowhead Paramedic		FMZ-600	-	1.0606	A	1,333,841	1.0088	B	1,345,579	1.0503	A	1,413,282	1.0639	A	1,503,569
Service Zone PM-2 Highland Paramedic		FVZ-580	-	1.0606	A	3,309,231	1.0088	B	3,338,352	1.0503	A	3,506,271	1.0639	A	3,730,322
Service Zone PM-3 Yucaipa Paramedic		FVZ-580	-	1.0606	A	67,063	1.0088	B	67,653	1.0503	A	71,056	1.0639	A	75,596
Service Zone PM-4 Crestline Paramedics	8	FMZ-600	-	-		-	-		-	-		1,875,000	1.0639	A	1,994,813
CFD No. 2002-2 Central Valley CFD		SFE-106	-	1.0606	A	3,176,266	1.0088	B	3,204,217	1.0503	A	3,365,389	1.0639	A	3,580,437
County Flood Control District															
Zone 1		RFA-091	4,332,646	1.1904	B	436,243,168	1.1102	B	484,317,165	1.1273	B	545,970,740	1.1038	B	602,642,503
Zone 2		RFF-092	2,216,316	1.0794	B	1,491,733,578	1.3625	B	2,032,487,000	1.1620	B	2,361,749,894	1.1169	B	2,637,838,457
Zone 3		RFL-093	552,637	1.3505	B	57,796,469	1.1352	B	65,610,552	1.0503	A	68,910,763	1.1938	B	82,265,669
Zone 4		RFQ-094	892,563	1.1618	B	111,947,704	1.0456	B	117,052,519	1.0503	A	122,940,261	1.0639	A	130,796,144
Zone 5		RFV-096	715,114	1.0606	A	76,520,388	1.0241	B	78,364,529	1.2307	B	96,443,226	1.0639	A	102,605,948

County of San Bernardino

Office of the Auditor-Controller/Treasurer/Tax Collector

Local Agencies' Annual Appropriations Limit (GANN Limit)

(As Required Under Article XIII B, State Constitution)

Agency	Footnotes	Fund-Department	1978-79 Appropriation Limit Base Year	2013-14 Change Factor Adopted		2013-14 Appropriation Limit Adopted	2014-2015 Change Factor Adopted		2014-2015 Appropriation Limit Adopted	2015-2016 Change Factor Adopted		2015-2016 Appropriation Limit Adopted	2016-2017 Change Factor Adopted		2016-2017 Appropriation Limit Adopted
Big Bear Valley Recreation and Park District															
Big Bear Valley Recreation and Park District		SSA-620	458,651	1.1324	B	11,403,326	1.0207	B	11,639,375	1.0503	A	12,224,836	1.0639	A	13,006,903
Bloomington Recreation and Park District															
Bloomington Recreation and Park District		SSD-625	93,583	1.0506	A	3,437,021	1.0121	B	3,478,609	1.0503	A	3,653,583	1.0639	A	3,887,047

Article XIII B of the California Constitution was amended by Proposition 111 to change the price and population factors used by the county in setting the appropriation limit.

CHANGE FACTOR COMPONENTS
PRICE FACTOR: The County has the option to select either (A) the Percentage Change in California Per Capita Personal Income or (B) the Percentage Change in the Local Assessment Roll Due to the Addition of Local Non-Residential New Construction.
For 2014-2015 the County selected to use option (2). For 2016-17 the County has selected option (3).
POPULATION FACTOR: The County may choose the percentage change in one of the following: (1) the population within its jurisdiction, (2) the population within its jurisdiction combined with the population within all county borders contiguous to the County, or (3) the change in population within the incorporated portion of the County. For 2013-14 and 2015-16 the County has selected option (3).
For 2014-2015 the County selected to use option (2). For 2016-17 the County has selected option (3).

NOTES

1. The general fund base year adjustments, listed below, were made in 1988-89 to correct errors and incorporate omissions and interpretations by the Courts, County Counsel and the State Controller's Office:

   * $600,000 increase for cigarette tax revenue, inadvertently omitted as other state revenue.
   * $2,551,240 increase due to the addition of County Library's base year limit.
   * $95,000 decrease due to aid for agriculture included as tax proceeds.
   * $1,442,444 decrease due to the exclusion of federally restricted Public Assistance Revenues included in the base year as tax proceeds.

2. The base year limit of $2,551,240 for the library was established, and separated from that of the General Fund in 1996-97 due to each fund having separate percentage change in the local assessment roll due to the addition of local non-residential new construction.

3. Valley service Zone appropriation limit for 2016-17 was increased by $21,596,954 for the annexation of the City of San Bernardino County Fire Protection District to San Bernardino Fire Protection district effective 2016-17, per LAFCO No. 3186.

4. Mountain Service Zone appropriation limit for 2015-16 was increased by $7,039,517, for the annexation of the dissolved Crest Forest Fire Protection District to San Bernardino Fire Protection District effective 7/1/15, per LAFCO Resolution No. 3186 through Resolution No. 3196.

5. South Desert Service Zone appropriatoin limit for 2016-17 was increased by $183,870. The increase is due to reorganization to include annexation of the Needles Fire Department for 2016-17, per Agenda 7-LAFCO 3206

6. South Desert Service Zone-Service Zone FP-5 Needles appropriatoin limit for 2016-17 was increased by $435,076. The increase is due to reorganization to include annexation of the Needles Fire Department for 2016-17, per Agenda 7-LAFCO 3206

7. South Desert Service Zone-Service Zone FP-5 Twentynine Palms appropriatoin limit for 2016-17 was increased by $2,061,532. The increase is due to reorganization to include annexation of the Twentynine Palms Fire Department for 2016-17, per Agenda 8-LAFCO 3200

8. Service Zone PM-4 Crestline Paramedics was assigned an appropriation limit of $1,675,000 for 2015-16, as part of the annexation of the dissolved Crest Forest Fire Protection District to San Bernardino Fire Protection District effective 7/1/15, per LAFCO No. 3186 through Resolution No. 3196.

Data Sources:
Auditor-Controller/Treasurer/Tax Collector, County of San Bernardino
San Bernardino County Budget
San Bernardino County Special Districts Budget
Local Agency Formation Commission, County of San Bernardino
California Department of Finance

SA-3

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Los Angeles Regional Quality Control Board Order No. 01-182 Permit CAS004001 Parts 4C2a., 4C2b, 4E & 4F5c3 Filed September 2, 2003, (03-TC-04) September 26, 2003 (03-TC-19) by the County of Los Angeles, Claimant Filed September 30, 2003 (03-TC-20 & 03-TC-21) by the Cities of Artesia, Beverly Hills, Carson, Norwalk, Rancho Palos Verdes, Westlake Village, Azusa, Commerce, Vernon, Bellflower, Covina, Downey, Monterey Park, Signal Hill, Claimants	Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 *Municipal Stormwater and Urban Runoff Discharges* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted July 31, 2009)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 31, 2009. Leonard Kaye and Judith Fries appeared on behalf of the County of Los Angeles. Howard Gest appeared on behalf of the cities. Michael Lauffer appeared on behalf of the State Water Resources Control Board and the Regional Water Quality Control Board. Carla Castaneda and Susan Geanacou appeared on behalf of the Department of Finance. Geoffrey Brosseau appeared on behalf of the Bay Area Stormwater Management Agencies Association.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 4-2.

Summary of Findings

The consolidated test claim, filed by the County of Los Angeles and several cities, allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of various facilities to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board.

The Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate on local agencies subject to the permit that are not subject to a trash total

maximum daily load:[1] "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

BACKGROUND

The claimants allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board (LA Regional Board), a state agency.

History of the test claims

The test claims were filed in September 2003,[2] by the County of Los Angeles and several cities within it (the permit covers the Los Angeles County Flood Control District and 84 cities in Los Angeles County, all except Long Beach). The Commission originally refused jurisdiction over the permits based on Government Code section 17516's definition of "executive order" that excludes permits issued by the State Water Resources Control Board (State Water Board) or Regional Water Quality Control Boards (regional boards). After litigation, the Second District Court of Appeal held that the exclusion of permits and orders of the State and Regional Water Boards from the definition of "executive order" is unconstitutional. The court issued a writ commanding the Commission to set aside the decision "affirming your Executive Director's rejection of Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21" and to fully consider those claims.[3]

The County of Los Angeles and the cities re-filed their claims in October and November 2007. The claims were consolidated by the Executive Director in December 2008. Thus, the

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[1] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

[2] Originally, test claims 03-TC-04 (*Transit Trash Receptacles*) and 03-TC-19 (*Inspection of Industrial/Commercial Facilities)* were filed by the County of Los Angeles on September 5, 2003. Test claim 03-TC-21 (*Stormwater Pollution Requirements*) was filed by the Cities of Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina on September 30, 2003. Test claim 03-TC-20 (*Waste Discharge Requirements*) was filed by Cities of Artesia, Beverly Hills, Carson, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino, and Westlake Village on September 30, 2003.

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

reimbursement period is as though the claims were filed in September 2003, i.e., beginning July 1, 2002.[4]

Before discussing the specifics of the permit, an overview of municipal stormwater pollution puts the permit in context.

Municipal stormwater

One of the main objectives of the permit is "to assure that stormwater discharges from the MS4 [Municipal Separate Storm Sewer Systems][5] shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-stormwater to the MS4 has been effectively prohibited." (Permit, p. 13.)

Stormwater runoff flows untreated from urban streets directly into streams, lakes and the ocean. To illustrate the effect of stormwater[6] on water pollution, the Ninth Circuit Court of Appeal has stated the following:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[7]

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[4] Government Code section 17557, subdivision (e).

[5] Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

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

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

Because of the stormwater pollution problems described by the Ninth Circuit above, California and the federal government regulate stormwater runoff as described below.

California law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board).
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[8]

Much of what the regional board does, especially as pertaining to permits like the one in this claim, is based in federal law as described below.

Federal law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[9] from point sources[10] to waters of the United States, since

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

[9] According to the federal regulations, "Discharge of a pollutant" means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

[10] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

discharges of pollutants are illegal except under a permit.[11] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[12] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[13]

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California's permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a regional board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not " *less stringent* " than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent*

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[11] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

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

[13] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 621. Actually, State and regional board permits allowing discharges into state waters are called "waste discharge requirements" (Wat. Code, § 13263).

than required by federal law-from taking into account the economic effects of doing so.[14]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[15]

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[16]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[17] The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[18]

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application.

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

[15] Best management practices, or BMPs, means "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 CFR § 122.2.)

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

[17] 33 USCA 1342 (p)(2)(C).

[18] 33 USCA 1342 (p)(3)(B).

The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[19]

General state-wide permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[20] as described in the permit as follows:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. ... Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations. (Permit, p. 11.)

The State Board has statutory fee authority to conduct inspections to enforce the general state-wide permits.[21] The statewide permits are discussed in further detail in the analysis.

The Los Angeles Regional Board permit (Order No. 01-182, Permit CAS004001)

To obtain the permit, the County of Los Angeles, on behalf of all permittees, submitted on January 31, 2001 a Report of Waste Discharge, which constitutes a permit application, and a Stormwater Quality Management Program, which constituted the permittees' proposal for best management practices that would be required in the permit.[22]

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[19] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[20] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

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

[22] State Water Resources Control Board, comments submitted April 18, 2008, page 8 and attachment 36.

The permit states that its objective is: "to protect the beneficial uses of receiving waters in Los Angeles County."[23] The permit was upheld by the Second District Court of Appeal in 2006, which described it as follows:

> The 72-page permit is divided into 6 parts. There is an overview and findings followed by a statement of discharge prohibitions; a listing of receiving water limitations; the Storm Water Quality Management Program; an explanation of special provisions; a set of definitions; and a list of what are characterized as standard provisions. The county, the flood control district, and the 84 cities are designated in the permit as the permittees.[24]

After finding that "the county, the flood control district, and the 84 cities discharge and contribute to the release of pollutants from "municipal separate storm sewer systems" (storm drain systems)" and that the discharges were the subject of regional board permits in 1990 and 1996, the regional board found that the storm drain systems in the county discharged a host of specified pollutants into local waters. The permit summed up by stating: "Various reports prepared by the regional board, the Los Angeles County Grand Jury, and academic institutions indicated pollutants are threatening to or actually impairing the beneficial uses of water bodies in the Los Angeles region."[25]

The permit also specifies prohibited and allowable discharges, receiving water limitations, the implementation of the Storm Water Quality Management Program "requiring the use of best management practices to reduce pollutant discharge into the storm drain systems to the maximum extent possible."[26] As the court described the permit:

> In the prohibited discharges portion of the permit, the county and the cities were required to "effectively prohibit non-stormwater discharges" into their storm sewer systems. This prohibition contains the following exceptions: where the discharge is covered by a National Pollutant Discharge Elimination permit for non-stormwater emission; natural springs and rising ground water; flows from riparian habitats or wetlands; stream diversions pursuant to a permit issued by the

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[23] Permit page 13. The permit also says: "This permit is intended to develop, achieve, and implement a timely comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the US subject to the Permittees' jurisdiction."

[24] *County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 990.

[25] *County of Los Angeles v. California State Water Resources Control Board , supra,* 143 Cal.App.4th 985, 990

[26] *County of Los Angeles v. California State Water Resources Control Board,, supra,* 143 Cal.App.4th 985, 994.

regional board; "uncontaminated ground water infiltrations" ... and waters from emergency fire-fighting flows.[27]

There is also a list of permissible discharges that are incidental to urban activity, as specified (e.g., landscape irrigation runoff, etc.). In the part on receiving water limitations, the permit prohibits discharges from storm sewer systems that "cause or contribute" to violations of "Water Quality Standards" objectives in receiving waters as specified in state and federal water quality plans. Storm or non-stormwater discharges from storm sewer systems which constitute a nuisance are also prohibited.[28]

To comply with the receiving water limitations, the permittees must implement control measures in accordance with the permit.[29]

The permittees are also to implement the Storm Water Quality Management Program (SQMP) that meets the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduces the pollutants in stormwaters to the maximum extent possible with the use of best management practices. And the permittees must revise the SQMP to comply with specified total maximum daily load (TMDL) allocations.[30] If a permittee modified the countywide SQMP, it must implement a local management program. Each permittee is required by November 1, 2002, to adopt a stormwater and urban runoff ordinance. By December 2, 2002, each permittee must certify that it had the legal authority to comply with the permit through adoption of ordinances or municipal code modifications.[31]

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[27] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985, 991-992.

[28] "'Nuisance' means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes." *Id.* at 992.

[29] If the Storm Water Quality Management Program did not assure compliance with the receiving water requirements, the permittee must immediately notify the regional board; submit a Receiving Water Limitations Compliance Report that describes the best management practices currently being used and proposed changes to them; submit an implementation schedule as part of the Receiving Water Limitations Compliance Report; and, after approval by the regional board, promptly implement the new best management practices. If the permittee makes these changes, even if there were further receiving water discharges beyond those addressed in the Water Limitations Compliance Report, additional changes to the best management practices need not be made unless directed to do so by the regional board. *Id.* at 993.

[30] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

[31] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

The permit gives the County of Los Angeles additional responsibilities as principal permittee, such as coordination of the SQMP and convening watershed management committees. In addition, the permit contains a development construction program under which permittees are to implement programs to control runoff from construction sites, with additional requirements imposed on sites one acre or larger, and more on those five acres or larger. Permittees are to eliminate all illicit connections and discharges to the storm drain system, and must document, track and report all cases.

In this claim, however, claimants only allege activities in parts 4C2a, 4C2b, 4E and 4F5c3 of the permit. These parts concern placement and maintenance of trash receptacles at transit stops, and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites, as quoted below.

Co-Claimants' Position

Co-claimants assert that parts 4C2a, 4C2b, 4E and 4F5c3 of the LA Regional Board's permit constitute a reimbursable state-mandate within the meaning of article XIII B, section 6, and Government Code section 17514.

Transit Trash Receptacles: Los Angeles County ("County") filed test claims 03-TC-04 and 03-TC-19. In 03-TC-04, *Transit Trash Receptacles*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, the claimants allege the following activities as stated in the permit part 4F5c3 (Part 4, Special Provisions, F. Public Agency Activities Program, 5. Storm Drain Operation and Management):

> c. Permittees not subject to a trash TMDL[32] shall: [¶]...[¶]
>
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Claimant County asserts that this permit condition requires the following:

1. Identifying all transit stops within its jurisdiction except for the Los Angeles River and Ballona Creek Watershed Management areas.
2. Selecting proper trash receptacle design and evaluating proper placement of trash receptacles.
3. Designing receptacle pad improvement, if needed.
4. Constructing and installing trash receptacle units.
5. Collecting trash and maintaining receptacles.

Inspection of Industrial and Commercial Facilities: In claim 03-TC-19, *Inspection of Industrial/ Commercial Facilities*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, claimants allege the following activities as stated in the permit parts 4C2a and 4C2b (Part 4, Special Provisions, C. Industrial/Commercial Facilities Control Program):

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[32] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:

a) Commercial Facilities

(1) Restaurants

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections-: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with State law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP [Storm Water Quality Management Program]. At each restaurant, inspectors shall verify that the restaurant operator:

- has received educational materials on stormwater pollution prevention practices;
- does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
- keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
- does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;
- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;

- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO [Retail Gasoline Outlet] and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;
- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices.

b) Phase I Facilities[33]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[34] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[35] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[36] to stormwater. For those facilities that do

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[33] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[34] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[35] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

[36] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Inspection of Construction Sites: In claims 03-TC-20 and 03-TC-21, *Waste Discharge Requirements*, the cities allege the activities in permit parts 4C2a, 4C2b, and 4F5c3, as listed in the test claims cited above, in addition to the following activities as stated in part 4E of the permit (Part 4, Special Provisions, E. Development Construction Program):

- For construction sites one acre or greater, each Permittee shall comply with all conditions in section E1 above and shall: ...

  (b) Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. The Local SWPPP [Storm Water Pollution Prevention Plan] shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been attained, the Permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

  Part 4E3 of the Order provides, in relevant part, as follows:

  3. For sites five acres and greater, each Permittee shall comply with all conditions in Sections E1 and E2 and shall:

  a) require, prior to issuing a grading permit for all projects requiring coverage under the state general permit,[37] proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;" [40 CFR §122.26 (b)(14), Emphasis added.]

[37] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA [Clean Water Act] within a geographical area." (40 CFR § 122.2.) California has issued one general permit for construction activity and one for industrial activity.

Activity Storm Water Permit][38] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.

b) Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
c) Use an effective system to track grading permits issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

Both county and city claimants allege more than $1000 in costs in each test claim to comply with the permit activities.

In comments submitted June 4, 2009 on the draft staff analysis, the County of Los Angeles asserts that local agencies do not have fee authority to collect trash from trash receptacles that must be placed at transit stops, and that voter approval under Proposition 218 would be required to do so. The County also argues that voter approval under Proposition 218 would be required for stormwater inspection costs, and cites as evidence the City of Santa Clarita's stormwater pollution prevention fee, as well as legislative proposals now in the legislature that would, if enacted, provide fee authority.

In comments submitted June 8, 2009 on the draft staff analysis, the cities disagree with the conclusion that they have fee authority to recoup the costs of the transit-stop trash receptacles, and disagree that they have fee authority to inspect facilities covered by the state-issued general stormwater permits, as discussed in more detail below.

State Agency Positions

Department of Finance: Finance, in comments filed March 27, 2008 on all four test claims, alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because "The permit conditions imposed on the local agencies are required by federal laws" so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that "requirements of the permit are federally required to comply with the NPDES [National Pollutant Discharge Elimination System] program ... [and] is enforceable under the federal CWA [Clean Water Act]."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The permittees submitted a Storm Water Quality Management Program prevention report with their applications, in which they had the option to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies prescribed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[39] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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[38] See page 11, paragraph 22 of the permit for a description of the statewide permits.

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

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance submitted comments on the draft staff analysis on June 19, 2009, agreeing that the local agencies have fee authority sufficient to pay for the mandated activities. Finance disagrees, however, with the portion of the analysis that finds that the activities are not federal mandates.

State Water Resources Control Board: The State Board filed comments on the four test claims on April 18, 2008, noting that the federal CWA mandates that municipalities apply for and receive permits regulating discharges of pollutants from their municipal separate storm sewer system (MS4) to waters of the United States. "Pursuant to federal regulations, the Permit contains numerous requirements for the cities and County to take actions to reduce the flow of pollutants into the rivers and the Bay, known as Best Management practices (BMPs)."

The State Board asserts that the permit is mandated on the local governments by federal law, and applies to many dischargers of stormwater, both public and private, so it is not unique to local governments. The federal mandate requires that the permit be issued to the local governments, and the specific requirements challenged are consistent with the minimum requirements of federal law. According to the State Board, even if the permit were interpreted as going beyond federal law, any additional state requirements are de minimis. And the costs are not subject to reimbursement because the programs were proposed by the cities and County themselves, and because they have the ability to fund these requirements through charges and fees and are not required to raise taxes.

In comments filed with the State Board on April 10, 2008 (attached to the State Board comments on the test claim), the United States Environmental Protection Agency (U.S. EPA) asserts that the permit conditions reduce pollutants to the "maximum extent practicable." The transit trash receptacle and inspection programs, according to U.S. EPA, are founded in section 402 (p) of the Clean Water Act, and are well within the scope of the federal regulations (40 CFR § 122.26 (d)(2)(iv)(A)(3)).

In its comments on the draft staff analysis submitted June 5, 2009, the State Board agrees with the conclusion and staff recommendation to deny the test claim, but disagrees with parts of the analysis. The State Board asserts that federal law: (1) requires local agencies to obtain NPDES permits from California Water Boards, and (2) mandates the permit, which is less stringent than permits for private industry. The State Board also states that the permit does not exceed the minimum federal mandate, as found by a court of appeal. Finally, the State Board argues that the federal stormwater law is one of general application, and therefore does not impose a state mandate.

Interested Party Positions

Bay Area Stormwater Management Agencies Association: In comments on the draft staff analysis received June 3, 2009 (although the letter is dated April 29, 2009) the Bay Area Stormwater Management Agencies Association (BASMAA) states that this matter is of statewide importance with broad implications, and fundamentally a matter of public finance. BASMAA also urges keeping the voters' objectives paramount. BASMAA agrees that the permit requirements are a new program or higher level of service and that the requirements go beyond the federal Clean Water Act's mandates. As for the portion of the draft staff analysis that

discusses local agency fee authority, BASMAA calls it "myopic" saying it "falls short in its consideration of all potentially relevant issues and appellate court precedents that need to be presented to the Commission to serve the interest of the public." (Comments p. 3.) BASMAA contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the Proposition 218 voting requirement or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

League of California Cities and California State Association of Counties (CSAC): In joint comments on the draft staff analysis received June 4, 2009, the League of Cities and CSAC agree with the draft staff analysis that the permit is a mandate, but question whether the *Connell* and *County of Fresno* decisions are still valid as applied to Government Code section 17556, subdivision (d), which prohibit the Commission from finding costs mandated by the state if the local agency has fee authority. This is because of the voters' approval of Proposition 218 in 1996. The League and CSAC urge the Commission not to find that fee authority exists for local agencies (1) to the extent there may be doubt about whether a local agency has it, and (2) to the extent that there is no person upon which the local agency can impose the fee.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[40] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[41] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[42] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

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[40] Article XIII B, section 6, subdivision (a), provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

task.[43] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[44]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[45] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[46] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[47]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[48]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[49] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[50]

The permit provisions in the consolidated test claim are discussed separately to determine whether they are reimbursable state-mandates.

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

[44] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[45] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

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

[48] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

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

[50] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue 1: Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, and whether they constitute a federal mandate.

A. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which defines an "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following:

(a) The Governor.
(b) Any officer or official serving at the pleasure of the Governor.
(c) Any agency, department, board, or commission of state government."[51]

The LA Regional Water Board is a state agency.[52] The permit it issued is both a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) the result of claimants' discretion?

The permit provisions require placing and maintaining trash receptacles at transit stops and inspecting specified facilities and construction sites.

The Department of Finance, in comments submitted March 27, 2008, asserts that the claimants had discretion over what activities and conditions to include in the permit application, so that any resulting costs are downstream of the claimant's decision to include those provisions in the permit. Thus, Finance argues that the costs are not mandated by the state.

Similarly, the State Board, in its April 18, 2008 comments, cites the Stormwater Quality Management Program (SQMP) submitted by the county that constituted the claimants' proposal for the BMPs required under the permit. The State Water Board refers to (on p. 28 of the SQMP) the county's proposal to "collect trash along open channels and encourage voluntary trash collection in natural stream channels." The State Water Board further states that the SQMP (pp. 22-23) contains the municipalities' proposal for (1) site visits to industrial and commercial facilities, including automotive service businesses and restaurants to verify evidence of BMP

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[51] Section 17516 also states: ""Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 904.

[52] Water Code section 13200 et seq.

implementation, and (2) maintaining a database of automotive and food service facilities including whether they have NPDES stormwater permit coverage.

Claimant County of Los Angeles, in its June 23, 2008 rebuttal comments (pp.3-4), stated whether or not most jurisdictions place transit receptacles at transit stops is not relevant to the existence of a state mandate because Government Code section 17565 provides that if a local agency has been incurring costs for activities that are subsequently mandated by the state, the activities are still subject to reimbursement. The County also states that the permit application only proposed an industrial/commercial *educational* site visit program, not an inspection program. The claimants allege that the inspection program was previously the state's duty, but that the permit shifted it to the local agencies.

Claimant cities in their June 28, 2008 comments also construe the SQMP proposal as involving only educational site visits, which they characterize as very different from compliance inspections. And cities assert that "nowhere in the Report of Waste Discharge do the applicants propose compliance inspections of facilities that hold general industrial and general construction stormwater permits for compliance with those permits." According to the cities, the city and county objected orally and in writing to the inspection permit provision.

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity ... do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[53]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants were required by state and federal law to submit the NPDES permit application in the form of a Report of Waste Discharge and SQMP. Submitting them was not discretionary. According to the record,[54] the county on behalf of all claimants, submitted on January 31, 2001 a Report of Waste Discharge (ROWD), which constitutes a permit application, and a SQMP, which constitutes the claimants' proposal for best management practices that would be required in the permit.

The duty to apply for an NPDES permit is not within the claimants' discretion. According to the federal regulation:

> a) *Duty to apply.* (1) Any person[55] who discharges or proposes to discharge pollutants ... and who does not have an effective permit ... must submit a

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

[54] State Water Resources Control Board, comments submitted April 18, 2008, page 8 & attachment 36.

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

> complete application to the Director in accordance with this section and part 124 of this chapter.[56]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state ... shall file a report of the discharge in compliance with the procedures set forth in Section 13260 ..."[57] Thus, submitting the ROWD is not discretionary.

Federal regulations also anticipate the filing of an application for a stormwater permit, which contains the information in the SQMP. The regulation states in part:

> (d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application.[58]

According to the permit, section 122.26, subdivision (d), of the federal regulations contains the essential components of the SQMP (p. 32), which is an enforceable element of the permit (p. 45). Section 122.26, subdivision (d)(2)(iv)(C), in the federal regulations is interpreted in the permit to "require that MS4 permittees implement a program to monitor and control pollutants in discharges to the municipal system from industrial and commercial facilities that contribute a substantial pollutant load to the MS4." (p. 35.) In short, the claimants were required by law to submit the ROWD and SQMP, with specified contents.

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which were not the result of the claimants' discretion.

C. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b)?

The next issue is whether the parts of the permit at issue are federally mandated, as asserted by the State Board and the Department of Finance (whose comments are detailed below). If so, the parts of the permit would not constitute a state mandate.

In *County of Los Angeles v. Commission on State Mandates,* the court stated as follows regarding this permit: "We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."[59] But after

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[56] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[57] Water Code section 13376.

[58] 40 Code of Federal Regulations, section 122.26 (d).

[59] *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 914.

summarizing the arguments on both sides, the court declined to decide the issue, stating: "Resolution of the federal or state nature of these [permit] obligations therefore is premature and, thus, not properly before this court."[60] The court agreed with the Commission (calling it an "inescapable conclusion") that the federal versus state issues in the test claims must be addressed in the first instance by the Commission.[61]

The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes ... by their terms, provide for reimbursement only of *state*- mandated costs, not *federally* mandated costs."[62]

When analyzing federal law in the context of a test claim under article XII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[63] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[64]

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find "costs mandated by the state" if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."

In *Long Beach Unified School Dist. v. State of California,*[65] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[66] The *Long Beach* court stated that unlike the federal law at issue, "the executive

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[60] *Id.* at page 918.

[61] *Id.* at page 917. The court cited *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830, 837, in support.

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

[63] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

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

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

[66] *Id.* at page 173.

Order and guidelines require specific actions … [that were] required acts. These requirements constitute a higher level of service."[67]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[68] Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[69] The federal Clean Water Act also allows for more stringent measures, as follows:[70]

> Permits for discharges from municipal storm sewers [¶]…[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the … State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

As discussed further below, the Commission finds that the permit activities are not federally mandated because federal law does not require the permittees to install and maintain trash receptacles at transit stops, or require inspections of restaurants, automotive service facilities, retail gasoline outlets or automotive dealerships. As to inspecting phase I facilities or construction sites, the federal regulatory scheme authorizes states to perform the inspections under a general statewide permit, making it possible to avoid imposing a mandate on the local agencies to do so.

In its June 2009 comments on the draft staff analysis, the State Board disagrees that specific mandates in the permit exceed the federal requirements, the State Board argues:

> This approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. … The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not convert the federal mandate into a state mandate.[71]

The Commission disagrees. Based on the *Long Beach Unified School Dist.* case discussed above and applied in the analysis below, the specific requirements in the permit may constitute a state mandate even though they are imposed in order to comply with the federal Clean Water Act.

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

[68] 33 U.S.C. § 1370.

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

[70] 33 USCA section 1370.

[71] State Board comments submitted June 2009, page 6.

Finance, in its June 2009 comments on the draft staff analysis, distinguishes this permit from the issue in the *Long Beach Unified School Dist.* case. According to Finance, in *Long Beach,* the courts had suggested certain steps and approaches that might help alleviate racial discrimination, although the state's executive order and guidelines required specific actions. But in this claim, federal law requires NPDES permits to include specific requirements.

The Commission agrees that NPDES permits are required to include specific measures. But as discussed in more detail below, those measures are not the same as the specific requirements at issue in this permit (in Parts 4C2a, 4C2b, 4E, and 4F5c3).

The State Board's June 2009 comments also discuss *County of Los Angeles v. State Water Resources Control Board,*[72] which involved the same permit as in this test claim. The State Board asserts that this case holds, in an unpublished part, that "the permit did not exceed the federal minimum requirements for the MS4 program."[73] (Comments, p. 5.) The State Board asserts that the Commission is bound by this decision.

The Commission reads the *County of Los Angeles* case differently than the State Board. The plaintiffs (permittees and others) in that case challenged the permit on a variety of issues, including that the regional board did not have jurisdiction to issue it, and that it violated the California Environmental Quality Act. The court did not, however, discuss the permit conditions at issue in this test claim. In the portion cited by the State Board, the court was addressing the consideration of the permit's economic effects. One of the plaintiffs' challenges to the permit was that the regional board was required to consider the economic effects in issuing the permit. By alleging the regional board had not done so, the plaintiffs argued that the permit imposed conditions more stringent than required by the federal Clean Water Act. The court held that the plaintiff's contentions were waived for failure to set forth all the documents received by the regional board, and that the regional board had considered the costs and benefits of implementation of the permit. In other parts of the opinion, however, the court acknowledged the regional board's authority to impose permit restrictions beyond the "maximum extent feasible"[74]

The *County of Los Angeles* case is silent on the permit provisions at issue in this claim[75] (Parts 4C2a, 4C2b, 4E, and 4F5c3) except when it said: "we need no [sic] address the parties'

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[72] *County of Los Angeles v. State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

[73] The court's opinion, including the unpublished parts, are in attachment 26 of the State Board's comments submitted April 18, 2008.

[74] See page 18 of attachment 26 of the State Board's comments submitted April 18, 2008.

[75] In *County of Los Angeles,* the plaintiffs also challenged the following parts of the permit: (1) part 2.1 that deals with receiving water restrictions and that prohibits all water discharges that violate water quality standards or objectives regardless of whether the best management practices are reasonable; (2) part 3.C, which requires the permittees to revise their storm water quality management programs in order to implement the total maximum daily loads for impaired water bodies, and (3) parts 3.G and 4., which authorize the regional board to require strict requirements with numeric limits on pollutants which are incorporated into the total maximum daily load restrictions. The court held that these contentions were waived for failure to set forth all the

remaining contentions concerning trash receptacles."[76] The court also said inspections under the permit were not unlawful. Nonetheless, the case is not binding on the Commission in deciding the issues in this claim.

California in the NPDES program: By way of background, under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, the section that describes the NPDES program (and which, in subdivision (p), describes the requirements for the municipal stormwater system permits) states in part:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is neither required to have an NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[77] to comply with the Federal Water Pollution Control Act of 1972 stated the following findings and declaration in Water Code section 13370:

(a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants ... to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the

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applicable evidence, and that the regional board has authority to impose restrictions beyond the maximum extent feasible.

[76] See page 22, attachment 26 of the State Board's comments submitted April 18, 2008.

[77] Water Code section 13374 states: "The term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the Federal water Pollution Control Act, as amended."

provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this Water Code section 13370, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[78] to effect the stormwater permit program.

Any further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

In its June 2009 comments on the draft staff analysis, the State Board argues as follows:

> [T]he ... analysis treats the state's decision to *administer* the NPDES permit program in 1972 as the 'choice' referred to in *Hayes*. ...The state's 'choice' to administer the program in lieu of the federal government does not alter the federal requirement on municipalities to reduce pollutants in these discharges to the maximum extent practicable.[79]

Finance, in its June 2009 comments, also disagrees with this part of the draft staff analysis, asserting that the duty to apply for a NPDES permit is required by federal law on public and private dischargers, which in this case are local agencies.

Even though California opted into the NPDES program, further analysis is needed to determine whether the federal regulations impose a mandate on the local agencies. To the extent that state requirements go beyond the federal requirements, there would be a state mandate.[80] Thus, the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402(p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26.

Placing and maintaining trash receptacles at transit stops (part 4F5c3): This part of the permit states:

> c. Permittees not subject to a trash TMDL[81] shall: [¶]...[¶]
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

The comments of the State Water Board and U.S. EPA assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations. The U.S.

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

[79] State Board comments submitted June 2009, page 4.

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

[81] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

EPA submitted a letter to the State Water Board regarding the permit conditions in April 2008, which the State Water Board attached to its comments. Regarding the trash receptacles, the letter states:

> [M]aintaining trash receptacles at all public transit stops is well within the scope of these [Federal] regulations. Among the minimum controls required to reduce pollutants from runoff from commercial and residential areas are practices for "operating and maintaining public streets, roads, and highways ... [40 CFR] § 122.26(d)(2)(iv)(A)(3).[82]

U.S. EPA also cites EPA's national menu of BMPs for stormwater management programs, "which recommends a number of BMPs to reduce trash discharges." Among the recommendations is 'improved infrastructure' for trash management when necessary, which includes the placement of trash receptacles at appropriate locations based on expected need."[83]

The State Water Board, in comments filed April 18, 2008, states that part 4F of the permit (regarding trash receptacles) concerns "the municipalities' own activities, as opposed to its regulation of discharges into its system by others." The State Water Board cites the same section 122.26 regulation as U.S. EPA, and states that the requirements "reflect the federal requirement to reduce pollutants from the MS4 to the maximum extent practicable. It is federal law that animates the requirement and federal law that mandates specificity in describing the BMPs." The State Water Board alleges that two appellate courts[84] have determined that the permit provisions constitute the "maximum extent practicable" standard, which is the minimum requirement under federal law.

The Department of Finance also asserts that the permit requirements are a federal mandate.

The County of Los Angeles, in comments filed June 23, 2008, states that "Nothing in the federal Clean Water Act requires the County to install trash receptacles at transit stops. Nothing in the federal regulations or the Clean Water Act itself imposes this obligation." The county states that the U.S.EPA's citation to BMPs for stormwater management programs "may be permitted under federal law ... and even encouraged as 'reasonable expectations.' But such requirements are not mandated on the County by federal law." The County admits the existence of "an abundance of federal guidance and encouragement to have the County install and maintain trash receptacles at all public transit stops. But these are merely federal suggestions, not mandates."

The city claimants, in comments filed June 25, 2008, also argue that the requirement for transit trash receptacles is not a federal mandate, stating that nothing in the Clean Water Act or the federal regulations requires cities to install trash receptacles at transit stops. City claimants also submit a survey of other municipal stormwater permits, finding that none of those issued by U.S. EPA required installation of trash receptacles at transit stops.

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[82] Letter from Alexis Strauss, Director, Water Division, U.S. EPA, to Tam M. Doduc, Chair, and Dorothy Rice, Executive Director, State Water Resources Control Board, April 10, 2008, page 3.

[83] *Id.* at page 3.

[84] The State Water Board cites: *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region* (2006) 135 Cal.App.4th 1377; *County of Los Angeles v. California State Water Resources Control Board* (2006) 148 Cal.App.4th 985.

The federal law applicable to this issue is section 402 of the Clean Water Act, which states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[85] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[86] of a discharge[87] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]
>
> (2) Part 2 of the application shall consist of: [¶]...[¶]
>
> (iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design

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

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

[87] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures[88] to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]...[¶]

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities. (40 CFR § 122.26(d)(2)(iv)(A)(3).) [Emphasis added.]

The Commission finds that the plain language of the federal statute (33 USCA § 1342 (p)(3)(B)) and regulation (40 CFR § 122.26 (d)(2)(iv)(A)(3)) does not require the permitees to install and maintain trash receptacles at transit stops.

Specifically, the state freely chose[89] to impose the transit trash receptacle requirement on the permittees because neither the federal statute nor the regulations require it. Nor do they require the permittees to implement "practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems"[90] although the regulation requires a description of practices for doing so. Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that "mandate costs that exceed the mandate in the federal law or regulation."[91]

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[88] Minimum control measures are defined in 40 CFR § 122.34 to include: 1) Public education and outreach on storm water impacts; (2) Public involvement/participation; (3) Illicit discharge detection and elimination. (4) Construction site storm water runoff control; (5) Post-construction storm water management in new development and redevelopment.; (6) Pollution prevention/good housekeeping for municipal operations.

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

[90] 40 CFR § 122.26(d)(2)(iv)(A)(3).

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

In *Long Beach Unified School Dist. v. State of California,*[92] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[93] The *Long Beach Unified School District* court stated:

> Where courts have suggested that certain steps and approaches may be helpful [in meeting constitutional and case law requirements] the executive Order and guidelines require *specific actions.* ...[T]he point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.[94] [Emphasis added.]

The reasoning of *Long Beach Unified School Dist.* is applicable to this claim. Although "operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems..."[95] is a federal requirement on municipalities, the permit requirement to place trash receptacles at all transit stops and maintain them is an activity, like in *Long Beach Unified School Dist.,* that is a *specified action* going beyond federal law.[96]

Neither of the cases cited by the State Water Board demonstrate that placing trash receptacles at transit stops is required by federal law. In *City of Rancho Cucamonga v. Regional Water Quality Control Board –Santa Ana Region*[97] the court upheld a stormwater permit similar to the one at issue in this claim. The City of Rancho Cucamonga challenged the permit on a variety of grounds, including that it exceeded the federal requirements for stormwater dischargers to "reduce the discharge of pollutants to the maximum extent practicable"[98] and that it was overly prescriptive. The court concluded that the permit did not exceed the maximum extent practicable standard and upheld the permit in all respects. There is no indication in that case, however, that the permit at issue required trash receptacles at transit stops. Similarly, in a suit regarding the same permit at issue in this case, the *Los Angeles County*[99] court dismissed various challenges to the permit, but made no mention of the permit's transit trash receptacle provision.

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

[93] *Id.* at page 173.

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

[95] 40 Code of Federal Regulations, section 122.26 (d)(2)(iv)(A)(3).

[96] *Ibid.*

[97] *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region, supra,* 135 Cal.App.4th 1377.

[98] 33 USCA section 1342 (p)(3(B)(iii).

[99] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

Therefore, the Commission finds that placing and maintaining trash receptacles at all transit stops within the jurisdiction of each permittee, as specified, is not a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b).

Part 4F5c3 of the permit states as follows:

> c. Permittees not subject to a trash TMDL shall: (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Based on the mandatory language (i.e., "shall") in part 4F5c3 of the permit, the Commission finds it is a state mandate for the claimants that are not subject to a trash TMDL to place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003, and to maintain all trash receptacles as necessary.

Inspecting commercial facilities (part 4C2a): Section 4C2a of the permit requires inspections of restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships as follows:

> 2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:
>
> (a) Commercial Facilities
>
> (1) Restaurants
>
> Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.
>
> Level of Inspections: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with Statw law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each restaurant, inspectors shall verify that the restaurant operator:
>
> - has received educational materials on stormwater pollution prevention practices;
> - does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
> - keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
> - does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;

- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;
- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;

- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices. [¶]...[¶]

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The state asserts that these inspection requirements in permit part 4C2a are a federal mandate.

In comments filed April 18, 2008, the State Water Board quotes from the MS4 Program Evaluation Guide issued by U.S. EPA, asserting that it requires inspections of businesses. The State Water Board also states:

> The federal regulations also specifically require local stormwater agencies, as part of their responsibilities under NPDES permits, to conduct inspections. [citing 40 CFR § 122.26(d)(2)(iv)(C).] Throughout the federal law, there are numerous requirements for entities that discharge pollutants to waters of the United States to monitor and inspect their facilities and their effluent. [citing Clean Water Act §402(b)(2)(B); 40 CFR § 122.44(i)).] The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers they must conduct inspections.

Similarly, the April 10, 2008 letter from U.S. EPA to the State Water Board and attached to the Board's comments submitted April 18, 2008, states:

> A program for commercial and industrial facility inspection and enforcement that includes restaurants and automobile facilities, would appear to be both practicable and effective. Such an inspection program ensures that stormwater discharges from such facilities are reducing their contribution of pollutants and that there are no non-stormwater discharges or illicit connections. Thus these programs are founded in both 402 (p)(3)(B)(ii) and (iii) and are well within the scope of 40 CFR § 122.26(d)(2)(iv)(A) and (B).

The County of Los Angeles, in its June 23, 2008 rebuttal comments, asserts that federal law requires prohibiting non-stormwater discharges into the storm sewers, and reducing the discharge of pollutants in stormwater to the maximum extent practicable (33 USC 1342(p)) but not inspecting restaurants, automotive service facilities, retail gas outlets, or automotive dealerships.

Only municipal landfills, hazardous waste treatment, disposal and recovery facilities and related facilities are required to be inspected (40 CFR § 122.26(d)(2)(iv)(C)).

In comments received June 25, 2008, the city claimants argue that the LA Regional Board freely chose to impose the permit requirements on the permittees, and make the following arguments: (1) The inspection obligations were not contained in two prior permits issued to the cities and the County—thus, the requirements are not federal mandates; (2) No federal statute or regulation requires the cities or the County to inspect restaurants, automotive service facilities, retail gas outlets, automotive dealerships or facilities that hold general industrial permits; (3) Stormwater NPDES permits issued by the U.S. EPA do not contain the requirement to inspect restaurants, auto service facilities, retail gas outlets and automotive dealerships, or require the extensive inspection of facilities that hold general industrial stormwater permits as contained in the Order [i.e. permit]; (4) The Administrator of U.S. EPA, as well as the head of the water division for U.S. EPA Region IX, have specifically stated that a municipality has an obligation under a stormwater permit only to assure compliance with local ordinances; the state retains responsibility to inspect for compliance with state law, including state-issued permits.

The city claimants dispute the State Board's contention that the court in *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377 held that federal law required inspections like those at issue in the permit. The cities quote part of the *City of Rancho Cucamonga* case with the following emphasis:

> Rancho Cucamonga and the other permittees are responsible for inspecting construction and industrial sites and commercial facilities within their jurisdiction for compliance with and enforcement of local municipal ordinances and permits. *But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.* The Regional Board may conduct its own inspections but permittees must still enforce their own laws at these sites. (40 C.F.R. § 122.26, subd. (d)(2) (2005).)

In discussing the federal mandate issue, the applicable federal law is section 402 of the Clean Water Act, which states that municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis; (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations (40 CFR § 122.26 (d)(2)(iv)(B)&(C)) state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such

operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) Part 2 of the application shall consist of: [¶]...[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]...[¶]

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, <u>including inspections</u>, to implement and enforce an ordinance, orders or similar means <u>to prevent illicit discharges to the municipal separate storm sewer system</u>; this program description shall address all types of illicit discharges, however the following category of non-stormwater discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States [¶]...[¶]

(C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures <u>for inspections</u> and establishing and implementing control measures for such discharges. (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

There is a requirement in subdivision (d)(2)(iv)(B)(1) for implementing and enforcing "an ordinance, orders, or similar means to prevent illicit discharges to the municipal separate storm system." There is no express requirement in federal law, however, to inspect restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Nor does the

portion of the MS4 Program Evaluation Guide quoted by the State Water Board contain mandatory language to conduct inspections for these facilities.

In its April 2008 comments, the State Water Board argues that this reading of the regulations is not reasonable, and that U.S. EPA acknowledged that the initial selection by MS4s was only a starting point. In its comments (p.15), the State Water Board also states:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.

The State Water Board would have the Commission read requirements into the federal law that are not there. The Commission, however, cannot read a requirement into a statute or regulation that is not on its face or its legislative history.[100]

Based on the plain language of the federal regulations that are silent on the types of facilities at issue in the permit, the Commission finds that performing inspections at restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships, as specified in the permit, is not a federal mandate.

Moreover, the requirement to inspect the facilities listed in the permit is an activity, as in the *Long Beach Unified School Dist.* case discussed above, [101] that is a specified action going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, the inspections are not federally mandated.

The permit states in part: "Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified ..." Based on the mandatory language in part 4C2a of the permit, the Commission finds that this part is a state mandate on the claimants to perform the inspections at restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships at the frequency and levels specified in the permit.

Inspecting phase I industrial facilities (part 4C2b): Part 4C2b of the permit regarding phase I industrial facilities requires the following:

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[100] *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 219-220. "Rules governing the interpretation of statutes also apply to interpretation of regulations." *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037.

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

b) Phase I Facilities[102]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[103] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[104] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity to stormwater. For those facilities that do have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

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[102] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[103] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[104] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The issue is whether these inspection requirements for phase I industrial facilities is a federal mandate. The governing federal regulation is 40 CFR section 122.26 (d)(2)(iv)(B)&(C), which is cited above. Specifically on point is subpart (C), which states that the proposed management program must include the following:

> (C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:
>
> (1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges; (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

The phase I facilities in the permit are defined to include.

> (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities. (Permit, p. 62)

And the Tier 1 facilities in the permit include municipal landfills, hazardous waste treatment, disposal and recovery facilities and facilities subject to SARA Title III (see permit attachment B, pp. B-1 to B-2). Thus, there is a federal requirement to inspect these phase I and tier 1 facilities in the permit. The issue is whether this requirement constitutes a federal mandate on local agencies. The Commission finds that it does not.

It is the state that mandates the phase I inspection and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[105] This is because the federal regulatory scheme provides an alternative means of regulating and inspecting these industrial facilities under the state-enforced, statewide permit, as follows:

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

(c) Application requirements for stormwater discharges associated with industrial activity[106] and stormwater discharges associated with small construction activity -

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. Facilities that are required to obtain an individual permit, or any discharge of stormwater which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph. [Emphasis added.]

The state has issued a statewide general activity industrial permit (GIASP) that is enforced through the regional boards.[107] This, along with the statewide construction permit, is described in the permit itself:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. The GCASP was reissued on August 19, 1999. The GIASP was reissued on April 17, 1997. Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The USEPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and

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[106] According to 40 CFR § 122.26, (b)(14): "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶](x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more."

[107] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

> non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.[108]

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspections of industrial facilities (specified in part 4C2b of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4C2b of the permit. In fact, the State Board collects fees for the regional boards for performing inspections under the GIASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

In its April 18, 2008 comments, the State Water Board asserts:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.[109]

The Commission disagrees. Inasmuch as the federal regulation (40 CFR § 122.26 (c)) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) does not expressly require those inspections to be performed by the county or cities (or the "owner or operator of the discharge") the Commission finds that the state has freely chosen[110] to impose these activities on the permittees. Therefore, the Commission finds that there is no federal mandate on the claimants to perform inspections of phase I facilities as specified in part 4C2b of the permit.

As to whether the permit is a state mandate, part 4C2b contains the following mandatory language:

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[108] Permit, page 11, paragraph 22.

[109] State Water Board comments, submitted April 18, 2008, page 15.

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

b) Phase I Facilities[111]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below. [Emphasis added.]

Frequency of Inspection

Facilities in Tier 1 Categories:[112] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[113] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[114] to stormwater. For those facilities that do

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[111] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[112] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[113] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

[114] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Based on this mandatory language to perform the inspections of phase I facilities as specified, the Commission finds that part 4C2b of the permit is a state-mandate.

Inspecting construction sites (part 4E): Part 4E of the permit contains the following requirements:

- Implement a program to control runoff from construction activity at all construction sites within each permittees jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater, each permittee shall:

- Require the preparation and submittal of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).
  - If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
  - If non-compliance continues the Regional Board shall be notified for further joint enforcement actions. (Permit, 4E2b.)

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more." [40 CFR §122.26 (b)(14), Emphasis added.]

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP (Permit, 4E2c.)
- For sites five acres and greater:
    - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
    - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
    - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

The applicable federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) on the issue of whether the inspection of construction sites is a federal mandate is as follows:

> (d) Application requirements for large[115] and medium[116] municipal separate storm sewer discharges. The operator[117] of a discharge from a large or medium

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[115] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as

municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) Part 2 of the application shall consist of: [¶]...[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]...[¶]

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in stormwater runoff

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determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ..." (40 CFR § 122.26 (b)(4).)

[116] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ..." (40 CFR § 122.26 (b)(7).)

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

from construction sites to the municipal storm sewer system, which shall include: [¶]...[¶]

(3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and ... [Emphasis added.]

The language of the federal regulation indicates a duty to inspect construction sites and enforce control measures as specified in part 4E of the permit. The *Rancho Cucamonga* case cited by the State Board also states that federal law requires NPDES permittees to inspect construction sites.[118]

The issue, however, is whether the federal requirements to inspect construction sites and enforce control measures amounts to a federal mandate on the local agencies. The Commission finds that it does not. First, the federal regulations quoted above do not specify the frequency or other specifics of the inspection program as the permit does. These are activities, as in the *Long Beach Unified School Dist.* case discussed above,[119] that are specified actions going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, it is not a federal mandate for the local agency permittees to inspect construction sites.

Moreover, it is the state that mandates the inspections of construction sites and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[120] The federal regulations do not require: (1) a municipality to have a separate permit for construction activity or enforcement; or (2) that the inspections and related activities in part 4E of the permit be conducted by the owner or operator of the discharge. Rather, these activities may be conducted by the state under a state-wide, state-enforced, general permit, as stated in the federal stormwater regulation (40 CFR § 122.26 (c)), which states in part:

(c) Application requirements for stormwater discharges associated with industrial activity [includes construction activity of five or more acres] and stormwater discharges associated with small construction activity[121] [construction activity from one to less than five acres]--

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[118] *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region, supra,* 135 Cal.App.4th 1377, 1390.

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

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

[121] According to 40 CFR § 122.26, (b)(15): "Storm water discharge associated with small construction activity means the discharge of storm water from: (i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. [Emphasis added.]

The state has issued a statewide general construction permit, as described on page 11 of the permit as quoted above, which is enforced through the regional boards.[122] In fact, the State Board collects fees for the regional board for performing inspections under the GCASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspection of construction sites and related activities (in part 4E of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4E of the permit. Therefore, the Commission finds that the requirement for local-agency permittees to inspect construction sites in section 4E of the permit is not a federal mandate.

The Commission finds that, based on the permit's mandatory language, the following activities in part 4E are state mandates on the permittees within the meaning of article XIII B, section 6:

- Implement a program to control runoff from construction activity at all construction sites within each permittee's jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater:

- Require the preparation of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).

Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where: ..."

[122] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

- If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
- If non-compliance continues, notify the Regional Board for further joint enforcement actions. (Permit, 4E2b.)

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP. (Permit, 4E2c.)
- For sites five acres and greater:
  - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
  - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
  - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

One of the requirements in part 4E3c of the permit is to: "Use an effective system to track grading permits issued by each permittee. To satisfy this requirement, the use of a database or

GIS system is encouraged, but not required." The Commission finds that, based on the plain language of this provision, using an effective system to track grading permits is a state mandate, although use of a database or GIS system is not.

Overall, the Commission finds that the permit provisions (parts 4C2a, 4C2b, 4E & 4F5c3) are subject to article XIII B, section 6, of the California Constitution.

Issue 2: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) impose a new program or higher level of service?

The next issue is whether the permit provisions at issue, i.e., found above to be state-mandated, are a program, and whether they are a new program or higher level of service.

First, courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[123]

The State Water Board, in its April 2008 comments, argues that the NPDES program is not a program because "the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES stormwater permits."

In comments submitted June 25, 2008, the cities call the State Board's argument inapposite, and cite the *Carmel Valley Fire Protection District* case[124] regarding whether the permit constitutes a "program." According to claimant, "[t]he test is not whether the general program applies to both governmental and non-governmental entities. The test is whether the specific executive orders at issue apply to both government and non-governmental entities."

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. The permit activities are limited to local governmental entities. The permit defines the "permittees" as the County of Los Angeles and 84 incorporated cities within the Los Angeles County Flood Control District (Permit, p. 1 & attachment A). The permit lists no private entities as "permittees." Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County. (Or as stated on page 13 of the permit: "The objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County.") Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

In its comments on the draft staff analysis submitted June 5, 2009, the State Board disagrees with this conclusion because NPDES permits may also apply to private entities.

The State Board made this same argument in *County of Los Angeles v. Commission on State Mandates*, which the court addressed by stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation

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[123] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[124] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[125]

In other words, the issue is not whether NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitutes a program because this permit is the only one over which the Commission has jurisdiction. Because they apply exclusively to local agencies, the Commission finds that the activities (parts 4C2a, 4C2b, 4E & 4F5c3) in this permit (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitute a program within the meaning of article XIII B, section 6.

The next step to determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption.[126]

The Commission finds that local agencies were not required by state or federal law to place and maintain trash receptacles at transit stops before the permit was adopted. Whether or not most cities or counties do so, as argued by the State Water Board in its April 2008 comments, is not relevant to finding a state-mandated new program or higher level of service because even if they do, Government Code section 17565 states: "If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ... for those costs incurred after the operative date of the mandate."

Because the transit trash receptacle requirement is newly mandated by the permit, and based on the plain language of part 4F5c3 of the permit, the Commission finds that it is a new program or higher level of service to place trash receptacles at transit stops and maintain them as specified in the permit.

For the same reason, the Commission finds that the inspections and enforcement activities at industrial and commercial facilities, including restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, and phase I facilities (in parts 4C2a & 4C2b of the permit) as well as inspection and enforcement at construction sites (in part 4E of the permit) are a new program or higher level of service. These were not required activities of the permittees prior to the permit's adoption.

In sum, the Commission finds that all the permit provisions at issue in this test claim impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Issue 3: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E & 4F5c3) impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

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

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

The final issue is whether the permit provisions impose costs mandated by the state,[127] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claims. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement.

In test claims 03-TC-20 and 03-TC-21, the cities' claimant representative declares (p. 24) that the cities will incur costs estimated to exceed $1000 to implement the permit conditions.

In test claim 03-TC-04, the County of Los Angeles states (p. 18) that the costs in providing the services claimed "far exceed the minimum reimbursement amount of $1000 per annum." In the attached declaration for *Transit Trash Receptacles*, the County declares (pp. 22-23) the following itemization of costs from December 13, 2001 to October 31, 2002:

> (1) Identify all transit stops in the jurisdiction: $19,989.17;
>
> (2) Select proper trash receptacle design, evaluate proper placement, specification and drawing preparation: $38,461.87;
>
> (3) Preliminary engineering works (construction contract preparation, specification reviewing process, bid advertising and awarding): $19,662.02;
>
> (4) Construct and install trash receptacle units: $230,755.58, construction management $34,628.31;
>
> (5) Trash collection and receptacle maintenance in FY 2002-03, $3,513.94, maintenance contractor costs for maintaining and collecting trash in FY 2002-03, $93,982.50;
>
> (6) Projected costs for on-going maintenance in FY 2003-04, $375,570.00.

Similarly, attached to claim 03-TC-19 (pp. 20-21) are declarations that itemize the County of Los Angeles' costs for *Inspection of Industrial/Commercial Facilities* program, from December 13, 2001 to September 15, 2003, as follows:

> (1) inspect 1744 restaurants: $234,931.83;
>
> (2) inspect 1110 automotive service facilities: $149,526.36;
>
> (3) inspect 249 retail gasoline outlets and automotive dealerships: $33,542.45;
>
> (4) Identify and inspect all Phase I (387 Tier 1 and 543 Tier 2) facilities within the jurisdiction: $125,155.31;
>
> (5) Total $543,155.95.

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

These declarations illustrate that the costs associated with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Did the claimants request the activities in the permit within the meaning of Government Code section 17556, subdivision (a)?

The first issue is whether the claimants requested the activities in the permit. The Department of Finance and the State Water Board both asserted that they did. As discussed above, the claimants were required to submit a Report of Waste Discharge and Stormwater Quality Management Plan before the permit was issued.

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

> (a) The claim is submitted by a local agency ... that requested legislative authority for that local agency ... to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency ... that requests authorization for that local agency ... to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Do the claimants have fee authority for the permit activities within the meaning of Government Code section 17556, subdivision (d)?

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency ... if, after a hearing, the commission finds any one of the following: [¶]...[¶] (d) The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The constitutionality of Government Code section 17556, subdivision (d), was upheld by the California Supreme Court in *County of Fresno v. State of California*,[128] in which the court held that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes. The court stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to

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

> preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[129]

In *Connell v. Superior Court,*[130] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the Districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section

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[129] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487.

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

17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[131]

In its April 18, 2008 comments (p. 19), the State Board asserted that the claimants have fee authority to pay for the trash receptacle and inspection programs in the permit. Likewise, the Department of Finance, in its March 2008 comments, states that "some local agencies have set fees to be used toward funding the claimed permit activities" that should be considered offsetting revenues.

Los Angeles County, in its comments submitted in June 2008, states (p. 2) that it is "without sufficient fee authority to recover its costs." The County points out that the state or regional board has fee authority in Water Code section 13260, subdivision (d)(2)(B)(iii) for inspections of industrial and commercial facilities, but those fees are not shared with the County or the cities.[132] The County also states that the inspections are to determine compliance with the general industrial permit that is enforced by the regional boards.[133]

In their comments received June 25, 2008, the city claimants assert that they do not have fee authority. The cities first note that, for facilities that hold state-issued general industrial or general construction stormwater permits, the state already imposes an annual fee and therefore has occupied the field (Wat. Code, § 13260, subd. (d)(2)(B)(iii)). The cities also relate the difficulty of imposing a fee for inspecting restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships because, although the cities could enact a general businesses license on all businesses, "the cities could not charge other businesses for the cost of inspecting this subgroup without again running the risk of charging fees on the other businesses for services not related to regulation of them." The cities also dispute the State Water Board's assertion that transit users could be charged a fee for the transit trash receptacles because the County and cities do not operate the transit system.

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

[132] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii) states:

> (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund. (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

[133] Page 3 of the General Industrial Permit states in part: "Following adoption of this General Permit, the Regional Water Boards shall enforce its provisions."

In comments on the draft staff analysis submitted in June 2009, the League of California Cities and California State Association of Counties (CSAC) question whether the decisions in *Connell* (1997), and *County of Fresno* (1991), can any longer be cited as good authority for the constitutionality of Government Code section 17556, subdivision (d), given the voter-approval requirement of Proposition 218 (discussed below) added to the state Constitution in 1996. Proposition 218 requires, among other things, that new or increased property-related fees be approved by a majority of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners, except for property-related fees for sewer, water, or refuse collection services (Cal. Const., art. XIII D, § 6, subd. (c)).

The League and CSAC also urge the Commission, to the extent there may be legal doubt whether a local agency has the authority to impose a fee, to not find that the fee authority exception to reimbursement in Government Code section 17556, subdivision (d), applies.

The Commission disagrees with the League and CSAC. The Commission cannot ignore the precedents of *Connell* or *County of Fresno*, or find that they conflict with article XIII D of the California Constitution (Proposition 218), until the issue is decided by a court of law. With regards to Government Code section 17556, subdivision (d), article III, section 3.5 of the California Constitution forbids the Commission or any state agency from declaring a statute unenforceable or refusing to enforce it on the basis of its unconstitutionality unless an appellate court declares that it is unconstitutional. Since no appellate court has so declared, the Commission is bound to uphold and analyze the application of Government Code section 17556, subdivision (d), to this test claim.

The issue of local fee authority for the municipal stormwater permit activities, however, is one of first impression for the Commission. Although there are no authorities directly on point, some legal principles emerge that guide the analysis, as discussed below.

1. Local fee authority to inspect commercial and industrial and construction sites (parts 4C2a, 4C2b & 4E)

Fee authority to inspect under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

The Third District Court of Appeal has stated that article XI, section 7, includes the authority to impose fees. In *Mills v. Trinity County*,[134] a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without the two-thirds affirmative vote of the county electors. In upholding the fees, the court stated:

> [S]o long as the local enactments are not in conflict with general laws, the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution.[135]

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[134] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656.

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

In addition to the *Mills* case, courts have held that water pollution prevention is a valid exercise of government police power.[136] And municipal inspections in furtherance of sanitary regulations have been upheld as "an exercise of that branch of the police power which pertains to the public health."[137]

In *Sinclair Paint v. State Board of Equalization,* [138] the California Supreme Court upheld a fee imposed on manufacturers of paint that funded a child lead-poisoning program, ruling it was a regulatory fee and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution (Proposition 13). The court recognized that determining under Proposition 13 whether impositions were fees or taxes is a question of law. In holding that the fee on paint manufacturers was "regulatory" and not a special tax, the court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[139] [Emphasis added.]

The *Sinclair Paint* court also recognized that regulatory fees help to prevent pollution when it stated: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[140]

Although the court's holding in *Sinclair Paint* applied to a state-wide fee, the language it used (putting "ordinances" in the same category as "statutes") recognizes that local agencies also have the police power to impose regulatory fees. Moreover, the court relied on local government police power cases in its analysis.[141]

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

[137] *Sullivan v. City of Los Angeles Dept. of Bldg. & Safety* (1953) 116 Cal.App.2d 807, 811.

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

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

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

[141] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

A regulatory fee is an imposition that funds a regulatory program[142] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. ...the regulatory program is for the protection of the health and safety of the public."[143] Courts will uphold regulatory fees if they comply with the following principles:

> Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A section 4 analysis if the "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." [Citations omitted] "A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." [Citations omitted] "Such costs ... include all those incident to the issuance of the license or permit, investigation, 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."[144] [Emphasis added.]

Local fees for inspections of commercial and industrial facilities, and construction sites, would be preventative and could be imposed to comply with the criteria the courts have used to uphold regulatory fees, articulated above. And the regulatory fees fall within the local police power to prevent, clean up, or mitigate pollution.

Therefore, pursuant to article XI, section 7, the Commission finds that the claimants have fee authority within the meaning of Government Code section 17556, subdivision (d), sufficient to carry out the mandated activities in parts 4C2a, 4C2b and 4E of the permit. Therefore, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code section 17514 and 17556 to perform the activities in those parts of the permit (commercial, phase I, and construction site inspections and related activities).

In fact, in June 2005, claimant Covina adopted stormwater inspection fees on restaurants, retail gasoline outlets, automotive service facilities, etc., as part of its business license fee, expressly for the purpose of complying with the permit at issue in this test claim.[145]

Statutory fee authority to operate and maintain storm drains: Health and Safety Code section 5471 expressly authorizes cities and counties to charge fees for storm drainage maintenance and operation services:

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

[143] *Ibid.*

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

[145] City of Covina, Resolution No. 05-6455.

> [A]any entity[146] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. ... Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities ....

The statute makes no mention of "inspecting" commercial or industrial facilities or construction sites. Rather, the fee revenues are used for "maintenance and operation" of storm drainage facilities. Thus, for the types of businesses regulated by the permit (restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites) the Commission cannot find that pursuant to Health and Safety Code section 5471, the claimants have fee authority "sufficient" to pay for the mandated inspection program within the meaning of Government Code section 17556. The statute's "operation and maintenance" of storm drainage facilities does not encompass the state-mandated inspections of the facilities or construction sites specified in the permit.

2. Local fee authority under the police power and the Public Resources Code to place and maintain trash receptacles at transit stops (Permit, 4F5c3)

As discussed above, part 4F5c3 of the permit requires the County and cities to place and maintain trash receptacles at transit stops in their jurisdictions. Public Resources Code section 40059, subdivision (a), suggests that the County and cities have fee authority to perform this activity as follows:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following: (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

The statute gives local governments the authority over the "nature, location and extent of providing solid waste handling services" and is broad enough to encompass "placing and maintaining" receptacles at transit stops. The statute also provides local governments with broad authority over the "level of services, charges and fees."

The draft staff analysis determined that the claimants had fee authority under Public Resources Code section 40059 and the police power (Cal. Const. art. XI, § 7) to install and maintain trash receptacles at transit stops and recommended that the Commission deny the test claim with respect to part 4F5c3 of the permit.

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[146] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

The city claimants, in June 2009 comments on the draft staff analysis, argue that section 40059, subdivision (a), does not apply here because it was adopted as a "savings provision" in legislation establishing the Integrated Waste Management Board (IWMB) in order to ensure that local trash collection agreements would not be affected by the IWMB legislation. The cities also cite *Waste Resources Technologies v. Department of Public Health* (1994) 23 Cal.app.4th 299, which held that the statute reflected the Legislature's intent to allow for local regulation of waste collection. According to the cities, the statute "was not intended as an *imprimatur* for local agencies to assess fees on their residents or on businesses to pay for the costs of trash generated by transit users when that requirement was established not as a matter of local choice but rather state mandate." (Comments, p. 7.)

The cities also argue that a valid fee must have a causal connection or nexus between the person or entity paying the fee, and the benefit or burden being addressed. Claimants assert that there is no group on which the claimants can assess a fee that has a relationship with the trash receptacles because the burden is created by the transit riders but benefits the public at large. City claimants also argue that they cannot assess fees on transit agencies or increase transit fares to recoup the cost of installing and maintaining trash receptacles because they have no authority to do so. As an example, the claimants cite the Metropolitan Transit Authority's (the largest public transit operator in Los Angeles County) authority to set fares (Pub. Util. Code, § 30638) that rests exclusively with the MTA's board.

As to the police power, City claimants argue that they cannot use it to assess fees on property owners or businesses for the cost of transit trash receptacles because doing so would collect more than the actual cost of the collection and thereby create a special tax that would require a two-thirds vote (Cal. Const. art. XIII A, § 4). And according to the claimants, they do not have statutory fee authority to assess property owners for the cost of installing and maintaining trash receptacles. Finally, claimants assert that a fee on property owners for transit stop trash receptacles, even if it were not a special tax, would require a vote under Proposition 218 (Cal. Const., art. XIII D).

The County of Los Angeles, in its June 2009 comments on the draft staff analysis, argues that local agencies do not have fee authority over bus operators, and for support cites *Biber Electric Co. v. City of San Carlos* (1960) 181 Cal.App.2d 342, which held that a local fee would conflict with a general state Vehicle Code provision. The County also asserts that no fee could be imposed on bus riders because the pollution prevention would benefit all county residents, not only those riding buses, and that such a fee would require a vote under Proposition 218 because the fee's purpose would be excluding trash from storm drains rather than routine collection.

The League of California Cities and CSAC, in their June 2009 comments on the draft staff analysis, criticize the conclusion that fee authority exists for transit trash receptacles because the analysis does not discuss upon whom the fee would be imposed. They also dispute the application of the *Connell* case because the issue is not whether the fee is economically feasible, but whether it is legally feasible. The League and CSAC point out that local agencies have no authority to impose the fee on transit agencies or their ridership, and that Proposition 218 imposes procedural and substantive requirements on adjacent business owners and residences, so that the local agency could not impose the fee or assessment on them without their consent. Thus, the League and CSAC argue that the local agencies do not have fee authority pursuant to

Government Code section 17556, subdivision (d): "sufficient to pay for the mandated program or increased level of service."

After considering these arguments, the Commission agrees that Government Code section 17556, subdivision (d), does not apply to the placement and maintenance of transit trash receptacles as specified in the permit because the claimants do not have the authority to impose fees.

Michael Lauffer was asked at the Commission hearing on July 31, 2009, why the transit trash requirement in the permit was not imposed on transit agencies. Mr. Lauffer testified that transit agencies were not named historically on the permits, and that the Board, at the time it established the requirements, thought it was appropriate to place them on municipalities. He also testified that nothing would prevent the municipalities under the permit from working with Metropolitan Transit Authority (MTA) to cooperatively implement the transit trash requirement, or to have the MTA carry out the primary obligation for meeting it. He added that the transit stops were public facilities, the language used in the federal regulations, which is why the permit included the requirement to place the trash receptacles there.[147]

Because the trash receptacles are required to be placed at transit stops that would typically be on city property (sidewalks)[148] or transit district property (for bus or metro or subway stations), there are no entities on which the claimants would have authority to impose the fees. The plain language of Public Resources Code section 40059 provides no fee authority over transit districts or transit riders, and the Metropolitan Transit Authority's fee statutes grant fee authority exclusively to its board (Pub. Util. Code, §§ 30638 & 130051.12).

Additionally, the claimants do not have fee authority under the police power because they do not provide the "services necessary to the activity for which the fee is charged."[149]

Thus, the Commission finds that part 4F5c3 of the permit imposes costs mandated by the state within the meaning of Government Code section 17514 and 17556.

The remainder of this analysis addresses the arguments raised by the claimants that their local fee authority for inspections would be preempted by a statute granting the state fee authority, and that a local fee would be a special tax. The application of Proposition 218 on the fee authority for inspection is also discussed.

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[147] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, pages 52-53.

[148] "The general rule views the sidewalk as part of the street; it ... holds the city liable for pedestrian injuries caused by the dangerous condition of the sidewalk." *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 832.

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

3. Local fee authority to inspect industrial or construction sites (parts 4C2a, 4C2b & 4E) performed under the statewide general permits would not be preempted by state fee authority in Water Code section 13260, subdivision (b)(2)(B)

In their comments submitted in June 2008 (p. 14), the city claimants argue that the permittees cannot impose fees for inspections of industrial or commercial or construction sites as follows:

> [W]ith respect to facilities that hold state-issued general industrial or general construction stormwater permits, the state had occupied the field. ...[T]he state already imposes an annual fee on general industrial and general construction stormwater permittees. That fee is explicitly designated, in part, to cover inspections of these facilities and regulatory compliance. Water Code § 13260(d)(2)(B).
>
> This state fee thus preempts any fee that the Cities or County could charge for inspection of these facilities.

The cities also assert that in 2001, the regional board initiated negotiation of a contract with the County whereby the regional board would pay the County to perform inspections of facilities that held general industrial stormwater permits (the 'Phase I facilities') on the regional board's behalf. Immediately after the permit was issued, the regional board terminated those negotiations.

In comments submitted in June 2009 on the draft staff analysis, city claimants clarify that their comments "are not directed towards the claimants' ability to assess fees for inspections of the other commercial establishments, i.e., restaurants and automotive service facilities, retail gasoline outlets and automobile dealerships, or Phase I facilities or construction sites that are not required to hold a state-issued general industrial or general construction stormwater permit."

According to the city claimants, fees for inspecting the phase I industrial facilities and construction sites under the statewide permits (the GIASP and GCASP) would be preempted by state fee authority in Water Code section 13260, under which the State Board collects fees for inspecting those sites. The city claimants state the fact that the specific destination of the funds from the fees in Water Code section 13260, subdivision (d)(2)(iii) is spelled out is evidence of intent that the Legislature fully occupied the field for inspections of GIASP and GCASP permit holders.

Because the fee authority to inspect commercial facilities (identified in the permit as restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships) is not contested by the city claimants, the discussion below is limited to industrial and construction site inspections performed under the statewide permits concurrently with the permit at issue in this claim.

The California Supreme Court has outlined the following rules as to when a statute preempts a local ordinance by fully occupying the field:

> A local ordinance *enters a field fully occupied* by state law in either of two situations-when the Legislature "expressly manifest[s]" its intent to occupy the legal area or when the Legislature "impliedly" occupies the field. (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p.

551["[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost."].)

When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality." (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)[150]

The state statute at issue, the stormwater fee statute, in subdivision (d) of section 13260 of the Water Code, reads in pertinent part:

(d)(1)(A) Each person who is subject to subdivision (a) [who discharges waste that affects the quality of waters of the state] or (c) shall submit an annual fee according to a fee schedule established by the state board.

(B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(C) Recoverable costs include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out those actions. [¶]...[¶]

(2) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.

(B) (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

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[150] *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068. Emphasis in original.

> (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in that region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. (Wat. Code, § 13260, subds. (d)(1) & (d)(2).) [Emphasis added.]

The State Water Board has adopted regulations to implement the stormwater fee that include fee schedules based on the threat to water quality and a complexity rating.[151] At the hearing on July 31, 2009, Michael Lauffer of the State Water Board testified that the fee is established annually by the State Board, based on the legislative appropriation for the boards to carry out their responsibilities. Mr. Lauffer testified that the annual fee for industrial facilities under this Water Code statute is $833, and the fee for construction facilities is variable, starting at $238, plus $24 per acre, with a cap of $2,600. [152]

The issue is whether Water Code section 13260, subdivision (d)(1) and (d)(2), preempts local fee authority. In resolving this, we look for express or implied preemption or intent to occupy the field.[153]

First, there is no express intent on the face of the Water Code statute to preempt any local fee ordinance because the statute is silent on local fees. As to implied intent to occupy the field of law, the Supreme Court has stated that it may be found if:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.[154]

The city claimants, in their comments on the draft staff analysis submitted in June 2009, argue as follows with regard to Water Code section 13260:

> Here, the Legislature adopted a statute that specifically established a mechanism for fees to be assessed on GIASP and GCASP holders, for those funds to be

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[151] Fees for NPDES permits for municipal separate stormwater sewer systems are in subdivision (b) of section 2200 of title 23 of the California Code of Regulations.

[152] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, page 111.

[153] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[154] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

> segregated and sent to the regional boards, and for a specified amount of those funds ("not less than 50 percent of the money") to be used by the regional boards "solely" on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. Water Code section 13260(d)(2)(iii). Such a specific determination as to the destination of the funds for the purposes of inspection and compliance evidences the intent of the Legislature that the issue of funding for GIASP and GCASP inspections be "fully occupied."

The Commission disagrees. Specific determination of funds is not a factor the courts use to determine whether a state statute fully occupies the field. Applying the Supreme Court's factors from the *O'Connell v. City of Stockton* case, the subject matter of stormwater fees has not been "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern."[155] The Water Code's single fee statute for state permit holders does not rise to that level. Second, the Commission cannot find that "the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action."[156] No clear indication of a paramount state concern can be found on the face of the Water Code fee statute. And the third instance does not apply because the subject is not "of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality."

The legislative history of the Water Code provision does not indicate any intent to occupy the field. The legislative history of the amendment to require 50 percent of the fees to be used for stormwater inspection and regulatory compliance issues indicated as follows:

> ...California's 1994 Water Quality Inventory Report states that storm waters and urban run-off are the leading sources of pollution in California estuaries and ocean waters. Proponents argue that non-compliance is rampant, with approximately 10,000 industries in the Los Angeles area alone who are required but have failed to obtain storm water permits. Further, proponents point out that the Los Angeles Regional Water Quality Control Board has only two staff to contact, educate, and control each site and question whether adequate revenues are returned to the regional boards for this program.[157]

The Legislature acknowledged that the state inspections at the time the statute was enacted were inadequate to prevent the pollution that the statewide permits were intended to prevent.

And the regional board, via the permit, acknowledges the role of both local regulation and state regulation under the general permits. Page 11 of the permit states:

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[155] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[156] *Ibid.*

[157] Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assem. Bill No. 1186 (1997-1998 Reg. Sess.) as amended August 6, 1997.

> The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.

As to inspection of construction sites, section 4E of the permit states:

> If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

Moreover, the Water Code statute provides broader fee authority than a local inspection fee. The statute requires the regional board to "spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs." (Wat. Code, § 13260, subd. (d)(2)(iii). Emphasis added.) Because the fees for GIASP and GCASP permit holders may also be spent on "regulatory compliance issues" in addition to the inspections, the Commission cannot find that a local fee ordinance would duplicate or be "coextensive" with state fee authority, and therefore cannot find that the state fee statute occupies the field. A local fee would merely partially overlap with the state fee.

As for the phase I facilities[158] subject to inspection, the inspections do not occupy the field because the permit specifies that these need not be inspected if the regional board has inspected them within the past 24 months.

According to the State Board's April 2008 comments, the overlapping fees were envisioned by U.S./EPA.

> In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge stormwater "associated with industrial activity." (fn. CWA § 402(p)(2)(B)). As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits. (fn. CWA § 402(p).) The State Water Board has issued

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[158] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

> permits for industrial and construction discharges of stormwater, and the Los Angeles Water Board administers those permits within its jurisdiction. Therefore, the Los Angeles Water Board does conduct inspections at businesses in Los Angeles County to ensure compliance with the state permits. In addition, the MS4 Permit requires the permittees also to conduct inspections. This approach, which may result in two different entities inspecting the same businesses to review stormwater practices, was specifically envisioned and required by U.S. EPA in adopting its stormwater regulations.

U.S./EPA, in its "MS4 Program Evaluation Guidance" document, acknowledged regulation at both the local and state levels as follows:[159]

> In addition to regulation of construction site stormwater at the local level, EPA regulations also require construction sites disturbing greater than one acre to obtain an NPDES permit. This permit can be issued by the state permitting authority or EPA, depending on whether the state has been delegated the NPDES authority. This dual regulation of construction sites at both the local and state or federal level can be confusing to permittees and construction operators.[160]

In fact, as to inspection duties and costs under two permit systems, one court has stated regarding a permit similar to the one in this claim:

> Rancho Cucamonga and the other permittees are responsible for inspection construction and industrial sites and commercial facilities within their jurisdiction for compliance with the enforcement of local municipal ordinance and permits. But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.[161]

The reasoning of the *City of Rancho Cucamonga* case is instructive because a local regulatory fee could be used for local-government inspections, and the state fee is for state or regional inspections under the general statewide permits.

The state permit program and local inspection program under the regional board's permit can be viewed as two programs with similar, overlapping goals. Viewed in this way, the fees for two sets of inspections for construction sites (or for phase I facilities not inspected by the regional board within the past two years) would not necessarily exceed the costs of both sets of inspections.

In short, a local regulatory fee ordinance that provided for inspections of the industrial facilities and construction sites specified in the permit (parts 4C2a, 4C2b & 4E) would not be preempted

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[159] State Water Resources Control Board, comments submitted April 18, 2008, attachment 33.

[160] *Ibid.*

[161] *City of Rancho Cucamonga v. Regional Water Quality Control Board, supra,* 135 Cal.App.4th 1377. The test claim record is silent as to the number of facilities within the permit area that are subject to the General Industrial Activity Storm Water Permit, or how many construction sites within the permit area are subject to the General Construction Activity Storm Water Permit.

by the state fee authority in Water Code section 13260 or in title 23 of the California Code of Regulations.

4. Local fee authority to inspect industrial or construction sites covered under the state permits would not be a "special tax" under article XIII A, section 4, of the California Constitution

In their June 2008 rebuttal comments, the city claimants assert that they do not have sufficient fee authority under Government Code section 17556, subdivision (d). They focus on facilities that hold state-issued general industrial or construction stormwater permits and pay the state-imposed fees pursuant to Water Code section 13260, arguing that an additional local fee for inspecting these facilities would be considered a special tax. According to the city claimants:

> In order for a fee to be considered a "fee" as opposed to a "special tax," the fee cannot exceed the reasonable cost of providing the services necessary for which the fee is charged. See *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660. Any fee assessed by the Cities or the County for inspection of these facilities would be a double assessment, and thus run afoul of this rule.

The city claimants, in their June 2009 comments on the draft staff analysis, again assert that forcing claimants to recover their costs for inspecting the state-permitted GIASP and GCASP facilities and sites, the regional board is creating a special tax on holders of those state permits.

Special taxes are governed by article XIII A, section 4, of the California Constitution:

> Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Government Code section 50076 states that a fee is not a special tax under article XIII A, section 4, if the fees are: (1) "charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged," and (2) "are not levied for unrelated revenue purposes." The California Supreme Court has reaffirmed this rule.[162]

The Commission finds that a local regulatory stormwater fee, if appropriately calculated and charged, would not be a special tax within the meaning of article XIII A, section 4. There is no evidence in the record that a local regulatory fee charged for the stormwater inspections would exceed the reasonable cost of providing the inspections and related services or would otherwise violate the criteria in section 50076.

As the court stated in the *Connell v. Superior Court* case discussed above:

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[162] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th at p. 876: "[T]he term "special taxes" in article XIII A, section 4, does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes."

> The [Water] Districts argue any fees levied by the districts "cannot exceed the cost to the local agency to provide such service," because such excessive fees would constitute a special tax. However, the districts fail to explain how this is an issue. No one is suggesting the districts levy fees that exceed their costs.[163]

Similarly, in this claim no one is suggesting that the local agencies levy regulatory fees that exceed their costs. Therefore, the Commission finds that a local regulatory fee for stormwater would not be a "special tax" under article XIII A, section 4, of the California Constitution for the activities at issue in the permit.

5. The local fee to inspect industrial and construction sites would not be subject to voter approval under article XIII D (Proposition 218) of the California Constitution

Some local government fees are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 (1996). Article XIII D defines a property-related fee or charge as any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service. Among other things, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (article XIII D, § 6, subd. (c)). Exempt from voter approval, however, are property-related fees for sewer, water, or refuse collection services (*Ibid*).

In 2002, an appellate court decision in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to impose storm water fees if they are imposed "as an incident of property ownership."

The Commission finds that local fees for inspections of phase I facilities, restaurants, retail gasoline outlets, automotive dealerships, etc., would not be subject to the vote requirement of Proposition 218. In a case involving inspections of apartments in the City of Los Angeles in which a fee was charged to landlords, the California Supreme Court ruled that the regulatory fee for inspecting apartments was not a "levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service" [164] within the meaning of Proposition 218. The court interpreted the phrase "incident of property ownership" as follows:

> The foregoing language means that a levy may not be imposed on a property owner as such-i.e., in its capacity as property owner-unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge

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

[164] That is the definition of "fee" or "charge" in article XIII D, section 2, subdivision (e).

against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.[165]

[¶]...[¶] In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners*. The [City of Los Angeles'] ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords.[166]

Following the reasoning of the *Apartment Assoc.* case, the inspection fees on restaurants, retail gasoline outlets, automotive dealerships, phase I facilities, etc., like the fee in *Apartment Assoc.*, would not be imposed on landowners as landowners, nor as an incident of property ownership, but by virtue of business ownership. Thus, the inspection fee would fall outside the voter requirement of Proposition 218.

As to the fees for inspecting construction sites, the Commission finds that they too would not be subject to Proposition 218's voter requirement. Article XIII D of the California Constitution states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[167]

Moreover, the California Supreme Court, in determining whether water connection fees are within the purview of Proposition 218, reasoned that "water service" fees were within the meaning of "property-related services" but "water connection" fees were not.

> Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.[168]

The Supreme Court's reasoning applies to local stormwater fees for inspecting construction sites. That is, the fee would not be an incident of property ownership because it results from the owner's voluntary decision to build on or develop the property. Therefore, the Commission finds that local inspection fees for stormwater compliance at construction sites would not be within the purview of the election requirement of Proposition 218. A recent report by the Office of the Legislative Analyst concurs with this conclusion.[169]

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[165] *Apartment Assoc. of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

[166] *Id.* at 842 [Emphasis in original.]

[167] Article XIII D, section 1, subdivision (b).

[168] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427.

[169] "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners.

In its June 2009 comments, the County disagrees that stormwater pollution fees would not be subject to the voter requirement in Proposition 218, or that fee authority exists. In support, the County points to unadopted legislation pending in the current or in past legislative sessions that would provide fee authority or expressly exempt stormwater fees from the Proposition 218 voting requirement. For example SCA 18 (2009) would add "stormwater and urban runoff management" fees to those expressly exempted from the vote requirement in article XIII D, putting them in the same category as trash and sewer fees. SB 2058 (2002) would have required the regional water boards to share their fees with counties and cities. And SB 210 (2009) would provide cities and counties with stormwater regulatory or user-based fee authority.

The Commission finds that the unadopted legislative proposals cited by the County are unconvincing to show a lack of regulatory fee authority for business inspections as discussed above. First, courts have said that "As evidence of legislative intent, unadopted proposals have been held to have little value."[170] Second, if they were enacted, the legislative proposals would grant broader fee authority than is found in this analysis. For example, SCA 18, by adding a stormwater exception from the vote requirement in Proposition 218, would authorize *user* fees on residential property for stormwater and urban runoff programs, whereas this analysis addresses the much narrower issue of *regulatory* fees on businesses for inspections. Likewise, SB 2058 would have required the State Board's permit fees to be shared with "counties and cities" for the broad purpose of carrying out stormwater programs rather than for the narrower purpose of inspecting businesses. And SB 210 would likewise provide fee authority that is broader than regulatory fees; as the May 28, 2009 version expressly states in proposed section 16103, subdivision (c), of the Water Code: "The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter." In short, the legislative proposals cited by the County do not indicate that fee authority does not exist. Rather, the proposals would, if enacted, provide broader fee authority than now exists.

In comments received June 3, 2009, the Bay Area Stormwater Management Agencies Association (BASMAA) contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the voting requirements of Proposition 218 or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56.

[170] *County of Sacramento v. State Water Resources Control Board* (2007) 153 Cal.App.4th 1579, 1590.

The Commission disagrees. BASMAA raises issues that are outside the scope of the portions of the Los Angeles stormwater permit (parts 4C2a, 4C2b, 4E & 4Fc3) that were pled by the test claimants. Because the Commission's jurisdiction is limited by those parts of the permit pled in the test claim, it cannot opine on other issues outside the pleadings, even if it would raise issues closely related to other NPDES permits (or even other parts of this NPDES permit).

In sum, the Commission finds that the inspections and related activities at issue in the Los Angeles stormwater permit are not subject to voter approval in article XIII D of the California Constitution (Proposition 218), so a regulatory fee ordinance for stormwater inspections would not be subject to voter approval.

Given the existence of local regulatory fee authority under the police power (Cal. Const, art. XI, § 7), and lacking any evidence or information to the contrary, the Commission finds that the claimants' authority to adopt a regulatory fee is sufficient (pursuant to Gov. Code, § 17556, subd. (d)) to pay for the inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites, and related activities specified in the permit. Therefore, for the inspections and related activities at issue, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556.

CONCLUSION

For the reasons discussed above, the Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate within the meaning of Government Code sections 17514 and 17556: For local agencies subject to the permit that are not subject to a trash TMDL[171] to: "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

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[171] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

Abbreviations

BMP - Best management practice

CWA – Clean Water Act

GCASP - General Construction Activity Storm Water Permit

GIASP - General Industrial Activity Storm Water Permit

MS4 - Municipal Separate Storm Sewer Systems

NOI - Notice of Intent for coverage under the GCASP

NPDES - national pollutant discharge elimination system

RGO - Retail Gasoline Outlet

ROWD – Report of Waste Discharge

SQMP - Storm Water Quality Management Program

SWPPP - Storm Water Pollution Prevention Plan

TMDL - Total Maximum Daily Load

U.S. EPA – United States Environmental Protection Agency

WDID - Waste Discharger Identification

SA-4

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758 Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L. Filed June 20, 2008, by the County of San Diego, Cites of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, San Diego, and Vista, Claimants.	Case No.: 07-TC-09 *Discharge of Stormwater Runoff - Order No. R9-2007-0001* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted on March 26, 2010)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on March 26, 2010. Tim Barry, John VanRhyn, Helen Peak, Shawn Hagerty and James Lough appeared on behalf of the claimants. Elizabeth Jennings appeared on behalf of the State Water Resources Control Board. Carla Shelton and Susan Geanacou appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 6-1.

Summary of Findings

The test claim, filed by the County of San Diego and several cities, alleges various activities related to reducing stormwater pollution in compliance with a permit issued by the San Diego Regional Water Quality Control Board, a state agency.

The Commission finds that the following activities in the permit (as further specified on pp. 122-132 below) are a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution:

- street sweeping (permit part D.3.a(5));
- street sweeping reporting (part J.3.a.(3)(c) x-xv);
- conveyance system cleaning (part D.3.a.(3));
- conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii));
- educational component (part D.5.a.(1)-(2) & D.5.b.(1)(c)-(d) & D.5.(b)(3));
- watershed activities and collaboration in the Watershed Urban Runoff Management Program (part E.2.f & E.2.g);
- Regional Urban Runoff Management Program (parts F.1., F.2. & F.3);
- program effectiveness assessment (parts I.1 & I.2);
- long-term effectiveness assessment (part I.5) and
- all permittee collaboration (part L.1.a.(3)-(6)).

The Commission also finds that the following test claim activities are not reimbursable because the claimants[1] have fee authority sufficient (within the meaning of Gov. Code § 17556, subd. (d)) to pay for them: hydromodification management plan (part D.1.g) and low-impact development (parts D.1.d.(7) & D.1.d.(8)), as specified below.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

BACKGROUND

The claimants allege various activities for reducing stormwater pollution in compliance with a permit issued by the California Regional Water Quality Control Board, San Diego Region, (Regional Board), a state agency. Before discussing the specifics of the permit, an overview of the permit's purpose, and municipal stormwater pollution in general, puts the permit in context.

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[1] In this analysis, claimants and the permit term "copermittees" are used interchangeably, even though two of the copermittees (the San Diego Unified Port District and San Diego County Regional Airport Authority) are not claimants. The following are the claimants and copermittees that are subject to the permit requirements: Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, Vista, County of San Diego.

Municipal Stormwater

The purpose of the permit is to specify "requirements necessary for the copermittees[2] to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP)." Each of the copermittees or dischargers "owns or operates a municipal separate storm sewer system (MS4),[3] through which it discharges urban runoff into waters of the United States within the San Diego region."

Stormwater[4] runoff flowing untreated from urban streets directly into creeks, streams, rivers, lakes and the ocean, creates pollution, as the Ninth Circuit Court of Appeal has stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[5]

Because of these stormwater pollution problems described by the Ninth Circuit, both California and the federal government regulate stormwater runoff.

California Law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

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[2] "Copermittees" are entities responsible for National Pollutant Discharge Elimination System (NPDES) permit conditions pertaining to their own discharges. (40 C.F.R. § 122.26 (b)(1).)

[3] Municipal separate storm sewer system means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

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

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

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.)
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[6]
>
> In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits [national pollutant discharge elimination system] required by federal law. (§ 13374.)[7]

As to waste discharge requirements, section 13377 of the California Water Code states:

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

Much of what the Regional Board does, especially that pertains to permits like the one in this claim, is based in the federal Clean Water Act.

Federal Law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[8] from point sources[9] to waters of the United States, since

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

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

[8] According to the federal regulations, "Discharge of a pollutant" means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other

discharges of pollutants are illegal except under a permit.[10] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[11] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[12]

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California's permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a Regional Board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority

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conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

[9] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[10] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

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

[12] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 621. State and regional board permits allowing discharges into state waters are called "waste discharge requirements" (Wat. Code, § 13263).

> to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent* than required by federal law-from taking into account the economic effects of doing so.[13]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[14]

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[15]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[16] The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[17]

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

[14] Best management practices are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 CFR § 122.2.)

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

[16] 33 USCA section 1342 (p)(2)(C).

[17] 33 USCA section 1342 (p)(3)(B).

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application. The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[18]

General State-Wide Permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[19] as described in the permit as follows:

> In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (state and local) storm water regulation. Under this dual system, the Regional Board is responsible for enforcing the General Construction Activities Storm Water Permit, SWRCB Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, SWRCB Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit), and each municipal Copermittee is responsible for enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.

The State and Regional Boards have statutory fee authority to conduct inspections to enforce the general statewide permits.[20]

The Regional Board Permit (Order No. R9-2007-001, Permit CAS0108758)

Under Part A, "Basis for the Order," the permit states:

> This Order Renews National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108758, which was first issued on July 16, 1990 (Order No. 90-42), and then renewed on February 21, 2001 (Order No. 2001-01). On August 25, 2005, in accordance with Order NO. 2001-01, the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit.

Attachment B of the permit (part 7(q)) states that "This Order expires five years after adoption." Attachment B also says (part 7 (r)) that the terms and conditions of the permit "are automatically

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[18] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[19] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

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

continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of the expired permits (40 CFR 122.6) are complied with."[21]

Part J.2.d. of the permit requires the Principal Permittee (County of San Diego) to "submit to the Regional Board, no later than 210 days in advance of the expiration of this order, a report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements." The permit specifies the contents of the ROWD.

The permit is divided into 16 sections. It prohibits discharges from MS4s that contain pollutants that "have not been reduced to the maximum extent practicable" as well as discharges "that cause or contribute to the violation of water quality standards." The permit also prohibits non-storm water discharges unless they are authorized by a separate NPDES permit, or fall within specified exemptions. The copermittees are required to "establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means." The copermittees are also required to develop and implement an updated Jurisdictional Urban Runoff Management Program (JURMP) for their jurisdictions that meets the requirements specified in the permit as well as a Watershed Urban Runoff Management Program (watersheds are defined in the permit) and a Regional Urban Runoff Management Program, each of which are to be assessed annually and reported on. Annual fiscal analyses are also required of the copermittees. The principal permittee has additional responsibilities, as specified.

The Regional Board prepared a 115-page Fact Sheet/Technical Report for this permit in which are listed, among other things, Regional Board findings, the federal law, and the reasons for the various permit requirements.

The 2001 version of the Regional Board's permit (treated as prior law in this analysis) was challenged by the Building Industry Association of San Diego County, among others. They alleged that the permit provisions violate federal law because they prohibit the municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law.[22] The court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[23]

Attached to the claimants' February 2009 comments is a document entitled "Comparison Between the Requirement of Tentative Order 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order 90-42), and Previous Drafts of the San Diego Municipal Stormwater Permit" that compares the 2001 permit with the 1990 and earlier permits. One of the document's conclusions regarding the 2001 permit is: "40% of the requirements in Tentative Order 2001-01 which 'exceed the federal regulations' are based

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

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

[23] *Id.* at page 870.

almost exclusively on (1) guidance documents developed by USEPA and (2) SWRCB's [State Board's] orders describing statewide precedent setting decision on MS4 permits."

Claimants' Position

Claimants assert that various parts of the Regional Board's 2007 permit constitute a reimbursable state mandate within the meaning of article XIII B, section 6, and Government Code section 17514. The parts of the permit pled by claimants are quoted below:

I. Regional Requirements for Urban Runoff Management Programs

A. Copermittee collaboration

Parts F.2. and F.3. (F. Regional Urban Runoff Management Program) of the permit provide:

> Each Copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program. The Regional Urban Runoff Management Program shall meet the requirements of section F of this Order, reduce the discharge of pollutants[24] from the MS4 to the MEP, and prevent urban runoff[25] discharges from the MS4 from causing or contributing to a violation of water quality standards.[26] The Regional Urban Runoff Management Program shall, at a minimum: [¶]...[¶]
>
> 2. Develop the standardized fiscal analysis method required in section G of this Order.[27]
>
> 3. Facilitate the assessment of the effectiveness of jurisdictional, watershed,[28] and regional programs.

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[24] Pollutant is defined in Attachment C of the permit as "Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated."

[25] Urban Runoff is defined in Attachment C of the permit as "All flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water illicit discharges (dry weather flows).

[26] Water Quality Standards is defined in Attachment C of the permit as "The beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.) of water and the water quality objectives necessary to protect those uses.

[27] Section G requires the permittees to "collectively develop a standardized method and format for annually conducting and reporting fiscal analyses of their urban runoff management programs in their entirety (including jurisdictional, watershed, and regional activities)." Specific components of the method and time tables are specified in the permit (Permit parts G.2 & G.3).

[28] Watershed is defined in Attachment C of the permit as "That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as a drainage area, catchment, or river basin)."

Part L (All Copermittee Collaboration) of the Permit states:

> 1. Each Copermittee collaborate [sic] with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.
>
> a. Management structure – All Copermittees shall jointly execute and submit to the Regional Board no later than 180 days after adoption of this Order, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum:
>
> (1) Identifies and defines the responsibilities of the Principal Permittee[29] and Lead Watershed Permittees;[30]
> (2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;
> (3) Establishes a management structure to promote consistency and develop and implement regional activities;
> (4) Establishes standards for conducting meetings, decision-making, and cost-sharing.
> (5) Provides guidelines for committee and workgroup structure and responsibilities;
> (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;
> (7) Includes any and all other collaborative arrangements for compliance with this order.

Claimants stated that the Copermittees' costs to comply with this activity for fiscal year 2007-2008 was $260,031.29.

B. Copermittee collaboration – Regional Residential Education Program Development and Implementation

Part F.1 of the Permit provides:

The Regional Urban Runoff Management Program shall, at a minimum:

> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
>
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

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

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

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

C. Hydromodification[31]

Part D.1.g. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, g. Hydromodification – Limits on Increases of Runoff Discharge Rates and Durations) states:

> g. HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS
>
> Each Copermittee shall collaborate with the other Copermittees to develop and implement a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects,[32]

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[31] Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."

Hydromodification is also defined as changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." *Draft Hydromodification Management Plan for San Diego County*, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009 .

[32] According to the permit, "Priority Development Projects" are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

[¶]...[¶] [Part D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This

where such increased rates and durations are likely to cause increased erosion[33] of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses[34] and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan][35] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for

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category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[33] Erosion is defined in Attachment C of the permit as "When land is diminished or worn away due to wind, water, or glacial ice. Often the eroded debris (silt or sediment) becomes a pollutant via storm water runoff. Erosion occurs naturally but can be intensified by land clearing activities such as farming, development, road building and timber harvesting."

[34] Beneficial Uses is defined in Attachment C of the permit as "the uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. ... "Beneficial Uses" are equivalent to "Designated Uses" under federal law." (Wat. Code, § 13050, subd. (f).)

[35] The Standard Urban Storm Water Mitigation Plan is defined in Attachment C of the permit as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations[36] shall not exceed pre-project runoff flow rates and durations,[37] where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow[38] that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

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[36] Flow duration is defined in Attachment C of the permit as "The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). ... Flow duration within the range of geomorphologically significant flows is important for managing erosion.

[37] Attachment C of the permit defines "Pre-project or pre-development runoff conditions (discharge rates, durations, etc.) as "Runoff conditions that exist onsite immediately before the planned development activities occur. This definition is not intended to be interpreted as that period before any human-induced land activities occurred. This definition pertains to redevelopment as well as initial development."

[38] Critical channel flow, according to Attachment C of the permit, is "the channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc [critical channel flow], it should be based on the weakest boundary material – either bed or bank."

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

(2) The HMP may include implementation of planning measures (e.g., buffers and restoration activities, including revegetation, use of less-impacting facilities at the point(s) of discharge, etc.) to allow expected changes in stream channel cross sections, vegetation, and discharge rates, velocities, and/or durations without adverse impacts to channel beneficial uses. Such measures shall not include utilization of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc.

(3) Section D.1.g.(1)(c) does not apply to Development Projects[39] where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g.,

[39] Development projects, according to Attachment C of the permit, are "New development or redevelopment with land disturbing activities; structural development, including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects, and land subdivision."

with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[40]

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) the project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

[40] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

(b) the project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) the project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

Claimants stated that the total cost of this activity is $1.05 million, of which $630,000 was spent in fiscal year 2007-2008, and the remaining $420,000 will be spent in fiscal year 2008-2009.

D. Low-Impact Development[41] ("LID") and Standard Urban Storm Water Mitigation Plan ("SMUSP")

Part D.1.d. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, d. Standard Urban Storm Water Mitigation Plans – Approval Process Criteria and Requirements for Priority Development Projects), paragraphs (7) and (8) state as follows:

(7) Update of SUSMP BMP Requirements

The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP[42] requirements that meet or exceed the requirements of sections D.1.d.(4)[43] and D.1.d.(5),[44] and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs.[45] In addition, the update shall

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[41] Low Impact Development (LID) is defined in Attachment C of the permit as "A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions."

[42] Source Control BMPs are defined in Attachment C of the permit as "Land use or site planning practices, or structural or nonstructural measures that aim to prevent urban runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and urban runoff."

[43] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[44] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

[45] A treatment control BMP, according to Attachment C of the permit, is "Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants,

include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.
ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.
iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.
iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.
v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.
vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.
vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either

(1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

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

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).
ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

Claimants stated that the total cost of this activity is $52,200 to be spent in fiscal year 2007-2008.

E. Long Term Effectiveness Assessment

Part I.5 (I. Program Effectiveness Assessment) of the permit states:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6) of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).[46]

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The claimants state that this activity is budgeted to cost $210,000.

[46] See footnote 50, page 21.

II. Jurisdictional Urban Runoff Management Program

A. Street Sweeping

Part D.3.a.(5) of the Permit (D.3 Existing Development Component, a. Municipal) provides:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Part J.3.a.(3)(c)x-xv (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xiii. Identification of the total distance of curb-miles swept.
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
> xv. Amount of material (tons) collected from street and parking lot sweeping.

Claimants state the following costs for this activity: in fiscal year 2007-2008: Equipment: $2,080,245, Staffing: $1,014,321, Contract costs: $382,624; for 2008-2009: Equipment: $3,566,139 (for 2008-2012), Staffing $1,054,893 (4% increase), Contract costs: $382,624.

B. Conveyance System Cleaning

Part D.3.a.(3) of the Permit (D.3. Existing Development Component, a. Municipal) provides:

> (3) Operation and Maintenance of Municipal Separate Storm Sewer System and Structural Controls
>
> (a) Each Copermittee shall implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Each Copermittee shall implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year[47] for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter[48] in a timely manner.
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
> v. Proper disposal of waste removed pursuant to applicable laws.
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

Part J.3.a.(3)(c) iv-viii (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

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

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

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.
vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

The claimants state that this activity costs $3,456,087 in fiscal year 2007-2008, and increases 4% in subsequent years.

C. Program Effectiveness Assessment

Part I.1 and I.2 of the permit states:

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[49] Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[50] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

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[49] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[50] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[51] Water Quality Assessment,[52] and Integrated Assessment,[53] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff

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Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

[51] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[52] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[53] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[54] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as

[54] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists the hydrologic units and major receiving water bodies.

necessary to achieve compliance with section A of this Order.[55] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Claimants state that this activity in I.1. and I.2 costs $392,363 in fiscal year 2007-2008, is expected to increase to $862,293 in fiscal year 2008-2009, and is expected to increase 4% annually thereafter.

D. Educational Surveys and Tests

Part D.5 of the permit (under D. Jurisdictional Urban Runoff Management Program) states:

5. Education Component

Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

· Municipal Departments and Personnel
· Construction Site Owners and Developers
· Industrial Owners and Operators
· Commercial Owners and Operators
· Residential Community, General Public, and School Children

a. GENERAL REQUIREMENTS

(1) Each Copermittee shall educate each target community on the following topics where appropriate:

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

Table 3. Education

Laws, Regulations, Permits, & Requirements	Best Management Practices
• Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board's General NPDES Permit for Ground Water Dewatering • Regional Board's 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	**Other Topics**
• Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections	• Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation •Alternative materials and designs to maintain peak runoff values •Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[56] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

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

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

Claimants state that this activity in D.5 will cost $62,617 in fiscal year 2007-2008, and is expected to increase to $171,319 in fiscal year 2008-2009, and rise 4% annually thereafter.

III. Watershed Urban Runoff Management Program

A. Copermittee Collaboration

Parts E.2.f and E.2.g of the permit state:

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 below to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]...[¶]

f. Watershed Activities[57]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source

[57] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

Claimants state that the copermittees' staffing costs for watershed program implementation in fiscal year 2007-2008 is $1,033,219 and is expected to increase to $1,401,765 in fiscal year 2008-2009, and are expected to increase four percent annually. For consultant services, the costs are $599,674 in fiscal year 2007-2008 and are expected to be $657,101 in 2008-2009, and are expected to rise five percent annually. For Watershed Urban Runoff Management Program implementation, claimants allege that the cost in fiscal year 2008-2009 is $1,053,880.

Claimants filed a 60-page rebuttal to Finance's and the State Board's comments on February 9, 2009, which is addressed in the analysis below.

Claimant County of San Diego filed comments on the draft staff analysis in January 2010 that disagrees with the findings regarding fee authority for certain permit activities involving development. These arguments are discussed further below.

State Agency Positions

Department of Finance: In comments filed November 16, 2008, Finance alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because the permit conditions are required by federal laws so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that the State and Regional Water Boards "act on behalf of the federal government to develop, administer, and enforce the NPDES program in compliance with Section 402 of the CWA." Finance also states that more activities were included in the 2007 permit than the prior permit because "it appears ... they were necessary to comply with federal law."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The copermittees elected to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies proposed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[58] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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

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[59] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[60] "Its

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[59] Article XIII B, section 6, subdivision (a), provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[61] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[62]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[63]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[64] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[65] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[66]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[67]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[68] In making its

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crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

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

[63] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[64] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

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

[67] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[69]

The permit provisions in the test claim are discussed separately to determine whether they are reimbursable state-mandates.

Issue 1: Is the permit subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, whether they constitute a program, and whether they are a federal mandate or a state-mandated new program or higher level of service.

A. Is the permit an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which describes "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) Any agency, department, board, or commission of state government."[70]

The California Regional Water Board, San Diego Region, is a state agency.[71] The permit it issued is a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Is the permit the result of claimants' discretion?

The permit requires claimants to undertake various activities to reduce stormwater pollution in compliance with a permit issued by the Regional Board.

The Department of Finance, in comments submitted November 6, 2008, asserts that the claimants "had the option to use best management practices that would identify alternative practices to reduce pollution in water to the maximum extent practicable" Finance asserts that the claimants proposed permit requirements when they submitted the application for the permit,

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

[69] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[70] Section 17516 also states: ""Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 904.

[71] Water Code section 13200 et seq.

and that increased costs due to downstream activities of an underlying discretionary activity are not reimbursable.

Similarly, the State Board, in its October 27, 2008 comments, states that the copermittees proposed the concepts that were incorporated into and form the basis of the permit provisions for which they now seek reimbursement.

In rebuttal comments submitted February 9, 2009, claimants dispute that the Report of Waste Discharge (ROWD, or permit application) "represents a copermittee proposal for 2007 Permit content or that the adopted 2007 Permit is 'based on the ROWD." According to claimants, the 2007 permit provisions "were not taken directly from, nor are they generally consistent with the intent of, most of the specific ROWD content upon which the state contends they are based."

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity ... do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[72]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants are required by law to submit the NPDES permit application in the form of a Report of Waste Discharge.[73] Submitting it is not discretionary, as shown in the following federal regulation:

> a) *Duty to apply.* (1) Any person[74] who discharges or proposes to discharge pollutants ... and who does not have an effective permit ... must submit a complete application to the Director in accordance with this section and part 124 of this chapter.[75]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state ... shall file a report of the discharge in compliance with the procedures set forth in Section 13260 ..."[76] Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.

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

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

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

[75] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[76] Water Code section 13376.

In addition to federal and state law, the 2001 permit required submission of the ROWD. The 2007 permit, under Part A "Basis for the Order," states: "On August 25, 2005, in accordance with Order No. 2001-01 [the 2001 Permit], the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit."[77]

And although the ROWD provides a basis for some (but not all) of the 2007 permit provisions at issue in this test claim, there is a substantial difference between what was included in the claimants' ROWD and the specific requirements the Regional Board adopted (e.g., copermittee collaboration, parts F.2., F.3 & L, Regional Residential Education Program Development, part F.1., Low Impact Development, part D.1.d(7)-(8), long-term effectiveness assessment, part I.5, program effectiveness assessment, parts I.1 & I.2, educational surveys and tests, part D.5, and the Watershed Urban Runoff Management Program, parts E.2.f & E.2.g). Other permit activities were not proposed in the ROWD (e.g., hydromodification, part D.1.g., street sweeping, parts D.2.a(5) & J.3.a(3)(c)x-xv, conveyance system cleaning, part D.3.a(3) & J.3.a(3)(c)iv-viii).

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which are not the result of the claimants' discretion.

C. Does the permit constitute a program within the meaning of article XIII B, section 6 of the California Constitution?

As to whether the permit provisions in the test claim constitute a "program," courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[78]

The State Board, in its October 2008 comments, argues that the NPDES program is not a program because the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government in that industrial and construction facilities must also obtain NPDES stormwater permits.

The State Board reiterates this argument in its January 2010 comments, asserting that the draft analysis "fails to consider that private entities, as well as certain state ... and ... federal agencies also receive NPDES permits for storm water discharges." The State Board and Finance also cite *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, for the proposition that "where municipalities have separate but not more stringent requirements than private entities, there is no program subject to reimbursement." Finance, in its February 2010 comments, asserts that "the requirements within the test claim permit apply generally to state and private dischargers."

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

[78] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

Claimants, in their February 2009 rebuttal comments, disagree with the State Board and assert that an MS4 permit is unique to government and subject to unique regulations. Claimants cite the definition of an MS4 in 40 C.F.R. § 122.26(b)(8) as "a conveyance or system of conveyances ... owned or operated by a State, city, town, borough, county, parish, district, association, or other public body ...." Claimants argue that prohibiting "non-stormwater discharges into the storm sewers"[79] is a uniquely government function that provides for the health, safety, and welfare of the citizens in a community. Claimants also point out that the federal regulations for MS4 permits are in 40 C.F.R. §122.26(d), while the regulations pertaining to private industrial dischargers are in 40 C.F.R. § 122.26(c), different regulations that apply the Best Available Technology standard rather than the Maximum Extent Practicable standard imposed on MS4s.

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. In *County of Los Angeles v. Commission on State Mandates*, the State Board argued that an NPDES permit[80] issued by the Los Angeles Regional Water Quality Control Board does not constitute a "program." The court dismissed this argument, stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[81] In other words, whether the law regarding NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6 is not relevant. The only issue before the Commission is whether the permit in this test claim constitutes a program.

The permit activities in this claim (order no. R9-2007-001, NPDES no. CAS0108758) are limited to the local governmental entities specified in the permit. The permit defines the "permittees" as the County of San Diego and 18 incorporated cities, along with the San Diego Unified Port District and San Diego County Regional Airport Authority. [82] No private entities are regulated under this permit, so it is not a law (or executive order) of general application. That fact distinguishes this claim from the *City of Richmond* case cited by Finance and the State Board, in which the workers' compensation law was found to be one of general application. The same cannot be said of the permit in this claim (order no. R9-2007-001, NPDES no. CAS0108758) because no private entities are regulated by it.

Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in San Diego County. As stated in the permit: "This order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable."

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[79] 33 U.S.C. § 1342(p)(3).

[80] Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001. The Commission issued a decision on parts 4C2a, 4C2b, 4E and 4Fc3 of this permit (test claims 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21) at its July 31, 2009 hearing.

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

[82] The cities are Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

Thus, the permit carries out the governmental function of providing public services, and also imposes unique requirements on local agencies in San Diego County to implement a state policy that does not apply generally to all residents and entities in the state. Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

D. Are the permit provisions in the test claim a federal mandate or a state-mandated new program or higher level of service?

The next issue is whether the parts of the permit alleged in the test claim are a state mandate, or federally mandated, as asserted by the State Board and the Department of Finance. If so, the permit would not constitute a state mandate. The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes ... by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs."[83]

Also discussed is whether the permit is a new program or higher level of service. To determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption, in this case, the 2001 permit.[84]

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[85] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[86]

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find "costs mandated by the state" if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."

In *Long Beach Unified School Dist. v. State of California*,[87] the court considered whether a state executive order involving school desegregation constituted a state mandate. The regulations required, for example, conducting mandatory biennial racial and ethnic surveys, developing a reasonably feasible plan every four years to alleviate and prevent segregation to include specifics

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

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

[85] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

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

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

elements, and taking mandatory steps to involve the community including public hearings. The state argued that its Executive Order did not mandate a new program because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. The court held that the executive order did require school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements imposed on school districts.[88] The court stated:

> A review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. ...[T]he executive Order and guidelines require specific actions ... [that were] required acts. These requirements constitute a higher level of service."[89]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[90] The federal Clean Water Act allows for more stringent state-imposed measures, as follows:

> Permits for discharges from municipal storm sewers [¶]...[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the ... State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[91]

California in the NPDES program: 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, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and

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[88] *Id.* at 173.

[89] *Ibid.*

[90] 33 U.S.C. section 1370.

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

system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is not required to have its own NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[92] to comply with the Federal Water Pollution Control Act of 1972, stated the following findings and declaration in Water Code section 13370:

(a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants ... to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this statute, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[93] to effect the stormwater permit program. Further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

Finance, in its February 2010 comments on the draft staff analysis, states:

> The state's role as a permitting authority acting on behalf of the federal government negates the existence of a state mandate because the test claim permit is issued in compliance with federal law. ...[N]o state mandate exists if the state requirements, in the absence of state statute, would still be imposed upon local agencies by federal law.

Similarly, the State Board's January 2010 comments argue that the *Hayes* case is distinguishable from this test claim because NPDES permits do not impose a federal mandate on the state. Rather, federal law requires municipalities to comply with the permit. The State Board also states:

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[92] Water Code section 13374 states: "The term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the Federal water Pollution Control Act, as amended."

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

> This [draft staff analysis'] approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. ... The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not indicate that requirements extend beyond federal law, as in *Long Beach,* or convert the federal mandate into a state mandate.[94]

The Commission disagrees. As discussed above, the federal Clean Water Act[95] authorizes states to impose more stringent measures than required by federal law. The California Supreme Court has also recognized that permits may include state-imposed, in additional to federally required measures.[96] Those state measures that may constitute a state mandate if they "exceed the mandate in ... federal law."[97] Thus, although California opted into the NPDES program, further analysis is needed to determine whether the state requirements exceed the federal requirements imposed on local agencies.

The permit provisions are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402 (p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26. The federal stormwater statute states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[98] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)).

The issues are whether the parts of the permit in the test claim are federal mandates or state mandates, and whether they are a new program or higher level of service.

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[94] State Board comments submitted January 2010.

[95] 33 U.S.C. sections 1370 and 1342 (p)(3)(B)(iii).

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

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

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

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

Part D of the permit describes the Jurisdictional Urban Runoff Management Program (JURMP) of which each copermittee "shall develop and implement" an updated version (p.15). Part J of the permit ("Reporting") requires the JURMP to be updated and revised to include specified information. The test claim includes parts D.1.g (hydromodification management plan), D.1.d.(7)-(8) (low-impact development or LID), D3a(5) (street sweeping) and J.3.a(3)x-xv (reporting on street sweeping), D.3.a.(3) (conveyance system cleaning) and J.3.a.(3)(c)(iv)-(viii) (reporting on conveyance system cleaning), and D.5 (educational surveys and tests).

Hydromodification (part D.1.g.): Part D.1 of the permit is entitled "Development Planning." Part D.1.g. requires developing and implementing, in collaboration with other copermittees, a hydromodification management plan (HMP) "to manage increases in runoff discharge rates and durations from all Priority Development Projects."[99] Priority development projects can include both private projects, and municipal (city or county) projects. The purpose of the HMP is:

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[99] According to the permit, Priority Development Projects are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)..

[¶]...[¶] [Section D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."[100]

As detailed in the permit and on pages 12-17 above, the HMP must have specified content, including "a description of how the copermittees will incorporate the HMP requirements into their local approval processes." Also required is collaborative reporting on the HMP and implementation 180 days after the HMP is approved by the Regional Water Board, with earlier implementation encouraged.

According to the State Board's comments submitted in October 2008 the requirement to develop and implement a HMP is necessary to meet the minimum federal MEP standard. The Board states that "broad federal legal authority is contained in CWA sections 402(p)(3)(B)(ii)-(iii), CWA section 402(a), and in 40 C.F.R. sections 122.26 (d)(2)(i)(B)-(C), (E), and (F), 131.12, and 122.26(d)(2)(iv)(A)(2), which states:

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will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[100] It is also defined as "changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." Draft Hydromodification Management Plan for San Diego County, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009.

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[101] of a discharge[102] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) *Part 2.* Part 2 of the application shall consist of: [¶]...[¶]

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]...[¶]

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

[102] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

> (*2*) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. ...

The State Board also cited the U.S. Supreme Court decision, *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700, for the state's authority to regulate flow under the federal Clean Water Act in order to protect water quality standards.

In response, the claimants' February 2009 comments state that the permit's Fact Sheet did not cite any federal authorities to justify the HMP portion of the permit, and that none exists. Claimants also assert that no other jurisdiction in the United States that was surveyed for the claim has a permit that requires a HMP. Claimants call the HMP requirement a flood control measure that is not a requirement in any other permit outside of California, and that the HMP exceeds the federal requirements and constitutes a state mandate. Claimants also point to the language in section 122.26(d)(2)(iv)(A)(2) that they say is:

> [A]imed directly at controlling pollutant discharges from an MS4 that originate in areas of new development. [The regulation] does not mention the need to include controls to reduce the *volume* of storm water discharged from these areas. ... controls designed only to limit volume are not expressly required.

As to the *P.U.D. No. 1 v. Washington Department of Ecology* decision cited by the State Board, the claimants distinguish it as being decided under section 401 of the Clean Water Act, wherein the permit was issued under section 402. Claimants state that the *P.U.D.* case recognized state authority under the Clean Water Act rather than a federal mandate.

The Commission agrees with claimants about the applicability of the *P.U.D.* case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it. This was not addressed in the *P.U.D.* decision.

Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation."[103] As in *Long Beach Unified School Dist. v. State of California*,[104] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[105] to

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

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

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

impose these requirements. Thus, the Commission finds that part D.1.g. of the permit is not a federal mandate.

All of part D.1.g. of the permit requires the HMP to have specified contents except part D.1.g.(2), which states that the HMP "*may* include implementation of planning measures ..." as specified. As the plain language of this part does not require the implementation of planning measures, the Commission finds that part D.1.g.(2) of the permit is not a state mandate.

The Commission also finds that HMP is not a state mandate for municipal (city or county) projects that are priority development projects, such as a hospital, laboratory or other medical facility, recreational facility, airfield, parking lot, street, road, highway, and freeway, a project over an acre, and a project located in an environmentally sensitive area.[106] Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.[107] Thus, municipal projects are built by cities or counties voluntarily, and their decision triggers the requirements to comply with the HMP. In *Kern High School Dist.*,[108] the California Supreme Court decided whether the state must reimburse the costs of school site councils and advisory committees complying with the Brown (Open Meetings) Act for schools who participate in various school-related education programs. The court determined that participation in the underlying school site council program was not legally compelled and so mandate reimbursement was not required for the downstream compliance with the Brown Act. The court said:

> Activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds-even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[109]

As with the voluntary programs in *Kern,* there is no requirement for municipalities to undertake any of the priority development projects described in the permit. Thus, the Commission finds that the costs of complying with the HMP in part D.1.g., is not a state mandate for priority development projects undertaken by a city or county.

Based on the mandatory language of the remainder of part D.1.g. of the permit (except part D.1.g.(2) and except for municipal projects), the Commission finds that it is a state mandate on the claimants to do the following:

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[106] The County of San Diego, in its January 2010 comments on the draft staff analysis, raises the issue of its fee authority for municipal projects. The League of California Cities, in its January 2010 comments on the draft staff analysis, also discusses municipal projects, citing examples "where a city or county constructs a Priority Development Project for which no third party is available to assess a fee against."

[107] California Constitution, article XI, section 7. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

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

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

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.[110]

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[110] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) The project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

(b) The project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) The project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

As to whether part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service, the claimants, in their February 2009 comments, assert that it is.

> The 2001 Permit only included general statements regarding the need to control downstream erosion with post construction BMPs. The 2007 Permit increased these requirements by requiring the copermittees to, among other things, draft and implement interim and long-term hydromodification plans, and impose specific, strict post construction BMPs on new development projects within their jurisdiction.

The State Board, in its October 2008 comments, argues that part D.1 "expands upon and makes more specific the hydromodification requirements in the 2001 Permit."

Finance argues, in its February 2010 comments on the draft staff analysis, that the entire permit is not a new program or higher level of service because additional activities, beyond those

required by the 2001 permit, are necessary for the claimants to continue to comply with the federal Clean Water Act and reduce pollutants to the Maximum Extent Practicable.

The Commission disagrees with Finance. This analysis measures the 2007 permit against the 2001 permit to determine which provisions are a new program or higher level of service. Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly. In *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[111]

The Regional Board prepared a Fact Sheet/Technical Report[112] for the permit that lists the federal authority and reasons the permit provisions were adopted. Regarding part D.1.g. of the permit, the Fact Sheet/Technical Report does not expressly mention the 2001 permit, but states:

> This section of the Order expands the requirements for control of hydromodification caused by changes in runoff resulting from development and urbanization. Expansion of these requirements is needed due to the current lack of a clear standard for controlling hydromodification resulting from modification. While the Model SUSMP[113] [adopted in 2002] developed by the Copermittees requires project proponents to control hydromodification, it provides no standard or performance criteria for how this is to be achieved.

The Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) with respect to private priority development projects is a new program or higher level of service. The Fact Sheet/Technical Report describes the section as an "expansion" of hydromodification control requirements. The 2001 permit (in part F.1.b.(2)(j)) included only the following on hydromodification:

> Downstream Erosion – As part of the model SUSMP [Standard Urban Storm Water Mitigation Plan] and the local SUSMPs, the Copermittees shall develop criteria to ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat. At a minimum, criteria shall be developed to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat. Storm water discharge volumes and durations should also be considered.

The requirements in the 2007 permit, however, are much more expansive and detailed, requiring development and implementation of a hydromodification management plan (HMP) to be approved by the Regional Board. And while the 2001 permit contained a broad description of

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

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

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

the criteria required, part D.1.g. of the 2007 permit contains a detailed description of the contents of the HMP, including identifying standards for channel segments, using continuous simulation of the entire rainfall record to identify runoff flows, requiring priority development projects to implement hydrologic control measures, including other performance criteria for priority development projects to prevent urban runoff from the projects, and 9 other components to include in the HMP. Therefore, the Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service over the 2001 permit.

In sum, the Commission finds that part D.1.(g) of the permit (except for D.1.g.(2)) is a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the HMP for municipal priority development projects.

B. Low Impact Development (LID) and Standard Urban Storm Water Mitigation Plan (part D.1.d.): Also under part D.1 "Development Planning" is part D.1.d, which requires the copermittees to review and update their SUSMPs (Standard Urban Storm Water Mitigation Plans)[114]and (in paragraphs 7 and 8) add low impact development (LID) and source control BMP requirements for each priority development project, and to implement the updated SUSMP, as specified on pages 17-19 above. The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces (*Id.*)

According to the State Board's comments submitted in October 2008, the requirement in part D.1.d. is necessary to meet the minimum federal MEP standard, and is supported by 40 C.F.R. section 122.26 (d)(2)(iv)(A)-(D), part of which is quoted in the discussion of hydromodification above. Part (d)(2)(iv)(A)(2) of the regulation requires part of the permit application to include:

> (2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

The State Board asserts that these regulations "require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial and municipal land uses or activities." The Board cites a decision of the Washington Pollution Control Hearings Board that found that permit provisions to promote but not require low impact development "failed to satisfy the federal MEP standard and Washington state law because it ... did not require LID at the parcel and subdivision level."

In their February 2009 rebuttal comments, the claimants assert: "while federal regulations require the large MS4 permits to include programs to reduce the discharge of pollutants from the

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[114] The Permit defines the Standard Urban Storm Water Mitigation Plan as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

MS4 that originate in areas of new development, federal regulations do not require or even mention LID or LID principles." And "while requiring post-construction controls that limit pollutant discharges originating in areas of new development is clearly within the requirements of Section 122.26(d)(2)(iv)(A), the 2007 Permit's specific LID requirements are not." Claimants also address the Washington State Pollution Control Board decision by noting that the Board's decision "explicitly recognized that LID requirements are not federally mandated." The claimants also point out EPA-issued NPDES permits in Washington, D.C. and Albuquerque, New Mexico that make no reference to LID.

The Commission finds nothing in the federal regulation (40 C.F.R. § 122.26) that requires local agencies to collectively review and update the BMP requirements listed in their SUSMPs, or to develop, submit and implement "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the SUSMPs. Thus, the LID requirements in the permit "exceed the mandate in that federal law or regulation."[115] As in *Long Beach Unified School Dist. v. State of California*,[116] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[117] to impose these requirements. Thus, the Commission finds that part D.1.d. of the permit is not a federal mandate.

The Commission further finds that the LID requirements are not a state-mandated program for municipal projects for the same reason as discussed in the HMP discussion above: there is no requirement for cities or counties to build priority development projects, which would trigger the downstream requirement to comply with parts D.1.d.(7) and D.1.d.(8) of the permit, the LID portions of the permit.

As to non-municipal projects, however, because of the mandatory language on the face of the permit, the Commission finds that part D.1.d. of the permit is a state mandate for the claimants to do all of the following:

> (7) Update of SUSMP BMP Requirements
>
> The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP 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.

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

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

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

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.[118]

ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.[119]

iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.[120]

iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.

v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.

vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.

vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

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[118] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

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

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

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either (1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).

ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

The State Board, in its October 2008 comments on the test claim, argues that the requirements in part D.1.d.(7) of the permit are not a new program or higher level of service because they "merely add definition to the scope of the local SUSMP already required in the 2001 Permit (see Section F.1.b.(2))." As to part D.1.d.(8), the State Board asserts that it:

> [P]rovides a framework for the Copermittees to develop criteria to be used in the application of LID requirements to Priority Development Projects. The Copermittees must develop their LID programs through an update to the Model SUSMP, the document that guides (and guided the 2001 Permit cycle) post-construction BMP implementation at Priority Development Projects.

According to the State Board, these parts of the permit are not a new program or higher level of service because they merely add additional detail in implementing the same minimum federal MEP standard and add specificity to already existing BMPs.

The claimants, in their February 2009 comments, assert that by adding requirements and increasing the specificity of existing requirements, the 2007 LID permit requirements are a new program or higher level of service.

The Commission finds that part D.1.d.(7) is a new program or higher level of service because it calls for a collective review and update of BMP requirements listed in the claimants' SUSMPs (presumably those drafted under the 2001 permit) that was not required under the 2001 permit.

The Commission also finds that part D.1.d.(8) is a new program or higher level of service because it requires developing, submitting, and implementing "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the copermittees SUSMPs. Although the 2001 permit required adopting a Model SUSMP and local SUSMP, it

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*:[121] "if the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate."

The Commission agrees with claimants. The permit requires activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[122] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[123]

Yet the more specific requirements in the permit include variable street sweeping schedules for areas impacted by different amounts of trash. They also require reporting on the amount of trash collected, which is not required by the federal regulations. These activities "exceed the mandate in that federal law or regulation."[124] As in *Long Beach Unified School Dist. v. State of California*,[125] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[126] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(5) and J.3.a.(3)(c)x-xv of the permit are not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission also finds part D.3.a(5) of the permit is a state mandate for the claimants to do all of the following:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

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

[122] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[123] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

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

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

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

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) BMP Implementation (Municipal)
>
> (a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality municipal areas and activities (as determined under section F.3.a.(3)).The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific as appropriate.

Street sweeping is not expressly required in this 2001 permit provision, nor does it specify any frequencies or required reporting. Thus, the Commission finds that part D.3.a.(5) of the 2007 permit that requires street sweeping, as specified, is a new program or higher level of service, as well as part J.3.a(3)x-xv that requires reporting on street-sweeping activities.

D. Conveyance system cleaning and reporting (parts D.3.a.(3) & J.3.a.(3)(c)(iv)-(viii)): Also under part D.3 "Existing Development," part D.3.a.(3) requires conveyance system cleaning, including the following:

- Verifying proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from the MS4s and related drainage structures.
- Cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Cleaning open channels of observed anthropogenic litter in a timely manner.

In J.3.a.(3)(c)(iv)-(viii), as part of the annual reporting requirements, copermittees shall provide a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned. In addition, copermittees must report by category tons of waste and litter removed from the facilities.

The State Board, in its comments submitted in October 2008, disagrees that the requirements exceed federal law, saying that "the same broad authorities applicable to the street sweeping requirement also apply to the conveyance system cleaning requirements." According to the State Board, specificity in inspection and cleaning requirements is consistent with and supported by U.S. EPA guidance. Also, to the extent that permit requirements are more specific than the federal regulations, the State Board asserts that the requirements are an appropriate exercise of the San Diego Water Board's discretion to define the MEP standard.

The claimants, in their February 2009 comments, state that "the requirements to inspect and perform maintenance to insure compliance with these standards is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards." Also, claimants note that the content and detail in the reporting is more than required by the 2001 permit. As to the MEP standard required by the federal regulations, claimants assert that the U.S. EPA documents cited by the State Board provide guidance, not mandates, and the permit Fact Sheet does not specifically set forth mandatory annual inspection and maintenance requirements. According to the claimants, the only mandatory requirement is that a maintenance program exist, and that the applicant provide an inspection schedule if maintenance depends on the results of inspections or occurs infrequently. Yet the 2007 permit includes "very specific requirements that go beyond the U.S. EPA guidance and are not included within the federal regulations." Finally, claimants note that the State Board has acknowledged that the 2007 permit requirements are more specific than federal regulations, and cites the *Long Beach Unified School District* case to conclude that the specificity makes the requirements state mandates.

The Commission agrees with claimants. Like street sweeping, the permit requires conveyance system cleaning activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[127] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems..."[128]

Yet the permit requirements are more specific. Part D.3.a.(3) requires verifying proper operation of all municipal structural treatment controls, cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner, cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately, and cleaning open channels of observed anthropogenic litter in a timely manner. In addition, the reporting in part J requires a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned, and reporting by category tons of waste and litter removed from the facilities. These activities, "exceed[s] the mandate in that federal law or regulation."[129] As in *Long Beach*

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[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).

Unified School Dist. v. State of California,[130] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[131] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(3) and J.3.a.(3)(c)iv-viii of the permit are not a federal mandate.

Rather, the Commission finds that part D.3.a.(3) of the 2007 permit is a state mandate on the claimants to do the following:

> (a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
>
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
>
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.
>
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
>
> v. Proper disposal of waste removed pursuant to applicable laws.
>
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission also finds that part J.3.a.(3)(c) iv-viii is a state mandate to report the following information in the JURMP annual report:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
>
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

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[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.

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."[132] As in *Long Beach Unified School Dist. v. State of California*,[133] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[134] to impose these requirements. Thus, the Commission finds that part D.5 of the permit is not federally mandated.

Based on the mandatory language on the face of the permit, the Commission finds that part D.5 of the permit constitutes a state mandate on the copermittees to do all of the following:

> Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:
>
> · Municipal Departments and Personnel
> · Construction Site Owners and Developers
> · Industrial Owners and Operators
> · Commercial Owners and Operators
> · Residential Community, General Public, and School Children
>
> a. GENERAL REQUIREMENTS
>
> (1) Each Copermittee shall educate each target community on the following topics where appropriate:

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

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

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

Table 3. Education

Laws, Regulations, Permits, & Requirements	Best Management Practices
• Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board's General NPDES Permit for Ground Water Dewatering • Regional Board's 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	**Other Topics**
• Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections	• Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation •Alternative materials and designs to maintain peak runoff values •Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:
[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[135] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

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

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The State Board, in its October 2008 comments, states that the education requirement in part D.5. does not amount to a new program or higher level of service because the 2007 permit "includes education topics from the 2001 permit with minor wording and formatting changes. Additionally, the requirements were adopted to implement the same federal MEP standard as established in the CWA and in the 2001 Permit."

In their February 2009 comments, the claimants state that the 2001 permit did not require:

- Implementation of an education program so that the copermittee's planning and development review staff (and Planning Boards and Elected Officials, if applicable) understand certain specified laws and regulations related to water quality. (D.5.b.(1)(a).)
- Implementation of an education program that includes annual training prior to the rainy season so that the copermittee's construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of certain specified topics. (D.5.b.(1)(b).)
- Training of staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year relating to certain specified topics (D.5.b.(1)(c).)

- 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[136] and watershed education activities.[137]
    - Creating a watershed activities list that includes certain specified information to be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter.
    - Implementing identified watershed activities within established schedules.
    - Collaborating to develop and implement the Watershed Urban Runoff Management Program, including frequent regularly scheduled meetings.[138]

In its October 2008 comments, the State Board asserts that the Watershed Urban Runoff Management Program activities are necessary to meet the minimum federal MEP standard. The State Board quotes the following federal regulations: "The Director may … issue distinct permits for appropriate categories of discharges … including, but not limited to … all discharges within a system that discharge to the same watershed…" (40 C.F.R. 122.26(a)(3)(ii).) The State Board also quotes more specific federal regulations:

> Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system. (40 C.F.R. § 122.26 (a)(3)(v).)
>
> The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, a

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[136] Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of the permit (Part E.2.f).

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

[138] In their February 2009 comments, the claimants also list the following activities: (1) Annual review of WURMPs to identify needed modifications and improvements (part E.2.i); (2) Develop and periodically update watershed maps (part E.2.b); (3) Develop and implement a program for encouraging collaborative watershed-based land-use planning (part E.2.d); (4) Develop and implement a collective watershed strategy (part E.2.e). These parts of the permit, however, were not pled in the test claim so the Commission makes no findings on them.

> jurisdiction-wide basis, watershed basis, or other appropriate basis;" (40 C.F.R. § 122.26 (a)(5).)
>
> Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. (40 C.F.R. § 122.26 (d)(2)(iv).)

The State Board argues that the regional board "determined that the inclusion of the requirement to formalize the Watershed Water Qualities Activities List was appropriate to further the goal of the WURMPS in achieving compliance with federal law." Based on some reports it received, the Regional Board determined that "many of the watershed water quality activities had no clear connection to the high priority water quality problems in the area of implementation." The Board determined it was therefore necessary and appropriate to require development of an implementation strategy to maximize WURMP effectiveness.

Claimants, in their February 2009 comments, point out that while cooperative agreements may be required by 40 C.F.R. § 122.26(d)(2)(i)(D), "each copermittee is only responsible for their own systems." Claimants quote another federal regulation: "Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate." (40 C.F.R. § 122.26(a)(3)(vi).) Claimants argue that the 2007 permit:

> [R]equires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year.

Claimants also state that the permit "mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order." (part E.2.f.(1)(a).) According to what the claimants call these "dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work."

The Commission finds that the permit requirements in sections E.2.f and E.2.g. are not federal mandates. As with the other requirements in the permit, the federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional, watershed or other basis. These requirements "exceed the mandate in that federal law or regulation."[139] As in *Long Beach Unified School Dist. v. State of California*,[140] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[141] to impose these requirements.

Based on the mandatory language in the permit, the Commission finds that the following in part E are a state mandate on the copermittees:

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

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

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

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) as in Table 4 [of the permit] to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]...[¶]

f. Watershed Activities[142]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

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[142] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

(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.[143]

Therefore, the Commission finds that part E.2.g. of the 2007 permit is a new program or higher level of service.

Regarding watershed water quality activities in part E.2.f, the Fact Sheet/Technical Report the Regional Board stated:

> This requirement developed over time while working with the Copermittees on their WURMP implementation under Order No. 2001-01. In October 2004 letters, the Regional Board recommended the Copermittees develop a list of Watershed Water Quality Activities for potential implementation. Following receipt of the Regional Board letters, the Copermittees created the Watershed Water Quality Activity lists. Although the Copermittees' lists needed improvement, the Regional Board found the lists to be useful planning tools that can be evaluated to identify effective and efficient Watershed Water Quality Activities. Because the lists are useful and have become a part of the WURMP implementation process, a requirement for their development has been written into the Order.

Thus, the Commission finds that part E.2.f. of the permit is a new program or higher level of service, in that it requires the following not required in the 2001 permit:

- Identification and implementation of watershed activities that address the high priority water quality problems in the WMA (Watershed Management Area), as specified (part E.2.f.(1)).
- Submission of a watershed activities list with each updated WURMP and updated annually thereafter, as specified (part E.2.f.(2)-(3)).
- Implementation of watershed activities pursuant to established schedules: no less than two watershed water quality activities and two watershed education activities in active implementation phase, as defined, per permit year (part E.2.f.(4)).

III. Regional Urban Runoff Management Program (Part F)

Part F of the permit describes the Regional Urban Runoff Management Program (RURMP). It was included because "some aspects of urban runoff management can be effectively addressed at a regional level. ... However, significant flexibility has been provided to the Copermittees for new regional requirements."[144]

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[143] For an inexplicable reason, the Fact Sheet/Technical Report lists this collaboration activity under Section E.2.m of the permit rather than E.2.g.. The permit at issue has no section E.2.m.

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

A. Copermittee collaboration – Regional Residential Education Program Development and Implementation (part F.1): Part F.1 requires the copermittees to develop and implement a Regional Residential Education Program, with specified contents (see p. 12 above). In the test claim the claimants discuss hiring a consultant to develop the educational program that "will generally educate residents on: 1) the difference between stormwater conveyance systems and sanitary sewer systems; 2) the connection of storm drains to local waterways; and 3) common residential sources of urban run-off." Claimants allege activities to comply with section F.1 of the permit that include, but are not limited to: "development of materials/branding, a regional website, regional outreach events, regional advertising and mass media, partnership development, and the development of marketing and research tools, including regional surveys to be conducted in FY 2008-09 and again in FY 2011-12."

In comments submitted in October 2008, the State Board asserts that the permit condition in section F.1. is necessary to meet the minimum federal MEP standard and that the requirement is supported by the Clean Water Act statutes and regulations. The State Board cites the following federal regulations:

> (v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.[145] [¶]...[¶]
>
> (5) The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.[146] [¶]...[¶]
>
> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[147]
>
> (iv) Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. ...[148]

In response, the claimants' February 2009 comments state that the Regional Residential Education Program is not necessary to meet the minimum federal MEP standard. The regional nature of the education program, according to the claimants, is duplicative because it imposes the

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[145] 40 Code of Federal Regulations section 122.26 (a)(3(v).

[146] 40 Code of Federal Regulations section 122.26 (a)(5).

[147] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[148] 40 Code of Federal Regulations section 122.26 (d)(iv).

education requirements at the regional and jurisdictional levels concurrently, and it exceeds federal law.

The Commission finds that the requirements in part F.1 of the permit do not constitute a federal mandate. There is no federal requirement to provide a regional educational program, so the education program, "exceed[s] the mandate in that federal law or regulation."[149] As in *Long Beach Unified School Dist. v. State of California*, the permit "requires specific actions ... [that are] required acts."[150] In adopting part F.1, the state has freely chosen[151] to impose these requirements. Thus, the Commission finds that part F.1. of the permit does not constitute a federal mandate.

Based on the mandatory language on the face of the permit, the Commission finds that the permit constitutes a state mandate on the claimants to do all the following in part F.1 of the permit:

> The Regional Urban Runoff Management Program shall, at a minimum:
>
> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a (p. 50.)

As to whether this is a new program or higher level of service, the State Board, in its October 2008 comments, states that it is not because the claimants were already implementing a residential education program at a regional level before the permit was adopted.

In claimants' February 2009 rebuttal comments, they assert that it is irrelevant whether or not the copermittees voluntarily met or exceeded the now mandatory requirements imposed by the 2007 permit because Government Code section 17565 states: "If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ... for those costs incurred after the operative date of the mandate."

The Commission finds that part F.1 of the permit is a new program or higher level of service. The 2001 permit required an educational component as part of the Jurisdictional Urban Runoff Management Program (part F.4) that contained a residential component, but not a Regional Residential Education Program, so the activities in this program are new. Also, the Commission agrees that whether or not claimants were engaged in an educational program is not relevant due to Government Code section 17565. The Regional Board, in requiring the regional educational program, leaves the local agencies with no choice but to comply.

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

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

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

B. Copermittee collaboration (parts F.2 & F.3): Parts F.2 and F.3 (quoted on p. 11 above) require the copermittees to collaborate to develop, implement, and update as necessary a Regional Urban Runoff Management Program, to include developing the standardized fiscal analysis method required in permit part G (part F.2) and facilitating the assessment of the effectiveness of jurisdictional, watershed, and regional programs (part F.3).

In comments submitted in October 2008, the State Board asserts that the permit conditions in sections F.2 and F.3 are necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[152]

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

> (v) Permits for all or a portion of all discharges from large[153] or medium[154] municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different

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

[153] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ..." [40 CFR § 122.26 (b)(4).]

[154] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ..." [40 CFR § 122.26 (b)(7).]

management programs for different drainage areas which contribute storm water to the system.

The State Board also asserts:

> To the extent the Clean Water Act and federal regulations do not identify all of the specificity required in Sections F.2, F.3 ..., the San Diego Water Board properly exercised its discretion under federal law to include specificity so that the federal MEP standard can be achieved. The San Diego Water Board exercised this duty under federal law and therefore the provisions of the 2007 Permit were adopted as federal requirements.

In the claimants' rebuttal comments submitted in February 2009, they state that "all of the authorities cited by the State merely acknowledge the State's authority to go beyond the federal regulations."

The Commission finds that the requirements in parts F.2 and F.3. of the permit do not constitute a federal mandate. There is no federal requirement to collaborate on, develop, or implement a Regional Urban Runoff Management Program (RURMP). The Commission finds that these RURMP activities "exceed the mandate in that federal law or regulation."[155] As in *Long Beach Unified School Dist. v. State of California*,[156] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[157] to impose these requirements. Thus, the Commission finds that parts F.2 and F.3 of the permit do not constitute federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts F.2 and F.3 of the permit constitutes a state mandate on the claimants to do all the following:

> Collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]...[¶]
>
> (2) Develop the standardized fiscal analysis method required in section G of the permit, and,
>
> (3) Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

As to whether these activities are a new program or higher level of service, the claimants state in the test claim:

> "[W]hile the 2001 Permit required the copermittees to collaborate to address common issues and promote consistency among JURMPs and WURMPs and to

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

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

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

establish a management structure for this purpose, it lacked the detail, specificity and level of effort now mandated by the 2007 Permit."

In their February 2009 rebuttal comments, claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

The State Board, in its October 2008 comments, states that the 2001 permit required that "the Copermittees enter into a formal agreement to provide, at a minimum, a management structure for designating joint responsibilities, decision making, watershed management, information management of data and reports" and other collaborative arrangements to comply with the permit.

According to the State Board, parts F.2 and F.3 are not a new program or higher level of service because the copermittees "were already conducting multiple efforts on a regional level under the 2001 permit. The inclusion of the RURMP is designed to organize these efforts into one framework to improve Copermittee and Regional Board tracking of regional efforts." The State Board also asserts that the requirements were intended to reduce redundant reporting and improve efficiency and streamline regional program implementation. The State Board describes the 2007 permit as merely elaborating on and refining the 2001 requirements.

The permit itself states: "This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards." [Emphasis added.] The permit also describes the Regional Urban Runoff Management Plan as new.

While the 2001 permit contained requirements for a fiscal analysis (part F.8) and an assessment of effectiveness (part F.7), it did so only as components of a Jurisdictional Urban Runoff Management Program. The Regional Urban Runoff Management Program, required in part F.2 of the 2007 permit, is new. The fiscal analysis in part G is incorporated by reference into part F.2, and the effectiveness assessment is incorporated into part F.3. Thus, the Commission finds that the requirements in parts F.2 and F.3 are a new program or higher level of service.

IV. Program Effectiveness Assessment (Part I)

Part I of the permit is called "Program Effectiveness Assessment" and includes subparts for Jurisdictional (I.1), Watershed (I.2) and Regional (I.3) assessment, in addition to a Long Term Effectiveness Assessment (I.5). Of these, claimants pled subparts I.1, I.2 and I.5.

A. Jurisdictional and Watershed Program effectiveness assessment (parts I.1 & I.2): As more specifically stated on pages 22-24 above, the permit requires the copermittees to do the following:

- Annually assess the effectiveness of the Jurisdictional Urban Runoff Management Program (JURMP) that includes specifically assessing the effectiveness of specified components of the JURMP and the effectiveness of the JURMP as a whole.
- Identify measureable targeted outcomes, assessment measures, and assessment methods for each jurisdictional activity/BMP implemented, each major JURMP component, and the JURMP as a whole.

- Development and implement a plan and schedule to address the identified modifications and improvements.
- Annually report on the effectiveness assessment as implemented under each of the specified requirements.
- As a watershed group of copermittees, annually assess the effectiveness of the Watershed Urban Runoff Management Program (WURMP) implementation, including each water quality activity and watershed education activity, and the program as a whole.
- Determine source load reductions resulting from WURMP implementation and utilize water quality monitoring results and data to determine whether implementation is resulting in changes to water quality.
- As with the JURMP, annually review WURMP jurisdictional activities or BMPs to identify modifications and improvements needed to maximize the program's effectiveness, develop and implement a plan and schedule to address the identified modifications and improvements to the programs, and annually report on the program's effectiveness assessment as implemented under each of the requirements.

Regarding parts I.1.a. and I.2.a. of the permit, the Fact Sheet/Technical Report states: "The section requires both specific activities and broader programs to be assessed since the effectiveness of jurisdictional [or watershed] efforts may be evident only when considered at different scales."[158]

The State Board, in its comments submitted in October 2008, cites section 402(p)(3(B)(ii)-(iii) of the Clean Water Act, as well as 40 C.F.R. sections 122.26(d)(2)(i)(B)-(C), (E) and (F) and subdivision (d)(2)(iv) of the same section to show the "broad federal authorities relied upon by the San Diego Water Board to support Section I ... [that] ... support inclusion of the JURMP and WURMP effectiveness assessments under federal law." The State Board also quotes section 122.26(d)(2)(v) that the copermittees must include in part 2 of their application for a permit:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

The State Board also says that "under 40 C.F.R. section 122.42(c), applicants must provide annual reports on the progress of their storm water management programs. The federal law behind the JURMP and WURMP effectiveness assessment requirements were discussed at great length in the 2001 Permit Fact Sheet."[159] The State Board quotes a lengthy portion of the 2001

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[158] Fact Sheet/Technical Report for Order No. R9-2007-0001, Parts I.1.a. and I.2.a.. Two identical paragraphs describe the JURMP on page 319 and the WURMP on page 320.

[159] 40 C.F.R. section 122.42(c) states:

> *Municipal separate storm sewer systems.* The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under §122.26(a)(1)(v) of this part must

Fact Sheet, which states that the U.S. EPA requires applicants to submit estimated reductions in pollutant loads expected to result from implemented controls and describe known impacts of storm water controls on groundwater. The 2001 Fact Sheet also includes "Throughout the permit term, the municipality must submit refinements to its assessment or additional direct measurements of program effectiveness in its annual report." It also lists a number of U.S. EPA suggestions, recommendations, and encouraged actions.

The State Board also quotes at length from the 2007 Permit Fact Sheet/Technical Report regarding why the effectiveness assessments are required under the permit, including the need for them and the benefits of including them. According to the State Board, the federal authorities support including the effectiveness assessments, and the Regional Board appropriately exercised discretion under federal law to include them, finding them necessary to implement the MEP standard. Thus, the State Board asserts that sections I.1 and I.2 do not exceed federal law.

The claimants, in their February 2009 comments, state that neither the broad nor the specific legal authority cited in the permit Fact Sheet "contains the above-referenced mandates required under the 2007 Permit." Claimants characterize the federal regulations as only requiring "program descriptions, estimated reductions, known impacts, and an annual report on progress. Federal law does not mandate the specific activities mandated by the 2007 Permit." Claimants also argue that the permit requirements are not necessary to meet the federal MEP standard, and point out that the 2001 Permit Fact Sheet cited by the State Board describes actions recommended or encouraged by the U.S. EPA, but not required. As claimant says: "they simply authorize applicants to go beyond minimum federal requirements." Claimants also quote the State Board's comment on "the need for and benefits of assessment requirements," noting that needs and benefits "constitute an insufficient basis for the imposition of a mandated requirement without subvention."

Although the federal regulations require assessment of controls and annual reports, they do not require the detailed assessment in the 2007 permit. The regulations do not require, for example, assessments of the effectiveness of each significant jurisdictional activity/BMP or watershed

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submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include:

(1) The status of implementing the components of the storm water management program that are established as permit conditions;
(2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with §122.26(d)(2)(iii) of this part; and
(3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under §122.26(d)(2)(iv) and (d)(2)(v) of this part;
(4) A summary of data, including monitoring data, that is accumulated throughout the reporting year;
(5) Annual expenditures and budget for year following each annual report;
(6) A summary describing the number and nature of enforcement actions, inspections, and public education programs;
(7) Identification of water quality improvements or degradation.

quality activity, or of the implementation of each major component of the JURMP or WURMP, or identification of modifications and improvements to maximize the JURMP or WURMP effectiveness. These requirements, "exceed the mandate in that federal law or regulation."[160] As in *Long Beach Unified School Dist. v. State of California*,[161] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[162] to impose these requirements. Thus, the Commission finds that parts I.1 and I.2 of the permit are not federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts I.1 and I.2 of the permit are a state mandate on the copermittees to do all of the following:

> 1. Jurisdictional
>
> a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
>
> (1) Specifically assess the effectiveness of each of the following:
>
> (a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
> (b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[163] Detection and Elimination, and Education); and
> (c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
>
> (2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.
>
> (3) Utilize outcome levels 1-6[164] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (5) Utilize Implementation Assessment,[165] Water Quality Assessment,[166] and Integrated Assessment,[167] where applicable and feasible.

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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.

[163] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[164] See footnote 50, page 21.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[168] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

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[165] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[166] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[167] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[168] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[169] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

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

The State Board, in its October 2008 comments, states that the program effectiveness assessment is not a new program or higher level of service because the 2001 permit included a JURMP (in part F.7) and WURMP (in part J) effectiveness assessment requirements.

The claimants, in their February 2009 comments, state as follows:

> The 2001 Permit only required the copermittees to develop a long term strategy for assessing the effectiveness of their individual JURMP using specific and indirect measurements to track the long term progress of their individual JURMPs towards achieving water quality. [part F.7.a. of the 2001 permit.] The 2001 Permit also only mandated that the long term strategy developed by the copermittees include an assessment of the effectiveness of their JURMP in an annual report using the direct and indirect assessment measurements and methods developed in the long-term strategy. [part F.7. of the 2001 permit.]

Part F.7 of the 2001 permit required developing the following on the topic of "Assessment of Jurisdictional URMP Effectiveness Component."

> a. As part of its individual Jurisdictional URMP, each Copermittee shall develop a long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that each Copermittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.
>
> b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy.

The 2007 permit requires more detail in its assessments than the 2001 permit. The 2007 permit requires annual assessments and using outcome levels, among other things, to assess the effectiveness of (a) each significant jurisdictional activity/BMP, (b) implementation of each major component of the JURMP, and (c) implementation of the JURMP as a whole. The 2001 permit did not require assessments at these three levels. And for example, outcome level 4 in the 2007 permit is required for measuring load reductions.[170] This is a higher level of service than "pollutant loading estimations" to be used as an effectiveness strategy in the 2001 permit.[171] Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

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[170] There are six Effectiveness Assessments incorporated into part I.1.a.(3) of the permit and are defined in Attachment C. One of them is "Effectiveness Assessment Level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed."

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

The assessment provisions of the Watershed Urban Runoff Management Program are in part J.2 of the 2001 permit, which requires each copermittee to develop and implement a Watershed URMP that contains, among other things:

> b. An assessment of the water quality of all receiving waters in the watershed based upon (1) existing water quality data; and (2) annual watershed water quality monitoring that satisfies the watershed monitoring requirements of Attachment B.
>
> [¶]...[¶]
>
> i. Long-term strategy for assessing the effectiveness of the Watershed URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that will track the long-term progress of the Watershed URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.

As with the JURMP, the 2001 permit required a "long-term strategy for assessing the effectiveness of the Watershed URMP" whereas the 2007 permit requires the annual assessment of more specific criteria: (a) each Watershed Water Quality Activity implemented; (b) Each Watershed Education Activity implemented; and (c) Implementation of the Watershed Urban Runoff Management program as a whole. And the 2007 permit requires assessing these activities using the same six effectiveness outcome levels as for the JURMP (defined in Attachment C), that were not in the 2001 permit.[172]

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[172] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

Therefore, the Commission finds that section I.2. of the permit (the Watershed URMP effectiveness assessment) is a new program or higher level of service.

B. Long Term Effectiveness Assessment (part I.5): As stated on pages 19-20 above, part I.5 requires the copermittees to collaborate to develop a Long Term Effectiveness Assessment (LTEA) that evaluates the copermittee programs on a jurisdictional, watershed, and regional level, and that emphasizes watershed assessment. The LTEA must build on the results of the August 2005 Baseline LTEA, and must be submitted to the Regional Board no later than 210 days before the permit expires. The LTEA must address the Regional objectives listed in part I.3 of the permit, as well as assess the effectiveness of the Receiving Waters Monitoring Program, and address outcome levels 1-6 as specified in attachment C of the permit.

In its October 2008 comments on the test claim, the State Board says that the LTEA requirement was imposed "so that the San Diego Water Board could properly evaluate the Copermittees' storm water program during the reapplication process." The State Board asserts that the LTEA provision is a federal mandate, citing 40 C.F.R. section 122.26, subdivisions (d)(2)(iv) and (v), in which (v) states that a permit application must include:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

According to the State Board, "Even if the requirements to develop an LTEA are not specifically required by the federal regulations, the general discussion of the federal MEP standard is applicable here and supports the San Diego Water Board's determination that the region-wide LTEAs are necessary to meet the federal MEP standard."

In their February 2009 rebuttal comments, the claimants state:

> The program effectiveness component of the 2007 Permit mandates Jurisdictional (I.1), Watershed (I.2), Regional (I.3), Total Maximum Daily Loads ("TMDL") and BMP Implementation (I.4) and Long-term Effectiveness Assessment (I.5) requirements. This Section mandates multiple layers of program assessment, review and reporting. Such duplicative and collaborative efforts were not required under the 2001 Permit and are not required by federal law.

Claimants assert that there is no federal authority that states that the regional, jurisdictional and watershed program effectiveness training requirements are required to meet the minimum federal MEP standards. Claimants also state that permits in other jurisdictions do not have LTEA requirements. According to the claimants, "while portions of the federal regulations cited by the State permit region-wide or watershed-wide cooperation, there is no mandatory requirement for multiple layers of program effectiveness assessment."

Although the federal regulations require assessment of controls, they do not require the detailed assessment in the 2007 permit. They do not require, for example, collaboration with other copermittees, addressing specified objectives or outcome levels, or addressing jurisdictional, watershed, and regional programs. These requirements "exceed the mandate in that federal law

or regulation."[173] As in *Long Beach Unified School Dist. v. State of California*,[174] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[175] to impose these requirements. Thus, the Commission finds that part I.5 of the permit is not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission finds that part I.5 of the permit is a state mandate for the claimants to do all of the following:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[176] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of

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

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

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

[176] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

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;[177]

The Commission finds that there is no federal mandate to develop a management structure (memorandum of understanding, or MOU) as required in part L of the 2007 permit. The federal regulation most on point requires an applicant (claimant) to demonstrate adequate legal authority "which authorizes or enables the applicant at a minimum to: [¶]...[¶] (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;"[178] All the federal regulations address is authority to establish an interagency agreement or memorandum of understanding, but do not require it to be implemented or specify its contents beyond "controlling ... the contribution of pollutants from one portion of the municipal system to another portion of the municipal system."

By contrast, part L of the permit requires the copermittees to collaborate, promote consistency among JURMP and WURMP and plan and coordinate activities required under the permit. It also requires joint execution and submission to the Regional Board an MOU with a minimum of seven specified requirements.

Thus, this permit activity "exceed[s] the mandate in that federal law or regulation."[179] As in *Long Beach Unified School Dist. v. State of California,*[180] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[181] to impose these requirements. Thus, the Commission finds that part L of the permit does not impose a federal mandate.

Based on the mandatory language in the permit, the Commission finds that part L of the permit is a state mandate on the claimants to do the following:

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[177] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[178] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

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

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

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

1. Collaborate with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

(a) Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum:

(1) Identifies and defines the responsibilities of the Principal Permittee[182] and Lead Watershed Permittees;[183]

(2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;

(3) Establishes a management structure to promote consistency and develop and implement regional activities;

(4) Establishes standards for conducting meetings, decisions-making, and cost-sharing;

(5) Provides guidelines for committee and workgroup structure and responsibilities;

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;

(7) Includes any and all other collaborative arrangements for compliance with this order.

The State Board, in its October 2008 comments, asserts that the management structure framework in part L of the 2007 permit is not a new program or higher level of service because:

> The 2001 permit required significant collaboration to address common issues and promote consistency across management programs [and] development of a management structure through execution of a formal agreement, meeting minimum specifications. It also required standardized reporting, including fiscal analysis.

The State Board also argues there is "minimal substantive difference" between the 2001 and 2007 permits in their requirements to establish "a formal cooperative arrangement and to implement regional urban runoff management activities. The 2007 Permit merely elaborates on and refines the 2001 requirements."

In its February 2009 rebuttal comments, the claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

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

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

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.

Summary of Issue 1: The Commission finds that the following parts of the 2007 permit are a state-mandated, new program or higher level of service.

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

- Collaborate with other copermittees to develop and implement a hydromodification management plan, as specified (D.1.g.), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Develop and submit an updated Model SUSMP that defines minimum Low-impact Development and other BMPs as specified (D.1.d.(7)-(8)), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Street sweeping (D.3.a.(5)) and reporting on street sweeping (J.3.a(3)x-xv);
- Conveyance system cleaning (D.3.a.(3)(b)(iii)) and reporting on conveyance system cleaning (J.3.a.(3)(c)(iv)-(viii));
- Educational component (D.5).
    - Educate each specified target community on the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control (D.5.a.(1));
    - Educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources (D.5.a.(2));
    - Implement an education program that includes annual training only for planning boards and elected officials, if applicable, to have an understanding of the topics in (i) and (ii) (D.5.b.(1)(a)(i) & (ii));
    - Implement an education program so that its planning and development review staffs (and Planning Boards and Election Officials, if applicable) have an understanding of the topics in (iii) and (iv) as specified (D.5.b.(1)(a)(iii) & (iv));
    - Implement an education program that includes annual training prior to the rainy season so that [the Copermittee's] construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: the topics in (iii) to (vi), as specified (D.5.b.(1)(b)(iii) & (iv));
        - Municipal Industrial/Commercial Activities (D.5.b.(1)(c));
        - Municipal Other Activities (D.5.b.(1)(d));
        - New Development and Construction Education (D.5.(b)(2));
        - Residential, General Public, and School Children Education (D.5.(b)(3)).

II. Watershed Urban Runoff Management Program (Parts E.2.f & E.2.g.)

- Identify and implement the Watershed activities as specified (E.2.f.).
- Collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings. (E.2.g.)

III. Regional Urban Runoff Management Program (Parts F.1, F.2 & F.3)

- Include developing and implementing a Regional Residential Education Program development and implementation in the RURMP, as specified (F.1.).
- Include developing the standardized fiscal analysis method required in permit part G in the RURMP (F.2.).
- Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs in the RURMP (F.3.).

IV. Program Effectiveness Assessment (Parts I.1, I.2 & I.5)

- Annually assess the effectiveness of each copermittee's JURMP, as specified (I.1.).
- Annually assess the effectiveness of each watershed group's WURMP (I.2.).
- Collaborate with the other copermittees to develop a Long-term Effectiveness Assessment, as specified, and submit it to the Regional Board as specified (I.5.).

V. All Permittee Collaboration (Part L)

- Collaborate with all other copermittees to address common issues, promote consistency among the JURMP and WURMP, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement as specified (L.1.a. (3)-(5)).

Any further reference to the test claim activities is limited to these parts of the permit found to be a new program or higher level of service.

Issue 2: Do the test claim activities impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the permit provisions impose costs mandated by the state,[184] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

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

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement. In the test claim, the County of San Diego itemized the costs of complying with the permit conditions as follows:

Activity	Cost FY 2007-08
Regional Urban Runoff Management Program -Copermittee collaboration (F.2, F.3, L)	$260,031.09
Copermittee collaboration, Regional Residential Education, Program Development and Implementation (F.1)	$131,250.00
Jurisdictional Urban Runoff Management Program (JURMP) -hydromodification (D.1.g)	$630,000.00
JURMP Standard Urban Storm Water Mitigation Plans -low impact development (D.1.d)	$52,200.00
Long Term Effectiveness Assessment (I.5)	$210,000.00
Street Sweeping (D.3.a.(5) Equipment, Staffing, Contract	$3,477,190.00
Conveyance System Cleaning (D.3.a.(3)) and Reporting (J.2.a.(3)(c) iv – vii.	$3,456,087.00
Program Effectiveness Assessment (I.1 & I.2)	$392,363.00
Educational Surveys and Tests (D.5)	$62,617.00
Watershed Urban Runoff Management Program -Copermittee collaboration (E.2.f., E.2.g)	$1,632,893.00
Total	$10,304,631.09

Claimants submitted documentation in February 2010 that show the 2008-2009 cost for the permit activities is $18,014,213. These figures, along with those in the test-claim narrative and declarations submitted by the San Diego County and 18 cities,[185] illustrate that the costs to comply with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Claimants did not request the test claim activities within the meaning of Government Code section 17556, subdivision (a).

The first issue is whether the claimants requested or proposed the activities in the permit. The Department of Finance and the State Board both assert that claimants did so in their Report of

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

Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.[186]

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

> (a) The claim is submitted by a local agency ... that requested legislative authority for that local agency ... to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency ... that requests authorization for that local agency ... to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Claimants have fee authority under Government Code section 17556, subdivision (d), for the test claim activities that do not require voter approval under Proposition 218

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency ... if, after a hearing, the commission finds any one of the following: [¶]...[¶] (d) The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[187] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly

[186] Water Code section 13376; 40 Code of Federal Regulations, section 122.21 (a). The Federal regulation applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state-program provision) by reference. Also see the 2007 permit, page 2, part A.

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

> declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[188]

In another case about subdivision (d) of section 17556, *Connell v. Superior Court,*[189] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[190]

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

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

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

1. **Claimants' have regulatory fee authority (within the meaning of Gov. Code, § 17556, subd. (d)) under the police power sufficient to pay for the mandated activities that do not require voter approval under Proposition 218: the hydromodification plan and low-impact development.**

In its October 2008 comments, the State Board asserted that the claimants have fee authority to pay for the permit activities. Although the Board recognizes "limitations on assessing fees and surcharges under California law ... [concerning] the percentage of voters who must approve the assessment" the Board points to examples of local agencies (Cities of Los Angeles, San Clemente, and Palo Alto) that have successfully adopted an assessment. The State Board also argues that the cities' trash collection responsibilities may also include street sweeping and conveyance system cleaning for which the city could charge fees, and that developer fees could be charged for hydromodification and low impact development.

Claimants, in comments submitted in February 2009, state that they cannot unilaterally impose a fee to recover the cost to comply with the 2007 permit on water or sewer bills sent to residents because of *Howard Jarvis Taxpayer Assoc. v. City of Salinas,*[191] in which the court invalidated a stormwater management utility fee imposed by the city on all owners of developed parcels in the city. The court held that article XIII D (Proposition 218) of the California Constitution "required the city to subject the proposed storm drainage fee to a vote of the property owners or the voting residents of the affected area."[192] As to the argument that claimants can put the fee to a vote in their jurisdictions, claimants state as follows:

> Articles XIII C and XIII D, which were added to the Constitution by Proposition 218, regulate the imposition of general and special taxes as well as the imposition of special assessments and property related fees. In each of these cases the question of whether to impose a tax, special assessment or a property related fee must be submitted to and approved by the voters. And, in the case of a special tax, and in certain instances the imposition of a fee or charge, the tax or fee must be approved by a two-thirds vote of the resident voters. The State fails to cite any authority that requires the copermittees to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. Such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The issue of local fee authority for municipal stormwater permit activities in this permit cannot be answered without discussing regulatory fee authority under the police power and the limitations on that authority via the voter-approval requirement in article XIII D of the California Constitution (Proposition 218).

Case law has recognized three general categories of local agency fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.[193] The regulatory and development fees are discussed below in the context of

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

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

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

XIII D (Proposition 218) that would allow the claimants to impose fees for the activities in the test claim related to development.

Regulatory fee authority under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Article XI, section 7, includes the authority to impose fees, and courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[194]

Water pollution prevention is also a valid exercise of government police power.[195]

In *Sinclair Paint v. State Board of Equalization*,[196] the California Supreme Court upheld a fee on manufacturers of paint that funded a child lead-poisoning program that provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The program was entirely supported by fees assessed on manufacturers or other persons contributing to environmental lead contamination. In upholding the fee, the court ruled that it was a regulatory fee imposed under the police power and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution. The court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[197] [Emphasis added.]

Regulatory fees also help to prevent or mitigate pollution, as the Court said: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[198] The court also recognized that regulatory fees do not depend on government-conferred benefits or privileges.[199]

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[194] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662, in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors.

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

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

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

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

[199] *Id.* at page 875.

Although the holding in *Sinclair Paint* applied to a state-wide fee, the court's language (treating "ordinances" the same as "statutes") recognizes that local agencies also have police power to impose regulatory fees, and it relied on local government police power cases in its analysis.[200]

Other cases have defined a regulatory fee as an imposition that funds a regulatory program[201] or that distributes the collective cost of a regulation"[202] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. ...the regulatory program is for the protection of the health and safety of the public."[203] Courts will uphold regulatory fees if they do not exceed the reasonable cost of providing services necessary to the activity on which the fee is based and are not levied for an unrelated revenue purpose.

In upholding regulatory fees for environmental review by the California Department of Fish and Game, the court of appeal summarized the following rules on regulatory fees:

> A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation. [Citations omitted.] Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, 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.[204] [Emphasis added.]

In *Tahoe Keys Property Owner's Assoc. v. State Water Resources Control Board*,[205] the court refused to issue a preliminary injunction against collecting a pollution mitigation fee of $4000 for each lot developed in the Tahoe Keys subdivision of Lake Tahoe. The fees were to be used for mitigation projects designed to achieve a net reduction in nutrients generated by the Tahoe Keys development. The court said: "on the face of the regulation, there appears to be a sufficient

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[200] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

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

[202] *Id.* at 952.

[203] *Ibid.*

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

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

nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme [mitigation of pollution in Lake Tahoe]."[206]

A variety of local agency regulatory fees have been upheld for various programs, including: processing subdivision, zoning, and other land-use applications,[207] art in public places,[208] remedying substandard housing,[209] recycling,[210] administrative hearings under a rent-control ordinance,[211] signage,[212] air pollution mitigation,[213] and replacing converted residential hotel units.[214] Fees on developers for environmental mitigation under the California Environmental Quality Act have also been upheld.[215]

Given the variety of examples where regulatory fees have been upheld, and the broad range of costs to which they may be applied (including those for 'administration'), the claimants have fee authority under the police power to impose fees for the permit activities that are a state-mandated new program or higher level of service. But a determination as to whether the claimants' fee authority is sufficient, within the meaning of Government Code section 17556, subdivision (d), to pay for the mandated activities and deny the test claim, cannot be made without analysis of the limitations on the fee authority imposed by Proposition 218.

Regulatory fee authority is limited by voter approval under Proposition 218: 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

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[206] *Id.* at page 1480.

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

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

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

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

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

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

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

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

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

approval, however, are property-related fees for sewer, water, or refuse collection services (art. XIII D, § 6, subd. (c)).

In 2002, an appellate court in *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to charge stormwater fees if they are imposed "as an incident of property ownership."

The issue of whether a local agency has sufficient fee authority for the mandated activities under Government Code section 17556, subdivision (d), in light of the voter approval requirement for fees under article XIII D (Proposition 218) is one of first impression for the Commission.

The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.

Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[216]

In its January 2010 comments on the draft staff analysis, the State Board disagrees that "the requirement to subject new or increased fees to these voting or protest requirements strips the claimants of 'fee authority' within the meaning of Government Code section 17556, subdivision (d)." The State Board cites *Connell v. Superior Court,*[217] in which the water districts argued that they lacked "sufficient" fee authority because it was not economically feasible for them to levy fees that were sufficient to pay the mandated costs. The *Connell* court determined that "the plain language of the statute [Gov. Code, § 17556, subd. (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program."[218] The State Board equates the Proposition 218 voting requirement with the economic impracticability faced by the water districts in *Connell.*

The claimants disagree, citing a lack of authority that requires them to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. According

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

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

[218] *Id.* at page 401.

to the claimants, such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The Commission disagrees with the State Board. The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell*. Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program."[219]

In fact, the fee at issue in the *Connell* case (Wat. Code, § 35470) was amended by the Legislature in 2007 to conform to Proposition 218. Specifically, the Water Code statute now requires compliance with "the "notice, protest, and hearing procedures in Section 53753 of the Government Code."[220] This Government Code statute implements Proposition 218.

For these reasons, the Commission finds that local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d) to deny the test claim for those activities that would condition the fee or assessment on voter or property-owner approval under Proposition 218 (article XIII D). The Commission finds that Proposition 218 applies to all the activities in this test claim (except for the hydromodification and LID activities that are related to priority development projects discussed below) so that they impose "costs mandated by the state" (within the meaning of Gov. Code, § 17556, subd. (d)). To the extent that property-owner or voter-approved fees or assessments are imposed to pay for any of the permit activities found above to be a state-mandated new program or higher level of service, the fee or assessment would be identified as offsetting revenue in the parameters and guidelines to offset the claimant's costs in performing those activities.

Fees imposed for two of the test-claim activities, however, i.e., for the hydromodification management plan and low-impact development, would not be subject to voter approval under Proposition 218, as discussed below.

Fees as a condition of property development are not subject to Proposition 218: Proposition 218 does not apply to development fees, including those imposed on activities in part D of the permit. Article XIII D expressly states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[221]

Moreover, the California Supreme Court has ruled that fees imposed "as an incident to property ownership" are subject to Proposition 218, but fees that result from the owner's voluntary

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

[220] Water Code section 35470, as amended by Statutes 2007, chapter 27. Section 53753 of the Government Code requires compliance with "the procedures and approval process set forth in Section 4 of Article XIII D of the California Constitution" for assessments.

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

decision to seek a government benefit are not.[222] Thus, fees imposed as a result of the owner's voluntary decision to undertake a development project are not subject to Proposition 218, because they are not merely incident to property ownership.[223]

The final issue, therefore, is whether claimants may impose fees that are sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the activities in the permit related to development: the hydromodification management plan (part D.1.g), and low-impact development (part D.1.d.(7)&(8)). The Commission finds claimants have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d), and that these activities do not impose costs mandated by the state and are not reimbursable.

Hydromodification management plan: Part D.1 of the permit describes the development planning component of the JURMP. Part D.1.g. requires each copermittee to collaborate with other copermittees to develop and implement and report on developing a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, as specified. As discussed above, the HMP is a state-mandated new program or higher level of service for only private priority development projects. The purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

According to the permit, priority development projects are:

> a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

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[222] In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, the court held that water service fees were subject to Proposition 218, but that water connection fees were not. In *Apartment Assoc. of Los Angeles County v. City of Los Angeles, supra,* 24 Cal.4th 830, 839-840, the court held that apartment inspection fees were not subject to Proposition 218 because they were not imposed on property owners as such, but in their capacity as landlords.

[223] A recent report by the Office of the Legislative Analyst concurs with this conclusion: "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners. Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56. [Emphasis added.] See: <http://www.lao.ca.gov/2008/rsrc/water_primer/ water_primer_102208.pdf> as of October 22, 2008.

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)[224] and D.1.d.(5).[225] Both D.1.d.(4) and D.1.d.(5) are the LID requirement implemented at priority development projects.

Part D.1.d.(8) requires permittees to develop and submit an updated model SUSMP that defines minimum low impact development and other BMP requirements to incorporate into the permittees local SUSMPs for application to priority development projects.

The Commission finds that claimants have authority to impose fees for complying with the LID activities in parts D.1.d.(7) and D.1.d.(8) of the permit, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that they are not subject to Proposition 218 voter approval. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on the priority development projects to pay for the costs associated with LID, the Commission finds that permit parts D.1.d.(7) and D.1.d.(8) do not impose costs mandated by the state.

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[224] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[225] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

2. Claimants also have fee authority regulated by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d)) to pay for the hydromodification and low-impact development permit activities.

Development fees are also an exercise of the local police power under article XI, section 7 of the California Constitution.[226] A fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relation to the development's probable costs to the community and benefits to the developer.[227] Development fees are not restricted by Proposition 218 as discussed above.

Fees on developers as conditions of permit approval are governed by the Mitigation Fee Act (Gov. Code, §§ 66000-66025) which defines a "fee" as:

> [A] monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include ... fees for processing applications for governmental regulatory actions or approvals ...."[228] [Emphasis added.]

Public facilities are defined in the Act as "public improvements, public services, and community amenities."[229]

When a local agency imposes or increases a fee as a condition of development approval, it must do all of the following: (1) Identify the purpose of the fee; (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and, (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project upon which the fee is imposed. (Gov. Code, § 66001, subd. (a),)

The city or county must also determine whether there is a reasonable relationship between the specific amount of the fee and the costs of building, expanding, or upgrading public facilities. These determinations, known as nexus studies, are in writing and must be updated whenever new fees are imposed or existing fees are increased.[230] A fee imposed "as a condition of approval of

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

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

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

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

[230] Government Code section 66001, subdivision (b). The Act also requires cities to segregate fee revenues from other municipal funds and to refund them if they are not spent within five years. Any person may request an audit to determine whether any fee or charge levied by the city or county exceeds the amount reasonably necessary to cover the cost of the service provided (Gov. Code, §66006, subd. (d)). Under Government Code section 66014, fees charged for zoning changes, use permits, building permits, and similar processing fees are subject to the same nexus requirements as development fees. Lastly, under California Government Code

a proposed development or development project" is limited to the estimated reasonable cost of providing the service or facility.[231] This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.[232]

The Mitigation Fee Act defines a "development project" as "any project undertaken for the purpose of development ... includ[ing] a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate." (Gov. Code, § 66000, subd. (a).)

A fee does not become a development fee simply because it is made in connection with a development project. Approval of the development must be conditioned on the payment of the fee. The Mitigation Fee Act is limited to situations where the fee or exaction is imposed as a condition of approval of a development project.[233]

Because local agencies may make development of priority development projects conditional on the payment of a fee, the Commission finds that the claimants have fee authority, governed by the Mitigation Fee Act, that is sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the hydromodification management plan and low-impact development activities. As discussed below, HMP and LID are "public facilities," which the Mitigation Fee Act defines as "public improvements, public services, and community amenities."[234]

The County of San Diego, in its January 2010 comments on the draft staff analysis, disagrees that it can impose a fee for the hydromodification plan (HMP) activities in the permit, stating that development and implementation of the HMP does not constitute a "public facility."

The Commission disagrees. The purpose of the permit is to prevent or abate pollution in waterways and beaches in San Diego County. More specifically, the purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

All these stated purposes of the HMP provide public services or improvements, or community amenities within the meaning of the Act.[235] Moreover, the California Supreme Court stated that the Act "concerns itself with development fees; that is, fees imposed on development projects in

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section 66020, agencies collecting fees must provide project applicants with a statement of the amounts and purposes of all fees at the time of fee imposition or project approval.

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

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

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

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

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

order to finance public improvements or programs that bear a 'reasonable relationship' to the development at issue."[236] The HMP is such a program.

Similarly, the purposes of LID are to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff from priority development projects. These activities are public services or improvements that fall within the Act's definition of public facility.

The County also argues that under the Mitigation Fee Act, the local agency must determine that there is "a reasonable relationship between the fee's use and the type of development project on which the fee is imposed." The County argues that there is no reasonable relationship between the costs incurred by claimants to develop and implement the HMP and a particular development project on which the fee might be imposed.

Again, the Commission disagrees. Every time a developer proposes a project that falls within one of the "priority development project" categories listed above, and the developer has "not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences," the local agency may impose a fee subject to the Mitigation Fee Act. The fee would be for the costs of developing and implementing the HMP to "manage increases in runoff discharge rates and durations from all Priority Development Projects [that] cause ... impacts to beneficial uses and stream habitat due to increased erosive force." The local agency may also impose a fee on priority development projects to comply with LID, the purpose of which is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff.

Finally, the County argues that assessing fees on a private developer who submits a project for approval to recover the costs of reviewing and approving a particular project is "specifically excluded from the definition of 'fee' under the Act." The definition of fee in the Act states that it "does not include ... fees for processing applications for governmental regulatory actions or approvals ...." (Gov. Code, § 66000, subd. (b).)

The Commission disagrees that an HMP fee would be for "processing applications for governmental regulatory actions or approvals." Rather, it would be for permit approval of priority development projects, and used to implement the HMP and LID requirements. In *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 698, the California Supreme Court distinguished between regulatory fees that implement state and local building safety standards under the Health and Safety Code and developer fees subject to the Mitigation Fee Act by stating: "These regulatory fees fund a program that supervises how, not whether, a developer may build." Thus, the Commission finds that the developer fees may be imposed for permit approval for priority development projects if the permit is conditional on payment of the fee, and the fee is used for HMP and LID compliance.

In sum, the Commission finds that the claimants have fee authority governed by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d), to pay for the following parts of the permit that are related to development: the hydromodification management plan (part D.1.g) and updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (part D.1.d.(7)&(8)).

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

3. Claimants' fee authority under Public Resources Code section 40059, or via benefit assessments, is not sufficient to pay for street sweeping, and Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping.

Street sweeping is one test claim activity that is typically funded by local agency fees or assessments. Fees and assessments are both governed by Proposition 218.

The permit (in part D.3.a.5) requires a program to sweep "improved (possessing a curb and gutter) municipal roads, streets, highways, and paring facilities" at intervals depending on whether they are identified as consistently generating the highest volumes, moderate volumes, or low volumes of trash and/or debris. Reporting on street sweeping, such as curb-miles swept and tons of material collected, is also required (part J.3.a.(3)(c)x-xv).

Some local agencies collect fees for street sweeping for their refuse fund, such as the City of Pasadena.[237] Other local agencies, e.g., the County of Fresno[238] and the City of La Quinta,[239] collect an assessment for street sweeping as a street maintenance activity. Both approaches are discussed below in light of the procedural requirements under Proposition 218.

Fees for street sweeping as refuse collection/solid waste handling: Article XI, section 7 of the California Constitution states: "A county or city may make and enforce within its limits all local, police, sanitary or other ordinances and regulations not in conflict with general laws." Local agency fees for refuse collection are authorized by Public Resources Code section 40059, which states:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:
>
> (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services. [Emphasis added.]

"Solid waste" is defined in Public Resources Code section 40191 as:

> [A]ll putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge

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[237] City of Pasadena, Agenda Report, Resolution Nos. 8942 and 8943, April 27, 2009, "Public Hearing: Amendment to the General Fee Schedule to Increase the Residential Refuse Collection Fees and Solid Waste Franchise Fees." One of the findings in the resolution is: "Whereas, street sweeping is a refuse collection service involving solely the collection, removal and disposal of solid waste from public rights of way, and is, therefore, properly allocated to the Refuse Fund."

[238] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[239] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

which is not hazardous waste, manure, vegetable or animal solid and semisolid wastes and other discarded solid and semisolid wastes.[240]

"Solid waste handling" is defined in Public Resources Code section 40195 as "the collection, transportation, storage, transfer, or processing of solid wastes." Given the nature of material swept from city streets, street sweeping falls under the rubric of 'solid waste handling.'

Under Proposition 218, "refuse collection" is expressly exempted from the voter-approval requirement (article XIII D, § 6, subd. (c).). Although "refuse collection" has no definition in article XIII D, the plain meaning of refuse[241] collection is the same as solid waste handling, as the dictionary definition of "refuse" and the statutory definition of "solid waste" both refer to rubbish and trash as synonyms. Refuse is collected via solid waste handling.

To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)). In addition, revenues are: (1) not to exceed the funds required to provide the service, (2) shall not be used for any other purpose than to provide the property-related service, and the amount of the fee on a parcel shall not exceed the proportional cost of the service attributable to the parcel. And the service must be actually used by or immediately available to the property owner (article XIII D, § 6, subd. (b)).

Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.

Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[242]

Thus, the Commission finds that fee authority under Public Resources Code section 40059 is not sufficient to pay for the mandated program or increased level of service in permit parts D.3.a.5 (street sweeping). Therefore, the Commission finds that street sweeping imposes costs mandated by the state and is reimbursable.

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

[241] "Refuse" is defined as " Items or material discarded or rejected as useless or worthless; trash or rubbish." <http://dictionary.reference.com/browse/refuse> as of November 23, 2009.

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

Any proposed fees that are not blocked by a majority of parcel owners for street sweeping must be identified as offsetting revenue in the parameters and guidelines.

Fees for street sweeping reports: Proposition 218 does not contain an express exemption on voter approval for reporting on street sweeping, only for "refuse collection." Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the street sweeping reports be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping, so that part J.3.a.(3)(c)x-xv of the permit imposes costs mandated by the state and is reimbursable.

Assessments for street operation and maintenance: As mentioned above, some local agencies collect an assessment for street sweeping, e.g., the County of Fresno[243] and the City of La Quinta.[244] Assessments are defined as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property. 'Assessment' includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment' and 'special assessment tax.'" (article XIII D, § 2, subd. (b).) The terms "maintenance and operation" of "streets" and "drainage systems," although used in article XIII D, are not defined in it. The plain meaning of maintenance of streets and drainage systems, however, would include street sweeping because "maintenance" means "the work of keeping something in proper condition; upkeep."[245] Clean streets are used not only for transportation, but for conveying storm water to storm drains.

The Supreme Court defined special assessments as follows:

> A special assessment is a "'compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein....' " [Citation.]' [Citation.] In this regard, a special assessment is 'levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.' [Citation.] 'The rationale of special assessment[s] is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.[246]

The Supreme Court summarized the constitutional procedures for creating an assessment district.

> Under Proposition 218's procedures, local agencies must give the record owners of all assessed parcels written notice of the proposed assessment, a voting ballot, and a statement disclosing that a majority protest will prevent the assessment's

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[243] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[244] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

[245] <http://dictionary.reference.com/browse/maintenance> as of December 7, 2009.

[246] *Silicon Valley Taxpayers Ass'n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 442.

> passage. (Art. XIII D, § 4, subds. (c), (d).) The proposed assessment must be "supported by a detailed engineer's report." (Art. XIII D, § 4, subd. (b).) At a noticed public hearing, the agencies must consider all protests, and they "shall not impose an assessment if there is a majority protest." (Art. XIII D, § 4, subd. (e).) Voting must be weighted "according to the proportional financial obligation of the affected property." (*Ibid.*)[247]

Proposition 218 dictated that as of July 1, 1997, existing assessments were to comply with its procedural requirements, but an exception was created for "any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control." (art. XIII D, § 5, subd. (a), emphasis added.) This means that the procedural requirements of Proposition 218 apply only to increases in assessments for street sweeping that were imposed after Proposition 218 was enacted.[248]

Absent any evidence in the record that assessments imposed before July 1, 1997 for street sweeping are sufficient to pay for the street sweeping specified in part D.3.a. of the permit, the Commission cannot find that assessments imposed before that date would pay for the costs mandated by the state for street sweeping within the meaning of Government Code section 17556, subdivision (d).

Should a local agency determine that its existing assessments are not sufficient to pay for the mandated street sweeping, it can raise assessments by following the article XIII D (Proposition 218) procedures detailed above. Those procedures, however, include an election and a protest, both of which were found above to extinguish local fee authority sufficient to pay for the mandate and to block the application of Government Code section 17556, subdivision (d).

Thus, to the extent that the claimants impose or increase assessments to pay for the street sweeping, they would be identified as offsetting revenue in the parameters and guidelines.

4. Claimants' fee or assessment authority under Health and Safety Code section 5471 is not sufficient to pay for conveyance-system cleaning, and Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning

Conveyance-system cleaning for operation and maintenance of the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.) is required in the permit (part D.3.a.(3)). Specifically, claimants are required to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity.... Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner." Claimants are also required to report on the number of catch basins and inlets inspected and cleaned (J.3.a.(3)(c)iv-viii).

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[247] *Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Authority, supra,* 44 Cal.4th 431, 438.

[248] See also *Howard Jarvis Taxpayers Ass'n. v. City of Riverside* (1999) 73 Cal.App.4th, 679, holding that a preexisting streetlighting assessment is 'exempt under Proposition 218.'

Local agencies have fee authority under Health and Safety Code section 5471 to charge fees for storm drainage maintenance and operation as follows:

> [A]ny entity[249] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, 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 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

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[249] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

assessments imposed for this reporting would be subject to a vote of parcel owners. Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the reports on conveyance- system cleaning be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning, and that part J.3.a.(3)(c)iv-viii of the permit imposes costs mandated by the state within the meaning of Government Code section 17556, subdivision (d), and is reimbursable.

Any revenue from existing assessments, or assessments obtained after voter approval, for conveyance system cleaning would be included in the parameters and guidelines as offsets to reimbursement.

C. Claimants have potential fee authority and offsetting revenue if they comply with the requirements of Senate Bill 310 (Stats. 2009, ch. 577)

Effective January 2010, Senate Bill 310 (Stats. 2009, ch. 577) was enacted to add Water Code provisions authorizing local agencies to adopt watershed improvement plans.

SB 310 is intended to establish multiple watershed-based pilot programs.[250] The bill creates the California Watershed Improvement Act of 2009 (commencing with Wat. Code, § 16000). Pursuant to Water Code section 16101, each county, city, or special district that is a copermittee under a NPDES permit ***may*** develop either individually or jointly a watershed improvement plan. The process for developing a watershed improvement plan is to be conducted consistent with all applicable open meeting laws. Each county, city, or special district, or combination thereof, is to notify the appropriate Regional Board of its intention to develop a watershed improvement plan.

The watershed improvement plan is voluntary – it is not necessarily the same watershed activities required by the permit in the test claim.

SB 310 includes the following local agency fee authority:

> 16103. (a) In addition to making use of other financing mechanisms that are available to local agencies to fund watershed improvement plans and plan measures and facilities, a county, city, special district, or combination thereof may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution, to pay the costs of the preparation of a watershed improvement plan, and the implementation of a watershed improvement plan if all of the following requirements are met:
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> (1) The Regional Board has approved the watershed improvement plan.
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> (2) The entity or entities that develop the watershed improvement plan make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities of the feepayer. "Activities," for the purposes of this paragraph,

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

means the operations and existing structures and improvements subject to regulation under an NPDES permit for municipal separate storm sewer systems.

(3) The fee is not imposed solely as an incident of property ownership.

(b) A county, city, special district, or combination thereof may plan, design, implement, construct, operate, and maintain controls and facilities to improve water quality, including controls and facilities related to the infiltration, retention and reuse, diversion, interception, filtration, or collection of surface runoff, including urban runoff, stormwater, and other forms of runoff, the treatment of pollutants in runoff or other waters subject to water quality regulatory requirements, the return of diverted and treated waters to receiving water bodies, the enhance-ment of beneficial uses of waters of the state, or the beneficial use or reuse of diverted waters.

(c) The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.

However, Water Code section 16102, subdivision (d), states: "A regional board may, if it deems appropriate, utilize provisions of the approved watershed improvement plan (approved under this new act) to promote compliance with one of more of the regional board's regulatory plans or programs." Subdivision (e) states "Unless a regional board incorporates the provisions of the watershed improvement plan into waste discharge requirements issued to a permittee, the implementation of a watershed improvement plan by a permittee shall not be deemed to be in compliance with those waste discharge requirements."

Therefore, the Commission finds that Water Code section 16103 may only provide offsetting revenue for this test claim to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

D. The holding in *San Diego Unified School Dist. v. Commission on State Mandates* does not apply to the test claim activities.

The State Board's January 2010 comments on the draft staff analysis cite *San Diego Unified v. Commission on States Mandates,*[251] arguing that the permit in this test claim, like the pupil expulsion hearings, are intended to implement a federal law, and has costs that are, in context, de minimis. In *San Diego Unified School District,* the California Supreme Court held costs for hearing procedures and notice are not reimbursable for pupil expulsions that are discretionary under state law. The court found that these hearing procedures are incidental to federal due process requirements and the costs are de minimis, and thus not reimbursable.

The Commission disagrees. The permit in this case does not meet the criteria in the *San Diego Unified School District* case. Unlike the discretionary expulsions in *San Diego Unified School District,* the permit imposes state-mandated activities. And although the permit is intended to implement the federal Clean Water Act, there is no evidence or indication that its costs are de minimis. Claimants submitted declarations of costs totaling over $10 million for fiscal year

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

2007-2008 alone.[252] Claimants further submitted documentation of 2008-2009 costs of over $18 million. The State Board offers no evidence or argument to refute these cost declarations, so the Commission finds that permit activities (except for LID and HMP discussed above) impose costs mandated by the state that are not de minimis.

Summary: To recap fee authority under issue 2, the Commission finds that, due to the fee authority under the police power generally, and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

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

CONCLUSION

For the reasons discussed above, the Commission finds that parts of 2007 permit issued by the California Regional Quality Control Board, San Diego Region (Order No. R9-2007-001, NPDES No. CAS0108758), are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the claimants to perform the following activities.

The term of the permit is from January 24, 2007 – January 23, 2012.[253] The permit terms and conditions are automatically continued, however, pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits are complied with.[254]

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

Street sweeping (part D.3.a.(5)): Sweeping of Municipal Areas

> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

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

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[253] According to attachment B of the permit: "*Effective Date.* This Order shall become effective on the date of its adoption provided the USEPA has no objection...." "(q) *Expiration.* This Order expires five years after adoption."

[254] According to attachment B of the permit: "(r) *Continuation of Expired Order* [23 CCR 2235.4]. After this Order expires, the terms and conditions of this Order are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits (40 CFR 122.6) are complied with."

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

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[256] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

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[255] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[256] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[257] Water Quality Assessment,[258] and Integrated Assessment,[259] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[260] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

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[257] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[258] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[259] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[260] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;

(b) Each Watershed Education Activity implemented; and

(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban

Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[261] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

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

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Long Term Effectiveness Assessment (I.5):

a. Collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[262] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

1. Collaborate with all other Copermittees regulated under the permit to address common issues, promote consistency among Jurisdictional Urban Runoff

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[262] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

V. All Copermittee Collaboration (part L)

(a) Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.

Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum: [¶]...[¶]

3. Establishes a management structure to promote consistency and develop and implement regional activities;
4. Establishes standards for conducting meetings, decisions-making, and cost-sharing.
5. Provides guidelines for committee and workgroup structure and responsibilities;
6. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

The Commission finds that due to the fee authority under the police power (Cal. Const. art. XI, § 7) and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code

section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;

- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

SA-5

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)

GENERAL PERMIT FOR
STORM WATER DISCHARGES
ASSOCIATED WITH INDUSTRIAL ACTIVITIES

ORDER
NPDES NO. CAS000001

This Order was adopted by the State Water Resources Control Board on:	**April 1, 2014**
This Order shall become effective on:	**July 1, 2015**
This Order shall expire on:	**June 30, 2020**

IT IS HEREBY ORDERED that as of July 1, 2015 this Order supersedes Order 97-03-DWQ except for Order 97-03-DWQ's requirement to submit annual reports by July 1, 2015 and except for enforcement purposes. As of July 1, 2015, a Discharger shall comply with the requirements in this Order to meet the provisions contained in Division 7 of the California Water Code (commencing with section 13000) and regulations adopted thereunder, and the provisions of the federal Clean Water Act and regulations and guidelines adopted thereunder.

CERTIFICATION

I, Jeanine Townsend, Clerk to the Board, do hereby certify that this Order, including its fact sheet, attachments, and appendices is a full, true, and correct copy of an Order adopted by the State Water Resources Control Board, on April 1, 2014.

AYE:	Chair Felicia Marcus Vice Chair Frances Spivy-Weber Board Member Tam M. Doduc Board Member Steven Moore
NAY:	None
ABSENT:	Board Member Dorene D'Adamo
ABSTAIN:	None

Jeanine Townsend
Clerk to the Board

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TABLES

ATTACHMENTS AND APPENDICES

I. FINDINGS

A. General Findings

The State Water Resources Control Board (State Water Board) finds that:

1. The Federal Clean Water Act (Clean Water Act) prohibits certain discharges of storm water containing pollutants except in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. (33 U.S.C. §§ 1311, 1342 (also referred to as Clean Water Act §§ 301, 402).) The United States Environmental Protection Agency (U.S. EPA) promulgates federal regulations to implement the Clean Water Act's mandate to control pollutants in storm water discharges. (40 C.F.R. § 122, et seq.) The NPDES permit must require implementation of Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT) to reduce or prevent pollutants in storm water discharges and authorized non-storm water discharges (NSWDs). The NPDES permit must also include additional requirements necessary to implement applicable water quality objectives or water quality standards (water quality standards, collectively).

2. On November 16, 1990, U.S. EPA promulgated Phase I storm water regulations in compliance with section 402(p) of the Clean Water Act. (55 Fed. Reg. 47990, codified at 40 C.F.R. § 122.26.) These regulations require operators of facilities subject to storm water permitting (Dischargers), that discharge storm water associated with industrial activity (industrial storm water discharges), to obtain an NPDES permit. Section 402(p)(3)(A) of the Clean Water Act also requires that permits for discharges associated with industrial activity include requirements necessary to meet water quality standards.

3. Phase II storm water regulations[1] require permitting for storm water discharges from facilities owned and operated by a municipality with a population of less than 100,000. The previous exemption from the Phase I permitting requirements under section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 was eliminated.

4. This Order (General Permit) is an NPDES General Permit issued in compliance with section 402 of the Clean Water Act and shall take effect on July 1, 2015, provided that the Regional Administrator of U.S. EPA has no objection. If the U.S. EPA Regional Administrator has an objection, this General Permit will not become effective until the objection is withdrawn.

5. This action to adopt an NPDES General Permit is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code, § 21000, et seq.) in accordance with section 13389 of the Water Code. (See *County of*

[1] U.S. EPA. Final NPDES Phase II Rule. <http://cfpub.epa.gov/npdes/stormwater/swfinal.cfm>. [as of February 4, 2014]

Los Angeles v. California State Water Resources Control Bd. (2006) 143 Cal.App.4th 985.)

6. State Water Board Order 97-03-DWQ is rescinded as of the effective date of this General Permit (July 1, 2015) except for Order 97-03-DWQ's requirement that annual reports be submitted by July1, 2015 and except for enforcement purposes.

7. Effective July 1, 2015, the State Water Board and the Regional Water Quality Control Boards (Regional Water Boards) (Water Boards, collectively) will enforce the provisions herein.

8. This General Permit authorizes discharges of industrial storm water to waters of the United States, so long as those discharges comply with all requirements, provisions, limitations, and prohibitions in this General Permit.

9. Industrial activities covered under this General Permit are described in Attachment A.

10. The Fact Sheet for this Order is incorporated as findings of this General Permit.

11. Acronyms are defined in Attachment B and terms used in this General Permit are defined in Attachment C.

12. This General Permit regulates industrial storm water discharges and authorized NSWDs from specific categories of industrial facilities identified in Attachment A hereto, and industrial storm water discharges and authorized NSWDs from facilities designated by the Regional Water Boards to obtain coverage under this General Permit. This General Permit does not apply to industrial storm water discharges and NSWDs that are regulated by other individual or general NPDES permits

13. This General Permit does not preempt or supersede the authority of municipal agencies to prohibit, restrict, or control industrial storm water discharges and authorized NSWDs that may discharge to storm water conveyance systems or other watercourses within their jurisdictions as allowed by state and federal law.

14. All terms defined in the Clean Water Act, U.S. EPA regulations, and the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000, et seq.) will have the same definition in this General Permit unless otherwise stated.

15. Pursuant to 40 Code of Federal Regulations section 131.12 and State Water Board Resolution 68-16, which incorporates the requirements of 40 Code of Federal Regulations section 131.12 where applicable, the State Water Board finds that discharges in compliance with this General Permit will not result in the lowering of water quality to a level that does not achieve water quality objectives and protect beneficial uses. Any degradation of water quality from existing high quality water to a level that achieves water quality objectives and

protects beneficial uses is appropriate to support economic development. This General Permit's requirements constitute best practicable treatment or control for discharges of industrial storm water and authorized non-storm water discharges, and are therefore consistent with those provisions.

16. Compliance with any specific limits or requirements contained in this General Permit does not constitute compliance with any other applicable permits.

17. This General Permit requires that the Discharger certify and submit all Permit Registration Documents (PRDs) for Notice of Intent (NOI) and No Exposure Certification (NEC) coverage via the State Water Board's Storm Water Multiple Application and Report Tracking System (SMARTS) website. (See Attachment D for an example of the information required to be submitted in the PRDs via SMARTS.) All other documents required by this General Permit to be electronically certified and submitted via SMARTS can be submitted by the Discharger or by a designated Duly Authorized Representative on behalf of the Discharger. Electronic reporting is required to reduce the state's reliance on paper, to improve efficiency, and to make such General Permit documents more easily accessible to the public and the Water Boards.

18. All information provided to the Water Boards shall comply with the Homeland Security Act and all other federal law that concerns security in the United States, as applicable.

B. Industrial Activities Not Covered Under this General Permit

19. Discharges of storm water from areas on tribal lands are not covered under this General Permit. Storm water discharges from industrial facilities on tribal lands are regulated by a separate NPDES permit issued by U.S. EPA.

20. Discharges of storm water regulated under another individual or general NPDES permit adopted by the State Water Board or Regional Water Board are not covered under this General Permit, including the State Water Board NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities.

21. Storm water discharges to combined sewer systems are not covered under this General Permit. These discharges must be covered by an individual permit. (40 C.F.R. § 122.26(a)(7).)

22. Conveyances that discharge storm water runoff combined with municipal sewage are not covered under this General Permit.

23. Discharges of storm water identified in Clean Water Act section 402(l) (33 U.S.C. § 1342(l)) are not covered under this General Permit.

24. Facilities otherwise subject to this General Permit but for which a valid Notice of Non-Applicability (NONA) has been certified and submitted via SMARTS, by the Entity are not covered under this General Permit. Entities (See Section XX.C.1 of this General Permit) who are claiming "No Discharge"

through the NONA shall meet the eligibility requirements and provide a No Discharge Technical Report in accordance with Section XX.C.

25. This General Permit does not authorize discharges of dredged or fill material regulated by the US Army Corps of Engineers under section 404 of the Clean Water Act and does not constitute a water quality certification under section 401 of the Clean Water Act.

C. Discharge Prohibitions

26. Pursuant to section 13243 of the Water Code, the State Water Board may specify certain conditions or areas where the discharge of waste, or certain types of waste, is prohibited.

27. With the exception of certain authorized NSWDs as defined in Section IV, this General Permit prohibits NSWDs. The State Water Board recognizes that certain NSWDs should be authorized because they are not generated by industrial activity, are not significant sources of pollutants when managed appropriately, and are generally unavoidable because they are related to safety or would occur regardless of industrial activity. Prohibited NSWDs may be authorized under other individual or general NPDES permits, or waste discharge requirements issued by the Water Boards.

28. Prohibited NSWDs are referred to as unauthorized NSWDs in this General Permit. Unauthorized NSWDs shall be either eliminated or permitted by a separate NPDES permit. Unauthorized NSWDs may contribute significant pollutant loads to receiving waters. Measures to control sources of unauthorized NSWDs such as spills, leakage, and dumping, must be addressed through the implementation of Best Management Practices (BMPs).

29. This General Permit incorporates discharge prohibitions contained in water quality control plans, as implemented by the Water Boards.

30. Direct discharges of waste, including industrial storm water discharges, to Areas of Special Biological Significance (ASBS) are prohibited unless the Discharger has applied for and the State Water Board has granted an exception to the State Water Board's 2009 Water Quality Control Plan for Ocean Waters of California as amended by State Water Board Resolution 2012-0056 (California Ocean Plan)[2] allowing the discharge.

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[2] State Water Resources Control Board. Ocean Standards Web Page. <http://www.waterboards.ca.gov/water_issues/programs/ocean/>. [as of February 4, 2014].
State Water Resources Control Board. Water Quality Control Plan for Ocean Waters of California 2009. <http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/2009_cop_adoptedeffective_usepa.pdf>. [as of February 4, 2014].
State Water Resources Control Board. Resolution 2012-0056. <http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012_0056.pdf>. [as of February 4, 2014].

D. Effluent Limitations

31. Section 301(b) of the Clean Water Act and 40 Code of Federal Regulations section require NPDES permits to include technology-based requirements at a minimum, and any more stringent effluent limitations necessary for receiving waters to meet applicable water quality standards. Clean Water Act section 402(p)(3)(A) requires that discharges of storm water runoff from industrial facilities comply with Clean Water Act section 301.

32. This General Permit requires control of pollutant discharges using BAT and BCT to reduce and prevent discharges of pollutants, and any more stringent effluent limitations necessary for receiving waters to meet applicable water quality standards.

33. It is not feasible for the State Water Board to establish numeric technology based effluent limitations for discharges authorized by this General Permit at this time. The rationale for this determination is discussed in detail in the Fact Sheet of this General Permit. Therefore, this General Permit requires Dischargers to implement minimum BMPs and applicable advanced BMPs as defined in Section X.H (collectively, BMPs) to comply with the requirements of this General Permit. This approach is consistent with U.S. EPA's 2008 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (2008 MSGP).

34. 40 Code of Federal Regulations section 122.44(d) requires that NPDES permits include Water Quality Based Effluent Limitations (WQBELs) to attain and maintain applicable numeric and narrative water quality standards for receiving waters.

35. Where numeric water quality criteria have not been established, 40 Code of Federal Regulations section 122.44(d)(1)(vi) provides that WQBELs may be established using U.S. EPA criteria guidance under section 304(a) of the Clean Water Act, a proposed state criteria or policy interpreting narrative criteria supplemented with other relevant information, and/or an indicator parameter.

36. This General Permit requires Dischargers to implement BMPs when necessary, in order to support attainment of water quality standards. The use of BMPs to control or abate the discharge of pollutants is authorized by 40 Code of Federal Regulations section 122.44(k)(3) because numeric effluent limitations are infeasible and implementation of BMPs is reasonably necessary to achieve effluent limitations and water quality standards, and to carry out the purposes and intent of the Clean Water Act. (40 C.F.R. § 122.44(k)(4).)

E. Receiving Water Limitations

37. This General Permit requires compliance with receiving water limitations based on water quality standards. The primary receiving water limitation requires that industrial storm water discharges and authorized NSWDs not

cause or contribute to an exceedance of applicable water quality standards. Water quality standards apply to the quality of the receiving water, not the quality of the industrial storm water discharge. Therefore, compliance with the receiving water limitations generally cannot be determined solely by the effluent water quality characteristics. If any Discharger's storm water discharge causes or contributes to an exceedance of a water quality standard, that Discharger must implement additional BMPs or other control measures in order to attain compliance with the receiving water limitation. Compliance with water quality standards may, in some cases, require Dischargers to implement controls that are more protective than controls implemented solely to comply with the technology-based requirements in this General Permit.

F. Total Maximum Daily Loads (TMDLs)

38. TMDLs relate to the maximum amount of a pollutant that a water body can receive and still attain water quality standards. A TMDL is defined as the sum of the allowable loads of a single pollutant from all contributing point sources (the waste load allocations) and non-point sources (load allocations), plus the contribution from background sources. (40 C.F.R. § 130.2(i).) Discharges addressed by this General Permit are considered to be point source discharges, and therefore must comply with effluent limitations that are "consistent with the assumptions and requirements of any available waste load allocation for the discharge prepared by the state and approved by U.S. EPA pursuant to 40 Code of Federal Regulations section 130.7. (40 C.F.R. § 122.44 (d)(1)(vii).) In addition, Water Code section 13263, subdivision (a), requires that waste discharge requirements implement any relevant water quality control plans. Many TMDLs contained in water quality control plans include implementation requirements in addition to waste load allocations. Attachment E of this General Permit lists the watersheds with U.S. EPA-approved and U.S. EPA-established TMDLs that include requirements, including waste load allocations, for Dischargers covered by this General Permit.

39. The State Water Board recognizes that it is appropriate to develop TMDL-specific permit requirements derived from each TMDL's waste load allocation and implementation requirements, in order to provide clarity to Dischargers regarding their responsibilities for compliance with applicable TMDLs. The development of TMDL-specific permit requirements is subject to public noticing requirements and a corresponding public comment period. Due to the number and variety of Dischargers subject to a wide range of TMDLs, development of TMDL-specific permit requirements for each TMDL listed in Attachment E will severely delay the reissuance of this General Permit. Because most of the TMDLs were established by the Regional Water Boards, and because some of the waste load allocations and/or implementation requirements may be shared by multiple Dischargers, the development of TMDL-specific permit requirements is best coordinated at the Regional Water Board level.

40. State and Regional Water Board staff will develop proposed TMDL-specific permit requirements (including monitoring and reporting requirements) for each of the TMDLs listed in Attachment E. After conducting a 30-day public comment period, the Regional Water Boards will submit to the State Water Board proposed TMDL-specific permit requirements for adoption by the State Water Board into this General Permit by July 1, 2016. The Regional Water Boards may also include proposed TMDL-specific monitoring requirements for inclusion in this General Permit, or may issue Regional Water Board orders pursuant to Water Code section 13383 requiring TMDL-specific monitoring. The proposed TMDL-specific permit requirements shall have no force or effect until adopted, with or without modification, by the State Water Board. Consistent with the 2008 MSGP, Dischargers are not required to take any additional actions to comply with the TMDLs listed in Attachment E until the State Water Board reopens this General Permit and includes TMDL-specific permit requirements, unless notified otherwise by a Regional Water Board.

41. The Regional Water Boards shall submit to the State Water Board the following information for each of the TMDLs listed in Attachment E:

    a. Proposed TMDL-specific permit, monitoring and reporting requirements applicable to industrial storm water discharges and NSWDs authorized under this General Permit, including compliance schedules and deliverables consistent with the TMDLs. TMDL-specific permit requirements are not limited by the BAT/BCT technology-based standards;

    b. An explanation of how the proposed TMDL-specific permit requirements, compliance schedules, and deliverables are consistent with the assumptions and requirements of any applicable waste load allocation and implement each TMDL; and,

    c. Where a BMP-based approach is proposed, an explanation of how the proposed BMPs will be sufficient to implement applicable waste load allocations.

42. Upon receipt of the information described in Finding 40, and no later than July 1, 2016, the State Water Board will issue a public notice and conduct a public comment period for the reopening of this General Permit to amend Attachment E, the Fact Sheet, and other provisions as necessary for incorporation of TMDL-specific permit requirements into this General Permit. Attachment E may also be subsequently reopened during the term of this General Permit to incorporate additional TMDL-specific permit requirements.

G. Discharges Subject to the California Ocean Plan

43. On October 16, 2012 the State Water Board amended the California Ocean Plan. The amended California Ocean Plan requires industrial storm water dischargers with outfalls discharging to ocean waters to comply with the

California Ocean Plan's model monitoring provisions. These provisions require Dischargers to: (a) monitor runoff for specific parameters at all outfalls from two storm events per year, and collect at least one representative receiving water sample per year, (b) conduct specified toxicity monitoring at certain types of outfalls at a minimum of once per year, and (c) conduct marine sediment monitoring for toxicity under specific circumstances. The California Ocean Plan provides conditions under which some of the above monitoring provisions may be waived by the Water Boards.

44. This General Permit requires Dischargers with outfalls discharging to ocean waters that are subject to the model monitoring provisions of the California Ocean Plan to develop and implement a monitoring plan in compliance with those provisions and any additional monitoring requirements established pursuant to Water Code section 13383. Dischargers that have not developed and implemented a monitoring program in compliance with the California Ocean Plan's model monitoring provisions by July 1, 2015 (the effective date of this General Permit), or seven (7) days prior to commencing operations, whichever is later, are ineligible to obtain coverage under this General Permit.

45. The California Ocean Plan prohibits the direct discharge of waste to ASBS. ASBS are defined in California Ocean Plan as "those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable."

46. The California Ocean Plan authorizes the State Water Board to grant an exception to Ocean Plan provisions where the board determines that the exception will not compromise protection of ocean waters for beneficial uses and the public interest will be served.

47. On March 20, 2012, the State Water Board adopted Resolution 2012-0012 which contains exceptions to the California Ocean Plan for specific discharges of storm water and non-point sources. This resolution also contains the special protections that are to be implemented for those discharges to ASBS.

48. This General Permit requires Dischargers who have been granted an exception to the Ocean Plan authorizing the discharges to ASBS by the State Water Board to comply with the requirements contained in Section VIII.B of this General Permit.

H. Training

49. To improve compliance and maintain consistent implementation of this General Permit, Dischargers are required to designate a Qualified Industrial Storm Water Practitioner (QISP) for each facility the Discharger operates that has entered Level 1 status in the Exceedance Response Action (ERA) process as described in Section XII of this General Permit. A QISP may be assigned to more than one facility. In order to qualify as a QISP, a State

Water Board-sponsored or approved training course must be completed. A competency exam may be required by the State Water Board to demonstrate sufficient knowledge of the QISP course material.

50. A QISP must assist the Discharger in completing the Level 1 status and Level 2 status ERA requirements as specified in Section XII of this General Permit. A QISP is also responsible for assisting New Dischargers that will be discharging to an impaired water body with a 303(d) listed impairment, demonstrate eligibility for coverage through preparing the data and/or information required in Section VII.B.

51. A Compliance Group Leader, as defined in Section XIV of this General Order must complete a State Water Board sponsored or approved training program for Compliance Group Leaders.

52. All engineering work subject to the Professional Engineers Act (Bus. & Prof. Code § 6700, et seq.) and required by this General Permit shall be performed by a California licensed professional engineer.

53. California licensed professional civil, industrial, chemical, and mechanical engineers and geologists have licenses that have professional overlap with the topics of this General Permit. The California Department of Consumer Affairs, Board for Professional Engineers, Land Surveyors and Geologists (CBPELSG) provides the licensure and regulation of professional civil, industrial, chemical, and mechanical engineers and professional geologists in California. The State Water Board is developing a specialized self-guided State Water Board-sponsored registration and training program specifically for these CPBELSG licensed engineers and geologists in good standing with CBPELSG.

I. Storm Water Pollution Prevention Plan (SWPPP) Requirements

54. This General Permit requires the development of a site-specific SWPPP in accordance with Section X of this General Permit. The SWPPP must include the information needed to demonstrate compliance with the requirements of this General Permit. The SWPPP must be submitted electronically via SMARTS, and a copy be kept at the facility. SWPPP revisions shall be completed in accordance with Section X.B of this General Permit

J. Sampling, Visual Observations, Reporting and Record Keeping

55. This General Permit complies with 40 Code of Federal Regulations section 122.44(i), which establishes monitoring requirements that must be included in storm water permits. Under this General Permit, Dischargers are required to: (a) conduct an Annual Comprehensive Facility Compliance Evaluation (Annual Evaluation) to identify areas of the facility contributing pollutants to industrial storm water discharges, (b) evaluate whether measures to reduce or prevent industrial pollutant loads identified in the Discharger's SWPPP are adequate and properly implemented in accordance with the terms of this

General Permit, and (c) determine whether additional control measures are needed.

56. This General Permit contains monitoring requirements that are necessary to determine whether pollutants are being discharged, and whether response actions are necessary. Data and information resulting from the monitoring will assist in Dischargers' evaluations of BMP effectiveness and compliance with this General Permit. Visual observations are one form of monitoring. This General Permit requires Dischargers to perform a variety of visual observations designed to identify pollutants in industrial storm water discharges and their sources. To comply with this General Permit Dischargers shall: (1) electronically self-report any violations via SMARTS, (2) comply with the Level 1 status and Level 2 status ERA requirements, when applicable, and (3) adequately address and respond to any Regional Water Board comments on the Discharger's compliance reports.

57. Dischargers that meet the requirements of the No Exposure Certification (NEC) Conditional Exclusion set forth in Section XVII of this General Permit are exempt from the SWPPP requirements, sampling requirements, and visual observation requirements in this General Permit.

K. Facilities Subject to Federal Storm Water Effluent Limitation Guidelines (ELGs)

58. U.S. EPA regulations at 40 Code of Federal Regulations Chapter I Subchapter N (Subchapter N) establish technology-based Effluent Limitation Guidelines and New Source Performance Standards (ELGs) for industrial storm water discharges from facilities in specific industrial categories. For these facilities, compliance with the BAT/BCT and ELG requirements constitutes compliance with technology-based requirements of this General Permit.

59. 40 Code of Federal Regulations section 122.44(i)(3) and (4) require storm water permits to require at least one Annual Evaluation and any monitoring requirements for applicable ELGs in Subchapter N. This General Permit requires Dischargers to comply with all applicable ELG requirements found in Subchapter N.

L. Sampling and Analysis Reduction

60. This General Permit reduces the number of qualifying sampling events required to be sampled each year when the Discharger demonstrates: (1) consistent compliance with this General Permit,(2) consistent effluent water quality sampling, and (3) analysis results that do not exceed numerical action levels.

M. Role of Numeric Action Levels (NALs) and Exceedance Response Actions (ERAs)

61. This General Permit incorporates a multiple objective performance measurement system that includes NALs, new comprehensive training requirements, Level 1 ERA Reports, Level 2 ERA Technical Reports, and Level 2 ERA Action Plans. Two objectives of the performance measurement system are to inform Dischargers, the public and the Water Boards on: (1) the overall pollutant control performance at any given facility, and (2) the overall performance of the industrial statewide storm water program. Additionally, the State Water Board expects that this information and assessment process will provide information necessary to determine the feasibility of numeric effluent limitations for industrial dischargers in the next reissuance of this General Permit, consistent with the State Water Board Storm Water Panel of Experts' June 2006 Recommendations.[3]

62. This General Permit contains annual and instantaneous maximum NALs. The annual NALs are established as the 2008 MSGP benchmark values, and are applicable for all parameters listed in Table 2. The instantaneous maximum NALs are calculated from a Water Board dataset, and are only applicable for Total Suspended Solids (TSS), Oil and Grease (O&G), and pH. An NAL exceedance is determined as follows:

    a. For annual NALs, an exceedance occurs when the average of all analytical results from all samples taken at a facility during a reporting year for a given parameter exceeds an annual NAL value listed in Table 2 of this General Permit; or,

    b. For the instantaneous maximum NALs, an exceedance occurs when two or more analytical results from samples taken for any parameter within a reporting year exceed the instantaneous maximum NAL value (for Total Suspended Solids, and Oil and Grease), or are outside of the instantaneous maximum NAL range (for pH) listed in Table 2 of this General Permit. For the purposes of this General Permit, the reporting year is July 1 through June 30.

63. The NALs are not intended to serve as technology-based or water quality-based numeric effluent limitations. The NALs are not derived directly from either BAT/BCT requirements or receiving water objectives. NAL exceedances defined in this General Permit are not, in and of themselves, violations of this General Permit. A Discharger that does not fully comply with the Level 1 status and/or Level 2 status ERA requirements, when required by the terms of this General Permit, is in violation of this General Permit.

64. ERAs are designed to assist Dischargers in complying with this General Permit. Dischargers subject to ERAs must evaluate the effectiveness of their

[3] State Water Board Storm Water Panel of Experts, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 19, 2006) <http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/numeric/swpanel_final_report.pdf> [as of February 4, 2014].

BMPs being implemented to ensure they are adequate to achieve compliance with this General Permit.

65. U.S. EPA regulations at Subchapter N establish ELGs for storm water discharges from facilities in 11 industrial categories. Dischargers subject to these ELGs are required to comply with the applicable requirements.

66. Exceedances of the NALs that are attributable solely to pollutants originating from non-industrial pollutant sources (such as run-on from adjacent facilities, non-industrial portions of the Discharger's property, or aerial deposition) are not a violation of this General Permit because the NALs are designed to provide feedback on industrial sources of pollutants. Dischargers may submit a Non-Industrial Source Pollutant Demonstration as part of their Level 2 ERA Technical Report to demonstrate that the presence of a pollutant causing an NAL exceedance is attributable solely to pollutants originating from non-industrial pollutant sources.

67. A Discharger who has designed, installed, and implemented BMPs to reduce or prevent pollutants in industrial storm water discharges in compliance with this General Permit may submit an Industrial Activity BMPs Demonstration, as part of their Level 2 ERA Technical Report.

68. This General Permit establishes design storm standards for all treatment control BMPs. These design standards are directly based on the standards in State Water Board Order 2000-0011 regarding Standard Urban Storm Water Mitigation Plans (SUSMPs). These design standards are generally expected to be consistent with BAT/BCT, to be protective of water quality, and to be effective for most pollutants. The standards are intended to eliminate the need for most Dischargers to further treat/control industrial storm water discharges that are unlikely to contain pollutant loadings that exceed the NALs set forth in this General Permit.

N. Compliance Groups

69. Compliance Groups are groups of Dischargers (Compliance Group Participants) that share common types of pollutant sources and industrial activity characteristics. Compliance Groups provide an opportunity for the Compliance Group Participants to combine resources and develop consolidated Level 1 ERA Reports for Level 1 NAL exceedances and appropriate BMPs for implementation in response to Level 2 status ERA requirements that are representative of the entire Compliance Group. Compliance Groups also provide the Water Boards and the public with valuable information as to how industrial storm water discharges are affected by non-industrial background pollutant sources (including natural background) and geographic locations. When developing the next reissuance of this General Permit, the State Water Board expects to have a better understanding of the feasibility and benefits of sector-specific and watershed-based permitting alternatives, which may include technology- or water quality-based numeric effluent limitations. The effluent data, BMP performance data

and other information provided from Compliance Groups' consolidated reporting will further assist the State Water Board in addressing sector-specific and watershed-based permitting alternatives.

O. Conditional Exclusion – No Exposure Certification (NEC)

70. Pursuant to U.S. EPA Phase II regulations, all Dischargers subject to this General Permit may qualify for a conditional exclusion from specific requirements if they submit a NEC demonstrating that their facilities have no exposure of industrial activities and materials to storm water discharges.

71. This General Permit requires Dischargers who seek the NEC conditional exclusion to obtain coverage in accordance with Section XVII of this General Permit. Dischargers that meet the requirements of the NEC are exempt from the SWPPP, sampling requirements, and monitoring requirements in this General Permit.

72. Dischargers seeking NEC coverage are required to certify and submit the applicable permit registration documents. Annual inspections, re-certifications, and fees are required in subsequent years. Light industry facility Dischargers excluded from coverage under the previous permit (Order 97-03-DWQ) must obtain the appropriate coverage under this General Permit. Failure to comply with the Conditional Exclusion conditions listed in this General Permit may lead to enforcement for discharging without a permit pursuant to sections 13385 or 13399.25, et seq., of the Water Code. A Discharger with NEC coverage that anticipates a change (or changes) in circumstances that would lead to exposure should register for permit coverage prior to the anticipated changes.

P. Special Requirements for Facilities Handling Plastic Materials

73. Section 13367 of the Water Code requires facilities handling preproduction plastic to implement specific BMPs aimed at minimizing discharges of such materials. The definition of Plastic Materials for the purposes of this General Permit includes the following types of sources of Plastic Materials: virgin and recycled plastic resin pellets, powders, flakes, powdered additives, regrind, dust, and other types of preproduction plastics with the potential to discharge or migrate off-site.

Q. Regional Water Board Authorities

74. Regional Water Boards are primarily responsible for enforcement of this General Permit. This General Permit recognizes that Regional Water Boards have the authority to protect the beneficial uses of receiving waters and prevent degradation of water quality in their region. As such, Regional Water Boards may modify monitoring requirements and review, comment, approve or disapprove certain Discharger submittals required under this General Permit.

IT IS HEREBY ORDERED that all Dischargers subject to this General Permit shall comply with the following conditions and requirements.

II. RECEIVING GENERAL PERMIT COVERAGE

A. Certification

1. For Storm Water Multiple Application and Report Tracking System (SMARTS) electronic account management and security reasons, as well as enforceability of this General Permit, the Discharger's Legally Responsible Person (LRP) of an industrial facility seeking coverage under this General Permit shall certify and submit all Permit Registration Documents (PRDs) for Notice of Intent (NOI) or No Exposure Certification (NEC) coverage. All other documents shall be certified and submitted via SMARTS by the Discharger's (LRP) or by their Duly Authorized Representative in accordance with the Electronic Signature and Certification Requirements in Section XXI.K. All documents required by this General Permit that are certified and submitted via SMARTS shall be in accordance with Section XXI.K.

2. Hereinafter references to certifications and submittals by the Discharger refer to the Discharger's LRP and their Duly Authorized Representative.

B. Coverages

This General Permit includes requirements for two (2) types of permit coverage, NOI coverage and NEC coverage. State Water Board Order 97-03-DWQ (previous permit) remains in effect until July 1, 2015. When PRDs are certified and submitted and the annual fee is received, the State Water Board will assign the Discharger a Waste Discharger Identification (WDID) number.

1. General Permit Coverage (NOI Coverage)

   a. Dischargers that discharge storm water associated with industrial activity to waters of the United States are required to meet all applicable requirements of this General Permit.

   b. The Discharger shall register for coverage under this General Permit by certifying and submitting PRDs via SMARTS (http://smarts.waterboards.ca.gov), which consist of:

      i. A completed NOI and signed certification statement;

      ii. A copy of a current Site Map from the Storm Water Pollution Prevention Plan (SWPPP) in Section X.E;

      iii. A SWPPP (see Section X); and,

c. The Discharger shall pay the appropriate Annual Fee in accordance with California Code of Regulations, title 23, section 2200 et seq.[4]

2. General Permit Coverage (NEC Coverage)

   a. Dischargers that certify their facility has no exposure of industrial activities or materials to storm water in accordance with Section XVII qualify for NEC coverage and are not required to comply with the SWPPP or monitoring requirements of this General Permit.

   b. Dischargers who qualify for NEC coverage shall conduct one Annual Facility Comprehensive Compliance Evaluation (Annual Evaluation) as described in Section XV, pay an annual fee, and certify annually that their facilities continue to meet the NEC requirements.

   c. The Discharger shall submit the following PRDs on or before October 1, 2015 for NEC coverage via SMARTS:

      i. A completed NEC Form (Section XVII.F.1) and signed certification statement (Section XVII.H);

      ii. A completed NEC Checklist (Section XVII.F.2); and

      iii. A current Site Map consistent with requirements in Section X.E.;

   d. The Discharger shall pay the appropriate annual fee in accordance with California Code of Regulations, title 23, section 2200 et seq.[5]

3. General PRD Requirements

   a. Site Maps

      Dischargers registering for NOI or NEC coverage shall prepare a site map(s) as part of their PRDs in accordance with Section X.E. A separate copy of the site map(s) is required to be in the SWPPP. If there is a significant change in the facility layout (e.g., new building, change in storage locations, boundary change, etc.) a revision to the site map is required and shall be certified and submitted via SMARTS.

   b. A Discharger shall submit a single set of PRDs for coverage under this General Permit for multiple industrial activities occurring at the same facility.

   c. Any information provided to the Water Boards by the Discharger shall comply with the Homeland Security Act and other federal law that

[4] Annual fees must be mailed or sent electronically using the State Water Boards' Electronic Funds Transfer (EFT) system in SMARTS.
[5] See footnote 4.

addresses security in the United States; any information that does not comply should not be submitted in the PRDs. The Discharger must provide justification to the Regional Water Board regarding redacted information within any submittal.

d. Dischargers may redact trade secrets from information that is submitted via SMARTS. Dischargers who certify and submit redacted information via SMARTS must include a general description of the redacted information and the basis for the redaction in the version that is submitted via SMARTS. Dischargers must submit complete and un-redacted versions of the information that are clearly labeled "CONFIDENTIAL" to the Regional Water Board within 30 days of the submittal of the redacted information. All information labeled "CONFIDENTIAL" will be maintained by the Water Boards in a separate, confidential file.

4. Schedule for Submitting PRDs - Existing Dischargers Under the Previous Permit.

a. Existing Dischargers[6] with coverage under the previous permit shall continue coverage under the previous permit until July 1, 2015. All waste discharge requirements and conditions of the previous permit are in effect until July 1, 2015.

b. Existing Dischargers with coverage under the previous permit shall register for NOI coverage by July 1, 2015 or for NEC coverage by October 1, 2015. Existing Dischargers previously listed in Category 10 (Light Industry) of the previous permit, and continue to have no exposure to industrial activities and materials, have until October 1, 2015 to register for NEC coverage.

c. Existing Dischargers with coverage under the previous permit, that do not register for NOI coverage by July 1, 2015, may have their permit coverage administratively terminated as soon as July 1, 2015.

d. Existing Dischargers with coverage under the previous permit that are eligible for NEC coverage but do not register for NEC coverage by October 1, 2015 may have their permit coverage administratively terminated as soon as October 1, 2015.

e. Existing Dischargers shall continue to comply with the SWPPP requirements in State Water Board Order 97-03-DWQ up to, but no later than, June 30, 2015.

[6] Existing Dischargers are Dischargers with an active Notice of Intent (permit coverage) under the previous permit (97-03-DWQ) prior to the effective date of this General Permit.

f. Existing Dischargers shall implement an updated SWPPP in accordance with Section X by July 1, 2015.

g. Existing Dischargers that submit a Notice of Termination (NOT) under the previous permit prior to July 1, 2015 and that receive NOT approval from the Regional Water Board are not subject to this General Permit unless they subsequently submitted new PRDs.

5. Schedule for Submitting PRDs - New Dischargers Obtaining Coverage On or After July 1, 2015

   New Dischargers registering for NOI coverage on or after July 1, 2015 shall certify and submit PRDs via SMARTS at least seven (7) days prior to commencement of industrial activities or on July 1, 2015, whichever comes later.

   a. New Dischargers registering for NEC coverage shall electronically certify and submit PRDs via SMARTS by October 1, 2015, or at least seven (7) days prior to commencement of industrial activities, whichever is later.

C. Termination and Changes to General Permit Coverage

1. Dischargers with NOI or NEC coverage shall request termination of coverage under this General Permit when either (a) operation of the facility has been transferred to another entity, (b) the facility has ceased operations, completed closure activities, and removed all industrial related pollutants, or (c) the facility's operations have changed and are no longer subject to the General Permit. Dischargers shall certify and submit a Notice of Termination via SMARTS. Until a valid NOT is received, the Discharger remains responsible for compliance with this General Permit and payment of accrued annual fees.

2. Whenever there is a change to the facility location, the Discharger shall certify and submit new PRDs via SMARTS. When ownership changes, the prior Discharger (seller) must inform the new Discharger (buyer) of the General Permit applications and regulatory coverage requirements. The new Discharger must certify and submit new PRDs via SMARTS to obtain coverage under this General Permit.

3. Dischargers with NOI coverage where the facility qualifies for NEC coverage in accordance with Section XVII of this General Permit, may register for NEC coverage via SMARTS. Such Dischargers are not required to submit an NOT to cancel NOI coverage.

4. Dischargers with NEC coverage, where changes in the facility and/or facility operations occur, which result in NOI coverage instead of NEC coverage, shall register for NOI coverage via SMARTS. Such Dischargers are not required to submit an NOT to cancel NEC coverage.

5. Dischargers shall provide additional information supporting an NOT, or revise their PRDs via SMARTS, upon request by the Regional Water Board.

6. Dischargers that are denied approval of a submitted NOT or registration for NEC coverage by the Regional Water Board, shall continue compliance with this General Permit under their existing NOI coverage.

7. New Dischargers (Dischargers with no previous NOI or NEC coverage) shall register for NOI coverage if the Regional Water Board denies NEC coverage.

D. Preparation Requirements

1. The following documents shall be certified and submitted by the Discharger via SMARTS:

   a. Annual Reports (Section XVI) and SWPPPs (Section X);

   b. NOTs;

   c. Sampling Frequency Reduction Certification (Section XI.C.7);

   d. Level 1 ERA Reports (Section XII.C) prepared by a QISP;

   e. Level 2 ERA Technical Reports and Level 2 ERA Action Plans (Sections XII.D.1-2) prepared by a QISP; and,

   f. SWPPPs for inactive mining operations as described in Section XIII, signed (wet signature and license number) by a California licensed professional engineer.

2. The following documents shall be signed (wet signature and license number) by a California licensed professional engineer:

   a. Calculations for Dischargers subject to Subchapter N in accordance with Section XI.D;

   b. Notice of Non-Applicability (NONA) Technical Reports described in Section XX.C for facilities that are engineered and constructed to have contained the maximum historic precipitation event (or series of events) using the precipitation data collected from the National Oceanic and Atmospheric Agency's website;

   c. NONA Technical Reports described in Section XX.C for facilities located in basins or other physical locations that are not tributaries or hydrologically connected to waters of the United States; and,

   d. SWPPPs for inactive mines described in Section XIII.

III. DISCHARGE PROHIBITIONS

A. All discharges of storm water to waters of the United States are prohibited except as specifically authorized by this General Permit or another NPDES permit.

B. Except for non-storm water discharges (NSWDs) authorized in Section IV, discharges of liquids or materials other than storm water, either directly or indirectly to waters of the United States, are prohibited unless authorized by another NPDES permit. Unauthorized NSWDs must be either eliminated or authorized by a separate NPDES permit.

C. Industrial storm water discharges and authorized NSWDs that contain pollutants that cause or threaten to cause pollution, contamination, or nuisance as defined in section 13050 of the Water Code, are prohibited.

D. Discharges that violate any discharge prohibitions contained in applicable Regional Water Board Water Quality Control Plans (Basin Plans), or statewide water quality control plans and policies are prohibited.

E. Discharges to ASBS are prohibited in accordance with the California Ocean Plan, unless granted an exception by the State Water Board and in compliance with the Special Protections contained in Resolution 2012-0012.

F. Industrial storm water discharges and NSWDs authorized by this General Permit that contain hazardous substances equal to or in excess of a reportable quantity listed in 40 Code of Federal Regulations sections 110.6, 117.21, or 302.6 are prohibited.

IV. AUTHORIZED NON-STORM WATER DISCHARGES (NSWDs)

A. The following NSWDs are authorized provided they meet the conditions of Section IV.B:

1. Fire-hydrant and fire prevention or response system flushing;

2. Potable water sources including potable water related to the operation, maintenance, or testing of potable water systems;

3. Drinking fountain water and atmospheric condensate including refrigeration, air conditioning, and compressor condensate;

4. Irrigation drainage and landscape watering provided all pesticides, herbicides and fertilizers have been applied in accordance with the manufacturer's label;

5. Uncontaminated natural springs, groundwater, foundation drainage, footing drainage;

6. Seawater infiltration where the seawater is discharged back into the source: and,

7. Incidental windblown mist from cooling towers that collects on rooftops or adjacent portions of your facility, but not intentional discharges from the cooling tower (e.g., "piped" cooling tower blowdown or drains).

B. The NSWDs identified in Section IV.A are authorized by this General Permit if the following conditions are met:

1. The authorized NSWDs are not in violation of any Regional Water Board Water Quality Control Plans (Basin Plans) or other requirements, or statewide water quality control plans or policies requirement;

2. The authorized NSWDs are not in violation of any municipal agency ordinance or requirements;

3. BMPs are included in the SWPPP and implemented to:

   a. Reduce or prevent the contact of authorized NSWDs with materials or equipment that are potential sources of pollutants;

   b. Reduce, to the extent practicable, the flow or volume of authorized NSWDs;

   c. Ensure that authorized NSWDs do not contain quantities of pollutants that cause or contribute to an exceedance of a water quality standards; and,

   d. Reduce or prevent discharges of pollutants in authorized NSWDs in a manner that reflects best industry practice considering technological availability and economic practicability and achievability.

4. The Discharger conducts monthly visual observations (Section XI.A.1) of NSWDs and sources to ensure adequate BMP implementation and effectiveness; and,

5. The Discharger reports and describes all authorized NSWDs in the Annual Report.

C. Firefighting related discharges are not subject to this General Permit and are not subject to the conditions of Section IV.B. These discharges, however, may be subject to Regional Water Board enforcement actions under other sections of the Water Code. Firefighting related discharges that are contained and are later discharged may be subject to municipal agency ordinances and/or Regional Water Board requirements.

V. EFFLUENT LIMITATIONS

A. Dischargers shall implement BMPs that comply with the BAT/BCT requirements of this General Permit to reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability.

B. Industrial storm water discharges from facilities subject to storm water ELGs in Subchapter N shall not exceed those storm water ELGs. The ELGs for industrial storm water discharges subject to Subchapter N are in Attachment F of this General Permit.

C. Dischargers located within a watershed for which a Total Maximum Daily Load (TMDL) has been approved by U.S. EPA, shall comply with any applicable TMDL-specific permit requirements that have been incorporated into this General Permit in accordance with Section VII.A. Attachment E contains a reference list of potential TMDLs that may apply to Dischargers subject to this General Permit.

VI. RECEIVING WATER LIMITATIONS

A. Dischargers shall ensure that industrial storm water discharges and authorized NSWDs do not cause or contribute to an exceedance of any applicable water quality standards in any affected receiving water.

B. Dischargers shall ensure that industrial storm water discharges and authorized NSWDs do not adversely affect human health or the environment.

C. Dischargers shall ensure that industrial storm water discharges and authorized NSWDs do not contain pollutants in quantities that threaten to cause pollution or a public nuisance.

VII. TOTAL MAXIMUM DAILY LOADS (TMDLs)

A. Implementation

1. The State Water Board shall reopen and amend this General Permit, including Attachment E, the Fact Sheet and other applicable Permit provisions as necessary, in order to incorporate TMDL-specific permit requirements, as described in Findings 38 through 42. Once this General Permit is amended, Dischargers shall comply with the incorporated TMDL-specific permit requirements in accordance with any specified compliance schedule(s). TMDL-specific compliance dates that exceed the term of this General Permit may be included for reference, and are enforceable in the event that this General Permit is administratively extended or reissued.

2. The State Water Board may, at its discretion, reopen this General Permit to add TMDL-specific permit requirements to Attachment E, or to incorporate new TMDLs adopted during the term of this General Permit that include requirements applicable to Dischargers covered by this General Permit.

B. New Dischargers applying for NOI coverage under this General Permit that will be discharging to a water body with a 303(d) listed impairment are ineligible for coverage unless the Discharger submits data and/or information, prepared by a QISP, demonstrating that:

1. The Discharger has eliminated all exposure to storm water of the pollutant(s) for which the water body is impaired, has documented the procedures taken to prevent exposure onsite, and has retained such documentation with the SWPPP at the facility;

2. The pollutant for which the water body is impaired is not present at the Discharger's facility, and the Discharger has retained documentation of this finding with the SWPPP at the facility; or,

3. The discharge of any listed pollutant will not cause or contribute to an exceedance of a water quality standard. This is demonstrated if: (1) the discharge complies with water quality standard at the point of discharge, or (2) if there are sufficient remaining waste load allocations in an approved TMDL and the discharge is controlled at least as stringently as similar discharges subject to that TMDL.

VIII. DISCHARGES SUBJECT TO THE CALIFORNIA OCEAN PLAN

A. Discharges to Ocean Waters

1. Dischargers with outfalls discharging to ocean waters that are subject to the model monitoring provisions of the California Ocean Plan shall develop and implement a monitoring plan in compliance with those provisions and any additional monitoring requirements established pursuant to Water Code section 13383. Dischargers who have not developed and implemented a monitoring program in compliance with the California Ocean Plan's model monitoring provisions by July 1, 2015, or seven (7) days prior to commencing of operations, whichever is later, are ineligible to obtain coverage under this General Permit.

2. Dischargers are ineligible for the methods and exceptions provided in Section XI.C of this General permit for any of the outfalls discharging to ocean waters subject to the model monitoring provisions of the California Ocean Plan.

B. Discharge Granted an Exceptions for Areas of Special Biological Significance (ASBS)

Dischargers who were granted an exception to the California Ocean Plan prohibition against direct discharges of waste to an ASBS pursuant to Resolution 2012-0012[7] amended by Resolution 2012-0031[8] shall comply with the conditions and requirements set forth in Attachment G of this General Permit. Any Discharger that applies for and is granted an exception to the California Ocean Plan prohibition after July 1, 2013 shall comply with the conditions and requirements set forth in the granted exception.

IX. TRAINING QUALIFICATIONS

A. General

1. A Qualified Industrial Storm Water Practitioner (QISP) is a person (either the Discharger or a person designated by the Discharger) who has completed a State Water Board-sponsored or approved QISP training course[9], and has registered as a QISP via SMARTS. Upon completed registration the State Water Board will issue a QISP identification number.

2. The Executive Director of the State Water Board or an Executive Officer of a Regional Water Board may rescind any QISP's registration if it is found that the QISP has repeatedly demonstrated an inadequate level of performance in completing the QISP requirements in this General Permit. An individual whose QISP registration has been rescinded may request that the State Water Board review the rescission. Any request for review must be received by the State Water Board no later than 30 days of the date that the individual received written notice of the rescission.

3. Dischargers with Level 1 status shall:

   a. Designate a person to be the facility's QISP and ensure that this person has attended and satisfactorily completed the State Water Board-sponsored or approved QISP training course.

   b. Ensure that the facility's designated QISP provides sufficient training to the appropriate team members assigned to perform activities required by this General Permit.

[7] State Water Resources Control Board. Resolution 2012-0012. <http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012_0012.pdf>. [as of February 4, 2014].
[8] State Water Resources Control Board. Resolution 2012-0031. <http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012_0031.pdf>. [as of February 4, 2014].
[9] A specialized self-guided State Water Board-sponsored registration and training program will be available as an option for CPBELSG licensed professional civil, mechanical, industrial, and chemical engineers and professional geologists by the effective date of this General Permit.

X. Storm Water Pollution Prevention Plan (SWPPP)

A. SWPPP Elements

Dischargers shall develop and implement a site-specific SWPPP for each industrial facility covered by this General Permit that shall contain the following elements, as described further in this Section[10]:

1. Facility Name and Contact Information;
2. Site Map;
3. List of Industrial Materials;
4. Description of Potential Pollution Sources;
5. Assessment of Potential Pollutant Sources;
6. Minimum BMPs;
7. Advanced BMPs, if applicable;
8. Monitoring Implementation Plan;
9. Annual Comprehensive Facility Compliance Evaluation (Annual Evaluation); and,
10. Date that SWPPP was Initially Prepared and the Date of Each SWPPP Amendment, if Applicable.

B. SWPPP Implementation and Revisions

All Dischargers are required to implement their SWPPP by July 1, 2015 or upon commencement of industrial activity. The Discharger shall:

1. Revise their on-site SWPPP whenever necessary;
2. Certify and submit via SMARTS their SWPPP within 30 days whenever the SWPPP contains significant revision(s); and,
3. With the exception of significant revisions, the Discharger is not required to certify and submit via SMARTS their SWPPP revisions more than once every three (3) months in the reporting year.

[10] Appendix 1 (SWPPP Checklist) of this General Permit is provided to assist the Discharger in including information required in the SWPPP. This checklist is not required to be used.

C. SWPPP Performance Standards

1. The Discharger shall ensure a SWPPP is prepared to:

   a. Identify and evaluate all sources of pollutants that may affect the quality of industrial storm water discharges and authorized NSWDs;

   b. Identify and describe the minimum BMPs (Section X.H.1) and any advanced BMPs (Section X.H.2) implemented to reduce or prevent pollutants in industrial storm water discharges and authorized NSWDs. BMPs shall be selected to achieve compliance with this General Permit; and,

   c. Identify and describe conditions or circumstances which may require future revisions to be made to the SWPPP.

2. The Discharger shall prepare a SWPPP in accordance with all applicable SWPPP requirements of this Section. A copy of the SWPPP shall be maintained at the facility.

D. Planning and Organization

1. Pollution Prevention Team

   Each facility must have a Pollution Prevention Team established and responsible for assisting with the implementation of the requirements in this General Permit. The Discharger shall include in the SWPPP detailed information about its Pollution Prevention Team including:

   a. The positions within the facility organization (collectively, team members) who assist in implementing the SWPPP and conducting all monitoring requirements in this General Permit;

   b. The responsibilities, duties, and activities of each of the team members; and,

   c. The procedures to identify alternate team members to implement the SWPPP and conduct required monitoring when the regularly assigned team members are temporarily unavailable (due to vacation, illness, out of town business, or other absences).

2. Other Requirements and Existing Facility Plans

   a. The Discharger shall ensure its SWPPP is developed, implemented, and revised as necessary to be consistent with any applicable municipal, state, and federal requirements that pertain to the requirements in this General Permit.

   b. The Discharger may include in their SWPPP the specific elements of existing plans, procedures, or regulatory compliance documents that

contain storm water-related BMPs or otherwise relate to the requirements of this General Permit.

c. The Discharger shall properly reference the original sources for any elements of existing plans, procedures, or regulatory compliance documents included as part of their SWPPP and shall maintain a copy of the documents at the facility as part of the SWPPP.

d. The Discharger shall document in their SWPPP the facility's scheduled operating hours as defined in Attachment C. Scheduled facility operating hours that would be considered irregular (temporary, intermittent, seasonal, weather dependent, etc.) shall also be documented in the SWPPP.

E. Site Map

1. The Discharger shall prepare a site map that includes notes, legends, a north arrow, and other data as appropriate to ensure the map is clear, legible and understandable.

2. The Discharger may provide the required information on multiple site maps.

3. The Discharger shall include the following information on the site map:

   a. The facility boundary, storm water drainage areas within the facility boundary, and portions of any drainage area impacted by discharges from surrounding areas. Include the flow direction of each drainage area, on-facility surface water bodies, areas of soil erosion, and location(s) of nearby water bodies (such as rivers, lakes, wetlands, etc.) or municipal storm drain inlets that may receive the facility's industrial storm water discharges and authorized NSWDs;

   b. Locations of storm water collection and conveyance systems, associated discharge locations, and direction of flow. Include any sample locations if different than the identified discharge locations;

   c. Locations and descriptions of structural control measures[11] that affect industrial storm water discharges, authorized NSWDs, and/or run-on;

   d. Identification of all impervious areas of the facility, including paved areas, buildings, covered storage areas, or other roofed structures;

[11] Examples of structural control measures are catch basins, berms, detention ponds, secondary containment, oil/water separators, diversion barriers, etc.

e. Locations where materials are directly exposed to precipitation and the locations where identified significant spills or leaks (Section X.G.1.d) have occurred; and

f. Areas of industrial activity subject to this General Permit. Identify all industrial storage areas and storage tanks, shipping and receiving areas, fueling areas, vehicle and equipment storage/maintenance areas, material handling and processing areas, waste treatment and disposal areas, dust or particulate generating areas, cleaning and material reuse areas, and other areas of industrial activity that may have potential pollutant sources.

F. List of Industrial Materials

The Discharger shall ensure the SWPPP includes a list of industrial materials handled at the facility, and the locations where each material is stored, received, shipped, and handled, as well as the typical quantities and handling frequency.

G. Potential Pollutant Sources

1. Description of Potential Pollutant Sources

   a. Industrial Processes

      The Discharger shall ensure the SWPPP describes each industrial process including: manufacturing, cleaning, maintenance, recycling, disposal, and any other activities related to the process. The type, characteristics, and approximate quantity of industrial materials used in or resulting from the process shall be included. Areas protected by containment structures and the corresponding containment capacity shall be identified and described.

   b. Material Handling and Storage Areas

      The Discharger shall ensure the SWPPP describes each material handling and storage area, including: the type, characteristics, and quantity of industrial materials handled or stored; the shipping, receiving, and loading procedures; the spill or leak prevention and response procedures; and the areas protected by containment structures and the corresponding containment capacity.

   c. Dust and Particulate Generating Activities

      The Discharger shall ensure the SWPPP describes all industrial activities that generate a significant amount of dust or particulate that may be deposited within the facility boundaries. The SWPPP shall describe such industrial activities, including the discharge locations, the source type, and the characteristics of the dust or particulate pollutant.

d. Significant Spills and Leaks

The Discharger shall:

i. Evaluate the facility for areas where spills and leaks can likely occur;

ii. Ensure the SWPPP includes:

a) A list of any industrial materials that have spilled or leaked in significant quantities and have discharged from the facility's storm water conveyance system within the previous five-year period;

b) A list of any toxic chemicals identified in 40 Code of Federal Regulations section 302 that have been discharged from the facilities' storm water conveyance system as reported on U.S. EPA Form R, as well as oil and hazardous substances in excess of reportable quantities (40 C.F.R. §§ 110, 117, and 302) that have discharged from the facility's storm water conveyance system within the previous five-year period;

c) A list of any industrial materials that have spilled or leaked in significant quantities and had the potential to be discharged from the facility's storm water conveyance system within the previous five-year period; and,

iii. Ensure that for each discharge or potential discharge listed above the SWPPP includes the location, characteristics, and approximate quantity of the materials spilled or leaked; approximate quantity of the materials discharged from the facility's storm water conveyance system; the cleanup or remedial actions that have occurred or are planned; the approximate remaining quantity of materials that have the potential to be discharged; and the preventive measures taken to ensure spills or leaks of the material do not reoccur.

e. NSWDs

The Discharger shall:

i. Ensure the SWPPP includes an evaluation of the facility that identifies all NSWDs, sources, and drainage areas;

ii. Ensure the SWPPP includes an evaluation of all drains (inlets and outlets) that identifies connections to the storm water conveyance system;

iii. Ensure the SWPPP includes a description of how all unauthorized NSWDs have been eliminated; and,

iv. Ensure all NSWDs are described in the SWPPP. This description shall include the source, quantity, frequency, and characteristics of the NSWDs, associated drainage area, and whether it is an authorized or unauthorized NSWD in accordance with Section IV.

f. Erodible Surfaces

The Discharger shall ensure the SWPPP includes a description of the facility locations where soil erosion may be caused by industrial activity, contact with storm water, authorized and unauthorized NSWDs, or run-on from areas surrounding the facility.

2. Assessment of Potential Pollutant Sources

a. The Discharger shall ensure that the SWPPP includes a narrative assessment of all areas of industrial activity with potential industrial pollutant sources. At a minimum, the assessment shall include:

i. The areas of the facility with likely sources of pollutants in industrial storm water discharges and authorized NSWDs;

ii. The pollutants likely to be present in industrial storm water discharges and authorized NSWDs;

iii. The approximate quantity, physical characteristics (e.g., liquid, powder, solid, etc.), and locations of each industrial material handled, produced, stored, recycled, or disposed;

iv. The degree to which the pollutants associated with those materials may be exposed to, and mobilized by contact with, storm water;

v. The direct and indirect pathways by which pollutants may be exposed to storm water or authorized NSWDs;

vi. All sampling, visual observation, and inspection records;

vii. The effectiveness of existing BMPs to reduce or prevent pollutants in industrial storm water discharges and authorized NSWDs;

viii. The estimated effectiveness of implementing, to the extent feasible, minimum BMPs to reduce or prevent pollutants in industrial storm water discharges and authorized NSWDs; and,

ix. The identification of the industrial pollutants related to the receiving waters with 303(d) listed impairments identified in Appendix 3 or approved TMDLs that may be causing or contributing to an exceedance of a water quality standard in the receiving waters.

b. Based upon the assessment above, Dischargers shall identify in the SWPPP any areas of the facility where the minimum BMPs described in

subsection H.1 below will not adequately reduce or prevent pollutants in storm water discharges in compliance with Section V.A. Dischargers shall identify any advanced BMPs, as described in subsection H.2 below, for those areas.

c. Based upon the assessment above, Dischargers shall identify any drainage areas with no exposure to industrial activities and materials in accordance with the definitions in Section XVII.

d. Based upon the assessment above, Dischargers shall identify any additional parameters, beyond the required parameters in Section XI.B.6 that indicate the presence of pollutants in industrial storm water discharges.

H. Best Management Practices (BMPs)

1. Minimum BMPs

The Discharger shall, to the extent feasible, implement and maintain all of the following minimum BMPs to reduce or prevent pollutants in industrial storm water discharges.[12]

a. Good Housekeeping

The Discharger shall:

i. Observe all outdoor areas associated with industrial activity; including storm water discharge locations, drainage areas, conveyance systems, waste handling/disposal areas, and perimeter areas impacted by off-facility materials or storm water run-on to determine housekeeping needs. Any identified debris, waste, spills, tracked materials, or leaked materials shall be cleaned and disposed of properly;

ii. Minimize or prevent material tracking;

iii. Minimize dust generated from industrial materials or activities;

iv. Ensure that all facility areas impacted by rinse/wash waters are cleaned as soon as possible;

v. Cover all stored industrial materials that can be readily mobilized by contact with storm water;

[12] For the purposes of this General Permit, the requirement to implement BMPs "to the extent feasible" requires Dischargers to select, design, install and implement BMPs that reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability.

vi. Contain all stored non-solid industrial materials or wastes (e.g., particulates, powders, shredded paper, etc.) that can be transported or dispersed by the wind or contact with storm water;

vii. Prevent disposal of any rinse/wash waters or industrial materials into the storm water conveyance system;

viii. Minimize storm water discharges from non-industrial areas (e.g., storm water flows from employee parking area) that contact industrial areas of the facility; and,

ix. Minimize authorized NSWDs from non-industrial areas (e.g., potable water, fire hydrant testing, etc.) that contact industrial areas of the facility.

b. Preventive Maintenance

The Discharger shall:

i. Identify all equipment and systems used outdoors that may spill or leak pollutants;

ii. Observe the identified equipment and systems to detect leaks, or identify conditions that may result in the development of leaks;

iii. Establish an appropriate schedule for maintenance of identified equipment and systems; and,

iv. Establish procedures for prompt maintenance and repair of equipment, and maintenance of systems when conditions exist that may result in the development of spills or leaks.

c. Spill and Leak Prevention and Response

The Discharger shall:

i. Establish procedures and/or controls to minimize spills and leaks;

ii. Develop and implement spill and leak response procedures to prevent industrial materials from discharging through the storm water conveyance system. Spilled or leaked industrial materials shall be cleaned promptly and disposed of properly;

iii. Identify and describe all necessary and appropriate spill and leak response equipment, location(s) of spill and leak response equipment, and spill or leak response equipment maintenance procedures; and,

iv. Identify and train appropriate spill and leak response personnel.

d. Material Handling and Waste Management

The Discharger shall:

i. Prevent or minimize handling of industrial materials or wastes that can be readily mobilized by contact with storm water during a storm event;

ii. Contain all stored non-solid industrial materials or wastes (e.g., particulates, powders, shredded paper, etc.) that can be transported or dispersed by the wind or contact with storm water;

iii. Cover industrial waste disposal containers and industrial material storage containers that contain industrial materials when not in use;

iv. Divert run-on and storm water generated from within the facility away from all stockpiled materials;

v. Clean all spills of industrial materials or wastes that occur during handling in accordance with the spill response procedures (Section X.H.1.c); and,

vi. Observe and clean as appropriate, any outdoor material or waste handling equipment or containers that can be contaminated by contact with industrial materials or wastes.

e. Erosion and Sediment Controls

For each erodible surface facility location identified in the SWPPP (Section X.G.1.f), the Discharger shall:

i. Implement effective wind erosion controls;

ii. Provide effective stabilization for inactive areas, finished slopes, and other erodible areas prior to a forecasted storm event;

iii. Maintain effective perimeter controls and stabilize all site entrances and exits to sufficiently control discharges of erodible materials from discharging or being tracked off the site;

iv. Divert run-on and storm water generated from within the facility away from all erodible materials; and,

v. If sediment basins are implemented, ensure compliance with the design storm standards in Section X.H.6.

f. Employee Training Program

The Discharger shall:

i. Ensure that all team members implementing the various compliance activities of this General Permit are properly trained to implement the requirements of this General Permit, including but not limited to: BMP implementation, BMP effectiveness evaluations, visual observations,

and monitoring activities. If a Discharger enters Level 1 status, appropriate team members shall be trained by a QISP;

ii. Prepare or acquire appropriate training manuals or training materials;

iii. Identify which personnel need to be trained, their responsibilities, and the type of training they shall receive;

iv. Provide a training schedule; and,

v. Maintain documentation of all completed training classes and the personnel that received training in the SWPPP.

g. Quality Assurance and Record Keeping

The Discharger shall:

i. Develop and implement management procedures to ensure that appropriate staff implements all elements of the SWPPP, including the Monitoring Implementation Plan;

ii. Develop a method of tracking and recording the implementation of BMPs identified in the SWPPP; and

iii. Maintain the BMP implementation records, training records, and records related to any spills and clean-up related response activities for a minimum of five (5) years (Section XXI.J.4).

2. Advanced BMPs

a. In addition to the minimum BMPs described in Section X.H.1, the Discharger shall, to the extent feasible, implement and maintain any advanced BMPs identified in Section X.G.2.b, necessary to reduce or prevent discharges of pollutants in its storm water discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability.

b. Advanced BMPs may include one or more of the following BMPs:

i. Exposure Minimization BMPs

These include storm resistant shelters (either permanent or temporary) that prevent the contact of storm water with the identified industrial materials or area(s) of industrial activity.

ii. Storm Water Containment and Discharge Reduction BMPs

These include BMPs that divert, infiltrate, reuse, contain, retain, or reduce the volume of storm water runoff. Dischargers are

encouraged to utilize BMPs that infiltrate or reuse storm water where feasible.

iii. Treatment Control BMPs

This is the implementation of one or more mechanical, chemical, biologic, or any other treatment technology that will meet the treatment design standard.

iv. Other Advanced BMPs

Any additional BMPs not described in subsections b.i through iii above that are necessary to meet the effluent limitations of this General Permit.

3. Temporary Suspension of Industrial Activities

For facilities that plan to temporarily suspend industrial activities for ten (10) or more consecutive calendar days during a reporting year, the Discharger may also suspend monitoring if it is infeasible to conduct monitoring while industrial activities are suspended (e.g., the facility is not staffed, or the facility is remote or inaccessible) and the facility has been stabilized. The Discharger shall include in the SWPPP the BMPs necessary to achieve compliance with this General Permit during the temporary suspension of the industrial activity. Once all necessary BMPs have been implemented to stabilize the facility, the Discharger is not required to:

a. Perform monthly visual observations (Section XI.A.1.a.); or,

b. Perform sampling and analysis (Section XI.B.) if it is infeasible to do so (e.g. facility is remotely located).

The Discharger shall upload via SMARTS (7) seven calendar days prior to the planned temporary suspension of industrial activities:

a. SWPPP revisions specifically addressing the facility stabilization BMPs;

b. The justification for why monitoring is infeasible at the facility during the period of temporary suspension of industrial activities;

c. The date the facility is fully stabilized for temporary suspension of industrial activities; and,

d. The projected date that industrial activities will resume at the facility.

Upon resumption of industrial activities at the facility, the Discharger shall, via SMARTS, confirm and/or update the date the facility's industrial activities have resumed. At this time, the Discharger is required to resume all compliance activities under this General Permit.

The Regional Water Boards may review the submitted information pertaining to the temporary suspension of industrial activities. Upon review, the Regional Water Board may request revisions or reject the Discharger's request to temporarily suspend monitoring.

4. BMP Descriptions

   a. The Discharger shall ensure that the SWPPP identifies each BMP being implemented at the facility, including:

      i. The pollutant(s) that the BMP is designed to reduce or prevent in industrial storm water discharges;

      ii. The frequency, time(s) of day, or conditions when the BMP is scheduled for implementation;

      iii. The locations within each area of industrial activity or industrial pollutant source where the BMP shall be implemented;

      iv. The individual and/or position responsible for implementing the BMP;

      v. The procedures, including maintenance procedures, and/or instructions to implement the BMP effectively;

      vi. The equipment and tools necessary to implement the BMP effectively; and,

      vii. The BMPs that may require more frequent visual observations beyond the monthly visual observations as described in Section XI.A.1.

   b. The Discharger shall ensure that the SWPPP identifies and justifies each minimum BMP or applicable advanced BMP not being implemented at the facility because they do not reflect best industry practice considering technological availability and economic practicability and achievability.

   c. The Discharger shall identify any BMPs described in subsection a above that are implemented in lieu of any of the minimum or applicable advanced BMPs.

5. BMP Summary Table

   The Discharger shall prepare a table summarizing each identified area of industrial activity, the associated industrial pollutant sources, the industrial pollutants, and the BMPs being implemented.

6. Design Storm Standards for Treatment Control BMPs

All new treatment control BMPs employed by the Discharger to comply with Section X.H.2 Advanced BMPs and new sediment basins installed after the effective date of this order shall be designed to comply with design storm standards in this Section, except as provided in an Industrial Activity BMP Demonstration (Section XII.D.2.a). A Factor of Safety shall be incorporated into the design of all treatment control BMPs to ensure that storm water is sufficiently treated throughout the life of the treatment control BMPs. The design storm standards for treatment control BMPs are as follows:

a. Volume-based BMPs: The Discharger, at a minimum, shall calculate[13] the volume to be treated using one of the following methods:

i. The volume of runoff produced from an 85th percentile 24-hour storm event, as determined from local, historical rainfall records;

ii. The volume of runoff produced by the 85th percentile 24-hour storm event, determined as the maximized capture runoff volume for the facility, from the formula recommended in the Water Environment Federation's Manual of Practice;[14] or,

iii. The volume of annual runoff required to achieve 80% or more treatment, determined in accordance with the methodology set forth in the latest edition of California Stormwater Best Management Practices Handbook[15], using local, historical rainfall records.

b. Flow-based BMPs: The Discharger shall calculate the flow needed to be treated using one of the following methods:

i. The maximum flow rate of runoff produced from a rainfall intensity of at least 0.2 inches per hour for each hour of a storm event;

ii. The maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity, as determined from local historical rainfall records, multiplied by a factor of two; or,

iii. The maximum flow rate of runoff, as determined using local historical rainfall records, that achieves approximately the same reduction in total pollutant loads as would be achieved by treatment of the 85th percentile hourly rainfall intensity multiplied by a factor of two.

[13] All hydrologic calculations shall be certified by a California licensed professional engineer in accordance with the Professional Engineers Act (Bus. & Prof. Code § 6700, et seq).

[14] Water Environment Federation (WEF). Manual of Practice No. 23/ ASCE Manual of Practice No. 87, cited in chapter 5 (1998 Edition) and Cited in Chapter 3 (2012 Edition) .

[15] California Stormwater Quality Association. Stormwater Best Management Practice New Development and Redevelopment Handbook. < http://www.casqa.org/ >. [as of July 3, 2013].

I. MONITORING IMPLEMENTATION PLAN

The Discharger shall prepare a Monitoring Implementation Plan in accordance with the requirements of this General Permit. The Monitoring Implementation Plan shall be included in the SWPPP and shall include the following items:

1. An identification of team members assigned to conduct the monitoring requirements;

2. A description of the following in accordance with Attachment H:

   a. Discharge locations;

   b. Visual observation procedures; and,

   c. Visual observation response procedures related to monthly visual observations and sampling event visual observations.

3. Justifications for any of the following that are applicable to the facility:

   a. Alternative discharge locations in accordance with Section XI.C.3;

   b. Representative Sampling Reduction in accordance with Section XI.C.4; or,

   c. Qualified Combined Samples in accordance with Section XI.C.5.

4. Procedures for field instrument calibration instructions, including calibration intervals specified by the manufacturer; and,

5. An example Chain of Custody form used when handling and shipping water quality samples to the lab.

XI. MONITORING

A. Visual Observations

1. Monthly Visual Observations

   a. At least once per calendar month, the Discharger shall visually observe each drainage area for the following:

      i. The presence or indications of prior, current, or potential unauthorized NSWDs and their sources;

      ii. Authorized NSWDs, sources, and associated BMPs to ensure compliance with Section IV.B.3; and,

iii. Outdoor industrial equipment and storage areas, outdoor industrial activities areas, BMPs, and all other potential source of industrial pollutants.

b. The monthly visual observations shall be conducted during daylight hours of scheduled facility operating hours and on days without precipitation.

c. The Discharger shall provide an explanation in the Annual Report for uncompleted monthly visual observations.

2. Sampling Event Visual Observations

Sampling event visual observations shall be conducted at the same time sampling occurs at a discharge location. At each discharge location where a sample is obtained, the Discharger shall observe the discharge of storm water associated with industrial activity.

a. The Discharger shall ensure that visual observations of storm water discharged from containment sources (e.g. secondary containment or storage ponds) are conducted at the time that the discharge is sampled.

b. Any Discharger employing volume-based or flow-based treatment BMPs shall sample any bypass that occurs while the visual observations and sampling of storm water discharges are conducted.

c. The Discharger shall visually observe and record the presence or absence of floating and suspended materials, oil and grease, discolorations, turbidity, odors, trash/debris, and source(s) of any discharged pollutants.

d. In the event that a discharge location is not visually observed during the sampling event, the Discharger shall record which discharge locations were not observed during sampling or that there was no discharge from the discharge location.

e. The Discharger shall provide an explanation in the Annual Report for uncompleted sampling event visual observations.

3. Visual Observation Records

The Discharger shall maintain records of all visual observations. Records shall include the date, approximate time, locations observed, presence and probable source of any observed pollutants, name of person(s) that conducted the observations, and any response actions and/or additional SWPPP revisions necessary in response to the visual observations.

4. The Discharger shall revise BMPs as necessary when the visual observations indicate pollutant sources have not been adequately addressed in the SWPPP.

B. Sampling and Analysis

1. A Qualifying Storm Event (QSE) is a precipitation event that:

   a. Produces a discharge for at least one drainage area; and,

   b. Is preceded by 48 hours with no discharge from any drainage area.

2. The Discharger shall collect and analyze storm water samples from two (2) QSEs within the first half of each reporting year (July 1 to December 31), and two (2) QSEs within the second half of each reporting year (January 1 to June 30).

3. Compliance Group Participants are only required to collect and analyze storm water samples from one (1) QSE within the first half of each reporting year (July 1 to December 31) and one (1) QSE within the second half of the reporting year (January 1 to June 30).

4. Except as provided in Section XI.C.4 (Representative Sampling Reduction), samples shall be collected from each drainage area at all discharge locations. The samples must be:

   a. Representative of storm water associated with industrial activities and any commingled authorized NSWDs; or,

   b. Associated with the discharge of contained storm water.

5. Samples from each discharge location shall be collected within four (4) hours of:

   a. The start of the discharge; or,

   b. The start of facility operations if the QSE occurs within the previous 12-hour period (e.g., for storms with discharges that begin during the night for facilities with day-time operating hours). Sample collection is required during scheduled facility operating hours and when sampling conditions are safe in accordance with Section XI.C.6.a.ii.

6. The Discharger shall analyze all collected samples for the following parameters:

   a. Total suspended solids (TSS) and oil and grease (O&G);

   b. pH (see Section XI.C.2);

c. Additional parameters identified by the Discharger on a facility-specific basis that serve as indicators of the presence of all industrial pollutants identified in the pollutant source assessment (Section X.G.2). These additional parameters may be modified (added or removed) in accordance with any updated SWPPP pollutant source assessment;

d. Additional applicable parameters listed in Table 1 below. These parameters are dependent on the facility Standard Industrial Classification (SIC) code(s);

e. Additional applicable industrial parameters related to receiving waters with 303(d) listed impairments or approved TMDLs based on the assessment in Section X.G.2.a.ix. Test methods with lower detection limits may be necessary when discharging to receiving waters with 303(d) listed impairments or TMDLs;

f. Additional parameters required by the Regional Water Board. The Discharger shall contact its Regional Water Board to determine appropriate analytical test methods for parameters not listed in Table 2 below. These analytical test methods will be added to SMARTS; and

g. For discharges subject to Subchapter N, additional parameters specifically required by Subchapter N. If the discharge is subject to ELGs, the Dischargers shall contact the Regional Water Board to determine appropriate analytical methods for parameters not listed in Table 2 below.

7. The Discharger shall select corresponding NALs, analytical test methods,, and reporting units from the list provided in Table 2 below. SMARTS will be updated over time to add additional acceptable analytical test methods. Dischargers may propose an analytical test method for any parameter or pollutant that does not have an analytical test method specified in Table 2 or in SMARTS. Dischargers may also propose analytical test methods with substantially similar or more stringent method detection limits than existing approved analytical test methods. Upon approval, the analytical test method will be added to SMARTS.

8. The Discharger shall ensure that the collection, preservation and handling of all storm water samples are in accordance with Attachment H, Storm Water Sample Collection and Handling Instructions.

9. Samples from different discharge locations shall not be combined or composited except as allowed in Section XI.C.5 (Qualified Combined Samples).

10. The Discharger shall ensure that all laboratory analyses are conducted according to test procedures under 40 Code of Federal Regulations part 136, including the observation of holding times, unless other test procedures have been specified in this General Permit or by the Regional Water Board.

11. Sampling Analysis Reporting

a. The Discharger shall submit all sampling and analytical results for all individual or Qualified Combined Samples via SMARTS within 30 days of obtaining all results for each sampling event.

b. The Discharger shall provide the method detection limit when an analytical result from samples taken is reported by the laboratory as a "non-detect" or less than the method detection limit. A value of zero shall not be reported.

c. The Discharger shall provide the analytical result from samples taken that is reported by the laboratory as below the minimum level (often referred to as the reporting limit) but above the method detection limit.

Reported analytical results will be averaged automatically by SMARTS. For any calculations required by this General Permit, SMARTS will assign a value of zero (0) for all results less than the minimum level as reported by the laboratory.

TABLE 1: Additional Analytical Parameters

SIC code	SIC code Description	Parameters*
102X	Copper Ores	COD; N+N
12XX	Coal Mines	Al; Fe
144X	Sand and Gravel	N+N
207X	Fats and Oils	BOD; COD; N+N
2421	Sawmills & Planning Mills	COD; Zn
2426	Hardwood Dimension	COD
2429	Special Product Sawmills	COD
243X	Millwork, Veneer, Plywood	COD
244X	Wood Containers	COD
245X	Wood Buildings & Mobile Homes	COD
2491	Wood Preserving	As; Cu
2493	Reconstituted Wood Products	COD
263X	Paperboard Mills	COD
281X	Industrial Inorganic Chemicals	Al; Fe; N+N
282X	Plastic Materials, Synthetics	Zn
284X	Soaps, Detergents, Cosmetics	N+N; Zn
287X	Fertilizers, Pesticides, etc.	Fe; N+N; Pb; Zn; P
301X	Tires, Inner Tubes	Zn
302X	Rubber and Plastic Footwear	Zn
305X	Rubber & Plastic Sealers & Hoses	Zn
306X	Misc. Fabricated Rubber Products	Zn
325X	Structural Clay Products	Al
326X	Pottery & Related Products	Al
3297	Non-Clay Refractories	Al
327X	Concrete, Gypsum, Plaster Products (Except 3274)	Fe
3295	Minerals & Earths	Fe
331X	Steel Works, Blast Furnaces, Rolling and Finishing Mills	Al; Zn
332X	Iron and Steel Foundries	Al; Cu; Fe; Zn
335X	Metal Rolling, Drawing, Extruding	Cu; Zn

336X	Nonferrous Foundries (Castings)	Cu; Zn
34XX	Fabricated Metal Products (Except 3479)	Zn; N+N; Fe; Al
3479	Coating and Engraving	Zn; N+N
4953	Hazardous Waste Facilities	NH3; Mg; COD; As; Cn; Pb; HG; Se; Ag
44XX	Water Transportation	Al; Fe; Pb; Zn
45XX	Air Transportation Facilities[16]	BOD; COD; NH3
4911	Steam Electric Power Generating Facilities	Fe
4953	Landfills and Land Application Facilities	Fe
5015	Dismantling or Wrecking Yards	Fe; Pb; Al
5093	Scrap and Waste Materials (not including source-separated recycling)	Fe; Pb; Al; Zn; COD

***Table 1 Parameter Reference**	
Ag – Silver	**Mg** – Magnesium
Al – Aluminum	**N+N** - Nitrate & Nitrite Nitrogen
As – Arsenic	**NH** – Ammonia
BOD – Biochemical Oxygen Demand	**Ni** – Nickel
Cd - Cadmium	**P** – Phosphorus
Cn – Cyanide	**Se** – Selenium
COD – Chemical Oxygen Demand	**TSS** – Total Suspended Solids
Cu – Copper	**Zn** – Zinc
Fe – Iron	**Pb** – Lead
Hg – Mercury	

[16] Only airports (SIC 4512-4581) where a single Discharger, or a combination of permitted facilities use more than 100,000 gallons of glycol-based deicing chemicals and/or 100 tons or more of urea on an average annual basis, are required to monitor these parameters for those outfalls that collect runoff from areas where deicing activities occur.

TABLE 2: Parameter NAL Values, Test Methods, and Reporting Units

PARAMETER	TEST METHOD	REPORTING UNITS	ANNUAL NAL	INSTANTANEOUS MAXIMUM NAL
pH*	See Section XI.C.2	pH units	N/A	Less than 6.0 Greater than 9.0
Suspended Solids (TSS)*, Total	SM 2540-D	mg/L	100	400
Oil & Grease (O&G)*, Total	EPA 1664A	mg/L	15	25
Zinc, Total (H)	EPA 200.8	mg/L	0.26**	
Copper, Total (H)	EPA 200.8	mg/L	0.0332**	
Cyanide, Total	SM 4500–CN C, D, or E	mg/L	0.022	
Lead, Total (H)	EPA 200.8	mg/L	0.262**	
Chemical Oxygen Demand (COD)	SM 5220C	mg/L	120	
Aluminum, Total	EPA 200.8	mg/L	0.75	
Iron, Total	EPA 200.7	mg/L	1.0	
Nitrate + Nitrite Nitrogen	SM 4500-NO3- E	mg/L as N	0.68	
Total Phosphorus	SM 4500-P B+E	mg/L as P	2.0	
Ammonia (as N)	SM 4500-NH3 B+ C or E	mg/L	2.14	
Magnesium, total	EPA 200.7	mg/L	0.064	
Arsenic, Total (c)	EPA 200.8	mg/L	0.15	
Cadmium, Total (H)	EPA 200.8	mg/L	0.0053**	
Nickel, Total (H)	EPA 200.8	mg/l	1.02**	
Mercury, Total	EPA 245.1	mg/L	0.0014	
Selenium, Total	EPA 200.8	mg/L	0.005	
Silver, Total (H)	EPA 200.8	mg/L	0.0183**	
Biochemical Oxygen Demand (BOD)	SM 5210B	mg/L	30	

SM – Standard Methods for the Examination of Water and Wastewater, 18th edition
EPA – U.S. EPA test methods
(H) – Hardness dependent
* Minimum parameters required by this General Permit
**The NAL is the highest value used by U.S. EPA based on their hardness table in the 2008 MSGP.

C. Methods and Exceptions

1. The Discharger shall comply with the monitoring methods in this General Permit and Attachment H.

2. pH Methods

   a. Dischargers that are not subject to Subchapter N ELGs mandating pH analysis related to acidic or alkaline sources and have never entered Level 1 status for pH, are eligible to screen for pH using wide range litmus pH paper or other equivalent pH test kits. The pH screen shall be performed as soon as practicable, but no later than 15 minutes after the sample is collected.

   b. Dischargers subject to Subchapter N ELGs shall either analyze samples for pH using methods in accordance with 40 Code of Federal Regulations 136 for testing storm water or use a calibrated portable instrument for pH.

   c. Dischargers that enter Level 1 status (see Section XII.C) for pH shall, in the subsequent reporting years, analyze for pH using methods in accordance with 40 Code of Federal Regulations 136 or use a calibrated portable instrument for pH.

   d. Dischargers using a calibrated portable instrument for pH shall ensure that all field measurements are conducted in accordance with the accompanying manufacturer's instructions.

3. Alternative Discharge Locations

   a. The Discharger is required to identify, when practicable, alternative discharge locations for any discharge locations identified in accordance with Section XI.B.4 if the facility's discharge locations are:

      i. Affected by storm water run-on from surrounding areas that cannot be controlled; and/or,

      ii. Difficult to observe or sample (e.g. submerged discharge outlets, dangerous discharge location accessibility).

   b. The Discharger shall submit and certify via SMARTS any alternative discharge location or revisions to the alternative discharge locations in the Monitoring Implementation Plan.

4. Representative Sampling Reduction

   a. The Discharger may reduce the number of locations to be sampled in each drainage area (e.g., roofs with multiple downspouts, loading/unloading areas with multiple storm drains) if the industrial

activities, BMPs, and physical characteristics (grade, surface materials, etc.) of the drainage area for each location to be sampled are substantially similar to one another. To qualify for the Representative Sampling Reduction, the Discharger shall provide a Representative Sampling Reduction justification in the Monitoring Implementation Plan section of the SWPPP.

b. The Representative Sampling Reduction justification shall include:

   i. Identification and description of each drainage area and corresponding discharge location(s);

   ii. A description of the industrial activities that occur throughout the drainage area;

   iii. A description of the BMPs implemented in the drainage area;

   iv. A description of the physical characteristics of the drainage area;

   v. A rationale that demonstrates that the industrial activities and physical characteristics of the drainage area(s) are substantially similar; and,

   vi. An identification of the discharge location(s) selected for representative sampling, and rationale demonstrating that the selected location(s) to be sampled are representative of the discharge from the entire drainage area.

c. A Discharger that satisfies the conditions of subsection 4.b.i through v above shall submit and certify via SMARTS the revisions to the Monitoring Implementation Plan that includes the Representative Sampling Reduction justification.

d. Upon submittal of the Representative Sampling Reduction justification, the Discharger may reduce the number of locations to be sampled in accordance with the Representative Sampling Reduction justification. The Regional Water Board may reject the Representative Sampling Reduction justification and/or request additional supporting documentation. In such instances, the Discharger is ineligible for the Representative Sampling Reduction until the Regional Water Board approves the Representative Sampling Reduction justification.

5. Qualified Combined Samples

   a. The Discharger may authorize an analytical laboratory to combine samples of equal volume from as many as four (4) discharge locations if the industrial activities, BMPs, and physical characteristics (grade, surface materials, etc.) within each of the drainage areas are substantially similar to one another.

b. The Qualified Combined Samples justification shall include:

   i. Identification and description of each drainage area and corresponding discharge locations;

   ii. A description of the BMPs implemented in the drainage area;

   iii. A description of the industrial activities that occur throughout the drainage area;

   iv. A description of the physical characteristics of the drainage area; and,

   v. A rationale that demonstrates that the industrial activities and physical characteristics of the drainage area(s) are substantially similar.

c. A Discharger that satisfies the conditions of subsection 5.b.i through iv above shall submit and certify via SMARTS the revisions to the Monitoring Implementation Plan that includes the Qualified Combined Samples justification.

d. Upon submittal of the Qualified Combined Samples justification revisions in the Monitoring Implementation Plan, the Discharger may authorize the lab to combine samples of equal volume from as many as four (4) drainage areas. The Regional Water Board may reject the Qualified Combined Samples justification and/or request additional supporting documentation. In such instances, the Discharger is ineligible for the Qualified Combined Samples justification until the Regional Water Board approves the Qualified Combined Samples justification.

e. Regional Water Board approval is necessary to combine samples from more than four (4) discharge locations.

6. Sample Collection and Visual Observation Exceptions

   a. Sample collection and visual observations are not required under the following conditions:

      i. During dangerous weather conditions such as flooding or electrical storms; or,

      ii. Outside of scheduled facility operating hours. The Discharger is not precluded from collecting samples or conducting visual observations outside of scheduled facility operating hours.

   b. In the event that samples are not collected, or visual observations are not conducted in accordance with Section XI.B.5 due to these exceptions, an explanation shall be included in the Annual Report.

c. Sample collection is not required for drainage areas with no exposure to industrial activities and materials in accordance with the definitions in Section XVII.

7. Sampling Frequency Reduction Certification
   a. Dischargers are eligible to reduce the number of QSEs sampled each reporting year in accordance with the following requirements:

      i. Results from four (4) consecutive QSEs that were sampled (QSEs may be from different reporting years) did not exceed any NALs as defined in Section XII.A; and

      ii. The Discharger is in full compliance with the requirements of this General Permit and has updated, certified and submitted via SMARTS all documents, data, and reports required by this General Permit during the time period in which samples were collected.

   b. The Regional Water Board may notify a Discharger that it may not reduce the number of QSEs sampled each reporting year if the Discharger is subject to an enforcement action.

   c. An eligible Discharger shall certify via SMARTS that it meets the conditions in subsection 7.a above.

   d. Upon Sampling Frequency Reduction certification, the Discharger shall collect and analyze samples from one (1) QSE within the first half of each reporting year (July 1 to December 31), and one (1) QSE within the second half of each reporting year (January 1 to June 30). All other monitoring, sampling, and reporting requirements remain in effect.

   e. Dischargers who participate in a Compliance Group and certify a Sampling Frequency Reduction are only required to collect and analyze storm water samples from one (1) QSE within each reporting year.

   f. A Discharger may reduce sampling per the Sampling Frequency Reduction certification unless notified by the Regional Water Board that: (1) the Sampling Frequency Reduction certification has been rejected or (2) additional supporting documentation must be submitted. In such instances, a Discharger is ineligible for the Sampling Frequency Reduction until the Regional Water Board provides Sampling Frequency Reduction certification approval. Revised Sampling Frequency Reduction certifications shall be certified and submitted via SMARTS by the Discharger.

   g. A Discharger loses its Sampling Frequency Reduction certification if an NAL exceedance occurs (Section XII.A).

D. Facilities Subject to Federal Storm Water Effluent Limitation Guidelines (ELGs)

1. In addition to the other requirements in this General Permit, Dischargers with facilities subject to storm water ELGs in Subchapter N shall:

   a. Collect and analyze samples from QSEs for each regulated pollutant specified in the appropriate category in Subchapter N as specified in Section XI.B;

   b. For Dischargers with facilities subject to 40 Code of Federal Regulations parts 419[17] and 443[18], estimate or calculate the volume of industrial storm water discharges from each drainage area subject to the ELGs and the mass of each regulated pollutant as defined in parts 419 and 443; and,

   c. Ensure that the volume/mass estimates or calculations required in subsection b are completed by a California licensed professional engineer.

2. Dischargers subject to Subchapter N shall submit the information in Section XI.D.1.a through c in their Annual Report.

3. Dischargers with facilities subject to storm water ELGs in Subchapter N are ineligible for the Representative Sampling Reduction in Section XI.C.4.

XII. EXCEEDANCE RESPONSE ACTIONS (ERAs)

A. NALs and NAL Exceedances

The Discharger shall perform sampling, analysis and reporting in accordance with the requirements of this General Permit and shall compare the results to the two types of NAL values in Table 2 to determine whether either type of NAL has been exceeded for each applicable parameter. The two types of potential NAL exceedances are as follows:

1. Annual NAL exceedance: The Discharger shall determine the average concentration for each parameter using the results of all the sampling and analytical results for the entire facility for the reporting year (i.e., all "effluent" data). The Discharger shall compare the average concentration for each parameter to the corresponding annual NAL values in Table 2. For Dischargers using composite sampling or flow-weighted measurements in accordance with standard practices, the average concentrations shall be calculated in accordance with the U.S. EPA's NPDES Storm Water

[17] Part 419 - Petroleum refining point source category
[18] Part 443 - Effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources for the paving and roofing materials (tars and asphalt) point source category

Sampling Guidance Document.[19] An annual NAL exceedance occurs when the average of all the analytical results for a parameter from samples taken within a reporting year exceeds the annual NAL value for that parameter listed in Table 2; and,

2. Instantaneous maximum NAL exceedance: The Discharger shall compare all sampling and analytical results from each distinct sample (individual or combined as authorized by XI.C.5) to the corresponding instantaneous maximum NAL values in Table 2. An instantaneous maximum NAL exceedance occurs when two (2) or more analytical results from samples taken for any single parameter within a reporting year exceed the instantaneous maximum NAL value (for TSS and O&G) or are outside of the instantaneous maximum NAL range for pH.

B. Baseline Status

At the beginning of a Discharger's NOI Coverage, all Dischargers have Baseline status for all parameters.

C. Level 1 Status

A Discharger's Baseline status for any given parameter shall change to Level 1 status if sampling results indicate an NAL exceedance for that same parameter. Level 1 status will commence on July 1 following the reporting year during which the exceedance(s) occurred.[20]

1. Level 1 ERA Evaluation

   a. By October 1 following commencement of Level 1 status for any parameter with sampling results indicating an NAL exceedance, the Discharger shall:

   b. Complete an evaluation, with the assistance of a QISP, of the industrial pollutant sources at the facility that are or may be related to the NAL exceedance(s); and,

   c. Identify in the evaluation the corresponding BMPs in the SWPPP and any additional BMPs and SWPPP revisions necessary to prevent future NAL exceedances and to comply with the requirements of this General Permit. Although the evaluation may focus on the drainage areas where the NAL exceedance(s) occurred, all drainage areas shall be evaluated.

2. Level 1 ERA Report

[19] U.S. EPA. NPDES Storm Water Sampling Guidance Document. <http://www.epa.gov/npdes/pubs/owm0093.pdf>. [as of February 4, 2014]

[20] For all sampling results reported before June 30th of the preceding reporting year. If sample results indicating an NAL exceedance are submitted after June 30th, the Discharger will change status once those results have been reported.

a. Based upon the above evaluation, the Discharger shall, as soon as practicable but no later than January 1 following commencement of Level 1 status :

i. Revise the SWPPP as necessary and implement any additional BMPs identified in the evaluation;

ii. Certify and submit via SMARTS a Level 1 ERA Report prepared by a QISP that includes the following:

1) A summary of the Level 1 ERA Evaluation required in subsection C.1 above; and,

2) A detailed description of the SWPPP revisions and any additional BMPs for each parameter that exceeded an NAL.

iii. Certify and submit via SMARTS the QISP's identification number, name, and contact information (telephone number, e-mail address).

b. A Discharger's Level 1 status for a parameter will return to Baseline status once a Level 1 ERA report has been completed, all identified additional BMPs have been implemented, and results from four (4) consecutive QSEs that were sampled subsequent to BMP implementation indicate no additional NAL exceedances for that parameter.

3. NAL Exceedances Prior to Implementation of Level 1 Status BMPs.

Prior to the implementation of an additional BMP identified in the Level 1 ERA Evaluation or October 1, whichever comes first, sampling results for any parameter(s) being addressed by that additional BMP will not be included in the calculations of annual average or instantaneous NAL exceedances in SMARTS.

D. Level 2 Status

A Discharger's Level 1 status for any given parameter shall change to Level 2 status if sampling results indicate an NAL exceedance for that same parameter while the Discharger is in Level 1. Level 2 status will commence on July 1 following the reporting year during which the NAL exceedance(s) occurred.[21]

1. Level 2 ERA Action Plan

[21] For all sampling results reported before June 30th of the preceding reporting year. If sample results indicating an NAL exceedance are submitted after June 30th, the Discharger will change status upon the date those results have been reported into SMARTS.

a. Dischargers with Level 2 status shall certify and submit via SMARTS a Level 2 ERA Action Plan prepared by a QISP that addresses each new Level 2 NAL exceedance by January 1 following the reporting year during which the NAL exceedance(s) occurred. For each new Level 2 NAL exceedance, the Level 2 Action Plan will identify which of the demonstrations in subsection D.2.a through c the Discharger has selected to perform. A new Level 2 NAL exceedance is any Level 2 NAL exceedance for 1) a new parameter in any drainage area, or 2) the same parameter that is being addressed in an existing Level 2 ERA Action Plan in a different drainage area.

b. The Discharger shall certify and submit via SMARTS the QISP's identification number, name, and contact information (telephone number, e-mail address) if this information has changed since previous certifications.

c. The Level 2 ERA Action Plan shall at a minimum address the drainage areas with corresponding Level 2 NAL exceedances.

d. All elements of the Level 2 ERA Action Plan shall be implemented as soon as practicable and completed no later than 1 year after submitting the Level 2 ERA Action Plan.

e. The Level 2 ERA Action Plan shall include a schedule and a detailed description of the tasks required to complete the Discharger's selected demonstration(s) as described below in Section D.2.a through c.

2. Level 2 ERA Technical Report

On January 1 of the reporting year following the submittal of the Level 2 ERA Action Plan, a Discharger with Level 2 status shall certify and submit a Level 2 ERA Technical Report prepared by a QISP that includes one or more of the following demonstrations:

a. Industrial Activity BMPs Demonstration

This shall include the following requirements, as applicable:

i. Shall include a description of the industrial pollutant sources and corresponding industrial pollutants that are or may be related to the NAL exceedance(s);

ii. Shall include an evaluation of all pollutant sources associated with industrial activity that are or may be related to the NAL exceedance(s);

iii. Where all of the Discharger's implemented BMPs, including additional BMPs identified in the Level 2 ERA Action Plan, achieve

compliance with the effluent limitations of this General Permit and are expected to eliminate future NAL exceedance(s), the Discharger shall provide a description and analysis of all implemented BMPs;

iv. In cases where all of the Discharger's implemented BMPs, including additional BMPs identified in the Level 2 ERA Action Plan, achieve compliance with the effluent limitations of this General Permit but are not expected to eliminate future NAL exceedance(s), the Discharger shall provide, in addition to a description and analysis of all implemented BMPs:

1) An evaluation of any additional BMPs that would reduce or prevent NAL exceedances;

2) Estimated costs of the additional BMPs evaluated; and,

3) An analysis describing the basis for the selection of BMPs implemented in lieu of the additional BMPs evaluated but not implemented.

v. The description and analysis of BMPs required in subsection a.iii above shall specifically address the drainage areas where the NAL exceedance(s) responsible for the Discharger's Level 2 status occurred, although any additional Level 2 ERA Action Plan BMPs may be implemented for all drainage areas; and,

vi. If an alternative design storm standard for treatment control BMPs (in lieu of the design storm standard for treatment control BMPs in Section X.H.6 in this General Permit) will achieve compliance with the effluent limitations of this General Permit, the Discharger shall provide an analysis describing the basis for the selection of the alternative design storm standard.

b. Non-Industrial Pollutant Source Demonstration

This shall include:

i. A statement that the Discharger has determined that the exceedance of the NAL is attributable solely to the presence of non-industrial pollutant sources. (The pollutant may also be present due to industrial activities, in which case the Discharger must demonstrate that the pollutant contribution from the industrial activities by itself does not result in an NAL exceedance.) The sources shall be identified as either run-on from adjacent properties, aerial deposition from man-made sources, or as generated by on-site non-industrial sources;

ii. A statement that the Discharger has identified and evaluated all potential pollutant sources that may have commingled with storm water associated with the Discharger's industrial activity and may be contributing to the NAL exceedance;

iii. A description of any on-site industrial pollutant sources and corresponding industrial pollutants that are contributing to the NAL exceedance;

iv. An assessment of the relative contributions of the pollutant from (1) storm water run-on to the facility from adjacent properties or non-industrial portions of the Discharger's property or from aerial deposition and (2) the storm water associated with the Discharger's industrial activity;

v. A summary of all existing BMPs for that parameter; and,

vi. An evaluation of all on-site/off-site analytical monitoring data demonstrating that the NAL exceedances are caused by pollutants in storm water run-on to the facility from adjacent properties or non-industrial portions of the Discharger's property or from aerial deposition.

c. Natural Background Pollutant Source Demonstration

This shall include:

i. A statement that the Discharger has determined that the NAL exceedance is attributable solely to the presence of the pollutant in the natural background that has not been disturbed by industrial activities. (The pollutant may also be present due to industrial activities, in which case the Discharger must demonstrate that the pollutant contribution from the industrial activities by itself does not result in an NAL exceedance);

ii. A summary of all data previously collected by the Discharger, or other identified data collectors, that describes the levels of natural background pollutants in the storm water discharge;

iii. A summary of any research and published literature that relates the pollutants evaluated at the facility as part of the Natural Background Source Demonstration;

iv. Map showing the reference site location in relation to facility along with available land cover information;

v. Reference site and test site elevation;

vi. Available geology and soil information for reference and test sites;

vii. Photographs showing site vegetation;

viii. Site reconnaissance survey data regarding presence of roads, outfalls, or other human-made structures; and,

ix. Records from relevant state or federal agencies indicating no known mining, forestry, or other human activities upstream of the proposed reference site.

3. Level 2 ERA Technical Report Submittal

   a. The Discharger shall certify and submit via SMARTS the Level 2 ERA Technical Report described in Section D.2 above.

   b. The State Water Board and Regional Boards (Water Boards) may review the submitted Level 2 ERA Technical Reports. Upon review of a Level 2 ERA Technical Report, the Water Boards may reject the Level 2 ERA Technical Report and direct the Discharger to take further action(s) to comply with this General Permit.

   c. Dischargers with Level 2 status who have submitted the Level 2 ERA Technical Report are only required to annually update the Level 2 ERA Technical Report based upon additional NAL exceedances of the same parameter and same drainage area (if the original Level 2 ERA Technical Report contained an Industrial Activity BMP Demonstration and the implemented BMPs were expected to eliminate future NAL exceedances in accordance with Section XII.D.2.a.ii), facility operational changes, pollutant source(s) changes, and/or information that becomes available via compliance activities (monthly visual observations, sampling results, annual evaluation, etc.). The Level 2 ERA Technical Report shall be prepared by a QISP and be certified and submitted via SMARTS by the Discharger with each Annual Report. If there are no changes prompting an update of the Level 2 ERA Technical Report, as specified above, the Discharger will provide this certification in the Annual Report that there have been no changes warranting re-submittal of the Level 2 ERA Technical Report.

   d. Dischargers are not precluded from submitting a Level 2 ERA Action Plan or ERA Technical Report prior to entering Level 2 status if information is available to adequately prepare the report and perform the demonstrations described above. A Discharger who chooses to submit a Level 2 ERA Action Plan or ERA Technical Report prior to entering Level 2 status will automatically be placed in Level 2 in accordance to the Level 2 ERA schedule.

4. Eligibility for Returning to Baseline Status

a. Dischargers with Level 2 status who submit an Industrial Activity BMPs Demonstration in accordance with subsection 2.a.i through iii above and have implemented BMPs to prevent future NAL exceedance(s) for the Level 2 parameter(s) shall return to baseline status for that parameter, if results from four (4) subsequent consecutive QSEs sampled indicate no additional NAL exceedance(s) for that parameter(s). If future NAL exceedances occur for the same parameter(s), the Discharger's Baseline status will return to Level 2 status on July 1 in the subsequent reporting year during which the NAL exceedance(s) occurred. These Dischargers shall update the Level 2 ERA Technical Report as required above in Section D.3.c.

b. Dischargers are ineligible to return to baseline status if they submit any of the following:

   i. A industrial activity BMP demonstration in accordance with subsection 2.a.iv above;

   ii. An non-industrial pollutant source demonstration; or,

   iii. A natural background pollutant source demonstration.

5. Level 2 ERA Implementation Extension

   a. Dischargers that need additional time to submit the Level 2 ERA Technical Report shall be automatically granted a single time extension for up to six (6) months upon submitting the following items into SMARTS, as applicable:

      i. Reasons for the time extension;

      ii. A revised Level 2 ERA Action Plan including a schedule and a detailed description of the necessary tasks still to be performed to complete the Level 2 ERA Technical Report; and

      iii. A description of any additional temporary BMPs that will be implemented while permanent BMPs are being constructed.

   b. The Regional Water Boards will review Level 2 ERA Implementation Extensions for completeness and adequacy. Requests for extensions that total more than six (6) months are not granted unless approved in writing by the Water Boards. The Water Boards may (1) reject or revise the time allowed to complete Level 2 ERA Implementation Extensions, (2) identify additional tasks necessary to complete the Level 2 ERA Technical Report, and/or (3) require the Discharger to implement additional temporary BMPs.

XIII. INACTIVE MINING OPERATION CERTIFICATION

A. Inactive mining operations are defined in Part 3 of Attachment A of this General Permit. The Discharger may, in lieu of complying with the General Permit requirements described in subsection B below, certify and submit via SMARTS that their inactive mining operation meets the following conditions:

1. The Discharger has determined and justified in the SWPPP that it is impracticable to implement the monitoring requirements in this General Permit for the inactive mining operation;

2. A SWPPP has been signed (wet signature and license number) by a California licensed professional engineer and is being implemented in accordance with the requirements of this General Permit; and,

3. The facility is in compliance with this General Permit, except as provided in subsection B below.

B. The Discharger who has certified and submitted that they meet the conditions in subsection A above, are not subject to the following General Permit requirements:

1. Monitoring Implementation Plan in Section X.I;

2. Monitoring Requirements in Section XI;

3. Exceedance Response Actions (ERAs) in Section XII; and,

4. Annual Report Requirements in Section XVI.

C. Inactive Mining Operation Certification Submittal Schedule

1. The Discharger shall certify and submit via SMARTS NOI coverage PRDs listed in Section II.B.1 and meet the conditions in subsection A above.

2. The Discharger shall annually inspect the inactive mining site and certify via SMARTS no later than July 15th of each reporting year, that their inactive mining operation continues to meet the conditions in subsection A above.

3. The Discharger shall have a California licensed professional engineer review and update the SWPPP if there are changes to their inactive mining operation or additional BMPs are needed to comply with this General Permit. Any significant updates to the SWPPP shall be signed (wet signature and license number) by a California license professional engineer.

4. The Discharger shall certify and submit via SMARTS any significantly revised SWPPP within 30 days of the revision(s).

XIV. COMPLIANCE GROUPS AND COMPLIANCE GROUP LEADERS

A. Compliance Group Qualification Requirements

1. Any group of Dischargers of the same industry type or any QISP representing Dischargers of the same industry type may form a Compliance Group. A Compliance Group shall consist of Dischargers that operate facilities with similar types of industrial activities, pollutant sources, and pollutant characteristics (e.g., scrap metals recyclers would join a different group than paper recyclers, truck vehicle maintenance facilities would join a different group than airplane vehicle maintenance facilities, etc.). A Discharger participating in a Compliance Group is termed a Compliance Group Participant. Participation in a Compliance Group is not required. Compliance Groups may be formed at any time.

2. Each Compliance Group shall have a Compliance Group Leader.

3. To establish a Compliance Group, the Compliance Group Leader shall register as a Compliance Group Leader via SMARTS. The registration shall include documentation demonstrating compliance with the Compliance Group qualification requirements above and a list of the Compliance Group Participants.

4. Each Compliance Group Participant shall register as a member of an established Compliance Group via SMARTS.

5. The Executive Director of the State Water Board may review Compliance Group registrations and/or activities for compliance with the requirements of this General Permit. The Executive Director may reject the Compliance Group, the Compliance Group Leader, or individual Compliance Group Participants within the Compliance Group.

B. Compliance Group Leader Responsibilities

1. A Compliance Group Leader must complete a State Water Board sponsored or approved training program for Compliance Group Leaders.

2. The Compliance Group Leader shall assist Compliance Group Participants with all compliance activities required by this General Permit.

3. A Compliance Group Leader shall prepare a Consolidated Level 1 ERA Report for all Compliance Group Participants with Level 1 status for the same parameter. Compliance Group Participants who certify and submit these Consolidated Level 1 ERA Reports are subject to the same provisions as individual Dischargers with Level 1 status, as described in Section XII.C. A Consolidated Level 1 ERA Report is equivalent to a Level 1 ERA Report.

4. The Compliance Group Leader shall update the Consolidated Level 1 ERA Report as needed to address additional Compliance Group Participants with ERA Level 1 status.

5. A Compliance Group Leader shall prepare a Level 2 ERA Action Plan specific to each Compliance Group Participant with Level 2 status. Compliance Group Participants who certify and submit these Level 2 ERA Action Plans are subject to the same provisions as individual Dischargers with Level 2 status, as described in Section XII.D.

6. A Compliance Group Leader shall prepare a Level 2 ERA Technical Report specific to each Compliance Group Participant with Level 2 status. Compliance Group Participants who certify and submit these Level 2 ERA Technical Reports are subject to the same provisions as individual Dischargers with Level 2 status, as described in Section XII.D.

7. The Compliance Group Leader shall inspect all the facilities of the Compliance Group Participants that have entered Level 2 status prior to preparing the individual Level 2 ERA Technical Report.

8. The Compliance Group Leader shall revise the Consolidated Level 1 ERA Report, individual Level 2 ERA Action Plans, or individual Level 2 Technical Reports in accordance with any comments received from the Water Boards.

9. The Compliance Group Leader shall inspect all the facilities of the Compliance Group Participants at a minimum of once per reporting year (July 1 to June 30).

C. Compliance Group Participant Responsibilities

1. Each Compliance Group Participant is responsible for permit compliance for the Compliance Group Participant's facility and for ensuring that the Compliance Group Leader's activities related to the Compliance Group Participant's facility comply with this General Permit.

2. Compliance Group Participants with Level 1 status shall certify and submit via SMARTS the Consolidated Level 1 ERA Report. The Compliance Group Participants shall certify that they have reviewed the Consolidated Level 1 ERA Report and have implemented any required additional BMPs. Alternatively, the Compliance Group Participant may submit an individual Level 1 ERA Report in accordance with the provisions in Section XII.C.2.

3. Compliance Group Participants with Level 2 status shall certify and submit via SMARTS their individual Level 2 ERA Action Plan and Technical Report prepared by their Compliance Group Leader. Each Compliance Group Participant shall certify that they have reviewed the Level 2 ERA Action Plan and Technical Report and will implement any required additional BMPs.

4. Compliance Group Participants can at any time discontinue their participation in their associated Compliance Group via SMARTS. Upon discontinuation, the former Compliance Group Participant is immediately subject to the sampling and analysis requirements described in Section XI.B.2.

XV. ANNUAL COMPREHENSIVE FACILITY COMPLIANCE EVALUATION (ANNUAL EVALUATION)

The Discharger shall conduct one Annual Evaluation for each reporting year (July 1 to June 30). If the Discharger conducts an Annual Evaluation fewer than eight (8) months, or more than sixteen (16) months, after it conducts the previous Annual Evaluation, it shall document the justification for doing so. The Discharger shall revise the SWPPP, as appropriate, and implement the revisions within 90 days of the Annual Evaluation. At a minimum, Annual Evaluations shall consist of:

A. A review of all sampling, visual observation, and inspection records conducted during the previous reporting year;

B. An inspection of all areas of industrial activity and associated potential pollutant sources for evidence of, or the potential for, pollutants entering the storm water conveyance system;

C. An inspection of all drainage areas previously identified as having no exposure to industrial activities and materials in accordance with the definitions in Section XVII;

D. An inspection of equipment needed to implement the BMPs;

E. An inspection of any BMPs;

F. A review and effectiveness assessment of all BMPs for each area of industrial activity and associated potential pollutant sources to determine if the BMPs are properly designed, implemented, and are effective in reducing and preventing pollutants in industrial storm water discharges and authorized NSWDs; and,

G. An assessment of any other factors needed to comply with the requirements in Section XVI.B.

XVI. ANNUAL REPORT

A. The Discharger shall certify and submit via SMARTS an Annual Report no later than July 15th following each reporting year using the standardized format and checklists in SMARTS.

B. The Discharger shall include in the Annual Report:

1. A Compliance Checklist that indicates whether a Discharger complies with, and has addressed all applicable requirements of this General Permit;

2. An explanation for any non-compliance of requirements within the reporting year, as indicated in the Compliance Checklist;

3. An identification, including page numbers and/or sections, of all revisions made to the SWPPP within the reporting year; and,

4. The date(s) of the Annual Evaluation.

XVII. CONDITIONAL EXCLUSION - NO EXPOSURE CERTIFICATION (NEC)

A. Discharges composed entirely of storm water that has not been exposed to industrial activity are not industrial storm water discharges. Dischargers are conditionally excluded from complying with the SWPPP and monitoring requirements of this General Permit if all of the following conditions are met:

1. There is no exposure of Industrial Materials and Activities to rain, snow, snowmelt, and/or runoff;

2. All unauthorized NSWDs have been eliminated and all authorized NSWDs meet the conditions of Section IV;

3. The Discharger has certified and submitted via SMARTS PRDs for NEC coverage pursuant to the instructions in Section II.B.2; and,

4. The Discharger has satisfied all other requirements of this Section.

B. NEC Specific Definitions

1. No Exposure - all Industrial Materials and Activities are protected by a Storm-Resistant Shelter to prevent all exposure to rain, snow, snowmelt, and/or runoff.

2. Industrial Materials and Activities - includes, but is not limited to, industrial material handling activities or equipment, machinery, raw materials, intermediate products, by-products, final products, and waste products.

3. Material Handling Activities - includes the storage, loading and unloading, transportation, or conveyance of any industrial raw material, intermediate product, final product, or waste product.

4. Sealed - banded or otherwise secured, and without operational taps or valves.

5. Storm-Resistant Shelters - includes completely roofed and walled buildings or structures. Also includes structures with only a top cover supported by permanent supports but with no side coverings, provided material within the structure is not subject to wind dispersion (sawdust, powders, etc.), or track-out, and there is no storm water discharged from within the structure that comes into contact with any materials.

C. NEC Qualifications

To qualify for an NEC, a Discharger shall:

1. Except as provided in subsection D below, provide a Storm-Resistant Shelter to protect Industrial Materials and Activities from exposure to rain, snow, snowmelt, run-on, and runoff;

2. Inspect and evaluate the facility annually to determine that storm water exposed to industrial materials or equipment has not and will not be discharged to waters of the United States. Evaluation records shall be maintained for five (5) years in accordance with Section XXI.J.4;

3. Register for NEC coverage by certifying that there are no discharges of storm water contaminated by exposure to Industrial Materials and Activities from areas of the facility subject to this General Permit, and certify that all unauthorized NSWDs have been eliminated and all authorized NSWDs meet the conditions of Section IV (Authorized NSWDs). NEC coverage and annual renewal requires payment of an annual fee in accordance with California Code of Regulations, title 23, section 2200 et seq.; and,

4. Submit PRDs for NEC coverage shall be prepared and submitted in accordance with the:

   a. Certification requirements in Section XXI.K; and,

   b. Submittal schedule in accordance with Section II.B.2.

D. NEC Industrial Materials and Activities - Storm-Resistant Shelter Not Required

To qualify for NEC coverage, a Storm-Resistant Shelter is not required for the following:

1. Drums, barrels, tanks, and similar containers that are tightly Sealed, provided those containers are not deteriorated, do not contain residual industrial materials on the outside surfaces, and do not leak;

2. Adequately maintained vehicles used in material handling;

3. Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt);

4. Any Industrial Materials and Activities that are protected by a temporary shelter for a period of no more than ninety (90) days due to facility construction or remodeling; and,

5. Any Industrial Materials and Activities that are protected within a secondary containment structure that will not discharge storm water to waters of the United States.

E. NEC Limitations

1. NEC coverage is available on a facility-wide basis only, not for individual outfalls. If a facility has industrial storm water discharges from one or more drainage areas that require NOI coverage, Dischargers shall register for NOI coverage for the entire facility through SMARTS in accordance with Section II.B.2. Any drainage areas on that facility that would otherwise qualify for NEC coverage may be specially addressed in the facility SWPPP by including an NEC Checklist and a certification statement demonstrating that those drainage areas of the facility have been evaluated; and that none of the Industrial Materials or Activities listed in subsection C above are, or will be in the foreseeable future, exposed to precipitation.

2. If circumstances change and Industrial Materials and Activities become exposed to rain, snow, snowmelt, and/or runoff, the conditions for this exclusion shall no longer apply. In such cases, the Discharger may be subject to enforcement for discharging without a permit. A Discharger with NEC coverage that anticipates changes in circumstances should register for NOI coverage at least seven (7) days before anticipated exposure.

3. The Regional Water Board may deny NEC coverage and require NOI coverage upon determining that:

   a. Storm water is exposed to Industrial Materials and Activities; and/or

   b. The discharge has a reasonable potential to cause or contribute to an exceedance of an applicable water quality standards.

F. NEC Permit Registration Documents Required for Initial NEC Coverage

A Discharger shall submit via SMARTS the following PRDs for NEC coverage to document the applicability of the conditional exclusion:

1. The NEC form, which includes:

   a. The legal name, postal address, telephone number, and e-mail address of the Discharger;

   b. The facility business name and physical mailing address, the county name, and a description of the facility location if the facility does not have a physical mailing address; and,

   c. Certification by the Discharger that all PRDs submitted are correct and true and the conditions of no exposure have been met.

2. An NEC Checklist prepared by the Discharger demonstrating that the facility has been evaluated; and that none of the following industrial materials or activities are, or will be in the foreseeable future, exposed to precipitation:

a. Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed;

b. Materials or residuals on the ground or in storm water inlets from spills/leaks;

c. Materials or products from past industrial activity;

d. Material handling equipment (except adequately maintained vehicles);

e. Materials or products during loading/unloading or transporting activities;

f. Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);

g. Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;

h. Materials or products handled/stored on roads or railways owned or maintained by the Discharger;

i. Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);

j. Application or disposal of processed wastewater (unless already covered by an NPDES permit); and,

k. Particulate matter or visible deposits of residuals from roof stacks/vents evident in the storm water outflow.

3. Site Map (see Section X.E).

G. Requirements for Annual NEC Coverage Recertification

By October 1 of each reporting year beginning in 2015, any Discharger who has previously registered for NEC coverage shall either submit and certify an NEC demonstrating that the facility has been evaluated, and that none of the Industrial Materials or Activities listed above are, or will be in the foreseeable future, exposed to precipitation, or apply for NOI coverage.

H. NEC Certification Statement

All NEC certifications and re-certifications shall include the following certification statement:

I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of 'no exposure' and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities

or materials from the industrial facility identified in this document (except as allowed in subsection C above). I understand that I am obligated to submit a no exposure certification form annually to the State Water Board and, if requested, to the operator of the local Municipal Separate Storm Sewer System (MS4) into which this facility discharges (where applicable). I understand that I must allow the Water Board staff, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

XVIII. SPECIAL REQUIREMENTS - PLASTIC MATERIALS

A. Facilities covered under this General Permit that handle Plastic Materials are required to implement BMPs to eliminate discharges of plastic in storm water in addition to the other requirements of this General Permit that are applicable to all other Industrial Materials and Activities. Plastic Materials are virgin and recycled plastic resin pellets, powders, flakes, powdered additives, regrind, dust, and other similar types of preproduction plastics with the potential to discharge or migrate off-site. Any Dischargers' facility handling Plastic Materials will be referred to as Plastics Facilities in this General Permit. Any Plastics Facility covered under this General Permit that manufactures, transports, stores, or consumes these materials shall submit information to the State Water Board in their PRDs, including the type and form of plastics, and which BMPs are implemented at the facility to prevent illicit discharges. Pursuant to Water Code section 13367, Plastics Facilities are subject to mandatory, minimum BMPs.

1. At a minimum, Plastics Facilities shall implement and include in the SWPPP:

   a. Containment systems at each on-site storm drain discharge location down gradient of areas containing plastic material. The containment system shall be designed to trap all particles retained by a 1mm mesh screen, with a treatment capacity of no less than the peak flow rate from a one-year, one-hour storm.

   b. When a containment system is infeasible, or poses the potential to cause an illicit discharge, the facility may propose a technically feasible

alternative BMP or suite of BMPs. The alternative BMPs shall be designed to achieve the same or better performance standard as a 1mm mesh screen with a treatment capacity of the peak flow rate from a one-year, one-hour storm. Alternative BMPs shall be submitted to the Regional Water Board for approval.

c. Plastics Facilities shall use durable sealed containers designed not to rupture under typical loading and unloading activities at all points of plastic transfer and storage.

d. Plastics Facilities shall use capture devices as a form of secondary containment during transfers, loading, or unloading Plastic Materials. Examples of capture devices for secondary containment include, but are not limited to catch pans, tarps, berms or any other device that collects errant material.

e. Plastics Facilities shall have a vacuum or vacuum-type system for quick cleanup of fugitive plastic material available for employees.

f. Pursuant to Water Code section 13367(e)(1), Plastics Facilities that handle Plastic Materials smaller than 1mm in size shall develop a containment system designed to trap the smallest plastic material handled at the facility with a treatment capacity of at least the peak flow rate from a one-year, one-hour storm, or develop a feasible alternative BMP or suite of BMPs that are designed to achieve a similar or better performance standard that shall be submitted to the Regional Water Board for approval.

2. Plastics Facilities are exempt from the Water Code requirement to install a containment system under section 13367 of the Water Code if they meet one of the following requirements that are determined to be equal to, or exceed the performance requirements of a containment system:

   a. The Discharger has certified and submitted via SMARTS a valid No Exposure Certification (NEC) in accordance with Section XVII; or

   b. Plastics Facilities are exempt from installing a containment system, if the following suite of eight (8) BMPs is implemented. This combination of BMPs is considered to reduce or prevent the discharge of plastics at a performance level equivalent to or better than the 1mm mesh and flow standard in Water Code section 13367(e)(1).

      i. Plastics Facilities shall annually train employees handling Plastic Materials. Training shall include environmental hazards of plastic discharges, employee responsibility for corrective actions to prevent errant Plastic Materials, and standard procedures for containing, cleaning, and disposing of errant Plastic Materials.

ii. Plastics Facilities shall immediately fix any Plastic Materials containers that are punctured or leaking and shall clean up any errant material in a timely manner.

iii. Plastics Facilities shall manage outdoor waste disposal of Plastic Materials in a manner that prevents the materials from leaking from waste disposal containers or during waste hauling.

iv. Plastics Facilities that operate outdoor conveyance systems for Plastic Materials shall maintain the system in good operating condition. The system shall be sealed or filtered in such a way as to prevent the escape of materials when in operation. When not in operation, all connection points shall be sealed, capped, or filtered so as to not allow material to escape. Employees operating the conveyance system shall be trained how to operate in a manner that prevents the loss of materials such as secondary containment, immediate spill response, and checks to ensure the system is empty during connection changes.

v. Plastics Facilities that maintain outdoor storage of Plastic Materials shall do so in a durable, permanent structure that prevents exposure to weather that could cause the material to migrate or discharge in storm water.

vi. Plastics Facilities shall maintain a schedule for regular housekeeping and routine inspection for errant Plastic Materials. The Plastics Facility shall ensure that their employees follow the schedule.

vii. PRDs shall include the housekeeping and routine inspection schedule, spill response and prevention procedures, and employee training materials regarding plastic material handling.

viii. Plastics Facilities shall correct any deficiencies in the employment of the above BMPs that result in errant Plastic Materials that may discharge or migrate off-site in a timely manner. Any Plastic Materials that are discharged or that migrate off-site constitute an illicit discharge in violation of this General Permit.

XIX. REGIONAL WATER BOARD AUTHORITIES

A. The Regional Water Boards may review a Discharger's PRDs for NOI or NEC coverage and administratively reject General Permit coverage if the PRDs are deemed incomplete. The Regional Water Boards may take actions that include rescinding General Permit coverage, requiring a Discharger to revise and re-submit their PRDs (certified and submitted by the Discharger) within a specified time period, requiring the Discharger to apply for different General Permit coverage or a different individual or general permit, or taking no action.

B. The Regional Water Boards have the authority to enforce the provisions and requirements of this General Permit. This includes, but is not limited to,

reviewing SWPPPs, Monitoring Implementation Plans, ERA Reports, and Annual Reports, conducting compliance inspections, and taking enforcement actions.

C. As appropriate, the Regional Water Boards may issue NPDES storm water general or individual permits to a Discharger, categories of Dischargers, or Dischargers within a watershed or geographic area. Upon issuance of such NPDES permits, this General Permit shall no longer regulate the affected Discharger(s).

D. The Regional Water Boards may require a Discharger to revise its SWPPP, ERA Reports, or monitoring programs to achieve compliance with this General Permit. In this case, the Discharger shall implement these revisions in accordance with a schedule provided by the Regional Water Board.

E. The Regional Water Boards may approve requests from a Discharger to include co-located, but discontiguous, industrial activities within the same facility under a single NOI or NEC coverage.

F. Consistent with 40 Code of Federal Regulations section 122.26(a)(9)(i)(D), the Regional Water Boards may require any discharge that is not regulated by this General Permit, that is determined to contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States, to be covered under this General Permit as appropriate. Upon designation, the Discharger responsible for the discharge shall obtain coverage under this General Permit.

G. The Regional Water Boards may review a Discharger's Inactive Mining Operation Certification and reject it at any time if the Regional Water Board determines that access to the facility for monitoring purposes is practicable or that the facility is not in compliance with the applicable requirements of this General Permit.

H. All Regional Water Board actions that modify a Discharger's obligations under this General Permit must be in writing and should also be submitted in SMARTS.

XX. SPECIAL CONDITIONS

A. Reopener Clause

This General Permit may be reopened and amended to incorporate TMDL-related provisions. This General Permit may also be modified, revoked and reissued, or terminated for cause due to promulgation of amended regulations, water quality control plans or water quality control policies, receipt of U.S. EPA guidance concerning regulated activities, judicial decision, or in accordance with 40 Code of Federal Regulations sections 122.62, 122.63, 122.64, and 124.5.

B. Water Quality Based Corrective Actions

1. Upon determination by the Discharger or written notification by the Regional Water Board that industrial storm water discharges and/or authorized NSWDs contain pollutants that are in violation of Receiving Water Limitations (Section VI), the Discharger shall:

   a. Conduct a facility evaluation to identify pollutant source(s) within the facility that are associated with industrial activity and whether the BMPs described in the SWPPP have been properly implemented;

   b. Assess the facility's SWPPP and its implementation to determine whether additional BMPs or SWPPP implementation measures are necessary to reduce or prevent pollutants in industrial storm water discharges to meet the Receiving Water Limitations (Section VI); and,

   c. Certify and submit via SMARTS documentation based upon the above facility evaluation and assessment that:

      i. Additional BMPs and/or SWPPP implementation measures have been identified and included in the SWPPP to meet the Receiving Water Limitations (Section VI); or

      ii. No additional BMPs or SWPPP implementation measures are required to reduce or prevent pollutants in industrial storm water discharges to meet the Receiving Water Limitations (Section VI).

2. The Regional Water Board may reject the Dischargers water quality based corrective actions and/or request additional supporting documentation.

C. Requirements for Dischargers Claiming "No Discharge" through the Notice of Non-Applicability (NONA)

1. For the purpose of the NONA, the Entity (Entities) is referring to the person(s) defined in section 13399.30 of the Water Code.

2. Entities who are claiming "No Discharge" through the NONA shall meet the following eligibility requirements:

   a. The facility is engineered and constructed to have contained the maximum historic precipitation event (or series of events) using the precipitation data collected from the National Oceanic and Atmospheric Agency's website (or other nearby precipitation data available from other government agencies) so that there will be no discharge of industrial storm water to waters of the United States; or,

   b. The facility is located in basins or other physical locations that are not hydrologically connected to waters of the United States.

3. When claiming the "No Discharge" option, Entities shall submit and certify via SMARTS both the NONA and a No Discharge Technical Report. The No

Discharge Technical Report shall demonstrate the facility meets the eligibility requirements described above.

4. The No Discharge Technical Report shall be signed (wet signature and license number) by a California licensed professional engineer.

XXI. STANDARD CONDITIONS

A. Duty to Comply

Dischargers shall comply with all standard conditions in this General Permit. Permit noncompliance constitutes a violation of the Clean Water Act and the Water Code and is grounds for enforcement action and/or removal from General Permit coverage.

Dischargers shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions.

B. Duty to Reapply

Dischargers that wish to continue an activity regulated under this General Permit after the expiration date of this General Permit shall apply for and obtain authorization from the Water Boards as required by the new general permit once it is issued.

C. General Permit Actions

1. This General Permit may be modified, revoked and reissued, or terminated for cause. Submittal of a request by the Discharger for General Permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not annul any General Permit condition.

2. If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of the Clean Water Act for a toxic pollutant which is present in the discharge, and that standard or prohibition is more stringent than any limitation on the pollutant in this General Permit, this General Permit shall be modified or revoked and reissued to conform to the toxic effluent standard or prohibition.

D. Need to Halt or Reduce Activity Not a Defense

In an enforcement action, it shall not be a defense for a Discharger that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this General Permit.

E. Duty to Mitigate

Dischargers shall take all responsible steps to reduce or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment.

F. Proper Operation and Maintenance

Dischargers shall at all times properly operate and maintain any facilities and systems of treatment and control (and related equipment and apparatuses) which are installed or used by the Discharger to achieve compliance with the conditions of this General Permit. Proper operation and maintenance also include adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance may require the operation of backup or auxiliary facilities or similar systems installed by a Discharger when necessary to achieve compliance with the conditions of this General Permit.

G. Property Rights

This General Permit does not convey any property rights of any sort or any exclusive privileges. It also does not authorize any injury to private property or any invasion of personal rights, nor does it authorize any infringement of federal, state, or local laws and regulations.

H. Duty to Provide Information

Upon request by the relevant agency, Dischargers shall provide information to determine compliance with this General Permit to the Water Boards, U.S. EPA, or local Municipal Separate Storm Sewer System (MS4) within a reasonable time. Dischargers shall also furnish, upon request by the relevant agency, copies of records that are required to be kept by this General Permit.

I. Inspection and Entry

Dischargers shall allow the Water Boards, U.S. EPA, and local MS4 (including any authorized contractor acting as their representative), to:

1. Enter upon the premises at reasonable times where a regulated industrial activity is being conducted or where records are kept under the conditions of this General Permit;

2. Access and copy at reasonable times any records that must be kept under the conditions of this General Permit;

3. Inspect the facility at reasonable times; and,

4. Sample or monitor at reasonable times for the purpose of ensuring General Permit compliance.

J. Monitoring and Records

1. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

2. If Dischargers monitor any pollutant more frequently than required, the results of such monitoring shall be included in the calculation and reporting of the data submitted.

3. Records of monitoring information shall include:

   a. The date, exact location, and time of sampling or measurement;

   b. The date(s) analyses were performed;

   c. The individual(s) that performed the analyses;

   d. The analytical techniques or methods used; and,

   e. The results of such analyses.

4. Dischargers shall retain, for a period of at least five (5) years, either a paper or electronic copy of all storm water monitoring information, records, data, and reports required by this General Permit. Copies shall be available for review by the Water Board's staff at the facility during scheduled facility operating hours.

5. Upon written request by U.S. EPA or the local MS4, Dischargers shall provide paper or electronic copies of Annual Reports or other requested records to the Water Boards, U.S. EPA, or local MS4 within ten (10) days from receipt of the request.

K. Electronic Signature and Certification Requirements

1. All Permit Registration Documents (PRDs) for NOI and NEC coverage shall be certified and submitted via SMARTS by the Discharger's Legally Responsible Person (LRP). All other documents may be certified and submitted via SMARTS by the LRP or by their designated Duly Authorized Representative.

2. When a new LRP or Duly Authorized Representative is designated, the Discharger shall ensure that the appropriate revisions are made via SMARTS. In unexpected or emergency situations, it may be necessary for the Discharger to directly contact the State Water Board's Storm Water Section to register for SMARTS account access in order to designate a new LRP.

3. Documents certified and submitted via SMARTS by an unauthorized or ineligible LRP or Duly Authorized Representative are invalid.

4. LRP eligibility is as follows:

   a. For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means:

      i. A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function; or

      ii. The manager of one or more manufacturing, production, or operating facilities, provided, the manager is authorized to make management decisions which govern the operation of the regulated facility including having the explicit or implicit duty of making major capital investment recommendations, and initiating and directing other comprehensive measures to assure long term environmental compliance with environmental laws and regulations; the manager can ensure that the necessary systems are established or actions taken to gather complete and accurate information for permit application requirements; and where authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

   b. For a partnership or sole proprietorship: by a general partner or the proprietor, respectively;

   c. For a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official. This includes the chief executive officer of the agency or the senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrators of U.S. EPA).

5. Duly Authorized Representative eligibility is as follows:

   a. The Discharger must authorize via SMARTS any person designated as a Duly Authorized Representative;

   b. The authorization shall specify that a person designated as a Duly Authorized Representative has responsibility for the overall operation of the regulated facility or activity, such as a person that is a manager, operator, superintendent, or another position of equivalent responsibility, or is an individual who has overall responsibility for environmental matters for the company; and,

   c. The authorization must be current (it has been updated to reflect a different individual or position) prior to any report submittals, certifications, or records certified by the Duly Authorized Representative.

L. Certification

Any person signing, certifying, and submitting documents under Section XXI.K above shall make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons that manage the system or those persons directly responsible for gathering the information, to the best of my knowledge and belief, the information submitted is, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

M. Anticipated Noncompliance

Dischargers shall give advance notice to the Regional Water Board and local MS4 of any planned changes in the industrial activity that may result in noncompliance with this General Permit.

N. Penalties for Falsification of Reports

Clean Water Act section 309(c)(4) provides that any person that knowingly makes any false material statement, representation, or certification in any record or other document submitted or required to be maintained under this General Permit, including reports of compliance or noncompliance shall upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than two years or by both.

O. Oil and Hazardous Substance Liability

Nothing in this General Permit shall be construed to preclude the initiation of any legal action or relieve the Discharger from any responsibilities, liabilities, or penalties to which the Discharger is or may be subject to under section 311 of the Clean Water Act.

P. Severability

The provisions of this General Permit are severable; if any provision of this General Permit or the application of any provision of this General Permit to any circumstance is held invalid, the application of such provision to other circumstances and the remainder of this General Permit shall not be affected thereby.

Q. Penalties for Violations of Permit Conditions

1. Clean Water Act section 309 provides significant penalties for any person that violates a permit condition implementing sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act or any permit condition or limitation implementing any such section in a permit issued under section 402. Any

person that violates any permit condition of this General Permit is subject to a civil penalty not to exceed $37,500[22] per calendar day of such violation, as well as any other appropriate sanction provided by section 309 of the Clean Water Act.

2. The Porter-Cologne Water Quality Control Act also provides for civil and criminal penalties, which may be greater than penalties under the Clean Water Act.

R. Transfers

Coverage under this General Permit is non-transferrable. When operation of the facility has been transferred to another entity, or a facility is relocated, new PRDs for NOI and NEC coverage must be certified and submitted via SMARTS prior to the transfer, or at least seven (7) days prior to the first day of operations for a relocated facility.

S. Continuation of Expired General Permit

If this General Permit is not reissued or replaced prior to the expiration date, it will be administratively continued in accordance with 40 Code of Federal Regulations 122.6 and remain in full force and effect.

[22] May be further adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act.

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40 CFR 124.8

This document is current through the July 26, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through July 7, 2017.

§ 124.8 Fact sheet.

(Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).)

(a)A fact sheet shall be prepared for every draft permit for a major HWM, UIC, 404, or NPDES facility or activity, for every Class I sludge management facility, for every 404 and NPDES general permit (§§ 237.37 and 122.28), for every NPDES draft permit that incorporates a variance or requires an explanation under § 124.56(b), for every draft permit that includes a sewage sludge land application plan under *40 CFR 501.15(a)(2)(ix)*, and for every draft permit which the Director finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

(b) The fact sheet shall include, when applicable:

(1)A brief description of the type of facility or activity which is the subject of the draft permit;

(2) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged.

(3) For a PSD permit, the degree of increment consumption expected to result from operation of the facility or activity.

(4)A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by § 124.9 (for EPA-issued permits);

(5) Reasons why any requested variances or alternatives to required standards do or do not appear justified;

(6)A description of the procedures for reaching a final decision on the draft permit including:

(i) The beginning and ending dates of the comment period under § 124.10 and the address where comments will be received;

(ii)Procedures for requesting a hearing and the nature of that hearing; and

(iii)Any other procedures by which the public may participate in the final decision.

(7)Name and telephone number of a person to contact for additional information.

(8)For NPDES permits, provisions satisfying the requirements of § 124.56.

(9)Justification for waiver of any application requirements under § 122.21(j) or (q) of this chapter.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

Resource Conservation and Recovery Act, *42 U.S.C. 6901* et seq.; Safe Drinking Water Act, *42 U.S.C. 300f* et seq.; Clean Water Act, *33 U.S.C. 1251* et seq.; Clean Air Act, *42 U.S.C. 7401* et seq.

History

[48 FR 14264, Apr. 1, 1983, as amended at *54 FR 18786,* May 2, 1989; *64 FR 42434, 42470,* Aug. 4, 1999, as corrected at *64 FR 43426,* Aug. 10, 1999; *65 FR 43586, 43661,* July 13, 2000, withdrawn at *68 FR 13608, 13614,* Mar. 19, 2003; *66 FR 53044, 53048,* Oct. 18, 2001]

Annotations

Case Notes

LexisNexis® Notes

Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview
Administrative Law : Judicial Review : Administrative Record : General Overview
Contracts Law : Negotiable Instruments : General Overview
Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure
Environmental Law : Water Quality : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview

United States v. Metropolitan Dist. Com., 1985 U.S. Dist. LEXIS 16232 (D Mass Sept. 5, 1985).

Overview: *A publicly owned treatment works was enjoined from further discharge of sludge into navigable waterways because it failed to voluntarily comply with an administrative order, a permit, and statutory prohibitions against such discharge.*

SA-7

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2015-0075

In the Matter of Review of

Order No. R4-2012-0175, NPDES Permit No. CAS004001

WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHEDS OF LOS ANGELES COUNTY, EXCEPT THOSE DISCHARGES ORIGINATING FROM THE CITY OF LONG BEACH MS4

Issued by the
California Regional Water Quality Control Board,
Los Angeles Region

SWRCB/OCC FILES A-2236 (a)-(kk)

BY THE BOARD:

In this order, the State Water Resources Control Board (State Water Board) reviews Order No. R4-2012-0175 (NPDES Permit No. CAS004001) adopted by the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) on November 8, 2012. Order No. R4-2012-0175 regulates discharges of storm water and non-storm water from the municipal separate storm sewer systems (MS4s) located within the coastal watersheds of Los Angeles County, with the exception of the City of Long Beach MS4, and is hereinafter referred to as the "Los Angeles MS4 Order" or the "Order." We received 37 petitions challenging various provisions of the Los Angeles MS4 Order. For the reasons discussed herein, we generally uphold the Los Angeles MS4 Order, but with a number of revisions to the findings and provisions in response to issues raised in the petitions and as a result of our own review of the Order.

I. BACKGROUND

The Los Angeles MS4 Order regulates discharges from the MS4s operated by the Los Angeles County Flood Control District, Los Angeles County, and 84 municipal permittees (Permittees) in a drainage area that encompasses more than 3,000 square miles and multiple watersheds. The Order was issued by the Los Angeles Water Board in

accordance with section 402(p)(3)(B) of the Clean Water Act[1] and sections 13263 and 13377 of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act),[2] as a National Pollutant Discharge Elimination System (NPDES) permit to control storm water and non-storm water discharges that enter the area's water bodies from the storm sewer systems owned or operated by the multiple governmental entities named in the Order. The Los Angeles MS4 Order superseded Los Angeles Water Board Order No. 01-182 (2001 Los Angeles MS4 Order), and is the fourth iteration of the NPDES permit for MS4 discharges in the relevant area.

The Los Angeles MS4 Order incorporates most of the pre-existing requirements of the 2001 Los Angeles MS4 Order, including the water quality-based requirement to not cause or contribute to exceedances of water quality standards in the receiving water. The Los Angeles MS4 Order also requires Permittees to comply with new water quality-based requirements to implement 33 watershed-based total maximum daily loads (TMDLs) for the region. The Order links both of these water quality-based requirements to the programmatic elements of the Order by allowing Permittees to comply with the water quality-based requirements, in part, by developing and implementing a watershed management program (WMP) or enhanced watershed management program (EWMP), as more specifically defined in the Order.

Following adoption of the Los Angeles MS4 Order, we received 37 timely petitions challenging various provisions of the Order and, in particular, the provisions implementing TMDLs and integrating water quality-based requirements and watershed-based program implementation. Several petitioners asked that their petitions be held in abeyance;[3] however, due to the number of active petitions also seeking review, we declined to hold those petitions in abeyance at that time.[4] Five petitioners additionally requested that we partially stay the Los Angeles MS4 Order. Following review, the Executive Director of the State Water Board denied the stay requests for failure to comply with the prerequisites for a stay as specified in California Code of Regulations, title 23, section 2053.

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[1] 33 U.S.C. § 1342(p)(3)(B).

[2] Wat. Code, §§ 13263, 13377.

[3] See Cal. Code Regs., tit. 23, § 2050.5, subd. (d).

[4] By letter dated January 30, 2013, we provided an opportunity for petitioners to submit an explanation for why a petition should be held in abeyance notwithstanding the existence of the active petitions. In response, two petitioners, City of Signal Hill and the City of Claremont, argued that their petitions raised unique issues not common to the remaining petitions and therefor appropriate for abeyance. We thereafter denied their requests on July 29, 2013, finding that the unique issues could nevertheless be resolved concurrently with the issues in the other petitions. On October 9, 2013, the City of Claremont withdrew two of the claims in its petition.

We deemed the petitions complete by letter dated July 8, 2013, and, as permitted under our regulations,[5] consolidated the petitions for review.

An issue front and center in the petitions is the appropriateness of the approach of the Los Angeles MS4 Order in addressing what we generally refer to as "receiving water limitations." Receiving water limitations in MS4 permits are requirements that specify that storm water and non-storm water discharges must not cause or contribute to exceedances of water quality standards in the waters of the United States that receive those discharges. In precedential State Water Board Order WQ 99-05 (*Environmental Health Coalition*), we directed that all MS4 permits contain specific language that explains how the receiving water limitations will be implemented. (For clarity, we refer to MS4 permit language that relates to implementation of the permit's receiving water limitations as "receiving water limitations provisions.") We held a workshop on November 20, 2012, concerning receiving water limitations in MS4 permits. The purpose of the workshop was to receive public comment on an issue paper discussing several alternatives to the receiving water limitations provisions currently included in MS4 permits as directed by Order WQ 99-05 (Receiving Water Limitations Issue Paper).[6]

Because the Los Angeles MS4 Order contains new provisions that authorize the Permittees to develop and implement WMP/EWMPs in lieu of requiring compliance with the receiving water limitations provisions, we view our review of the Order as an appropriate avenue for resolving some of the issues raised in our November 20, 2012 workshop. Through notice to all interested persons, we bifurcated the responses to the petitions and solicited two separate sets of responses: (1) Responses to address issues related to whether the WMP/EWMP alternatives contained in the Los Angeles MS4 Order are an appropriate approach to revising the receiving water limitations provisions in MS4 permits (August 15, 2013 Receiving Water Limitations Submissions); and (2) Responses to address all other issues raised in the petitions (October 15, 2013 Responses).[7] We held a workshop on October 8, 2013, to hear public comment on the first set of responses.

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[5] Cal. Code Regs., tit. 23, § 2054.

[6] Information on that workshop is available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml> (as of Nov 18, 2014).

[7] We requested the bifurcated responses initially by letter dated July 15, 2013. Subsequent letters on July 29, 2013, and September 18, 2013, clarified the nature of the submissions and extended the submission deadline for the second response.

State Water Board regulations generally require final disposition on petitions within 270 days of the date a petition is deemed complete.[8] However, in this case, we required additional time to review the large number of issues raised in the petitions. When the State Water Board anticipates addressing a petition on the merits after the review period passes, it may indicate that it will review the matter on its own motion.[9] On April 1, 2014, we adopted Order WQ 2014-0056 taking up review of the issues in the petitions on our own motion.[10]

We now resolve the issues in the petitions with this order.

II. ISSUES AND FINDINGS

The 37 petitions raise over sixty contentions claiming deficiencies in the Los Angeles MS4 Order. This Order addresses the most significant contentions. To the extent petitioners raised issues that are not discussed in this Order, such issues are dismissed as not raising substantial issues appropriate for State Water Board review.[11]

Before proceeding to the merits of the petitions, we will resolve several procedural issues.

Requests to Take Official Notice or Supplement the Record with Additional Evidence

We received a number of requests to take official notice of documents not in the administrative record of the adoption of the Los Angeles MS4 Order by the Los Angeles Water Board (hereinafter Administrative Record)[12] and a number of requests to admit supplemental evidence not considered by the Los Angeles Water Board.[13] We reviewed the requests with

[8] Cal. Code Regs., tit. 23, § 2050.5, subd. (b).

[9] See Wat. Code, § 13320, subd. (a); Cal. Code Regs., tit. 23, § 2050.5, subd. (c).

[10] To avoid premature litigation on the petition issues as a result of our review extending past the 270 day-regulatory review period, at our suggestion most of the petitioners asked that their petitions be placed in abeyance until adoption by the State Water Board of a final order. We granted those requests. Simultaneously with adopting this order, we are removing the petitions from abeyance and acting upon them.

[11] *People v. Barry* (1987) 194 Cal.App.3d 158, 175-177; *Johnson v. State Water Resources Control Bd.* (2004) 123 Cal.App.4th 1107, 1114; Cal. Code Regs., tit. 23, § 2052, subd. (a)(1).

[12] The Administrative Record was prepared by the Los Angeles Water Board and is available at <http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/AdminRecordOrderNoR4_2012_0175/index.shtml> (as of Nov. 18, 2014).

[13] Several requests for official notice or to admit supplemental evidence were received concurrently with submission of the petitions, with the August 15, 2013 Receiving Water Limitations Submissions, and with the October 15, 2013 Responses. Additional requests for official notice were submitted concurrently with comments on first and revised public drafts of this order and were opposed by several parties. (Request for Official Notice, Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay, Jan. 21, 2015; Request for Official Notice, Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay, June 2, 2015.) Although we have reviewed these additional requests for official notice, we have not granted the requests for the various reasons articulated in this section, in Section II.B.8, and in footnote 74.

consideration of whether they were appropriate for notice or admission based on the legal standards governing our proceedings[14] and whether the documents would materially aid in our review of the issues in the proceedings. We grant the requests with regard to documents 1-7 below, and additionally take official notice on our own motion of documents 8, 9, and 10:[15]

1. Order No. 2013-0001-DWQ, NPDES Permit for Storm Water Discharges from Small MS4s, adopted by State Water Board, February 5, 2013;[16]
2. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia issued by the United States Environmental Protection Agency (USEPA), November 9, 2012, and a responsiveness summary issued in support of its original adoption of the permit, October 7, 2011;[17]
3. Administrative Procedures Update Number 90-004 on Antidegradation Policy Implementation for NPDES Permitting, issued by the State Water Board, July 2, 1990;[18]
4. Chapter 7 of the NPDES Permit Writers' Manual, updated by USEPA, September 2010;[19]
5. Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA, August 8, 2012;[20]

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[14] For official notice see Cal. Code Regs., tit. 23, § 648.2; Gov. Code, § 11515; Evid. Code, § 452. For admission of supplemental evidence see Cal. Code Regs., tit. 23, § 2050.6.

[15] We note that two documents for which we received requests for official notice are already in the administrative record: USEPA, Memorandum Setting Forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (Nov. 12, 2010) (Administrative Record, section 10.II, RB-AR23962-23968); USEPA, Chapter 6 of the NPDES Permit Writers' Manual (updated Sept. 2010) (Administrative Record, section 10.IV, RB-AR24905-24932).

[16] County of Los Angeles October 15, 2013 Response, Att. C; also available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/order_final.pdf> (as of Nov. 18, 2014).

[17] Los Angeles Water Board Request for State Water Board to Take Official Notice of Or Accept as Supplemental Evidence Exhibit A through SS (Oct. 15, 2013) (Los Angeles Water Board Request for Official Notice), Exh.'s A, B; also available at <http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/MS4FinalLimitedModDocument/FinalModifiedPermit_10-25-12.pdf> and <http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/FinalPermit2011/DCMS4FINALResponsivenessSummary093011.pdf> (as of Nov. 18, 2014).

[18] Los Angeles Water Board Request for Official Notice, Exh.C; also available at <http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf> (as of Nov.18, 2014).

[19] Chapter 7 of USEPA's NPDES Permit Writers' Manual, EPA-833-K-10-001, September 2010 (NPDES Permit Writers' Manual) was submitted as Exhibit C to Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay Request for Official Notice (Dec. 10, 2012) (Environmental Petitioners' Request for Official Notice). The chapter may additionally be accessed through links at <http://water.epa.gov/polwaste/npdes/basics/NPDES-Permit-Writers-Manual.cfm> (as of Nov.18, 2014).

6. Memorandum to the Water Management Division Directors, Regions I-X, and NPDES State Directors, issued by USEPA, 1989;[21]
7. "Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12," issued by USEPA, Region 9, June 3, 1987;[22]
8. Order WQ 2014-0077-DWQ, amending NPDES Statewide Storm Water Permit for State of California Department of Transportation, Order 2012-0011-DWQ, adopted by State Water Board, May 20, 2014;[23]
9. Statement from USEPA soliciting comments on the USEPA Memorandum Setting forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (November 12, 2010), issued March 17, 2011.[24]
10. Memorandum, "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,'" issued by USEPA, November 26, 2014.[25]

In addition, we are incorporating the administrative record of the November 20, 2012 workshop on receiving water limitations, including the Receiving Water Limitations Issue Paper and comments by interested persons, into our record for the petitions on the Los Angeles MS4 Order.[26]

(continued from previous page)

[20] Environmental Petitioners' Request for Official Notice, Exh.B, available at <http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf> (as of Nov. 18, 2014).

[21] Environmental Petitioners' Request for Official Notice, Exh.D; also available at <http://www.epa.gov/npdes/pubs/owm0231.pdf> (as of Nov. 18, 2014).

[22] Environmental Petitioners' Request for Official Notice, Exh.E; available at <http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf> (as of Nov. 18, 2014).

[23] Available at <http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2014/wqo2014_0077_dwq.pdf> (as of Nov. 18, 2014).

[24] Available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf> (as of Nov. 18, 2014).

[25] Available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf> (as of March 30, 2015).

[26] The Receiving Water Limitations Issue Paper and comments and workshop presentations by interested person are available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml>.

Among other requests, we are not granting the requests to take official notice of or supplement the Administrative Record with the notices of intent, workplans, draft programs, and other documents filed by Permittees toward development of WMPs/EWMPs and associated monitoring programs following adoption of the Los Angeles MS4 Order or comments submitted on those documents, or the conditional approvals of several of the programs. With regard to factual evidence regarding actions taken by Permittees to comply with the Los Angeles MS4 Order after it was adopted, we believe it appropriate to close the record with the adoption of the Los Angeles MS4 Order. However, we are keenly aware that the success of the Los Angeles MS4 Order in addressing water quality issues depends primarily on the careful and effective development and implementation of programs consistent with the requirements of the Order; we speak to that issue later in our discussion.

City of El Monte's Amended Petition

Petitioner City of El Monte (El Monte) timely filed a petition on December 10, 2012, challenging a number of provisions of the Los Angeles MS4 Order. Thereafter, on February 19, 2013, El Monte filed an amended petition, based on information it asserted was not available prior to the deadline for submission of the petition.

Water Code section 13320, subdivision (a) provides that a petition for review of a regional water quality control board (regional water board) action must be filed within 30 days of the regional water board's action.[27] The State Water Board interprets that requirement strictly and petitions filed more than 30 days from regional water board action are rejected as untimely. El Monte asserted that the two additional arguments raised in the amended petition were based on information that was not available prior to the deadline for submitting the petition and were therefore appropriate for State Water Board consideration.

Even if we were required by statute or regulation to accept amended petitions based on new information, here, El Monte's new arguments are not supported by information previously unavailable. First, El Monte argues that the Supreme Court's decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council* (2013) 133 S.Ct. 710 invalidated certain provisions of the Los Angeles MS4 Order that require compliance with water quality standards and total maximum daily load requirements through receiving water monitoring. Contrary to El Monte's assertion, the decision by the Supreme Court did not invalidate any requirements of the Los Angeles MS4 Order and did not result in any changes to

[27] See also Cal. Code Regs., tit. 23, § 2050.

the Order. The Supreme Court decision, to the extent it applies to the legal issues before us in this matter, constitutes precedential case law and must be considered in our review of the Los Angeles MS4 Order, but it does not constitute new information that supports an amended petition.[28]

Second, El Monte argues that the Los Angeles Water Board failed to consider various provisions of the California Watershed Improvement Act of 2009[29] when it adopted the Los Angeles MS4 Order. To the extent El Monte believed that the California Watershed Improvement Act was relevant to adoption of the Los Angeles MS4 Order, El Monte had the opportunity to raise that issue in comments before the Los Angeles Water Board and in its timely petition to the State Water Board. Having failed to raise the issue before the Los Angeles Water Board and in its timely petition, El Monte cannot raise the issue in an amended petition.[30]

We reject El Monte's amended petition as untimely.

Environmental Petitioners' Motion to Strike

Petitioners Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay (Environmental Petitioners), submitted a motion on November 11, 2013, requesting that the State Water Board strike sections of the October 15, 2013 Responses by six petitioners (Motion to Strike). The relevant sections respond to a collateral estoppel argument made by the Environmental Petitioners in their August 15, 2013 Receiving Water Limitations Submission to the State Water Board. Several parties asserted in their petitions that requiring compliance with water quality standards in MS4 permits violates federal law or conflicts with prior State Water Board precedent. The Environmental Petitioners responded in their August 15, 2013 Receiving Water Limitations Submission that these arguments were barred by collateral estoppel because the claims were settled in prior court cases challenging the 2001 Los Angeles MS4 Order. Six of the October 15, 2013 Responses, namely those by the Cities of

[28] We note that the State Water Board has the option of allowing additional briefing when there are material legal developments concerning issues raised in a petition, but we did not find such briefing would aid review of the petitions in this case.

[29] Wat. Code, § 16100 et seq.

[30] In addition to being untimely, El Monte's argument lacks merit. The California Watershed Improvement Act of 2009 grants authority to local government permittees regulated by an MS4 permit to develop and implement watershed improvement plans, but does not limit the authority of a regional water board to impose terms related to watershed management in an MS4 permit. Further, the terms of the WMPs/EWMPs are largely consistent with the watershed improvement plans authorized by the Act, so a permittee can comply with the Los Angeles MS4 Order while also using the authority provided by the California Watershed Improvement Act of 2009 if it so chooses.

Arcadia, Claremont, Covina, Duarte and Huntington Park, San Marino et al.,[31] and Sierra Madre, incorporated a response to the collateral estoppel argument.

We stated in a July 15, 2013 letter that"[i]nterested persons may not use the [October 15][32] deadline for responses on the remaining petition issues as an opportunity to respond to comments filed on the receiving water limitations approach." We clarified further in a July 29, 2013 letter: "[W]hen submitting subsequent responses to the petitions in accordance with the [October 15] deadline, petitioners and interested persons should not raise new issues related to the specific questions regarding the watershed management program/enhanced watershed management program or respond to any August 15, 2013, submissions; however petitioners and interested persons will not be precluded from responding to specific issues raised in the original petitions on grounds that the issues are related to the receiving water limitations language."

We find that the collateral estoppel responses by the six petitioners are disallowed by the direction we provided in our July 15 and July 29, 2013 letters. However, as will be apparent in our discussion in section II.A, we do not rely on the Environmental Petitioners' collateral estoppel argument in resolving the petitions. Our determination that portions of the October 15, 2013 Responses are disallowed is, therefore, immaterial to the resolution of the issues.[33]

Having resolved the procedural issues, we turn to the merits of the Petitions.

A. Implementation of the Iterative Process as Compliance with Receiving Water Limitations

The Los Angeles MS4 Order includes receiving water limitations provisions that are consistent with our direction in Order WQ 99-05 in Part V.A of the Los Angeles MS4 Order. Part V.A. provides, in part, as follows:

1. Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited.

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[31] The cities of San Marino, Rancho Palos Verdes, South El Monte, Norwalk, Artesia, Torrance, Beverly Hills, Hidden Hills, Westlake Village, La Mirada, Vernon, Monrovia, Agoura Hills, Commerce, Downey, Inglewood, Culver City, and Redondo Beach submitted a joint October 15, 2013 Response.

[32] The July 15, 2013 letter set a deadline of September 20, 2013, which was subsequently extended to October 15, 2013.

[33] In a November 21, 2013 letter, we indicated that we would consider the Motion to Strike concurrently with drafting of this Order, but that we would not accept any additional submissions in this matter, including any responses to the Motion to Strike. City of San Marino objected to the letter and submitted an opposition to the Motion to Strike. Several petitioners submitted joinders in City of San Marino's motion. For the same reasons articulated above, we are not accepting these submissions; they would not affect our resolution of the issues.

2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible [footnote omitted], shall not cause or contribute to a condition of nuisance.

3. The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications. . . .[34]

The petitioners that are permittees (hereinafter referred to as "Permittee Petitioners")[35] argue that the above language either means, or should be read and/or clarified to mean, that good faith engagement in the requirements of Part V.A.3, traditionally referred to as the "iterative process," constitutes compliance with Parts V.A.1. and V.A.2. The position put forth by Permittee Petitioners is one we took up when we initiated a process to re-examine the receiving water limitations and iterative process in MS4 permits statewide with our Receiving Water Limitations Issue Paper and the November 20, 2012 workshop. We summarize the law and policy regarding Permittee Petitioners' position again here and ultimately disagree with Permittee Petitioners that implementation of the iterative process does or should constitute compliance with receiving water limitations.

The Clean Water Act generally requires NPDES permits to include technology-based effluent limitations and any more stringent limitations necessary to meet water quality standards.[36] In the context of NPDES permits for MS4s, however, the Clean Water Act does not explicitly reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency.[37] Specifically the Clean Water Act states as follows:

> Permits for discharges from municipal storm sewers –
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> . . .
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

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[34] Los Angeles MS4 Order, Part V.A, pp. 38-39.

[35] For ease of reference, where an argument is made by multiple Permittee Petitioners, even if not by all, we attribute that argument to Permittee Petitioners generally, and do not list which of the 37 Permittee Petitioners in fact make the argument. Where only one or two Permittee Petitioners make a particular argument, we have identified the specific Permittee Petitioner(s).

[36] 33 U.S.C. §§ 1311, 1342(a).

[37] 33 U.S.C. § 1342(p)(3)(B); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

> (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 State determines appropriate for the control of such pollutants.[38]

Thus, a permitting agency imposes requirements related to attainment of water quality standards where it determines that those provisions are "appropriate for the control of [relevant] pollutants" pursuant to the Clean Water Act municipal storm water provisions.

Under the Porter-Cologne Act, waste discharge requirements must implement applicable water quality control plans, which include the beneficial uses to be protected for a given water body and the water quality objectives reasonably required for that protection.[39] In this respect, the Porter-Cologne Act treats MS4 dischargers and other dischargers even-handedly and anticipates that all waste discharge requirements will implement the water quality control plans. However, when implementing requirements under the Porter-Cologne Act that are not compelled by federal law, the State Water Board and regional water boards (collectively, "water boards") have some flexibility to consider other factors, such as economics, when establishing the appropriate requirements.[40] Accordingly, since the State Water Board has discretion under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, the State Water Board may also utilize the flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.

We have previously exercised the discretion we have under federal law in favor of requiring compliance with water quality standards, but have required less than strict compliance. We have directed, in precedential orders, that MS4 permits require discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters,[41] but have prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements. That iterative process involves reporting of the violation, submission of a report describing proposed improvements to BMPs

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[38] 33 U.S.C. § 1342(p)(3)(B).

[39] Wat. Code, § 13263. The term "water quality standards" encompasses the beneficial uses of the water body and the water quality objectives (or "water quality criteria" under federal terminology) that must be met in the waters of the United States to protect beneficial uses. Water quality standards also include the federal and state antidegradation policy.

[40] Wat. Code, §§ 13241, 13263; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.

[41] State Water Board Orders WQ 98-01 (*Environmental Health Coalition*), WQ 99-05 (*Environmental Health Coalition*), WQ 2001-15 (*Building Industry Association of San Diego*).

expected to better meet water quality standards, and implementation of these new BMPs.[42] The current language of the existing receiving waters limitations provisions was actually developed by USEPA when it vetoed two regional water board MS4 permits that utilized a prior version of the State Water Board's receiving water limitations provisions.[43] In State Water Board Order WQ 99-05, we directed that all regional boards use USEPA's receiving water limitations provisions.

There has been significant confusion within the regulated MS4 community regarding the relationship between the receiving water limitations and the iterative process, in part because the water boards have commonly directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process. But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process.[44]

The position that the receiving water limitations are independent from the provisions that establish the iterative process has been judicially upheld on several occasions. The receiving water limitations provisions of the 2001 Los Angeles MS4 Order specifically have been litigated twice, and in both cases, the courts upheld the provisions and the Los Angeles Water Board's interpretation of the provisions. In a decision resolving a challenge to the 2001 Los Angeles MS4 Order, the Los Angeles County Superior Court stated: "[T]he Regional [Water] Board acted within its authority when it included [water quality standards compliance] in

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[42] State Water Board Order WQ 99-05, pp. 2-3; see also State Water Board Order WQ 2001-15, pp. 7-9. Additionally, consistent with federal law, we found it appropriate to require implementation of BMPs in lieu of numeric water quality-based effluent limitations to meet water quality standards. *See* State Water Board Orders WQ 91-03 (*Citizens for a Better Environment)*, WQ 91-04 (*Natural Resources Defense Council*), WQ 98-01, WQ 2001-15. This issue is discussed in greater detail in Section II.C. of this order.

[43] See State Water Board Orders WQ 99-05, WQ 2001-15.

[44] Several Permittee Petitioners have argued that the State Water Board's opinion in State Water Board Order WQ 2001-15 must be read to endorse a safe harbor in the iterative process. We disagree. Regardless, the State Water Board's position that the iterative process of the subject permit did not create a "safe harbor" from compliance with receiving water limitations was clearly established in subsequent litigation on that order. (See *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (Super. Ct. 2003, No. GIC780263), affd. *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866.)

the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard."[45] The lack of a safe harbor in the iterative process of the 2001 Los Angeles MS4 Order was again acknowledged in 2011 and 2013, this time by the Ninth Circuit Court of Appeal. In these instances, the Ninth Circuit was considering a citizen suit brought by the Natural Resources Defense Council against the County of Los Angeles and the Los Angeles County Flood Control District for alleged violations of the receiving water limitations of that order. The Ninth Circuit held that, as the receiving water limitations of the 2001 Los Angeles MS4 Order (and accordingly as the precedential language in State Water Board Order WQ 99-05) was drafted, engagement in the iterative process does not excuse liability for violations of water quality standards.[46] The California Court of Appeal has come to the same conclusion in interpreting similar receiving water limitations provisions in MS4 Orders issued by the San Diego Regional Water Quality Control Board in 2001 and the Santa Ana Regional Water Quality Control Board in 2002.[47]

While we reiterate that the judicial rulings have been consistent with the water boards' intention and position regarding the relationship between the receiving water limitations and the iterative process, we acknowledge that some in the regulated community perceived the 2011 Ninth Circuit opinion in particular as a re-interpretation of that relationship. Our Receiving Water Limitations Issue Paper and subsequent workshop reflected our desire to re-examine the issue in response to concerns expressed by the regulated community in the aftermath of that ruling.

As stated above, both the Clean Water Act and the Porter-Cologne Act afford some discretion to not require strict compliance with water quality standards for MS4 discharges. In each of the discussed court cases above, the court's decision is based on the specific permit language; thus the cases do not address our authority with regard to requiring compliance with water quality standards in an MS4 permit as a threshold matter, and they do not require us to continue to exercise our discretion as we decided in State Water Board Order

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[45] *In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-5, 7. The decision was affirmed on appeal (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985); however, this particular issue was not discussed in the court of appeal's decision.

[46] *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d. 880, rev'd on other grounds sub nom. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2013) 133 S.Ct. 710, mod. by *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135.

[47] *Building Industry Assn. of San Diego County, supra*,124 Cal.App.4th 866; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377.

WQ 99-05. Although it would be inconsistent with USEPA's general practice of requiring compliance with water quality standards over time through an iterative process,[48] we may even have the flexibility to reverse[49] our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance.[50]

However, with this Order, we now decline to do either. As the storm water management programs of municipalities have matured, an increasing body of monitoring data indicates that many water quality standards are in fact not being met by many MS4s. The iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards. Compliance with water quality standards is and should remain the ultimate goal of any MS4 permit. We reiterate and confirm our determination that provisions requiring compliance with receiving water limitations are "appropriate for the control of . . . pollutants" addressed in MS4 permits and that therefore, consistent with our authority under the Clean Water Act, we will continue to require compliance with receiving water limitations.[51]

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[48] See, e.g. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia, *supra*, fn. 17.

[49] Of course any change of direction would be subject to ordinary principles of administrative law. (See Code Civ. Proc., § 1094.5, subd. (b).)

[50] As such, it is not necessary to address the collateral estoppel arguments raised by the Environmental Petitioners and opposed by Permittee Petitioners. We agree that it is settled law that we have the discretion to require compliance with water quality standards in an MS4 permit under federal and state law. We also agree that it is settled law that the receiving water limitations provisions currently spelled out in our MS4 permits do not carve out a safe harbor in the iterative process. But the question for us is whether we should continue to exercise our discretion to utilize the same approach to receiving water limitations established under our prior precedent, or proceed in a new direction.

[51] Several Permittee Petitioners argued in comments submitted on the first draft of this order that, because we find that we have some discretion under Clean Water Act section 402(p)(3) to not require compliance with receiving water limitations, the Los Angeles Water Board's action in requiring such compliance -- and our action in affirming it -- is pursuant to state authority. (See, e.g., Cities of Arcadia, Claremont, and Covina, Comment Letter, Jan. 21, 2015.) The Permittee Petitioners argue that the action is therefore subject to evaluation in light of the factors set out in Water Code section 13263 and 13241 pursuant to *City of Burbank, supra,* 35 Cal.4th 613. Under *City of Burbank,* a regional water board must consider the factors specified in section 13241 when issuing waste discharge requirements under section 13263, subdivision (a), but only to the extent those waste discharge requirements exceed the requirements of the federal Clean Water Act. (35 Cal.4th at 627.) Nowhere in our discussion in this section do we mean to disavow either that the Los Angeles Water Board acted under federal authority to impose "such other provisions as . . .determine[d] appropriate for the control of . . . pollutants" in adopting the receiving water limitations provisions of the Los Angeles MS4 Order in the first instance or that we are acting under federal authority in upholding those provisions. (33 U.S.C. § 1342(p)(3)(B)(iii).) The receiving water limitations provisions do not exceed the requirements of federal law. We nevertheless also point out that the Los Angeles Water Board engaged in an analysis of the factors under section 13241 when adopting the Order. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-139 to F-155.)

As we explained in 2001, "[u]rban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses."[52] More than a decade later, this is still true. By definition, many of our urban waterways will never attain water quality standards and fully realize their beneficial uses if municipal runoff is allowed to continue to cause or contribute to exceedances of water quality standards. Further, the efforts of other dischargers who are required to not cause or contribute to exceedances of water quality standards would be largely in vain if we did not regulate MS4 dischargers with a somewhat even hand.

Such an approach is additionally consistent with the Porter-Cologne Act's emphasis on water quality control plans as the cornerstone of water quality planning and regulation and the act's expectation that all waste discharge requirements will implement the water quality control plans. We believe that direct enforcement of water quality standards is necessary to protect water quality, at a minimum as a back-stop where dischargers fail to meet requirements of the Order designed to achieve progress toward meeting the standards. We will not reverse our precedential determination in State Water Board Order WQ 99-05 that established the receiving water limitations provisions for MS4 permits statewide and reiterate that we will continue to read those provisions consistent with how the courts have: engagement in the iterative process does not excuse exceedances of water quality standards. We accordingly also decline to direct any revisions to the receiving water limitations provisions of the Los Angeles MS4 Order, which are consistent with our precedential language.[53]

Yet, we are sympathetic to the assertions made by MS4 dischargers that the receiving water limitations provisions mandated by our Order WQ 99-05 may result in many years of permit noncompliance, because it may take years of technical efforts to achieve compliance with the receiving water limitations, especially for wet weather discharges.

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[52] State Water Board Order WQ 2001-15, p. 7.

[53] We disagree with Permittee Petitioners' argument that the receiving water limitations in Part V.A of the Los Angeles MS4 Order are confusing, unclear, or overbroad, because they prohibit causing or contributing to a violation of a receiving water limitation rather than a violation of water quality standards. The Los Angeles Water Board defines "receiving water" as "[a] 'water of the United States' in to which waste and/or pollutants are or may be discharged." (Los Angeles MS4 Order, Att. A., p. A-16.) The Los Angeles Water Board further defines "receiving water limitations" as "[a]ny applicable numeric or narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies adopted by the State Water Board, or federal regulations, including but not limited to, 40 CFR §131.38." (*Ibid.*) Receiving water limitations are therefore the water quality standards, including water quality objectives and criteria, that apply to the receiving water as expressed in the water quality control plan for the region, statewide water quality control plans that specify objectives for water bodies in the region, State Water Board policies for water quality control, and federal regulations.

Accordingly, we believe that the MS4 permits should incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.

With the WMP/EWMP provisions of the Los Angeles MS4 Order, the Los Angeles Water Board is striving to allow one such alternative compliance path. As such, the fundamental issue for review before us in this matter is whether the Los Angeles MS4 Order's WMP/EWMP provisions constitute a legal and technically sound compliance alternative for achieving receiving water limitations. We discuss and resolve this issue in the next section.

B. WMP/EWMP as Alternative Compliance Options for Complying with Receiving Water Limitations

The WMP/EWMP provisions allow Permittees to choose an integrated and collaborative watershed-based approach to meeting the requirements of the Los Angeles MS4 Order, including the receiving water limitations. Permittees develop a plan, either collaboratively or individually, that addresses water quality priorities within a watershed. Permittees first prioritize water quality issues within each watershed. Permittees may use the WMP/EWMP to address water body-pollutant combinations for which a TMDL has been developed, giving highest priority to those with interim and final compliance deadlines within the permit term. Permittees may also address water body-pollutant combinations for which no TMDL has been developed, but where the water body is impaired or shows exceedances of the standards for the relevant pollutant from an MS4 source. Once prioritization is completed, Permittees assess the sources of the pollutants and select watershed strategies that are designed to eliminate non-storm water discharges to the MS4 that are a source of pollutants, that meet all applicable TMDL-derived interim and final water quality-based effluent limitations (WQBELs) and/or limitations to be met in the receiving water (referred to herein as "other TMDL-specific limitations")[54] pursuant to corresponding compliance schedules, and that ensure that discharges from the MS4 do not cause or contribute to exceedances of receiving water limitations. Except as described below for storm water retention projects, Permittees conduct a "reasonable assurance analysis" for each water body-pollutant combination incorporated into the

[54] Some of the TMDL limitations of the Los Angeles MS4 Order are expressed not as WQBELs but as standards to be met in the receiving water. The Los Angeles MS4 Order refers to these limitations as "receiving water limitations;" however, in order to avoid confusion with the general receiving water limitations in Part V.A., we will use the term "other TMDL-specific limitations." Accordingly, while the Los Angeles MS4 Order uses the term "receiving water limitations" to refer to both the receiving water limitations in part V.A and some of the TMDL-based requirements in Attachments L-R, when we use the term we refer only to the receiving water limitations in part V.A.

WMP/EWMP to demonstrate the ability of the program to meet those objectives. Permittees additionally implement an integrated monitoring and assessment program to determine progress, adapting strategies and measures as necessary.[55]

In addition to all the requirements above, for those Permittees that choose to develop and implement an EWMP, the EWMP provisions also require that Permittees collaborate on multi-benefit regional projects and, wherever feasible, retain all non-storm runoff, as well as all storm water runoff from the 85th percentile 24-hour storm event (hereinafter "storm water retention approach") for the drainage areas tributary to the projects.[56]

The primary controversy concerning the WMP/EWMP provisions of the Los Angeles MS4 Order is the manner in which they interact with the receiving water limitations and the WQBELs and other TMDL-specific limitations. Under certain conditions detailed in the Order, Permittees may be deemed in compliance with the receiving water limitations and the WQBELs and other TMDL-specific limitations by fully implementing the WMP/EWMP, rather than by demonstrating that the receiving water limitations and the WQBELs and other TMDL-specific limitations have actually been achieved. Specifically:

1. Permittees that develop and implement a WMP/EWMP and fully comply with all requirements and dates of achievement for the WMP/ EWMP as established in the Los Angeles MS4 Order, are deemed to be in compliance with the receiving water limitations in Part V.A for the water body-pollutant combinations addressed by the WMP/EWMP.[57]

2. Permittees fully in compliance with the requirements and dates of achievement of the WMP/EWMP are deemed in compliance with the *interim* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the WMP/EWMP.[58]

3. Permittees implementing an EWMP and utilizing the storm water retention approach in a drainage area tributary to the applicable water body are deemed in compliance with the *final* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the storm water retention approach.[59]

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[55] Los Angeles MS4 Order, Part VI.C., pp. 49-67.

[56] *Id.*, Part VI.C.1.g., pp. 48-49.

[57] *Id.*, Part VI.C.2.b., p. 52.

[58] *Id.*, Parts VI.C.3.a., p. 53, VI.E.2.d.i.4., pp. 143-44. The Los Angeles MS4 Order establishes separate requirements for Trash TMDLs and the WMP/EWMP are not a means of achieving compliance with the Trash TMDL provisions. (See Part VI.E.5, pp. 147-154.) References to TMDLs in this section exclude the Trash TMDLs.

[59] *Id.*, Part VI.E.2.e.i.(4), p. 145. As with Part VI.E.2.d.i.4, this Part does not apply to Trash TMDLs.

4. Because the Order additionally provides that full compliance with the general TMDL requirements in Part VI.E and the WQBELs and other TMDL-specific limitations in Attachments L through R constitutes compliance with the receiving water limitations in V.A for the specific pollutants addressed by the relevant TMDL, [60] provisions 2 and 3 above also constitute compliance with the receiving water limitations for the particular water body-pollutant combinations.

5. Finally, Permittees that have declared their intention to develop a WMP/EWMP may be deemed in compliance with receiving water limitations and with interim WQBELs with compliance deadlines occurring prior to approval of the WMP/EWMP if they meet certain conditions during the development phase.[61]

Both Environmental Petitioners and Permittee Petitioners put forth a number of arguments to the effect that the WMP/EWMP provisions of the Los Angeles MS4 Order are contrary to federal and state law or reflect poor policy. We discuss each argument below.

1. Anti-backsliding

The Environmental Petitioners argue that the inclusion of the WMP/EWMP in the Los Angeles MS4 Order violates the anti-backsliding provisions of the Clean Water Act and of the federal regulations.[62] The Clean Water Act generally prohibits the relaxation of an effluent limitation established in an NPDES permit when that permit is renewed; the federal regulations include similar provisions. The Environmental Petitioners argue that the WMP/EWMP of the Los Angeles MS4 Order, by allowing a discharger to be deemed in compliance with receiving water limitations, even where a discharger may in fact be causing or contributing to an exceedance of a water quality standard, represent a relaxation of the receiving water limitations provisions contained in the 2001 Los Angeles MS4 Order.[63]

We do not agree with the Environmental Petitioners that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the anti-backsliding provisions of either the Clean Water Act or the federal regulations. Anti-backsliding provisions are an important aspect

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[60] *Id.*, Part VI.E.2.c.ii., p. 143. Although this provision reflects a departure from provisions in previous MS4 permits, the provision has not generated controversy and has not been contested in the petitions. The State Water Board supports this provision in MS4 permits, as discussed at section II.B.5.b. of this order.

[61] *Id.*, Parts VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.

[62] 33 U.S.C. § 1342(o); 40 C.F.R. §122.44(*l*).

[63] The receiving water limitations of the 2001 Los Angeles MS4 Order (like the receiving water limitations in Section V.A. of the Los Angeles MS4 Order) were modeled on the precedential language in State Water Board Order WQ 99-05.

of the Clean Water Act that generally promote continued progress toward clean water, but the provisions do not apply in all circumstances and are subject to certain exceptions. The 2001 Los Angeles MS4 Order required compliance with receiving water limitations, directed Permittees to achieve those limitations through the iterative process, but retained the Los Angeles Water Board's discretion to enforce compliance with the receiving water limitations at any time. The Los Angeles MS4 Order requires compliance with receiving water limitations, but allows implementation of control measures through the WMPs/EWMPs to constitute such compliance, and reserves direct enforcement of the receiving water limitations to situations where a permittee fails to comply with the WMP/EWMP provisions. The approaches under the prior and current orders are designed to achieve the same results – compliance with receiving water limitations – but through distinct paths that are not easily comparable for purposes of the specific, technical anti-backsliding requirements laid out in federal law.[64] We nevertheless discuss the provisions below.

The Clean Water Act contains both statutory anti-backsliding provisions in section 402(o) and regulatory anti-backsliding provisions in 40 C.F.R. section 122.44(*l*). The Clean Water Act's statutory prohibition against backsliding applies under a narrow set of criteria specified in Clean Water Act section 402(o). First, section 402(o) prohibits relaxing effluent limitations originally established based on best professional judgment, when there is a newly revised effluent limitation guideline.[65] The WMP/EWMP is not derived from an effluent limitation guideline, so this first prohibition is inapplicable. Second, section 402(o) prohibits relaxing effluent limitations imposed pursuant to Clean Water Act sections 301(b)(1)(C) or 303(d) or (e).[66] The receiving water limitations provisions in the 2001 Los Angeles MS4 Order were not

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[64] Responding to an argument that NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia violated anti-backsliding requirements by removing certain numeric limitations in the prior permit, USEPA stated: "The Commenter implies that a Permit that replaces a numeric effluent limit with a non-numeric one is somehow automatically less stringent on that parameter. However, the narrative requirement only violates the anti-backsliding prohibition if the two provisions are comparable. . . . In this case, the two provisions are not comparable: EPA has determined that compliance with the performance standards in the Final Permit will result in more water quality protections for the DC MS4's receiving streams than did the previous aggregate numeric limit." (Responsiveness Summary, p. 84, *supra,* fn.17, citing *Communities for a Better Environment v. State Water Resources Control Bd.* (2005) 132 Cal. App. 4th 1313.)

[65] 33 U.S.C. § 1342(o)(1) ("In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314 (b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.").

[66] *Ibid.* ("In the case of effluent limitations established on the basis of section 1311 (b)(1)(C) or section 1313 (d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313 (d)(4) of this title.").

established based on either section 301(b)(1)(C) or section 303(d) or (e), so this prohibition on backsliding is inapplicable.[67] The receiving water limitations provisions in MS4 permits are imposed under section 402(p)(3)(B) of the Clean Water Act rather than under section 301(b)(1)(C),[68] and are accordingly not subject to the anti-backsliding requirements of section 402(o).

With respect to the regulatory anti-backsliding provisions in 40 Code of Federal Regulations section 122.44(*l*), the non-applicability is less clear cut. USEPA promulgated 40 Code of Federal Regulations section 122.44(*l*)(1) and its predecessor anti-backsliding regulations prior to the Water Quality Act of 1987, which established the municipal permitting requirements of section 402(p)(3)(B). There is ample regulatory history to demonstrate USEPA's intent in establishing the anti-backsliding policy and regulations with respect to evolving technology standards for traditional point sources.[69] We have found no definitive guidance, however, since that time from USEPA or the courts applying the general provisions of section 122.44(*l*) in the context of municipal storm water permits.[70] Further, we have previously noted that anti-backsliding principles may be difficult to assess in the context of non-

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[67] The Environmental Petitioners do not argue that the Los Angeles MS4 Order is contrary to Clean Water Act section 303(d)(4) (33 U.S.C. § 1313(d)(4)), which also sets out anti-backsliding requirements. Section 303(d)(4) sets out the conditions under which effluent limitations based on TMDL wasteload allocations may be relaxed. Specifically, effluent limitations for a discharge impacting an impaired water body where standards have not yet been attained may only be relaxed if either the cumulative effect of the revisions still assures the attainment of the water quality standards or the designated use that is not being attained is removed. (33 U.S.C. § 1313(d)(4)(A).) Where a water body has attained standards, effluent limitations may only be relaxed consistent with the federal antidegradation policy. (33 U.S.C. § 1313(d)(4)(B).)

[68] *Defenders of Wildlife*, *supra*, 191 F.3d at pp. 1165-1166.

[69] See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979) (describing codification of predecessor regulation codified at 40 C.F.R. 122.15(i).) In the context of municipal storm water, the MEP standard is the technology standard; the record here supports that MEP, as reflected in the permit conditions, has evolved since the issuance of the 2001 Los Angeles MS4 Order to become more stringent. (See, e.g., Los Angeles MS4 Order, Part VI.D.9.h.vii., p.132, compared to 2001 Los Angeles MS4 Order, Part 4.F.5.c., pp.48-49 [trash controls]; Los Angeles MS4 Order, Part VI.D.7.c., pp. 97-109, as compared to 2001 Los Angeles MS4 Order, Part 4.D.3., pp.36-37 [new development/redevelopment project performance criteria]; Los Angeles MS4 Order, Part VI.D.8.d., pp.113-114, as compared to 2001 Los Angeles MS4 Order, Part 4.E., pp.42-45 [requirements for construction sites less than one acre].)

[70] As requested by the Environmental Petitioners, we took official notice of a Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA Region III on August 8, 2012. (See fn. 19). We acknowledge that the letter states at page 3 that a provision in the Prince George County, Maryland, Phase I MS4 draft permit allowing for more time to complete tasks that were required under the previous permit constituted backsliding. The letter refers in passing to section 122.44(*l*)(1), but the letter has no regulatory effect and, further, is devoid of any analysis. The Environmental Petitioners have also pointed us to discussion of the regulatory anti-backsliding provisions in the NPDES Permit Writers' Manual. (NPDES Permit Writers' Manual, p. 7-4.) The relevant section of the NPDES Permit Writers' Manual does not explicitly distinguish between municipal storm water permits and traditional NPDES Permits in its discussion of the applicability of regulatory anti-backsliding provisions; however, nor does it specifically direct application of the anti-backsliding regulatory provisions to municipal storm water permits. We do not find this discussion to be to be determinative on the issue.

quantitative, non-numeric requirements such as BMPs and plans.[71] It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because, assuming for the sake of argument they do apply, the WMP/EWMP provisions would qualify for an exception to backsliding as discussed below.

Even if the receiving water limitations in MS4 permits could be considered subject to the anti-backsliding requirements of the Clean Water Act or the federal regulations, backsliding would be permissible based on the new information available to the Los Angeles Water Board when it developed and adopted the Los Angeles MS4 Order. The Clean Water Act and federal regulations contain exceptions to the anti-backsliding requirements where new information is available to the permitting authority that was not available at the time of the issuance of the prior permit and that would have justified the imposition of less stringent effluent limitations at that time.[72] The Los Angeles Water Board makes a compelling argument in its October 15, 2013 Response that the development of 33 watershed-based TMDLs adopted since 2001, the inclusion and implementation of three of those TMDLs in the 2001 Los Angeles MS4 Order, and the TMDL-specific and general monitoring and analysis during implementation, have made new information available to the Los Angeles Water Board that fundamentally shaped the WMP/EWMP alternative of the Los Angeles MS4 Order. The Los Angeles Water Board states that the new information resulted in a new understanding that "time to plan, design, fund, operate and maintain [best management practices (BMPs)] is necessary to attain water quality improvements, and these BMPs are best implemented on a watershed scale."[73] The Los Angeles Water Board further points out that, in terms of water supply, there has been a paradigm shift in the last decade from viewing storm water as a liability to viewing it as a regional asset, and that the Los Angeles MS4 Order was drafted to incorporate this new paradigm into its structure.

The WMP/EWMP approach represents a comprehensive attempt to implement the Board's new understanding regarding how to make progress toward achieving water quality

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[71] See Order WQ 96-13 (*Save San Francisco Bay Association*) at pp. 8-10. Although the relevant portion of that decision primarily concerned Clean Water Act section 402(o), its analysis is equally instructive with respect to 40 C.F.R. section 122.44(*l*). (In passing, we note that the order appears to assume that the permit's water quality-based requirements for the MS4 permit were derived pursuant to section 301(b)(1)(C); however, that assumption is in error based on the *Defenders of Wildlife* decision and subsequent State Water Board precedent.)

[72] See 33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(*l*)(1) (anti-backsliding does not apply if the circumstances on which the previous permit was based have materially and substantially changed and would constitute cause for permit modification under 40 C.F.R. section 122.62); 40 C.F.R. § 122.62(a)(2) (stating that new information not available at the time the previous permit was issued is cause for modification); see also 40 C.F.R. §122.44(*l*)(2)(i)(B)(1).

[73] Los Angeles Water Board October 15, 2013 Response, p. 51.

standards as well as supporting the development of new water supplies.[74] The anti-backsliding requirements of the Clean Water Act and the federal regulations thus did not foreclose the incorporation of the WMP/EWMP alternatives into the Los Angeles MS4 Order even though the alternatives allow additional time to achieve receiving water limitations as compared to the immediate compliance required under the 2001 Los Angeles MS4 Order.

We shall amend Finding II.N. and Part III.D.4, page F-20, of Attachment F, Fact Sheet, as follows:

Finding II.N:

N. Anti-Backsliding Requirements. Section 402(o)(2) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit. **The Fact Sheet of this Order contains further discussion regarding anti-backsliding.**

Attachment F, Fact Sheet, Part III.D.4:

4. Anti-Backsliding Requirements. Sections 402(o)(2) and 303(d)(4) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. ~~All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit.~~ **While this Order allows implementation of Watershed Management Plans/EWMPs to constitute compliance with receiving water limitations under certain circumstances, the availability of that alternative and the corresponding availability of additional time to come into compliance with receiving water limitations, does not violate the anti-backsliding provisions. The receiving**

[74] The Environmental Petitioners argue that information relied on to develop the WMP/EWMP approach was available to the Los Angeles Water Board at the time of the issuance of the 2001 Los Angeles MS4 Order, since regional and watershed based strategies and technologies in storm water planning, as well as the potential benefits of storm water for water supply, were considered prior to the last permit cycle. Similarly, the Environmental Petitioners argue that some of the data gathered through TMDL development was through the process of assessing impairments and through preparing drafts of the TMDL and was therefore available to the Los Angeles Water Board in 2001. (Environmental Petitioners, Written Comments, Jan. 21, 2015, pp. 15-17, 23-25.) The Environmental Petitioners have asked us to take official notice of several documents that support these assertions. It is not necessary for us to do so because we do not disagree with the Environmental Petitioners that some of the information that the Los Angeles Water Board has cited in support of an exception to the anti-backsliding requirements was available at the time of the adoption of the 2001 Los Angeles MS4 Order. We nevertheless concur with the Los Angeles Water Board that the more than a decade of implementation of storm water requirements, as well as the development and implementation of TMDL requirements, since 2001, has, as a whole, fundamentally reshaped our understanding of the physical and time scale on which such measures must be implemented to bring MS4s into compliance with receiving water limitations. Further, we find that all regional water boards are informed by the information gained in the Los Angeles region, so that any regional water board that adopts an alternative compliance path in a subsequent Phase I permit would not be in violation of anti-backsliding requirements, regardless of the particular storm water permitting history of that region.

water limitations provisions of this Order are imposed under section 402(p)(3)(B) of the Clean Water Act rather than based on best professional judgment, or based on section 301(b)(1)(C) or sections 303(d) or (e), and are accordingly not subject to the anti-backsliding requirements of section 402(o). Although the non-applicability is less clear with respect to the regulatory anti-backsliding provisions in 40 Code of Federal Regulations section 122.44(*l*), the regulatory history suggests that USEPA's intent was to establish the anti-backsliding regulations with respect to evolving technology standards for traditional point sources. (See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979)). It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because the WMP/EWMP provisions qualify for an exception to backsliding as based on new information. The Watershed Management Plan/EWMP provisions of this Order were informed by new information available to the Board from experience and knowledge gained through the process of developing 33 watershed-based TMDLs and implementing several of the TMDLs since the adoption of the previous permit. In particular, the Board recognized the significance of allowing time to plan, design, fund, operate and maintain watershed-based BMPs necessary to attain water quality improvements and additionally recognized the potential for municipal storm water to benefit water supply. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions. (33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1); 40 C.F.R. §122.44(l)(2)(i)(B)(1)).

2. Antidegradation

The Environmental Petitioners argue that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the federal and state antidegradation policies.[75] The federal and state antidegradation policies generally require that the existing quality of water bodies be maintained, unless degradation is justified through specific findings. At a minimum, any degradation may not lower the quality of the water below the water quality standards.[76]

The federal and state antidegradation policies are not identical; however, where the federal antidegradation policy is applicable, the State Water Board has interpreted State Water Board Resolution No. 68-16, the state antidegradation policy, to incorporate the federal antidegradation policy.[77] In the context of the Los Angeles MS4 Order, a federal NPDES permit, compliance with the federal antidegradation policy would require consideration of the following: First, the Los Angeles MS4 Order must ensure that "existing instream uses and the level of

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[75] 40 C.F.R. § 131.12; State Water Board Resolution No. 68-16, Statement of Policy with Respect to Maintaining High Quality Waters in California (State Water Board Resolution No. 68-16).

[76] *Ibid.*

[77] State Water Board Order WQ 86-17 (*Fay*), pp. 16-19.

water quality necessary to protect the existing uses" is maintained and protected.[78] Second, if the baseline quality of a water body for a given constituent "exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected" through the requirements of the Los Angeles MS4 Order unless the Los Angeles Water Board makes findings that (1) any lowering of the water quality is "necessary to accommodate important economic or social development in the area in which the waters are located;" (2) "water quality adequate to protect existing uses fully" is assured; and (3) "the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control" are achieved.[79]

The Los Angeles MS4 Order must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy.[80] In particular, the Los Angeles Water Board must find that not only present, but also anticipated future uses of water are protected, and must ensure "best practicable treatment or control" of the discharges."[81] The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.[82]

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[78] 40 C.F.R. § 131.12(a)(1). This provision has been interpreted to mean that, "[i]f baseline water quality is equal to or less than the quality as defined by the water quality objective, water quality shall be maintained or improved to a level that achieves the objectives." (State Water Board, Administrative Procedures Update, Antidegradation Policy Implementation for NPDES Permitting, 90-004 (APU 90-004), p. 4.) This provision is completely consistent with, and implemented by, the receiving water limitations provisions discussed above.

[79] 40 C.F.R. § 131.12(a)(2); see also State Water Board Resolution No. 68-16, Resolve 2. The federal regulations additionally require strict maintenance of water quality for "outstanding national resources." (40 C.F.R. § 131.12(a)(3).) There are no designated outstanding national resource waters covered by the Los Angeles MS4 Order.

[80] See State Water Board Order WQ 86-17 (*Fay*), p. 23, fn. 11.

[81] State Water Board Resolution No. 68-16, Resolve 2. Best practicable treatment or control is not defined in Resolution No. 68-16; however, the State Water Board has evaluated what level of treatment or control is technically achievable using "best efforts." (See State Water Board Orders WQ 81-5 (*City of Lompoc*), WQ 82-5 (*Chino Basin Municipal Water District)*, WQ 90-6 (*Environmental Resources Protection Council*).) A Questions and Answers document on Resolution No. 68-16 by the State Water Board states as follows: "To evaluate the best practicable treatment or control method, the discharger should compare the proposed method to existing proven technology; evaluate performance data, e.g. through treatability studies; compare alternative methods of treatment or control; and/or consider the method currently used by the discharger or similarly situated dischargers . . .The costs of the treatment or control should also be considered . . . ." (Questions and Answers, Resolution No. 68-16, State Water Board (Feb. 16, 1995), pp. 5-6.)

[82] APU 90-004, p.4. The baseline for application of the federal antidegradation policy is 1975. For state antidegradation requirements, see also *Asociacion de Gente Unida por el Agua v. Central Valley Water Board* (2012) 210 Cal.App.4th 1255,1270. The baseline for the application of the state antidegradation policy is generally the highest water quality achieved since 1968. However, where a water quality objective for a particular constituent was adopted after 1968, the baseline for that constituent is the highest water quality achieved since the adoption of the *(Continued)*

The Los Angeles MS4 Order contains a conclusory antidegradation finding, but the Fact Sheet contains additional discussion.[83] The Fact Sheet discussion essentially conveys that, where there are high quality waters in the region, the antidegradation requirements are met because the Order requires best practicable treatment or control in the form of MEP and water quality standards compliance and, further, where the water quality is already impaired, the Order requires implementation of TMDL requirements to achieve water quality standards over time. The Fact Sheet also finds that the Los Angeles MS4 Order does not authorize an increase in waste discharges. The Los Angeles Water Board argues that it was not required to make more detailed findings because, using its best professional judgment and available data, it concluded that the Los Angeles MS4 Order would prevent any degradation. For this proposition, the Los Angeles Water Board cites to State Water Board guidance from 1990 (APU 90-004).[84] The guidance may be construed to exempt the Los Angeles Water Board from conducting an extensive pollutant by pollutant analysis for each water body in the region, but it does not exempt the Board from clearly stating its basis for finding that its action is consistent with the antidegradation policies.

The Los Angeles Water Board has provided a more extensive analysis of why the Los Angeles MS4 Order complies with the antidegradation policies in its October 15, 2013 Response. The Los Angeles Water Board argues that most of the water bodies impacted by the Los Angeles MS4 Order are already impaired for multiple constituents and that, even if some of these water bodies may have been higher quality in 1968, a scenario largely contradicted by the available data,[85] the appropriate baseline for the quality of such waters is the level of control achieved under the prior permit. The Los Angeles Water Board further argues that the Los Angeles MS4 Order has provisions that are equally or more stringent than those of the

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objective. Resolution 68-16 requires a comparison of the existing quality to "the quality established in policies as of the date on which such policies become effective." (Resolution 68-16, Resolve 1.)

[83] Los Angeles MS4 Order, Finding II.M; Fact Sheet, Att. F, pp. F19-F20.

[84] APU 90-004, p. 2.

[85] We reviewed the Administrative Record, including the 1998 Clean Water Act section 303(d) List (May 12, 1999) (Administrative Record, section 10.VI.E., RB-AR35684-35733), the 2010 Clean Water Act section 303(d) List (Oct.11, 2011) (Administrative Record, section 10.VI.E., RB-AR35734-35785), Santa Monica Bay Restoration Project, An Assessment of Inputs of Fecal Indication Organisms and Human Enteric Viruses from Two Santa Monica Bay Storm Drains (1990) (Administrative Record, section 10.VI.E, RB-AR43363-43413), Toxic Substances Monitoring Program, 10 Year Summary Report 1978-1987 (Administrative Record, Order No. 01-182, R0044602-0045053) and comments submitted by interested persons to the Los Angeles Water Board (Administrative Record RB-AR1006-1038, RB-AR1100-1128, RB-AR1768-2119, RB-AR2653-2847, RB-AR5642-17888). We found no specific evidence presented to the Los Angeles Water Board of high quality waters in the region with regard to pollutants typically associated with storm water discharges; however, we also recognize that in the absence of specific evidence of high quality waters, a blanket statement that there are no high quality water body-pollutant combinations may be overbroad.

2001 Los Angeles MS4 Order and therefore will not allow water quality to degrade below the level of control achieved under the prior permit.

We agree with the Los Angeles Water Board that the Los Angeles MS4 Order maintains and improves the level of control achieved under the 2001 Los Angeles MS4 Order. We expect that the Los Angeles MS4 Order's TMDL requirements and receiving water limitations, which may be implemented through the WMP/EWMP provisions, will be the means for achieving water quality standards for the majority of degraded water bodies in the region. To assert, as the Environmental Petitioners do, that compliance with the receiving water limitations provisions of the 2001 Los Angeles Order is more stringent than establishing specific implementation requirements with clear deadlines for TMDL and receiving water limitations compliance is misguided. We are concerned with the totality of the provisions in the two permits and find that, viewed from that broader perspective, the Los Angeles MS4 Order is at least as stringent in addressing degradation as its predecessor.[86] The Los Angeles MS4 Order improves on past practices that have been inadequate to protect water quality, and includes a monitoring and assessment program that will identify any changes in water quality.[87] In general, under the Los Angeles MS4 Order, we expect to see a trajectory away from any past degradation, even if there may be some continued short-term degradation.

We are not persuaded, however, that the level of control achieved under the 2001 Los Angeles MS4 Order necessarily represents the baseline for purposes of an antidegradation analysis. The 2001 Los Angeles MS4 Order had only minimal findings regarding antidegradation and it is not apparent that any degradation that may have continued under the conditions of the 2001 Los Angeles MS4 Order was anticipated by the Los Angeles Water Board and supported with appropriate analysis regarding economic and social benefits[88] and best practicable treatment or control. We therefore find that the appropriate baseline remains 1968 or the highest quality of receiving waters attained since 1968. We acknowledge

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[86] In making this finding we also recognize that the Permittees may be deemed in compliance with receiving water limitations prior to approval of the WMP/EWMP. (Los Angeles MS4 Order Parts VI.C.2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.) As discussed further under section II.B.6., we find that the Los Angeles Water Board reasonably exercised its discretion in allowing for compliance during the program development phase and further that the program development phase does not detract from the overall effectiveness of the permit provisions.

[87] *See Asociacion de Gente Unida, supra*, 210 Cal.App.4th at p. 1278.

[88] We note that the administrative record provides evidence that some discharge of storm water is to the maximum benefit of the people of the state because such discharge is necessary for flood control and public safety and helps accommodate development. (See, e.g., Administrative Record, section 10.VI.C, RB-AR30101; RB-AR32557-32558.)

that the evidence in the record indicates that it is unlikely that many water bodies were high quality even as far back as 1968, but we cannot make a blanket statement to that effect.[89]

Despite this conclusion, we will not remand the antidegradation issue to the Los Angeles Water Board for further consideration, but will make the findings ourselves based on the record before us. Our findings are necessarily made at a generalized level. Even if the directive of APU 90-004 to carry out a complete antidegradation analysis for each water body-pollutant combination is applicable here, there is simply insufficient data available (to us or the Los Angeles Water Board) to make such findings. The APU 90-004 contemplates the appropriate antidegradation analysis for a discrete discharge or facility. It has limited value when considering antidegradation in the context of storm water discharges from diffuse sources, conveyed through multiple outfalls, with multiple pollutants impacting multiple water bodies within a municipality, or in this case, region, especially given that reliable data on the baseline water quality from 1968 is not available.[90]

The Environmental Petitioners propose that antidegradation be addressed in subsequent actions of the Los Angeles Water Board by requiring that the reasonable assurance analysis (discussed in greater detail in section II.B.4.c. of this Order) supporting a WMP/EWMP also demonstrate that the proposed control measures will maintain high quality of waters with regard to pollutants for which they are not impaired. We reject this approach for two reasons. First, the Los Angeles Water Board was required under the federal and state antidegradation policies to evaluate whether permit conditions would lead to degradation of high quality waters at the time of permit issuance. Second, requiring Permittees to incorporate an evaluation of all water body-pollutant combinations, including those where there are no impairments or exceedances, would require them to expand the reasonable assurance analysis beyond its useful function and manageable scope.

We shall amend Finding II.M and Part D.3 at pages F-19 to F-20 of Attachment F, the Fact Sheet, as follows:

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[89] See fn. 85.

[90] We note that USEPA did not conduct a detailed antidegradation analysis in issuing NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia, presumably for similar reasons. The court in *Asociacion de Gente Unida* relied on APU 90-004 in part in rejecting an antidegradation analysis conducted by the Central Valley Regional Water Quality Control Board for discharges of pollutants to groundwater from dairy facilities region-wide, but the court's objection was to the regional water board's reliance on an illusory prohibition of discharge to groundwater in finding that no antidegradation analysis was required, not to the sufficiency of any generalized antidegradation analysis the Board might have conducted in lieu of its reliance on the prohibition. (210 Cal.App.4th at pp. 1271-1273.)

Finding II. M.

M. Antidegradation Policy
40 CFR section 131.12 requires that state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. Resolution No. 68-16 requires that existing water quality be maintained unless degradation is justified based on specific findings. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the state and federal antidegradation policies. The permitted discharge is consistent with the antidegradation provision of section 131.12 and State Water Board Resolution No. 68-16 **as set out in the Fact Sheet.**

Attachment F, Fact Sheet Part III.D.3.

3. Antidegradation Policy. 40 CFR section 131.12[4] requires that the state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the State and federal antidegradation policies. Resolution No. 68-16 and 40 CFR section 131.12 require the Regional Water Board to maintain high quality waters of the State **unless degradation is justified based on specific findings. First, the Board must ensure that "existing instream uses and the level of water quality necessary to protect the existing uses" are maintained and protected. Second, if the baseline quality of a water body for a given constituent exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected through the requirements of the Order unless the Board makes findings that (1) any lowering of the water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) water quality adequate to protect existing uses fully is assured; and (3) the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control are achieved. The Board must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy. In particular, the Board must find that not only present, but also anticipated future uses of water are protected, and must ensure best practicable treatment or control of the discharges. The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.** ~~until it is demonstrated that any change in quality will~~

~~be consistent with maximum benefit to the people of the State, will not unreasonably affect beneficial uses, and will not result in water quality less than that described in the Regional Water Board's policies. Resolution 68-16 requires that discharges of waste be regulated to meet best practicable treatment or control to assure that pollution or nuisance will not occur and the highest water quality consistent with the maximum benefit to the people of the State be maintained.~~

The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR section 131.12 and Resolution 68-16 **as set out in the Findings below:**~~.~~

1. ~~Many of the water bodies within the area covered by this Order are of high quality. The Order requires the Permittees to meet best practicable treatment or control to meet water quality standards. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p).~~ Many of the waters within the area covered by this Order are impaired ~~and~~ **for multiple pollutants discharged through MS4s and are not high quality waters with regard to these pollutants. In most cases, there is insufficient data to determine whether these water bodies were impaired as early as 1968, but the limited available data shows impairment dating back for more than two decades. Many such water bodies are** listed on the State's CWA Section 303(d) List and either the Regional Water Board or USEPA has established TMDLs to address the impairments. **This Order ensures that existing instream (beneficial) water uses and the level of water quality necessary to protect the existing uses is maintained and protected**. This Order requires the Permittees to comply with permit provisions to implement the WLAs set forth in the TMDLs in order to restore the beneficial uses of the impaired water bodies consistent with the assumptions and requirements of the TMDLs. **This Order further requires compliance with receiving water limitations to meet water quality standards in the receiving water either by demonstrating compliance pursuant to Part V.A and the Permittee's monitoring and reporting program pursuant to Part VI.B or by implementing Watershed Management Programs/EWMPs with a compliance schedule**. This Order includes requirements to develop and implement storm water management programs, achieve water quality-based effluent limitations, and effectively prohibit non-storm water discharges through the MS4.

2. To the extent that some of the water bodies within the jurisdiction are high quality waters with regard to some constituents, this Order finds as follows:

a. Allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state. The discharge of storm water in certain circumstances is to the maximum benefit to the people of the state because it can assist with maintaining instream flows that support beneficial uses, may spur the development of multiple-benefit projects, and may be necessary for flood control, and public safety as well as to accommodate development in the

area. The alternative – capturing all storm water from all storm events – would be an enormous opportunity cost that would preclude MS4 permittees from spending substantial funds on other important social needs. The Order ensures that any limited degradation does not affect existing and anticipated future uses of the water and does not result in water quality less than established standards. The Order requires compliance with receiving water limitations that act as a floor to any limited degradation.

b. The Order requires the highest statutory and regulatory requirements and requires that the Permittees meet best practicable treatment or control. The Order prohibits all non-storm water discharges, with a few enumerated exceptions, through the MS4 to the receiving waters. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p), and implement extensive minimum control measures in a storm water management program. Recognizing that best practicable treatment or control may evolve over time, the Order includes new and more specific requirements as compared to Order No. 01-182. The Order incorporates options to implement Watershed Management Programs or EWMPs that must specify concrete and detailed structural and non-structural storm water controls that must be implemented in accordance with an approved time schedule. The Order contains provisions to encourage, wherever feasible, retention of the storm water from the 85th percentile 24-hour storm event.

~~The issuance of this Order does not authorize an increase in the amount of discharge of waste. The Order includes new requirements to implement WLAs assigned to Los Angeles County MS4 discharges that have been established in 33 TMDLs, most of which were not included in the previous Order.~~

3. Compliance Schedules and the Appropriateness of Enforcement Orders

The Environmental Petitioners concede that immediate compliance with receiving water limitations is not achievable in many instances and that some additional time to reach compliance is warranted. They have proposed an alternative to the WMP/EWMP that would incorporate many of the provisions of those programs but require implementation through the mechanism of a time schedule order or other enforcement order rather than as permit conditions. The Los Angeles MS4 Order already provides that Permittees who are out of compliance with final WQBELs and other TMDL-specific limitations may request a time schedule order.[91] Under the alternative proposed by the Environmental Petitioners, all Permittees that are currently out of compliance with receiving water limitations not addressed by a TMDL as well as with interim TMDL requirements with passed compliance deadlines, would be issued a time schedule order or other enforcement order not to exceed the five year term of

[91] Los Angeles MS4 Order, Part VI.E.4., pp.146-147.

the permit. The Permittees would then implement a WMP/EWMP type plan to achieve compliance with the appropriate limitations within the confines of the enforcement order.

In the prior two sections, we found that the WMP/EWMP provisions are not contrary to the anti-backsliding or antidegradation requirements of federal and state law. We therefore disagree with the Environmental Petitioners that the relevant provisions must be stricken from the Order and incorporated instead into an enforcement order for those reasons. We also find that, given that strict compliance with water quality standards is discretionary in MS4 permits, the Los Angeles Water Board was not restricted to limiting the schedule for compliance with receiving water limitations to the term of the Los Angeles MS4 Order.

Further, from a policy perspective, we find that the MS4 Permittees that are developing and implementing a WMP/EWMP should be allowed additional time to come into compliance with receiving water limitations and interim and final TMDLs through provisions built directly into their permit, rather than through enforcement orders. Building a time schedule into the permit itself, as the Los Angeles MS4 Order does, is appropriate because it allows a more efficient regulatory structure compared to having to issue multiple enforcement orders. More importantly, it is appropriate to regulate Permittees in a manner that allows them to strive for compliance with the permit terms, provided no provision of law otherwise precludes including the schedule in the NPDES permit. For example, for traditional point source discharges subject to strict compliance with water quality standards pursuant to section 301(b)(1)(C), the terms of a compliance schedule are dictated by our compliance schedule policy (State Water Board Resolution 2008-0025) and any additional time for compliance could only be under the auspices of an enforcement order outside the permit.[92]

The WMP/EWMP provisions constitute an effort to set ambitious, yet achievable, targets for Permittees; receiving water limitations, on the other hand, while the ultimate goal of MS4 permitting, may not in all cases be achievable within the five-year permit cycle. Generally, permits are best structured so that enforcement actions are employed when a discharger shows some shortcoming in achieving a realistic, even if ambitious, permit condition and not under circumstances where even the most diligent and good faith effort will fail to achieve the required condition. We add that it is our intention to encourage a watershed-based approach to addressing storm water issues going forward and that it would be contrary to that intention to

[92] We also note that the State Water Board's Policy for the Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (2005) (State Implementation Policy) and the CTR itself (40 C.F.R. § 131.38(e)) restrict the scope of compliance schedules for effluent limitations addressing the discharge of toxic pollutants; however the policy does not apply to storm water discharges. (State Implementation Policy, p.3, fn.1.)

structure the watershed-based requirements as an enforcement order. We will not require Permittees that propose and timely implement a WMP/EWMP to request time schedule orders or other enforcement orders as a precondition of being in compliance with the receiving water limitations or interim TMDL requirements of the Los Angeles MS4 Order.

While declining to structure the WMP/EWMP provisions generally as an enforcement order, we acknowledge that time schedule orders are appropriate under some circumstances. We have already noted that the Los Angeles MS4 Order allows a Permittee to request a time schedule order where a final compliance deadline for a state-adopted TMDL has passed and the Permittee believes that additional time to comply with the requirement is necessary.[93] We expect that a Permittee will request a time schedule order also if the Permittee fails to meet a final compliance deadline for a TMDL after the adoption date of the Los Angeles MS4 Order. We will also provide that a Permittee may request a time schedule order if the Permittee fails to meet a final compliance deadline for a receiving water limitation set in the Permittee's WMP/EWMP.

We shall add a new Part VI.C.6.b and revise Part VI.E.4.b as follows:

Part VI.C.6

b. Where a Permittee believes that additional time to comply with a final receiving water limitation compliance deadline set within a WMP/EWMP is necessary, and the Permittee fails to timely request or is not granted an extension by the Executive Officer, a Permittee may, no less than 90 days prior to the final compliance deadline, request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

Part VI.E.4

b. Where a Permittee believes that additional time to comply with the final water quality-based effluent limitations and/or receiving water limitations is necessary, a Permittee may within 45 days of Order adoption**, or no less than 90 days prior to the final compliance deadline if after adoption of the Order,** request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

4. Rigor and Accountability in the WMPs/EWMPs

We now turn to a consideration, from a technical as well as policy lens, as to whether the WMPs/EWMPs are structured in a manner that will maximize the likelihood of

[93] *Ibid.*

reaching the ultimate goal of the compliance alternative – achieving receiving water limitations.[94] We can support an alternative approach to compliance with receiving water limitations only to the extent that that approach requires clear and concrete milestones and deadlines toward achievement of receiving water limitations and a rigorous and transparent process to ensure that those milestones and deadlines are in fact met. Conversely, we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations.

We find below that the WMP/EWMP provisions generally ensure the appropriate rigor, transparency, and accountability, and that, with the few revisions we direct, are designed to lead to achievement of receiving water limitations.[95]

a. Milestones and Compliance Deadlines

We first consider whether the WMP/EWMP provisions require clear, concrete, and finite milestones and deadlines.

For water body-pollutant combinations addressed by TMDLs, the Los Angeles MS4 Order requires the Permittees to incorporate the compliance schedules found in Attachments L through R of the Order, which reflect previously adopted TMDL-based requirements, into the WMP/EWMP, and, as necessary, to develop interim milestones and dates for their achievement.[96] A Permittee that does not thereafter comply with the approved compliance schedule must instead demonstrate compliance with the WQBELs and other TMDL-specific limitations of the Order.[97] For water body-pollutant combinations not addressed by a TMDL, but where the relevant pollutant is one for which the water body is identified as impaired on the Clean Water Act section 303(d) List and the pollutant is in the same class as a TMDL pollutant, the Order requires that the WMP/EWMP incorporate a schedule consistent with the TMDL schedule for the same class pollutant.[98] A Permittee that does not thereafter comply with

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[94] From a legal standpoint, our analysis serves to verify that the Los Angeles MS4 Order's alternative compliance approach through WMPs/EWMPs is supported by the findings and by evidence in the record. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.)

[95] We do not agree with Permittee Petitioners that the WMP/EWMP provisions are precluded by the program requirements of 40 Code of Federal Regulations section 122.26. Nor do we agree that the requirements are vague or lack definition. The WMP/EWMP provisions of the Order are guidelines for development of a subsequent program with more specificity to be approved by the Los Angeles Water Board or its Executive Officer.

[96] Los Angeles MS4 Order, Part VI.C.5.c., pp.64-65.

[97] *Id.*, Part VI.E.2.d.i(4)(c), p.144.

[98] *Id.*, Part VI.C.2.a.i., pp. 49-50.

the approved compliance schedule must instead demonstrate immediate compliance with the receiving water limitations in Part V.A.[99] We will not disturb these provisions.

With regard to exceedances of receiving water limitations not addressed by a TMDL, and where the pollutant is not in the same class as a pollutant addressed by a TMDL, the Order requires that the WMP/EWMP include milestones based on measurable criteria or indicators and a schedule for achieving the milestones. The WMP/EWMP must also incorporate a final date for achievement of receiving water limitations, but that date is circumscribed simply as "as soon as possible."[100] Parts VI.C.2.a.ii.(4) and VI.C.2.a.iii.(2)(c) help clarify the meaning of "as soon as possible:"

> Permittees shall identify enforceable requirements and milestones and dates for their achievement to control MS4 discharges such that they do not cause or contribute to exceedances of receiving water limitations within a timeframe(s) that is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary. The time between dates shall not exceed one year. Milestones shall relate to a specific water quality endpoint (e.g., x% of the MS4 drainage area is meeting the receiving water limitations) and dates shall relate either to taking a specific action or meeting a milestone.[101]

We will make a revision to the compliance schedule provisions to make it clear that the term "as soon as possible" is to be interpreted consistent with the more specific direction cited above. However, because the WMP/EWMP, and therefore the proposed compliance schedule, is subject to public review and comment and approval by the Los Angeles Water Board or its

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[99] *Id.*, Part VI.C.2.c., p.52.

[100] *Id.*, Part VI.C.5.c.iii.(3), p. 65. If the pollutant is not in the same class as those addressed in a TMDL, but the water body is still identified as impaired for that pollutant, the WMP/EWMP must either have a final compliance deadline within the 5 year permit term or Permittees are expected to initiate development of a stakeholder-proposed TMDL and incorporate a compliance schedule consistent with the TMDL. (*Id.*, Part VI.C.2.a. ii., pp. 50-51) (If the exceedances are in a drainage area implementing the storm water retention approach, there is no requirement to initiate the TMDL development process.) The requirement to address receiving water limitations is ongoing. As exceedances are found through monitoring for water body-pollutant combinations not identified on the 303(d) List, Permittees must either meet receiving water limitations or include the water body-pollutant combination in the WMP/EWMP and set enforceable requirements and milestones and dates for their achievement within a time frame that is as short as possible. (*Id.*, Part VI.C.2.a.iii, pp. 51-52.) Permittees are deemed in compliance with receiving water limitations only for water body-pollutant combinations addressed in the WMP/EWMPs. Thus, as pointed out by several interested parties, for lower priority water body-pollutant combinations not incorporated into a WMP/EWMP for which exceedances are detected, Permittees may be in violation of the receiving water limitations. A Permittee always has the ability to reprioritize a water body-pollutant combination from low priority to high priority and amend its WMP/EWMP to incorporate measures to address that water body-pollutant combination.

[101] *Id.*, Parts VI.C.2.a.ii.4, p. 50, VI.C.2.a.iii.(2)(c), p. 51 (identical language).

Executive Officer,[102] we do not find it necessary to constrain the determination of milestones and dates for the achievement of receiving water limitations any further.

We shall amend Part VI.C.5.c.iii.(3)(b) as follows:

(b) A final date for achieving the receiving water limitations as soon as possible**, consistent with Parts VI.C.2.a.ii.(4) & VI.C.2.a.iii.(2)(c)**.

b. Constraints on Extension of Deadlines

The fact that the Los Angeles MS4 Order requires the establishment of concrete and rigorous deadlines within the WMP/EWMP for the achievement of receiving water limitations is critical to ensuring progress on such achievement; however, the Order also contemplates that the deadlines, with the exception of those compliance deadlines established in a TMDL, may be extended.[103] The WMP/EWMP is subject to an adaptive management process. Based on the results of that process the Permittees may propose modifications, including modifications to compliance deadlines and interim milestones, in the Annual Report.[104]

The potential for multiple extensions is nevertheless ameliorated by the fact that extensions of compliance deadlines and interim milestones require Los Angeles Water Board Executive Officer approval,[105] and are accordingly, subject to a 30-day public comment period.[106] The public comment period will allow all other interested persons to weigh in on the appropriateness of any requested extensions. If thereafter dissatisfied with the determination made by the Executive Officer, interested persons may additionally seek review of the Executive Officer's decision by the Los Angeles Water Board.[107] Of course, in cases where no extension

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[102] *Id.*, Part VI.C.4.c., p.56, Table 9, p. 54, Part VI.A.5.b., p. 42, Att. F, Fact Sheet, p. F-42. Under Part VI.A.5.b, "[a]ll documents submitted to the Regional Water Board Executive Officer for approval shall be made available to the public for a 30-day period to allow for public comment."

[103] *Id.*, Parts VI.C.7, p.66, VI.C.8, pp.66-67.

[104] *Id.*, Part, VI.C.8, p.67. Under another provision of the Order, Permittees may at any time request an extension of deadlines for achievement of interim milestones established to address exceedances of receiving water limitations not otherwise addressed by a TMDL. (*Id.*, Part VI.C.6.a., p.65.) (We note that the cited provision refers to "milestones established pursuant to Part VI.C.4.c.ii.(3)," but the intent appears to have been to reference Part VI.C.5.c.iii.(3).) But as we read the Los Angeles MS4 Order, extensions of not just interim deadlines for achievement of milestones but also final compliance deadlines to achieve receiving water limitations are already allowed under the adaptive management provisions of Part VI.C.8.a.ii.: "Based on the results of the adaptive management process, Permittees shall report any modifications, including where appropriate *new compliance deadlines* and interim milestones, with the exception of those compliance deadlines established in a TMDL, necessary to improve the effectiveness of the Watershed Management Program or EWMP, in the Annual Report . . . ." (Emphasis added.)

[105] *Id.*, Parts VI.C.8, p.67, VI.C.6.a., p.65. We recognize that as currently written the adaptive management provisions in effect deem any modifications to the WMPs/EWMPs approved if the Executive Officer "expresses no objections" within 60 days. (*Id.*, Part VI.C.8.a.iii., p. 67.) With our revisions, any deadline extensions must be affirmatively approved by the Executive Officer.

[106] *Id.*, Part VI.A.5.b, p. 42.

[107] *Id.*, Part VI.A.6, p.42.

is available, as with final deadlines established in TMDLs, [108] or where no extension is requested or granted, failure to meet a deadline means that the Permittee will have to comply from that time forward with the receiving water limitations or WQBELs and other TMDL-specific limitations or request a time schedule order. Therefore, Permittees cannot rely on the certainty of a deadline extension, and Permittees have a strong incentive to implement control measures that will in fact get them to compliance by the established deadline. Given that the Permittees and the Los Angeles Water Board are working with limited data regarding storm water impacts and control measure performance, especially where TMDLs have not been developed, we are hesitant to remove all flexibility for deadline extensions, and find that the Order strikes an appropriate balance.

Permittee Petitioners seek even greater flexibility under the WMP/EWMP provisions for adjusting approved control measures and time lines. They advocate for amendments that would allow a Permittee to propose alternative controls or time lines upon a demonstration that required controls for timely achievement of a limitation are either technically infeasible or otherwise constitute a substantial hardship to the Permittee. We have found above that, in the case of final deadlines set in the WMP/EWMP for achievement of receiving water limitations not otherwise addressed in a TMDL, the Los Angeles MS4 Order already provides for an opportunity to propose new deadlines through the adaptive management process. We will make a clarifying revision below to confirm that Permittees may ask for extensions in meeting receiving water limitations not addressed by a TMDL. Technical infeasibility or substantial hardship may be grounds for such a request. The Los Angeles Water Board Executive Officer, in turn, may, after allowing for public review and comment, choose to (1) extend the deadline, (2) decline the extension but approve any time schedule order requested by the Permittee, or (3) decline the extension and not approve a time schedule order, with the result that the Permittee will be out of compliance with the provision of the WMP/EWMP and therefore the receiving water limitations of Part V.A. As stated previously, interested persons may thereafter ask the Los Angeles Water Board to review the Executive Officer's determination.[109]

With regard to final deadlines for WQBELs and other TMDL-specific limitations, we will not amend the WMP/EWMP provisions to add flexibility for extensions. We find that the only option appropriately available to a Permittee unable to meet final deadlines that are set out in a TMDL and incorporated into the Los Angeles MS4 Order and the WMP/EWMPs, is to

[108] *Id.*, Part VI.C.8.a.ii., p.67.

[109] *Id.*, Part VI.A.6, p.42.

request a time schedule order, consistent with Part VI.E.2.e. of the Order, as that Part was amended in section II.B.3. above.[110]

We shall amend Part VI.C.6.a as follows:

a. Permittees may request an extension of deadlines for achievement of interim milestones **and final compliance deadlines** established pursuant to Part VI.C.4**5**.c.iii.~~(3) only~~**, with the exception of those final compliance deadlines established in a TMDL**. Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request the justification for the extension. Extensions ~~shall be subject to approval by~~ **must be affirmatively approved by** the Regional Water Board Executive Officer, **notwithstanding Part VI.C.8.a.iii.**

c. Rigor and Accountability in the Process

We see three additional components of the WMPs/EWMPs as essential to ensuring that the proposed WMPs/EWMPs are in fact designed to achieve receiving water limitations within the appropriate time frame.

First, as documents to be approved by either the Los Angeles Water Board or its Executive Officer, the WMPs/EWMPs are subject to a public review and comment period.[111] Such review includes consideration of proposed control measures, deadlines for achievement of final limitations, and the reasonable assurance analysis that supports the WMP/EWMP. We expect this public process to vet the proposed WMPs/EWMPs and facilitate revisions to strengthen the programs as needed, thereby providing some assurance that approved WMPs/EWMPs will achieve the water quality targets set out.

Second, the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP.[112] Competent use of the reasonable assurance analysis should facilitate achievement of final compliance within the specified deadlines.[113]

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[110] Final TMDL deadlines are established and incorporated into the Basin Plans during the TMDL development process. That process invites stakeholder participation and the proposed schedule is subject to public review and comment and approval by the relevant regional water board, the State Water Board, and USEPA. The deadlines are established with consideration of the time needed for compliance for all dischargers contributing to an impairment, including industrial and construction storm water dischargers and traditional NPDES dischargers. Although we recognize that it may not always be feasible for municipal storm water dischargers to meet final TMDL deadlines, short of amending the Basin Plan to modify the deadlines (see *California Association of Sanitation Agencies v. State Water Resources Control Board* (2012) 208 Cal.App.4th 1438), we find it appropriate for the dischargers to request time schedule orders rather than be granted an extension within the provisions of the Los Angeles MS4 Order.

[111] See Los Angeles MS4 Order, Parts VI.C.4.d., p. 57, VI.C.6, p. 65, Table 9, p.54; see also id., Part VI.A.5., p. 42.

[112] *Id.*, Part VI.C.5.b.iv.(5), pp. 63-64.

[113] We note that the Los Angeles Water Board has released guidance on the development of a reasonable assurance analysis. The guidance was released after adoption of the Los Angeles MS4 Order and accordingly is not *(Continued)*

Third, the adaptive management provisions of the Order ensure that the Permittees will evaluate monitoring data and other new information every two years and consider progress up to that point on achieving WQBELs and other TMDL-specific limitations. Permittees are required as part of the adaptive management process to propose modifications to improve the effectiveness of the WMP/EWMP and implement those modifications.[114]

While we are supportive of all of these measures, we find that they should be strengthened. As a preliminary matter, we will require the Permittees to submit specific information, concurrently with the two-year adaptive management process, that will assist the Los Angeles Water Board in determining how effective the WMP/EWMP path is in spurring the completion of on-the-ground structural control measures that lead to measurable water quality improvement. As we discuss further in Section II.B.8 of this Order, we will direct the Los Angeles Water Board to report to the State Water Board periodically on the effectiveness of the WMP/EWMP approach and expect the additional information submitted by the Permittees to inform that report.

More significantly, we will add a provision that requires Permittees to comprehensively update the reasonable assurance analysis and the WMP/EWMP, following an opportunity to implement the adaptive management process. Given the limitations inherent in models, as well as the potential incentive to choose the lowest effort and cost level predicted by the model to achieve receiving water limitations,[115] we are concerned that reliance on one initial reasonable assurance analysis is insufficient to ensure that in the long term WMPs/EWMPs will

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part of the Administrative Record. We nevertheless take this opportunity to state that we expect any revisions and updates to the guidance to be subject to a public process as part of reissuance of the Los Angeles MS4 Order.

[114] Los Angeles MS4 Order, Part VI.C.8., pp. 66-67. We add that the adaptive management process will also allow Permittees to revise their WMPs/EWMPs to take advantage of funding opportunities as they arise in the future, including funding opportunities through Assembly Bill 2403 (approved by Governor, June 28, 2014 (2013-2014 Reg. Sess.)) and Proposition 1 (approved by ballot Nov. 4, 2014). We are cognizant of criticism that the adaptive management process is just another version of the ineffective iterative process of the receiving water limitations. These arguments are misplaced. Unlike the iterative process of the receiving water limitations, the adaptive management process is only one component of a series of actions required under the WMP/EWMP and acts as a periodic check to ensure that all the other requirements are achieving the stated goals of the WMP/EWMP within clearly stated deadlines. As our discussion above makes clear, we would not endorse an alternative compliance path with the sole requirement to adaptively manage implemented control measures. Further, the adaptive management process in the Los Angeles MS4 Order differs from the iterative process in that Permittees must carry out the adaptive management process every two years, limiting any discretionary determination as to when the program must be evaluated. (Los Angeles MS4 Order, Part VI.C.8.a.)

[115] The numerical analysis methods and models approved for use by Permittees for estimating hydrologic conditions and contaminant fate and transport in the watersheds should, in principle, be able to propagate any and all known uncertainty to the outputs and results. It is in the public interest that the Los Angeles Water Board communicate this uncertainty to all stakeholders, as the results in most cases will affect the beneficial uses of California waters. Moreover, it is highly desirable that, to the extent possible, the Los Angeles Water Board define a minimum level of uncertainty (or level of confidence) acceptable for a reasonable assurance analysis to be approved.

achieve relevant water quality goals. . Currently, as stated above, the Permittees are required to implement the adaptive management process every two years from the date of program approval. Under the provision we add, the Permittees will be required to comprehensively update the reasonable assurance analysis (including potentially considering whether the model itself and its assumptions require updating) and the WMP/EWMP after several years of adaptive management, based on previous years' monitoring data and other performance measures. The Permittee will submit a full revised package to the Los Angeles Water Board Executive Officer for approval, following public review.

Given that the WMPs/EWMPs in many cases address water quality targets that are to be achieved a decade or more in the future, a periodic, complete re-consideration and recalibration of the assumptions and predictions that support the proposed control measures and implementation schedule in light of new data, above and beyond the two-year adaptive management requirements of the Los Angeles MS4 Order, is essential, notwithstanding the additional time and effort that Permittees must expend on the update. We also recognize that such review is a staff intensive process for the Los Angeles Water Board, but addressing storm water impacts is a priority for that Board. Although we expect that the update will be necessary in most cases, the new requirements provide that the Executive Officer of the Los Angeles Water Board may waive the requirement for an update if the Permittee demonstrates through water quality monitoring that the WMP/EWMP is meeting appropriate targets. Our direction to require a comprehensive update of the reasonable assurance analyses and the WMPs/EWMPs after several cycles of adaptive management should in no way be construed as limiting the Los Angeles Water Board Executive Officer's discretion to request such updates earlier in the implementation process or the obligation of the Permittees to initiate such updates earlier in the implementation process based on the ongoing adaptive management process.

The second added provision will not be relevant for the permit term of the order before us; however, we anticipate that the next iteration of an MS4 Order for the Los Angeles area will closely track the Los Angeles MS4 Order to allow for continued implementation of the WMP/EWMPs.

We shall amend Part VI.C.8 by adding new subsections a.iv. and b. as follows:

a.

iv. Permittees shall report the following information to the Regional Water Board concurrently with the reporting for the adaptive management process:

(1) On-the-ground structural control measures completed;

(2) Non-structural control measures completed;

(3) Monitoring data that evaluates the effectiveness of implemented control measures in improving water quality;

(4) Comparison of the effectiveness of the control measures to the results projected by the RAA;

(5) Comparison of control measures completed to date with control measures projected to be completed to date pursuant to the Watershed Management Program or EWMP;

(6) Control measures proposed to be completed in the next two years pursuant to the Watershed Management Program or EWMP and the schedule for completion of those control measures;

(7) Status of funding and implementation for control measures proposed to be completed in the next two years.

b. Watershed Management Program Resubmittal Process

i. In addition to adapting the Watershed Management Program or EWMP every two years as described in Part VI.C.8.a., Permittees must submit an updated Watershed Management Program or EWMP with an updated Reasonable Assurance Analysis by June 30, 2021, or sooner as directed by the Regional Water Board Executive Officer or as deemed necessary by Permittees through the Adaptive Management Process, for review and approval by the Regional Water Board Executive Officer. The updated Reasonable Assurance Analysis must incorporate both water quality data and control measure performance data, and any other information informing the two-year adaptive management process, gathered through December 31, 2020. As appropriate, the Permittees must consider any new numeric analyses or other methods developed for the reasonable assurance analysis. The updated Watershed Management Program or EWMP must comply with all provisions in Part VI.C. The Regional Water Board Executive Officer will allow a 60-day public review and comment period with an option to request a hearing. The Regional Water Board Executive Officer must approve or disapprove the updated Watershed Management Program or EWMP by June 30, 2022. The Executive Officer may waive the requirement of this provision, following a 60-day public review and comment period, if a Permittee demonstrates through water quality monitoring data that the approved Watershed Management Program or EWMP is meeting appropriate water quality targets in accordance with established deadlines.

5. Determination of Compliance with Final Requirements

a. Compliance with Final TMDL Requirements[116]

Part VI.E.2.e.i.4. of the Los Angeles MS4 Order provides that Permittees will be deemed in compliance with the final WQBELs and other TMDL-specific limitations if "[i]n drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water."[117] Part VI.E.2.e.i.4 is one of four options available to the Permittee in Part VI.E.2.e. to be deemed in compliance with WQBELs and other TMDL-specific limitations. The other three options allow a Permittee to establish compliance with a final WQBEL or other TMDL-specific limitation by showing that (1) there are no violations of the final WQBEL; (2) there are no exceedances of the receiving water limitation for the specific pollutant in the receiving water at or downstream of the Permittee's outfall, or (3) there is no direct or indirect discharge from the Permittee's MS4 to the receiving water during any relevant time period.[118] These three options ensure that either the receiving water limitations or WQBELs and other TMDL-specific limitations are in fact being complied with. In contrast, the storm water retention approach assumes compliance with *final* WQBELs and other TMDL-specific limitations, and accordingly, compliance with the receiving water limitations in Part V for the relevant water body-pollutant combinations,[119] even if the final WQBELs and other TMDL-specific limitations are not actually being achieved. The Environmental Petitioners argue that the Los Angeles Water Board has failed to establish through findings and record evidence that the storm water retention approach will in fact achieve compliance with the WQBELs and other TMDL-specific limitations and that the Los Angeles

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[116] The Los Angeles MS4 Order additionally deems compliance with *interim* WQBELs and other TMDL-specific limitations if the "Permittee has submitted and is fully implementing an approved" WMP/EWMP. (Los Angeles MS4 Order, Part VI.E.2.d.i.(4), p. 143; see also *id.*, Part VI.C.3.a., p. 53.) Because Permittees are required to incorporate into the WMP/EWMP compliance schedules "compliance deadlines occurring within the permit term for all applicable interim . . . water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R," we expect that in most cases full implementation of the WMP/EWMP necessarily results in compliance with interim WQBELs and other TMDL-specific limitations. However, to the extent this is not the result reached, we find that requiring implementation of the WMP/EWMP with control measures designed to achieve interim WQBELs and other TMDL-specific limitations, in lieu of showing actual compliance with any *interim* numeric requirements, is consistent with the assumptions and requirements of the wasteload allocations of the relevant TMDLs. (40 C.F.R. § 122.44(d)(1)(vii)(B).)

[117] Los Angeles MS4 Order, Part VI.E.2.e.i.(4), p. 145.

[118] *Id.*, Part VI.E.2.e.i.(1)-(3), pp. 144-45.

[119] We note again that Part VI.E.2.c.i. states that Part VI.E establishes the manner of achieving compliance with the receiving water limitations in Part V.A where the receiving water limitations are associated with water body-poliutant combinations addressed in a TMDL.

MS4 Order's reliance on the storm water retention approach for final compliance determination is therefore contrary to the law.

We are supportive of the EWMP's use of the storm water retention approach as a technical requirement. Retention of storm water is likely to be an effective path to water quality improvement. Furthermore, in addition to preventing pollutants from reaching the receiving water except as a result of high precipitation events (which also generally result in significant dilution in the receiving water), the storm water retention approach has additional benefits including recharge of groundwater, increased water supply, reduced hydromodification effects, and creation of more green space to support recreation and habitat.[120]

We have some concerns, however, with the lack of verification in the Los Angeles MS4 Order that final WQBELs and other TMDL-specific limitations or receiving water limitations will in fact be met as a result of implementation of the storm water retention approach. We acknowledge that, in most cases, the final TMDLs have deadlines outside of the permit term for the Los Angeles MS4 Order and that, therefore, with regard to those, our concerns are more theoretical at this point than immediate. Nevertheless, we agree with the Environmental Petitioners that the evidence in the Administrative Record is not sufficient to establish that the storm water retention approach will in all cases result in achievement of final WQBELs and other TMDL-specific limitations and, more importantly, are concerned that the Order itself does not incorporate clear requirements that would provide for such verification in the process of implementation.

With regard to evidence in the Administrative Record, it is clear that the storm water retention approach is a promising approach for achieving compliance with receiving water limitations, with multiple additional environmental benefits. But the research regarding the storm water retention approach is still in early stages and we cannot say with certainty at this point that implementation will lead to compliance with receiving water limitations in all cases.[121]

With that conclusion in mind, we look to the Los Angeles MS4 Order itself to determine if there are sufficient additional provisions to assure that, in the long run, the storm water retention approach will achieve the ultimate goal of compliance with receiving water limitations. We first note that the Order does not require a reasonable assurance analysis when

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[120] See e.g. Administrative Record, section 10.VI.C, RB-AR29263-29311, RB-AR32318-32350.

[121] We reviewed the citations to the Administrative Record provided in the Los Angeles Water Board October 15, 2013 Response and in the October 15, 2013 Responses of many of the Petitioners. We find that the cited studies show the storm water retention to be a promising approach to meeting water quality standards, but do not establish, at a sufficiently high level of confidence, that the storm water retention approach will definitively achieve compliance with the receiving water limitations.

a Permittee opts for the storm water retention approach. Permittees are required to conduct a reasonable assurance analysis for each water body-pollutant combination addressed by a WMP, with the objective of demonstrating the ability of the controls to ensure that MS4 discharges achieve applicable WQBELs and do not cause or contribute to exceedances of receiving water limitations.[122] The relevant provisions reference EWMPs, but elsewhere the Order states that the reasonable assurance analysis is only required for areas covered by the EWMP where retention of the 85th percentile, 24-hour storm event is not feasible.[123] The Fact Sheet also implies that the requirement for a reasonable assurance analysis is confined to situations where the storm water retention approach is not feasible.[124] In sum, then, Permittees that choose to develop and implement an EWMP are required to conduct a reasonable assurance analysis for each waterbody-pollutant combination addressed by the EWMP, except in the drainage areas that are tributary to the storm water retention projects.

The fact that the storm water retention approach does not require a reasonable assurance analysis prior to implementation to demonstrate the ability of the approach to achieve compliance with the limitations is mitigated in part by required monitoring and adaptive management to verify compliance following implementation. Although the provision could be clearer, we read the language "[i]n drainage areas where Permittees are implementing an EWMP" in Part VI.E.2.e.i.(4) to require Permittees to be in compliance with all aspects of the EWMP, including the monitoring and adaptive management provisions of Parts VI.C.7 and 8, to be deemed in compliance with final limitations through the storm water retention approach. As we read the Order, a Permittee's showing that it has retained all non-storm water and all storm water up to and including the volume equivalent to the 85th percentile, 24-hour event, establishes compliance, but only if the Permittee continues to conduct monitoring and adapt the EWMP in response to the monitoring. The Los Angeles Water Board appears to read the Order the way we do, as it states in its October 15, 2013 Response that "the Permit requires monitoring and adaptive management, which will continue to inform the Los Angeles Water Board regarding the efficacy of this storm water retention approach in conjunction with implementation of the other storm water management program elements and any needed

[122] Los Angeles MS4 Order, Part VI.C.5.b.iv.(5), pp. 63-64.

[123] *Id.*, Part VI.C.1.g., p. 48.

[124] *Id.*, Att. F, Fact Sheet, p. F-39.

modifications to the approach."[125] The Los Angeles Water Board further states in comments submitted on a draft of this order, as follows:

> The Los Angeles MS4 Order does not exclude EWMPs or areas within an EWMP where the stormwater retention standard is achieved from the integrated watershed monitoring, assessment and adaptive management processes. Neither does the Los Angeles MS4 Order specify or contemplate an end to the monitoring, assessment and adaptive management processes in the case of a Watershed Management Program (WMP) or EWMP. These required elements, including receiving water and outfall monitoring, evaluation of these monitoring data, and modification of the EWMP to improve its effectiveness, will be continually conducted throughout the Watershed Management Area addressed by the EWMP. . . . The Los Angeles Water Board understood that these regional multi-benefit projects would take time to implement and that Permittees needed to be afforded this time in the Los Angeles MS4 Order. The Los Angeles Water Board will continually evaluate progress during the implementation period. If, as full implementation nears, some Receiving Water Limitations are still not achieved, the Los Angeles Water Board and State Water Board have a variety of tools that can be used at a regional or statewide level including reconsideration of TMDLs, Basin Planning actions, policy development and permitting, among others.[126]

We will make a revision to Part VI.E.2.e.i. to make it clear that the Permittee must be in compliance with all other requirements of the EWMP in addition to implementation of the storm water retention approach in order to be deemed in compliance with the final WQBELs and other TMDL-specific limitations.

With no definitive evidence in the record establishing that the storm water retention approach will achieve final requirements, no reasonable assurance analysis required at the outset, and reliance only on subsequent monitoring and adaptive management to improve results if final limitations are not in fact achieved, the storm water retention approach does not provide a level of assurance of success that would lead us to conclude that its implementation, with nothing else, is sufficient to constitute compliance with final WQBELs and other TMDL-specific limitations. We understand that there are nevertheless very good reasons to encourage its use. Certainly for all non-storm water and for all storm water generated in storms up to the 85th percentile storm, the storm water retention approach achieves compliance because there is no discharge. And there are significant benefits beyond water quality, including most importantly benefits to water supply. We also believe that public projects requiring investment of this magnitude are unlikely to be carried out without a commitment from the water boards that Permittees will be considered in compliance even if the resulting improvement in water quality

[125] Los Angeles Water Board, October 15, 2013 Response, p. 62.

[126] Los Angeles Water Board, Comment Letter, January 21, 2015, pp. 2-3.

does not rise all the way to complete achievement of the final WQBELs and other TMDL-specific limitations.

We are not willing to go as far as saying that compliance with the storm water retention approach alone constitutes compliance with final WQBELs and other TMDL-specific limitations for all time, regardless of the actual results.[127] Nonetheless, we anticipate that implementation of such projects will bring the drainage area most and, in many cases, all of the way to achievement of water quality standards. Where there is still a gap in required water quality improvement, we expect the Executive Officer of the Los Angeles Water Board to require appropriate actions, consistent with the provisions of the Los Angeles MS4 Order and the Los Angeles Water Board's stated interpretation of those provisions,[128] to close that gap with additional control measures in order for the Permittee to be considered in compliance with the WQBEL or other TMDL-specific limitation. There are various mechanisms to provide assurances that additional control measures will be implemented to achieve the WQBEL or other TMDL-specific limitation, and in some instances, it may be appropriate for the Los Angeles Water Board to issue a time schedule order governing the implementation of further control measures. Further, as acknowledged by the Los Angeles Water Board in its comments, in some circumstances, reconsideration of the underlying TMDLs and the final deadlines within those TMDLs may instead be warranted.[129] We additionally recognize that municipal storm water management is an area of continued development and, with continued research and data evaluation, water quality standards may evolve and become more nuanced or sophisticated over time.

While we decline to interpret the storm water retention approach to, in and of itself, constitute compliance with final WQBELs and other TMDL-specific limitations, we emphasize here that any additional control measures to reach compliance that may be required by the Los Angeles Water Board must not require changes to installed storm water retention projects. Any revisions should be prospective in nature and should not disturb projects that Permittees have already installed in good faith to comply with the provisions of their EWMP.

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[127] Further, Permittees still have substantial incentive to develop and implement an EWMP. If a permittee pursues an EWMP, it will be deemed in compliance with the receiving water limitations during the EWMP development phase, and it may also recognize significant non-water quality benefits.

[128] Los Angeles Water Board, Comment Letter, January 21, 2015, pp. 2-3. As explained in footnote 110, at this time we see limited options available to the Los Angeles Water Board in addressing compliance with final deadlines for WQBELs and other TMDL-specific limitations.

[129] We also acknowledge the need for and commit to supporting state-wide solutions for source reduction as appropriate, similar to the brake pad legislation adopted to address copper discharges. (Senate Bill 346 (approved by the Governor September 27, 2010).)

Ultimately, we must set out to verify through appropriate monitoring that final WQBELs and other TMDL-specific limitations can be achieved through the storm water retention approach, or be willing to revise that approach. However, new or additional measures required at that point should be additive to the storm water retention approach measures already installed.

In sum, despite the uncertainty inherent in allowing the storm water retention approach, we concur in its use in the Los Angeles MS4 Order, with the clarification that ultimate compliance is subject to continued planning, monitoring and adaptive management. We shall amend Part VI.E.2.e.i. as follows:

> i. A Permittee shall be deemed in compliance with an applicable final water quality-based effluent limitation and final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:
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> . . .
>
> (4) In drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water**, and the Permittee is implementing all requirements of the EWMP, including, but not limited to, Parts VI.C.7 and VI.C.8 of this Order**. This provision (4) shall not apply to final trash WQBELs.

b. Compliance with Final Receiving Water Limitations

The Los Angeles MS4 Order states that for receiving water limitations associated with water-body pollutant combinations addressed in a TMDL, compliance with the TMDL requirements of the Order in Part VI.E and Attachments L through R constitutes compliance with the receiving water limitations in Part V.A.[130] In other words, if there is an exceedance for a pollutant in a water body that has a TMDL addressing that pollutant, as long as the Permittee is complying with the requirements for the TMDL, the Permittee is deemed in compliance with the receiving water limitation. No petitioner has contested this provision and we find that it constitutes an appropriate approach to compliance with receiving water limitations for water body-pollutant combinations that are addressed by a TMDL.

For exceedances of receiving water limitations for a water body-pollutant combination not addressed by a TMDL, as previously discussed, the Permittee must either incorporate control measures to address the exceedances into the Permittee's WMP/EWMP or comply directly with the receiving water limitations provisions of Part V.A of the Order. For

[130] Los Angeles MS4 Order, Part VI.E.2.c.ii., p. 143.

Permittees that choose the WMP/EWMP approach, the WMP/EWMP must incorporate "a final date for achieving the receiving water limitation."[131] To the extent the Permittee does not achieve the limitation by that final date and does not request and receive an extension, the Permittee has "fail[ed] to meet [a] requirement or date for its achievement in an approved Watershed Management Program or EWMP"[132] and is immediately subject to the receiving water limitations provisions of the Order, with the same result that it is out of compliance. In other words, implementation of non-structural and structural control measures in accordance with the timelines established in the WMP/EWMP constitutes compliance with the receiving water limitations up until the final deadline for achievement of the relevant receiving water limitation; however, at the deadline for final compliance, there must be verification of achievement based on the receiving water limitation itself. While we find that the Order provisions lead to this result as written, for the sake of greater clarity, we will specifically state that final compliance with receiving water limitations must be determined through verification that the receiving water limitation is actually being achieved.

We shall amend Part VI.C.2.c. as follows:

> **c.** If a Permittee fails to meet any requirement or date for its achievement in an approved Watershed Management Program or EWMP, the Permittee shall be subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the requirement. **For water body-pollutant combinations that are not addressed by a TMDL, final compliance with receiving water limitations is determined by verification through monitoring that the receiving water limitation provisions in Part V.A.1 and 2 have been achieved.**

c. Compliance with the Non-Storm Water Discharge Prohibition

The Environmental Petitioners suggest that the Los Angeles MS4 Order is unclear as to whether compliance with the WMP/EWMP may also constitute compliance with the non-storm water discharge prohibition of the Order. We disagree that the Los Angeles MS4 Order is unclear on this issue. The Permittees' obligation to comply with the receiving water limitations and WQBELs and other TMDL-specific limitations in Parts V.A and VI.E is independent of the Permittees' obligation to comply with the effective prohibition of non-storm water discharges in Part III.A. The several provisions stating that Permittees will be deemed to be in compliance with the receiving water limitations of the Los Angeles MS4 Order for implementing the WMP/EWMP specifically reference Parts V.A and VI.E of the Order and not

[131] *Id.*, Part VI.C.5.c.iii.(3)(b), p. 65.

[132] *Id.*, Part VI.C.2.c., p. 52.

III.A.[133] This notwithstanding, Parts VI.C.1.d and VI.C.5.b.iv.(2) require that a Permittee's WMP/EWMP include program elements and control measures to effectively prohibit non-storm water discharges consistent with Part III.A and Part VI.D.4.d or VI.D.10. Therefore, a Permittee's implementation of program elements and control measures consistent with Part III.A and Part VI.D.4.d or VI.D.10, through its approved WMP/EWMP, may provide a mechanism for compliance with Part III.A. Although we accordingly see no need to direct revisions to the Order, we provide this clarification here to respond to the Environmental Petitioners' concern and address any confusion that may exist.

6. "Safe Harbor" During the Planning Phase for the WMP/EWMP

Under the Los Angeles MS4 Order, a Permittee that has declared its intention to develop a WMP/EWMP is deemed in compliance with the receiving water limitations and with interim WQBELs with due dates prior to approval of the WMP/EWMP for the water body-pollutant combinations the WMP/EWMP addresses, provided it meets certain conditions, even though the Permittee is developing, not implementing the WMP/EWMP. Specifically, the Permittee is deemed in compliance if the Permittee (1) provides timely notice of its intent to develop a WMP/EWMP; (2) meets all interim and final deadlines for development of a WMP/EWMP; (3) targets implementation of watershed control measures in the existing program

[133] Los Angeles MS4 Order, Parts VI.C.2.b., p. 52, VI.C.3.a., p. 53, VI.E.2.c.ii., p. 143, VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144. To the extent that a non-storm water discharge authorized by Part III.A may be causing or contributing to an exceedance of receiving water limitations in V.A, compliance with the WMP/EWMP provisions would constitute compliance with the receiving water limitations and any relevant interim WQBELs and other TMDL-specific limitations, as long as the WMP/EWMP addresses the water body-pollutant combination for that water body. However, the discharger would have to additionally comply with requirements in Part III.A. and Part VI.D.4.d or VI.D.10 through its approved WMP/EWMP for conditionally exempt non-storm water discharges that are found to cause or contribute to an exceedance in the receiving water. (See *id.*, Part III.A.4.c.-e., pp. 31-32.) We disagree that every discharge from a Permittee's MS4 to the receiving water of non-storm water that is not specifically authorized under Part III.A will necessarily be subject to enforcement under the Los Angeles MS4 Order. Section 402(p)(3)(B)(ii) of the Clean Water Act imposes a requirement to "effectively prohibit" non-storm water discharges. Part III.A of the Los Angeles MS4 Order effectuates that requirement with a requirement for the Permittee to prohibit non-storm water discharges: "Each Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters, except where such discharges are . . . [listing exceptions]." (Los Angeles MS4 Order, Part III.A.1, p. 27.) The Los Angeles MS4 Order incorporates a specific and detailed programmatic requirement – the Illicit Connections and Illicit Discharges Elimination Program – for the Permittees to achieve their obligation to effectively prohibit non-storm water discharges. (Los Angeles MS4 Order, Parts VI.D.4.d., pp. 81-86, VI.D.10, pp. 137-141.) We recognize that even the most comprehensive efforts to address unauthorized non-storm water discharges may not eliminate all such discharges. Where a Permittee is fully implementing its Illicit Connections and Illicit Discharges Elimination Program, either pursuant to Parts VI.D.4.d. or VI.D.10, or by incorporation of customized actions into a WMP/EWMP as approved by the Los Angeles Water Board (see Los Angeles MS4 Order Part VI.D.1.a., p. 67), we would expect any enforcement action under Part III.A to be supported by a fact-specific analysis of the nature and source of the unauthorized non-storm water discharge and the efforts of the Permittee to prohibit the discharge.

to address known contributions of pollutants; and (4) receives approval of the WMP/EWMP within the specified time periods.[134]

The Environmental Petitioners object to the availability of a "safe harbor" during the planning phase. We disagree with the Environmental Petitioners that providing a "safe harbor" in the planning phase is disallowed by applicable law -- see our discussion of anti-backsliding requirements in section II.B.1. and antidegradation requirements in section II.B.2. However, we understand that deeming a discharger in compliance with receiving water limitations during the planning phase, not just the implementation phase, could weaken the incentive for Permittees to efficiently and timely seek approval of a WMP/EWMP and to move on to implementation. It is the implementation of the WMP/EWMP that will in fact lead to progress toward compliance with receiving water limitations; the planning phase is essential, but should be only as long as necessary for a well-planned program with carefully analyzed controls to be developed. Given the significance of the water quality issues addressed by the WMP/EWMPs, it is paramount that implementation begin as soon as feasible. Accordingly, the "safe harbor" in the planning phase is appropriate only if it is clearly constrained in a manner that sustains incentives to move on to approval and implementation and is structured with clear, enforceable provisions.

Having reviewed the planning sections of the WMP/EWMP provisions carefully, we find that the Los Angeles MS4 Order does sufficiently constrain the planning phase, so that the "safe harbor" provided is not unreasonable. As already stated, compliance is deemed only if the Permittee is meeting the relevant deadlines for development and approval of the WMP/EWMP.[135] There are no provisions in the Order that allow for extensions to these deadlines. If a Permittee fails to obtain approval within the allowed number of months for the development of a WMP/EWMP, the Order states that the Permittee must then instead demonstrate actual compliance with receiving water limitations and with applicable interim WQBELs.[136] The Los Angeles MS4 Order is also clear that achievement of any TMDL-associated final deadlines occurring prior to the approval deadlines for the WMP/EWMP cannot be excused through commitment to planning for a WMP/EWMP.[137]

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[134] *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

[135] *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

[136] *Id.*, Part VI.C.4.e., p. 58.

[137] *Id.*, Parts VI.C.3.c., p. 53, VI.C.4.d.iii, p. 58. Under Part VI.C.4.d.iii., Permittees must ensure that MS4 discharges achieve compliance with interim, in addition to final, trash WQBELs during the planning phase.

Further, Permittees are subject to a number of conditions during the planning phase that will ensure that progress toward achievement of receiving water limitations is not put on hold pending approval of the plan. These include requirements to put in place Low Impact Development (LID) ordinances and green streets policies[138] and to continue to implement watershed control measures in the existing storm water management programs, including those to eliminate non-storm water discharges,[139] but in a manner that is targeted to address known pollutants.[140]

Given the clear, enforceable requirements limiting the planning phase of the WMP/EWMP provisions, we find that the Los Angeles MS4 Order's inclusion of provisions deeming compliance with the receiving water limitations and with interim WQBELs during development of the programs is reasonable.

In fact, we are concerned that the Los Angeles Water Board has left no room for any deviation from the prescribed development schedule for WMP/EWMPs. A Permittee working in good faith to develop a WMP/EWMP over multiple months may encounter an issue that requires it to ask for a short extension on an interim or final deadline. Under such circumstances, the Los Angeles Water Board should be able to consider the request for the extension, rather than have its hands tied and have to reject a WMP/EWMP based on lack of timeliness. We will add a provision to the Order that provides the Los Angeles Water Board or its Executive Officer discretion in granting such extensions, but the Permittee will not be deemed in compliance with the applicable receiving water limitations and WQBELs during the period of the extension.

We shall add a new Part VI.C.4.g. as follows:

g. Permittees may request an extension of the deadlines for notification of intent to develop a Watershed Management Program or EWMP, submission of a draft plan, and submission of a final plan. The extension is subject to approval by the Regional Water Board or the Executive Officer. Permittees that are granted an extension for any deadlines for development of the WMP/EWMP shall be subject to the baseline requirements in Part VI.D and shall demonstrate compliance with receiving water limitations pursuant to Part V.A. and with applicable interim water quality-based effluent limitations in Part VI.E pursuant to subparts VI.E.2.d.i.(1)-(3) until the Permittee has an approved WMP/EWMP in place.

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[138] *Id.*, Part VI.C.4.c., pp. 56-57.

[139] *Id.*, Part VI.C.4.d.i.-il., pp. 57-58.

[140] *Id.*, Parts VI.C.2.d.iii., pp. 52-53, VI.C.3.b.iii., p. 53, VI.E.2.d.i.(4)(d)(3), p. 144.

7. Conclusion

In conclusion, we uphold the WMP/EWMP provisions as a reasonable alternative compliance option for meeting receiving water limitations and uphold the WMP/EWMP provisions in all other aspects, except as specifically stated above. We find that the WMP/EWMP approach is a clearly defined, implementable, and enforceable alternative to the receiving water limitations provisions that we mandated in Order WQ 99-05, and that the alternative provides Permittees an ambitious, yet achievable, path forward for steady and efficient progress toward achievement of those limitations while remaining in compliance with the terms of the permit.

We direct all regional water boards to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits going forward.[141] In doing so, we acknowledge that regional differences may dictate a variation on the WMP/EWMP approach, but believe that such variations must nevertheless be guided by a few principles.[142] We expect the regional water boards to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.

1. The receiving water limitations provisions of Phase I MS4 permits should continue to require compliance with water quality standards in the receiving water and should not deem good faith engagement in the iterative process to constitute such compliance. The Phase I MS4 permits should therefore continue to use the receiving water limitations provisions as directed by State Water Board Order WQ 99-05.

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[141] We acknowledge that small MS4s permitted under the statewide General Permit for WDRs for Storm Water Discharges from Small MS4s (Order No. 2013-0001-DWQ) (General Phase II MS4 Permit) have similar practical issues as Phase I permittees in complying with receiving water limitations. Nevertheless, because the General Phase II MS4 Permit is issued by the State Water Board, not the regional water boards, we limit our guidance to regional water boards to the Phase I permits. The State Water Board is committed to working with small MS4s, the regional water boards, and interested persons in developing an alternative compliance option for the General Phase II MS4 Permit.

[142] In considering appropriate guidance for regional water boards drafting alternative compliance paths in municipal storm water permits, we have reviewed the proposed "strategic compliance program" model language that was submitted by the California Stormwater Quality Association (CASQA) and supported in whole or in part by a number of interested persons. (CASQA August 15, 2013 Receiving Water Limitations Submission, Attachment A, Section E.) While we have not in these proceedings adopted the CASQA language, or, for that matter, any specific language, for alternative compliance path provisions, regional water boards remain free to consider and incorporate the CASQA approach into their municipal storm water permits to the extent they determine and document that the approach, including any modifications, satisfies the principles we set out in this section as well as all other direction we have provided in this order.

2. The Phase I MS4 permits should include a provision stating that, for water body-pollutant combinations with a TMDL, full compliance with the requirements of the TMDL constitutes compliance with the receiving water limitations for that water body-pollutant combination.
3. The Phase I MS4 permits should incorporate an ambitious, rigorous, and transparent alternative compliance path that allows permittees appropriate time to come into compliance with receiving water limitations without being in violation of the receiving water limitations during full implementation of the compliance alternative.
4. The alternative compliance path should encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements.
5. The alternative compliance path should encourage the use of green infrastructure and the adoption of low impact development principles.
6. The alternative compliance path should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.
7. The alternative compliance path should have rigor and accountability. Permittees should be required, through a transparent process, to show that they have analyzed the water quality issues in the watershed, prioritized those issues, and proposed appropriate solutions. Permittees should be further required, again through a transparent process, to monitor the results and return to their analysis to verify assumptions and update the solutions. Permittees should be required to conduct this type of adaptive management on their own initiative without waiting for direction from the regional water board.

8. Direction to the Los Angeles Water Board to Report to the State Water Board on Implementation

We recognize that our review has been limited to the provisions of the Los Angeles MS4 Order. The success of the WMP/EWMP approach depends in large part on the steps that follow adoption of these provisions, i.e., the effort invested by Permittees in developing WMPs/EWMPs that truly address the stringent provisions of the Order, the precision with which the Los Angeles Water Board reviews the draft programs and requires revisions, and, most importantly, the actual implementation and appropriate enforcement of the programs once approved. The work going forward must ensure that the WMPs/EWMPs in fact exhibit the rigor and accountability the provisions of the Los Angeles MS4 Order demand. We expect that the Los Angeles Water Board will make careful oversight and enforcement a priority and that they will be aided in this process by the public review and comment opportunities built into the terms of the Order.

The process of developing the WMPs/EWMPs is currently ongoing -- the Los Angeles Water Board has been reviewing draft and revised draft WMPs and workplans for EWMPs – and, although we have been asked by the Environmental Petitioners to take official notice of some of the submissions and conditional approvals in the process, it is premature for the State Water Board to speak to the sufficiency of the resulting WMPs/EWMPs until the Los Angeles Water Board, with full input from the stakeholders, has had the opportunity to consider, revise, and finally approve the programs. We note again that all documents submitted to the Los Angeles Water Board Executive Officer for approval are subject to a 30-day public comment period[143] and that any formal determination or approval by the Executive Officer may be reviewed by the Los Angeles Water Board upon request by an interested person.[144] And an interested person may petition the State Water Board to review an action or failure to act of the Los Angeles Water Board.[145]

Once the WMPs/EWMPs are approved, ensuring that they are diligently and timely implemented must remain a top priority for the Los Angeles Water Board. We expect that the Los Angeles Water Board will continue to work cooperatively and closely with the Permittees, the Environmental Petitioners, and other interested persons in this process, but that the Board will also use its enforcement authority to ensure that appropriate progress is made toward water quality goals. We intend to remain involved in this process, as we must learn statewide from the successes and shortcomings of the approach we are endorsing with this order. We accordingly direct the Los Angeles Water Board to report to us on progress in implementation of the WMPs/EWMPs, and progress in improving water quality during this and the next permit term by February 28, 2018, by February 29, 2020, and by March 31, 2022. Specifically, we ask that the Los Angeles Water Board report on region-wide data for the following:

- On-the-ground structural control measures completed;
- Non-structural control measures completed;
- Monitoring data that evaluates the effectiveness of implemented control measures in improving water quality;

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[143] Los Angeles MS4 Order, Part V.A.5.b, p. 42.

[144] *Id.*, Part V.A.6, p. 42.

[145] Wat. Code, § 13320. On April 28, 2015, the Executive Officer of the Los Angeles Water Board conditionally approved several submitted WMPs. On May 28, 2015, the Environmental Petitioners filed a petition challenging the conditional approvals and requesting review by the Los Angeles Water Board and by the State Water Board of the Executive Officer's determination.

- Comparison of the effectiveness of the control measures to the results projected by the reasonable assurance analyses;
- Comparison of control measures completed to date with control measures projected to be completed to date pursuant to the WMPs/EWMPs;
- Control measures proposed to be completed in the next two years pursuant to the WMPs/EWMPs and the schedule for completion of those control measures;
- Status of funding and implementation for control measures proposed to be completed in the next two years;
- Trends in receiving water quality related to pollutants typically associated with storm water;
- Available permit compliance data, including requests for compliance extensions;
- Enforcement actions taken and results.

In addition to covering the above information, the third report shall summarize and reflect the comprehensive information gathered through the updates of the reasonable assurance analyses and WMPs/EWMPs conducted by the Permittees in the second permit term.

C. Appropriateness of TMDL Requirements

Section 303(d) of the Clean Water Act requires the water boards to identify impaired water bodies that do not meet water quality standards after applying required technology-based effluent limitations.[146] TMDLs are developed by either the regional water boards or by USEPA in response to section 303(d) listings of impaired water bodies. A TMDL is defined as the sum of the individual wasteload allocations for point sources of pollution, the load allocations for nonpoint sources of pollution, and the contribution from background sources of pollution,[147] and represents the maximum amount of a pollutant that a water body may receive and still achieve water quality standards. TMDLs developed by regional water boards include implementation provisions[148] and are typically incorporated into the regional water board's water quality control plan.[149] TMDLs developed by USEPA typically contain the total load and load allocations required by section 303(d), but do not set out comprehensive implementation provisions.[150] Most TMDLs are not self-executing, but instead rely upon subsequently-issued permits to impose requirements on discharges that implement the TMDLs' wasteload

[146] 33 U.S.C. § 1313(d).

[147] 40 C.F.R. § 130.2(i).

[148] Wat. Code, §§ 13050, subd. (j), 13242.

[149] See 40 C.F.R. §§ 130.6(c)(1).

[150] *Am. Farm Bureau Fed'n v. U.S. E.P.A.* (M.D. Pa. 2013) 984 F. Supp. 2d 289, 314.

allocations.[151] The Los Angeles MS4 Order includes TMDL-specific requirements that implement 33 TMDLs (twenty-five adopted by the Los Angeles Water Board, seven established by USEPA, and one adopted by the Santa Ana Regional Water Quality Control Board that assigned requirements to two Permittees of the Los Angeles MS4 Order) in Part VI.E and in Attachments L-R.

Petitioners raise a number of challenges to the TMDL-based requirements of the Los Angeles MS4 Order. We take up several of those arguments in this section.[152]

1. Inclusion of Numeric WQBELs

Permittee Petitioners argue that the numeric WQBELs incorporated into the Los Angeles MS4 Order as TMDL-based limitations are contrary to the Clean Water Act and to state law and policy. We disagree.

Under the federal regulations implementing the Clean Water Act, effluent limitations in NPDES permits developed to achieve water quality standards must be consistent with the assumptions and requirements of any available wasteload allocation for the discharge.[153] In addition, the Porter-Cologne Act requires that waste discharge requirements implement any relevant water quality control plans,[154] including TMDL requirements that have been incorporated into the water quality control plans. The Los Angeles MS4 Order incorporates numeric WQBELs and other limitations that the Los Angeles Water Board found are consistent with the TMDL requirements applicable to the Permittees.

Permittee Petitioners argue that there is no requirement under federal law for incorporation of TMDL requirements into an MS4 permit and that the inclusion of the requirements in Part VI.E and in Attachments L-R was therefore at the discretion of the Los Angeles Water Board. They point out, as we acknowledged in section II.A, that MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the MEP, but that requirements to strictly meet water quality standards are at the discretion of the permitting agency.[155] Because TMDL requirements are a path to achieving water quality standards, the Permittee Petitioners argue, the Los Angeles Water Board had the discretion not to include them in the Los Angeles MS4 Order.

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[151] *City of Arcadia v. EPA* (N.D. Cal. 2013) 265 F.Supp.2d 1142, 1144-1145.

[152] We note that we do not take up any arguments that challenge the terms of the TMDLs. Those arguments should have been made during the public process when the TMDLs were adopted. They are untimely now.

[153] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[154] Wat. Code, § 13263, subd. (a).

[155] 33 U.S.C. § 1342(p); *Defenders of Wildlife*, *supra*, 191 F.3d 1159.

Answering the question of whether the Los Angeles Water Board was required under federal law to strictly effectuate TMDL compliance through the Los Angeles MS4 Order is a largely irrelevant exercise because we have already reaffirmed in this order that we will continue to require water quality standards compliance in MS4 permits. Further, given the back-stop nature of TMDLs, and the fact that each set of dischargers must meet their share of the allocation to reach the total reductions set out, a regime in which municipal storm water dischargers were given a pass on TMDL obligations would render the promise of water quality standards achievement through TMDLs illusory. This is especially true in a large urbanized area where pollutants in storm water constitute a significant share of the impairment and where other dischargers would be disproportionately burdened if MS4s were not held to their allocations. Although not dispositive, we also note that USEPA has assumed in guidance (discussed in more detail below) issued on storm water and TMDL implementation that MS4 permits must incorporate effluent limitations consistent with the assumptions and requirements of relevant wasteload allocations.[156] To the extent the TMDL provisions of the Clean Water Act and the federal regulations could be read to preclude mandatory incorporation of wasteload allocations into an MS4 permit, effluent limitations consistent with those load allocations should nevertheless be required under Clean Water Act section 402, subsection (p)'s direction that the MS4 permit shall require "such other controls" as the permitting authority determines "appropriate for the control of such pollutants."[157] Finally, for TMDLs incorporated into water quality control plans, the implementation plan associated with the TMDL applies to all dischargers named, including MS4 permittees, and the MS4 permits must be consistent with the direction in the water quality control plan.[158]

Having found that the Los Angeles Water Board acted in a manner consistent with federal and state law when it developed WQBELs to address applicable TMDLs, we next turn to whether *numeric* WQBELs were appropriate. We find that the Los Angeles Water Board

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[156] USEPA, Memorandum, "Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs," (Nov. 22, 2002) (2002 USEPA Memorandum); see also USEPA, Memorandum, "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,' " (Nov. 26, 2014) (2014 USEPA Memorandum). The 2014 USEPA Memorandum replaced a memorandum with the same title issued on November 12, 2010, which was subsequently opened to public comment. (USEPA Statement (March 17, 2011), available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf> (as of Nov. 18, 2014).)

[157] 33 U.S.C. § 1342(p)(3)(B)(iii). See, e.g., State Water Board Orders WQ 91-03, WQ 91-04, WQ 98-01, WQ 99-05, WQ 2001-15.

[158] Wat. Code, § 13263, subd. (a); see also *State Water Res. Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 730 (noting the obligation of the water boards to follow the program of implementation included in a water quality control plan).

acted within its legal authority when establishing numeric WQBELs, and further that its choice of numeric WQBELs was a reasonable exercise of its policy discretion.

In the context of MS4 discharges, effluent limitations in NPDES permits may be expressed in the form of either numeric limitations or best management practices (BMPs). The federal regulations specifically state that BMP-based effluent limitations may be used to control pollutants for storm water discharges.[159] USEPA has issued two memoranda, on November 22, 2002 (2002 USEPA Memorandum), and on November 26, 2014 (2014 USEPA Memorandum), providing guidance to the states on translating wasteload allocations for storm water into effluent limitations in NPDES Permits.[160] The 2002 USEPA Memorandum contemplated that "the NPDES permitting authority will review the information provided by the TMDL . . . and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit."[161] The 2002 USEPA Memorandum further stated that "EPA expects that most WQBELs for NPDES-regulated municipal . . . storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances."[162] The 2014 USEPA Memorandum, after noting the increased information available to the permitting agencies after more than a decade of experience with setting wasteload allocations and effluent limitations, explained that:

> Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant loads, the WLA should, where feasible, be translated into effective, measurable WQBELs that will achieve this objective. This could take the form of a numeric limit, or of a measurable, objective BMP-based limit that is projected to achieve the WLA. . . . The permitting authority's decision as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs, with clear, specific, and measurable elements, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying

[159] 40 C.F.R. § 122.44(k)(2); see also 33 U.S.C. § 1342(p)(3)(B)(iii). 40 Code of Federal Regulations section 122.44(k)(3) further contemplates that BMP-based effluent limitations are appropriate where it is infeasible to develop a numeric effluent limitation.

[160] 2002 USEPA Memorandum; 2014 USEPA Memorandum. In addition to the two memoranda, USEPA published guidance titled "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits" ((Sept. 1996) 61 Federal Register 57425), which recommended inclusion of BMPs in first-round permits, and expanded or better-tailored BMPs in subsequent permits. In 2005, the State Water Board assembled a blue ribbon panel to address the feasibility of including numeric effluent limits as part of NPDES municipal, industrial, and construction storm water permits. The panel issued a report dated June 19, 2006, which included recommendations as to the feasibility of including numeric limitations in storm water permits. The report concluded that it was not feasible, at that time, to set enforceable numeric effluent limitations for municipal storm water discharges.

[161] 2002 USEPA Memorandum, p. 5.

[162] *Id.*, p. 2.

WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information.[163]

Both options – to choose BMP-based WQBELs or to choose numeric WQBELs – were legally available to the Los Angeles Water Board. In adopting numeric WQBELs, the Los Angeles Water Board analyzed the specific facts and circumstances surrounding storm water discharges in the region and reasonably concluded that numeric WQBELs were warranted because storm water discharges constituted a significant contributor to the water quality standards exceedances in the area and the exceedances had not been to date resolved through BMP-based requirements. Moreover, the Los Angeles Water Board concluded that it could feasibly develop numeric WQBELs following the extensive work already conducted to develop the TMDLs, which involved analyzing pollutant sources and allocating loads using empirical relationships or quantitative models. We will not second-guess the determination of the Los Angeles Water Board, given its extensive and unique role in developing the TMDLs and the permit to implement the TMDLs, that numeric WQBELs were appropriate for the Los Angeles MS4 Order.[164]

We emphasize, however, that we are not taking the position that numeric WQBELs are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit. In a recent amendment to State Water Board Order 2011-0011-DWQ, NPDES Statewide Storm Water Permit for State of California Department of Transportation (Caltrans),[165] we found BMP-based TMDL requirements to be "consistent with the assumptions and requirements of the WLAs" of the TMDLs applicable to Caltrans. That determination was based on a number of factors including the fact that Caltrans, a single discharger, was named in over 80 TMDLs statewide, the fact that Caltrans had relatively little contribution to the exceedances in each of those TMDLs, and the consideration that there was significant efficiency to be gained by streamlining and standardizing control measure implementation throughout Caltrans' statewide storm water program. Similarly, regional water boards may find BMP-based requirements to be appropriate based on TMDL-specific, region-specific, or permittee-specific

[163] 2014 USEPA Memorandum, p. 6.

[164] The Los Angeles Water Board incorporated a discussion in the Fact Sheet of how the TMDL wasteload allocations were translated into numeric WQBELs in order to implement the TMDLs in the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att.F, Fact Sheet, pp. F-89-F-100). See 40 C.F.R. § 124.8. We are not independently reviewing the calculations and analyses underlying the specific numeric limitations arrived at by the Los Angeles Water Board; rather, our review has been limited to a determination of whether the choice of numeric rather than BMP-based limitations was reasonable. To the extent any petitioners asked us to independently review the issue in their petitions seeking review of the Order, the issue is dismissed. See fn. 11.

[165] State Water Board Order WQ 2014-0077-DWQ.

considerations. In many ways, the Los Angeles MS4 Order was uniquely positioned to incorporate numeric WQBELs because of the extensive TMDL development in the region in the past decade and the documented role of MS4 discharges in contributing to the impairments addressed by those TMDLs. Thus, while we decline to remove the numeric WQBELs from the Los Angeles MS4 Order, we also decline to urge the regional water boards to use numeric WQBELs in all MS4 permits. [166]

2. Requirement for Reasonable Potential Analysis

The federal regulations implementing NPDES permitting require the permitting authority to establish WQBELs for point source discharges when those discharges cause, have the "reasonable potential" to cause, or contribute to an excursion above water quality standards.[167] Permittee Petitioners argue that the Los Angeles Water Board did not conduct an appropriate reasonable potential analysis prior to imposing numeric WQBELs. The argument is misguided. The Los Angeles Water Board established that the MS4 discharges can cause or contribute to exceedances of water quality standards through the process of developing TMDLs and assigning wasteload allocations. At the permitting stage, the Los Angeles Water Board's legal obligation was to develop WQBELs "consistent with the assumptions and requirements of any wasteload allocation" in the TMDLs,[168] and not to reconsider reasonable potential.[169]

3. USEPA-Established TMDLs

USEPA has established seven TMDLs that include wasteload allocations for MS4 discharges covered by the Los Angeles MS4 Order. In contrast to state-adopted TMDLs, USEPA-established TMDLs do not contain an implementation plan or schedule for achievement of the wasteload allocations,[170] with the effect that Permittees must comply with wasteload allocations immediately. To avoid this result, the regional water board may either adopt a

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[166] Relying on the 2014 USEPA Memorandum, Permittee Petitioners also argue that the Los Angeles Water Board was required to disaggregate storm water sources within applicable TMDLs. The 2014 USEPA Memorandum only encourages permit writers to assign specific shares of the wasteload allocation to specific permittees during the permitting process, reasoning that permit writers may have more detailed information than the TMDL writers to assign reductions for specific sources. (2014 USEPA Memorandum, p.8.) In an MS4 system as complex and interconnected as that covered under the Los Angeles MS4 Order, we do not expect the permitting authority to be able to disaggregate wasteload allocations by discharger. Further, as discussed in section II.F. on joint responsibility, the Los Angeles MS4 Order has provided a means for Permittees with commingled discharges to demonstrate that they are not responsible for any given exceedance of a limitation.

[167] 40 C.F.R. § 122.44(d)(1)(iii).

[168] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[169] See USEPA, NPDES Permit Writers Manual (updated September 2010), Chapter 6, section 6.3.3.

[170] See, e.g., *Am. Farm Bureau Fed'n v. U.S. E.P.A., supra,* 984 F. Supp. 2d at p. 314.

separate implementation plan as a water quality control plan amendment[171] or issue the Permittee a compliance order with a compliance schedule.[172] For the seven USEPA-established TMDLs applicable to the Permittees, the Los Angeles Water Board authorizes Permittees subject to a wasteload allocation in a USEPA-established TMDL to propose control measures that will be effective in meeting the wasteload allocation, and a schedule for their implementation that is as short as possible, as part of a WMP/EWMP.[173] Permittees that do not submit an adequate WMP/EWMP are required to demonstrate compliance with the wasteload allocations immediately.[174]

Permittee Petitioners argue that the Los Angeles Water Board has acted inconsistently in requiring BMP-based compliance with the USEPA-established TMDLs but requiring numeric WQBELs for the state-established TMDLs. We have already stated above in section C.1 that the permitting authority has discretion to choose between BMP-based and numeric effluent limitations depending on fact-specific considerations. The Los Angeles Water Board was not restricted to choosing one single uniform approach to implementing all 33 TMDLs in the Los Angeles MS4 Order. In fact, straight-jacketing NPDES permit writers to choose one approach to the exclusion of another, even within the confines of a single MS4 permit, would run afoul of USEPA's expectations in the 2014 USEPA Memorandum for a fact-specific, documented justification for the permit requirements included to implement a wasteload allocation.

The Environmental Petitioners argue that the provisions are contrary to law because they excuse Permittees from complying with final numeric wasteload allocations as long as they are implementing the BMPs proposed in the WMP/EWMP. The approach taken by the Los Angeles MS4 Order to compliance here is similar to the provisions for compliance with receiving water limitations that are not otherwise addressed by a TMDL: The Permittee proposes control measures and a timeline that is as short as possible and is considered in compliance with the final numeric limitations while implementing the control measures consistent with the schedule. We find that, given the absence of an implementation plan with final compliance deadlines specified in the Los Angeles Water Board's water quality control

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[171] Wat. Code, § 13242.

[172] *Id.*, See, e.g., § 13300.

[173] The Los Angeles MS4 Order's Fact Sheet states that the Los Angeles Water Board may choose to adopt implementation plans or issue enforcement orders in the future. (Los Angeles MS4 Order, Att. F, Fact Sheet, p. F-111.)

[174] Los Angeles MS4 Order, Part VI.E.3., pp. 145-146.

plan, this approach is consistent with the assumptions and requirements of the relevant wasteload allocations. We will not revise the provisions.

D. Non-Storm Water Discharge Provisions

Permittee Petitioners argue that the non-storm water discharge provisions of the Los Angeles MS4 Order are contrary to the Clean Water Act. Specifically, Permittee Petitioners assert that the Los Angeles MS4 Order improperly regulates non-storm water discharges from the MS4 to the receiving waters by imposing the prohibition of discharge "through the MS4 to the receiving waters" and by imposing WQBELs and other numeric limitations, rather than the MEP standard, on dry weather discharges.

The Los Angeles MS4 Order states that "[e]ach Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters" with certain exceptions including discharges separately regulated under an NPDES permit and discharges conditionally exempt from the prohibition consistent with the federal regulations.[175] Permittee Petitioners take issue with the imposition of the prohibition "through the MS4 to receiving waters" because the language does not track the specific requirement of the Clean Water Act that the MS4 permit "include a requirement to effectively prohibit non-stormwater discharges *into the storm sewer.*" (Emphasis added.)[176]

We find the variation in language to be a distinction without a difference. Whether the Los Angeles MS4 Order prohibits non-storm water discharges *into* the MS4 or *through* the MS4 to receiving waters, the intent and effect of the prohibition is to prevent non-exempt non-storm water discharges from reaching the receiving waters.[177] The legal standard governing non-storm water – effective prohibition -- is not altered because the Los Angeles MS4 Order imposes the prohibition at the point of entry into the receiving water rather than the point of entry into the MS4 itself. Instructively, USEPA has used the terms "into," "from," and "through" interchangeably when describing the prohibition.[178]

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[175] *Id.*, Part III.A, pp 27-33.

[176] 33 U.S.C. § 1342(p)(3)(B)(ii).

[177] The Los Angeles Water Board notes that the language in the Los Angeles MS4 Order is not significantly changed from the version in the 2001 Los Angeles MS4 Order, which prohibited non-storm water discharges "into the MS4 and watercourses." The Board additionally asserts that phrasing the prohibition as "through the MS4 to receiving waters" provides Permittees with greater flexibility to use measures that control non-storm water after it enters the MS4, including regional solutions such as low-flow diversions and catch-basin inserts.

[178] See, e.g., 55 Fed. Reg. 47990, 47995-47996 ("Section 402(p)(B)(3) of the CWA requires that permits for discharges *from municipal separate storm sewer systems* require the municipality to 'effectively prohibit' non-storm water discharges *from the municipal separate storm sewer*...Ultimately, such non-storm water discharges *through a municipal separate storm sewer* must either be removed from the system or become subject to an NPDES permit. . . . *(Continued)*

Permittee Petitioners' objection to the phrasing of the prohibition in the Los Angeles MS4 Order appears to be based largely on the assumption that prohibiting non-storm water discharges at the point of entry into the receiving water rather than at the point of entry into the MS4 allows the Los Angeles Water Board to impose requirements on those discharges that would otherwise not be available under the Clean Water Act and federal regulations. We disagree.

As a preliminary matter, regardless of the phrasing of the non-storm water discharge prohibition, MEP is not the standard that governs non-storm water discharges. Permittee Petitioners have asserted that, for non-storm water discharges that enter the MS4, MEP is the governing standard just as it is for storm water discharges. This assertion misinterprets the statute. The Clean Water Act imposes two separate standards for regulation of non-storm water and storm water in an MS4 permit: The MS4 permit "shall include a requirement to effectively prohibit non-stormwater discharges" into the MS4, and "shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . ."[179] Although the statute imposes the MEP standard to control of "pollutants" rather than specifically to "pollutants in storm water," any reading of section 402(p)(3)(B)(iii) to apply generally to both non-storm water and storm water would render the effective prohibition of non-storm water in section 402(p)(3)(B)(ii) meaningless. The federal regulations confirm the distinction between the treatment of storm water and non-storm water by establishing requirements to prevent illicit discharges from entering the MS4.[180] While the regulations have no definition for "non-storm water discharges," illicit discharges most closely represent the statutory term and are defined as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit . . . and discharges resulting from firefighting activities."[181] Further, contrary to assertions by Permittee Petitioners, the definition of storm water in the federal regulations is not inclusive of dry weather discharges. The federal regulations define storm water as "storm water runoff, snow melt runoff, and surface runoff and

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The CWA prohibits the point source discharge of non-storm water not subject to an NPDES permit *through municipal separate storm sewers to waters of the United States.*" (Emphasis added.))

[179] 33 U.S.C. § 1342(p)(3)(b)(iii).

[180] 40 C.F.R. § 122.26(d)(2)(iv)(B).

[181] *Id.*, § 122.26(b)(2). The preamble to the regulations states: "Today's rule defines the term 'illicit discharge' to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit." (55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).)

drainage."[182] Surface runoff and drainage cannot be understood to refer to dry weather discharges where USEPA has specifically stated in the preamble to the relevant regulations that it would not expand the definition of storm water to include "a number of classes of discharges which are not in any way related to precipitation events."[183] Accordingly, dry weather discharges are not a component of storm water discharges subject to the MEP standard.[184]

Second, the Los Angeles Water Board's legal authority to impose TMDL-based WQBELs and other limitations on dry weather discharges is derived not from the phrasing of the discharge prohibition in the statute but from the TMDLs themselves, as well as the Clean Water Act direction to require "such other provisions" as the permitting authority "determines appropriate for the control of such pollutants." We have already found that the Los Angeles MS4 Order reasonably (and legally) incorporated numeric WQBELs and other limitations to implement the TMDLs. The Los Angeles Water Board's authority to impose the limitations for dry weather conditions is accordingly independent of the provisions establishing the non-storm water effective prohibition.

Permittee Petitioners also assert that requiring compliance with the non-storm water discharge prohibition through and from the MS4 would frustrate enforcement of the illicit connection and illicit discharge elimination programs of the Los Angeles MS4 Order, which continue to require the Permittee to prohibit illicit discharges and connections *to* the MS4.[185] On this point, we agree with the Los Angeles Water Board that the illicit connection and illicit discharge elimination program is a means to implement the non-storm water prohibition and independently implementable and enforceable. We are more sympathetic to the argument by Permittee Petitioners that, in the context of a complex MS4 system with commingled discharges, the prohibition of discharges through the MS4 to the receiving waters poses greater compliance challenges than a prohibition of discharges into the MS4; however, the Los Angeles MS4 Order's Monitoring and Reporting Program contains a procedure by which a Permittee will notify the Board and the upstream jurisdiction when non-exempted, non-storm water discharges pose an issue in commingled discharges.[186] Further, the Los Angeles Water Board states in its

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[182] 40 C.F.R. § 122.26(b)(13).

[183] 55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).

[184] We disagree that the phrasing of the non-storm water discharge prohibition in the Los Angeles MS4 Order means that *any* dry weather discharges from the MS4 could be construed as a violation of the Clean Water Act for the same reasons articulated in footnote 133 of this order.

[185] Los Angeles MS4 Order, Parts VI.A.2.a.iii, p. 40, VI.D.4.d., p. 81-86, VI.D.10, p. 137-141.

[186] Los Angeles MS4 Order, Att. E, Monitoring and Reporting Program, Part IX.F.6, p. E-27.

October 15, 2013 Response that the upstream jurisdiction would then have the responsibility to further investigate and address the discharge.[187] The challenge of addressing compliance and enforcement in the context of interconnected MS4s and commingled discharges is a challenge pervasive in the MS4 regulatory structure and not unique to non-storm water discharges. We are not sufficiently persuaded by Permittee Petitioners' arguments regarding compliance to disturb the non-storm water prohibitions as currently established in the Los Angeles MS4 Order.

E. Monitoring Provisions

Relying on Water Code sections 13165, 13225, and 13267, Permittee Petitioners argue that the Los Angeles Water Board was required to conduct a cost-benefit analysis to support the monitoring and reporting requirements of the Los Angeles MS4 Order. Because the monitoring and reporting provisions of the Los Angeles MS4 Order are incorporated pursuant to federal law, the cited provisions are inapplicable here. The monitoring and reporting provisions of the Los Angeles MS4 Order were established under the Clean Water Act and USEPA's regulations.[188] Further, under state law, Water Code section 13383, rather than Water Code section 13267, controls monitoring and reporting requirements in the context of NPDES permitting, and that provision does not include a requirement to ensure that the burden, including costs of the report, bear a reasonable relationship to the need for the report.[189]

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[187] Los Angeles Water Board, October 15, 2013 Response, p. 33 & fn. 116.

[188] See 33 U.S.C. §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)D), 122.41(h), 122.41(j), 122.41(*l*), 122.42(c),122.44(i), 122.48.

[189] Permittee Petitioners argue that the cost considerations of Water Code sections 13225 and 13267 are relevant to the Los Angeles MS4 Order notwithstanding the fact that it was issued under federal authority because the requirements of those section are not inconsistent with the requirements of section 13383. (See Water Code, §13372, subd. (a) ("To the extent other provisions of this division are consistent with the requirements for state programs . . . those provisions apply . . . ").) This exact assertion was taken up by the trial court in litigation challenging the 2001 Los Angeles MS4 Order and decided in favor of the Los Angeles Water Board. The trial court stated: "As noted in *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, the Court held, in part: 'state law is still preempted. . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' (464 U.S. at p. 248.) Applying Water Code sections 13225 and 13267 would stand, in the words of *Silkwood* as: 'an obstacle to the accomplishment of the full purposes and objectives of [the federal law].' (Ibid)." (*In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, at pp.19-20 (Administrative Record, section 10.II., RB-AR23197-23198.). Further, we note that Water Code section 13383, subdivision (c) specifically references subdivision (c) of section 13267 when establishing facility inspection requirements; in contrast, section 13383, subdivision (a) does not reference subdivision (b) of section 13267, which incorporates the requirement that "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." Water Code section 13383, subdivision (a), was therefore arguably intended to stand in place of the requirements in section 13267(b). Finally, even where authority to impose a monitoring and reporting requirement is clearly derived from Water Code section 13267, the provision requires consideration of the costs and benefits of monitoring and reporting, but not a full cost-benefit analysis. We therefore find that the Los Angeles Water Board did not fail to meet its legal obligations by not carrying out a full cost-benefit analysis specific to the monitoring and reporting requirements of the Los Angeles MS4 Order. However, in making this finding, in no way do we mean to disavow the significance of cost consideration in permitting actions, even where not specifically required by law. We note again that the Los Angeles Water Board carefully considered the costs of *(Continued)*

Moreover, the monitoring and reporting requirements of the Los Angeles MS4 Order do not exceed the requirements of the Clean Water Act and the federal regulations.[190] In particular, we find that the receiving water monitoring requirements of the Order are reasonable in light of the need to identify water quality exceedances and evaluate progress in compliance with water quality standards. The argument made by several Permittee Petitioners that the federal regulations allow only two types of monitoring – effluent and ambient – for compliance is without support in the relevant regulations. The relevant law is clear that the permitting authority is required to incorporate monitoring and reporting requirements sufficient to determine compliance with the permit conditions.[191] In contrast, nothing in the Clean Water Act or the regulations states that requiring wet weather receiving water monitoring is beyond the authority of the permitting agency.[192] Further, accepting such a constrained interpretation of the Clean Water Act's monitoring requirements would undermine storm water permitting assessment. Excluding wet weather receiving water monitoring would preclude storm water dischargers from assessing the impacts of their discharges on waters of the United States during the events for which they are primarily being permitted—storm events. We find nothing in the text or preamble of the federal regulations to support a narrow interpretation of monitoring to exclude wet weather receiving monitoring.

To the extent Permittee Petitioners are arguing that the MEP standard, applied at the outfall, constrains the permitting authority's discretion to require monitoring beyond the outfall, we also find no support in the law for that proposition. We have already stated that we will continue to require compliance with water quality standards in MS4 permits. Wet weather receiving water monitoring is fundamental to assessing the effects of storm water discharges on water quality and determining the trends in water quality as Permittees implement control

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compliance with the Los Angeles MS4 Order generally as summarized in the Fact Sheet. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-144-F-149.) Further, the Los Angeles Water Board considered monitoring costs-related comments on earlier drafts of the Los Angeles MS4 Order, and, in a number of cases, where presented with an argument that a cost related to a particular monitoring requirement was not commensurate with the benefits to be received from that requirement, made revisions to the requirement. (See, e.g., Administrative Record, section 8, RB-AR19653-19654, RB-AR19666, RB-AR19674, RB-AR19681.)

[190] The Los Angeles Water Board provided its rationale for the receiving water monitoring requirements in the Fact Sheet of the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att. F, Fact Sheet, F-113-F-137.)

[191] See 33 U.S.C. § 1318(a)(2); 40 C.F.R. § 122.26(d)(2)(i)(F). While we do not interpret these requirements to mean that each and every permit condition must have a corresponding monitoring and reporting requirement, neither do we see any constraints on the water boards' authority to establish monitoring and reporting requirements.

[192] Permittee Petitioners reference language in the federal regulations concerning "effluent and ambient monitoring" (40 C.F.R. § 122.44(d)(1)(vi)(C)(3)) and appear to be using the phrase as support for their argument. That section is inapposite as it applies to situations where a State has not established a water quality objective for a pollutant present in the effluent and instead establishes effluent limitations on an indicator parameter for the pollutant of concern.

measures. Compliance may be determined at the outfall – for example, where a permittee determines that the discharge does not exceed an applicable WQBEL or receiving water limitation – but outfall monitoring alone cannot provide the broader data related to trends in storm water discharge impacts on the receiving water. Accordingly, receiving water monitoring is a legal and reasonable component of the monitoring and reporting program. Further, because Permittees are responsible for impacts to the receiving waters resulting from their MS4 discharges, Permittees may be required to participate in monitoring not only in receiving waters within their jurisdiction but also in monitoring all receiving waters that their discharges impact.

We will make no revisions to the Monitoring and Reporting provisions of the Order.

F. Joint Responsibility

In the extensive and interconnected system regulated by the Los Angeles MS4 Order, discharges originating from one Permittee's MS4 frequently commingle with discharges from other Permittees' MS4s within or outside of the Permittee's jurisdiction. Permittee Petitioners argue that the Los Angeles MS4 Order improperly ascribes responsibility to all Permittees with commingled discharges where those commingled discharges exceed a WQBEL or cause or contribute to exceedances of receiving water limitations. Specifically, Permittee Petitioners take issue with the fact that the Los Angeles MS4 Order ascribes "joint responsibility"[193] to the co-Permittees without a showing that a particular Permittee has in fact discharged the pollutant causing or contributing to the exceedance.

The Los Angeles Water Board counters that the joint responsibility regime is consistent with the intent of the Clean Water Act and further that it does not compel a Permittee to clean up the discharge of another Permittee. The Los Angeles Water Board points to two provisions for this latter proposition. First, even with joint responsibility, Permittees that have commingled MS4 discharges need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.[194] Second, even where joint responsibility is presumed, a Permittee may subsequently counter the presumption of joint responsibility by

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[193] "Joint responsibility" is the term used in the Los Angeles MS4 Order. (See Los Angeles MS4 Order, Part II.K.1, p. 23 ("'Joint responsibility' means that the Permitttees that have commingled MS4 discharges are responsible for implementing programs in their respective jurisdictions, or within the MS4 for which they are an owner and/or operator, to meet the water quality-based effluent limitations and/or receiving water limitations assigned to such commingled MS4 discharges.") As defined by the Los Angeles Water Board and as discussed below, this term does not have the same meaning and scope as the legal doctrine of "joint liability."

[194] Los Angeles MS4 Order, Parts II.K.1, pp. 23-24, VI.A.4.a., p. 41; 40 C.F.R. § 122.26(a)(3)(vi); see also, *id.*, Part VI.E.2.b.ii., p. 142 (stating in the context of TMDL requirements that, where discharges are commingled and assigned a joint WLA, "each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.")

affirmatively demonstrating that its MS4 discharge did not cause or contribute to the relevant exceedances.[195]

Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order and the challenges inherent in designing a monitoring program that could parse out responsibility for each individual Permittee, we find that a joint responsibility regime is a reasonable approach to assigning initial responsibility for an exceedance. The Los Angeles MS4 Order provisions addressing TMDLs also appropriately take a joint responsibility approach, given that the wasteload allocations from which the WQBELs and other TMDL-specific limitations are derived are most frequently expressed as joint allocations shared by all MS4 dischargers in the watershed. We further agree with the Los Angeles Water Board that the regime is one that is permissible under applicable law. The Clean Water Act contemplates that MS4 permits may be issued on a system-wide or jurisdiction-wide basis[196] and the federal regulations anticipate the need for inter-governmental cooperation.[197] Further, the United States Court of Appeal, Ninth Circuit, recently stated in *Natural Resources Defense Council v. County of Los Angeles* (2013) 725 F.3d 1194 that the permitting authority has wide discretion concerning the terms of a permit, including the manner in which permittees share liability.[198]

Yet, we also find that joint responsibility in an MS4 Order is only appropriate if the ultimate responsibility for addressing an exceedance rests with those permittees that actually cause or contribute to the exceedance in question. The re-issued Los Angeles MS4 Order contains additional specificity and monitoring, beyond that contained in the 2001 Los Angeles MS4 Order, to document compliance and the presence or absence of an individual municipality's contribution of pollutants to the storm water. For this reason, the general reasoning of the Ninth Circuit's 2013 *Natural Resources Defense Council v. County of Los Angeles* decision finding liability based solely on the presence of pollutants above water quality standards in the receiving waters is of limited forward-looking importance. Generally, in the context of MS4 permits, we do not sanction joint responsibility to the extent that that joint

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[195] *Id.*, Part VI.E.2., pp.141-42; see also id., Part II.K.1, pp. 23-24.

[196] 33 U.S.C. § 1342(p)(3)(B)(i).

[197] See 40 C.F.R. §§ 122.26(d)(2)(i)(D), 122.26(d)(2)(iv), 122.26(d)(2)(vii).

[198] *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1205, fn. 16, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135. The Ninth Circuit went on to find that, based on the specific language of the 2001 Los Angeles MS4 Order, the Permittees were jointly liable for exceedances detected by mass emissions monitoring.

responsibility would require each Permittee to take full responsibility for addressing violations, regardless of whether, and to what extent, each permittee contributed to the violation.[199]

The Los Angeles MS4 Order does not impose such a joint responsibility regime where each Permittee must take full responsibility for addressing other Permittees' violations. In addition to clearly stating that permittees are responsible only for their contribution to the commingled discharges, the Los Angeles MS4 Order provides that Permittees may affirmatively show that their discharge did not cause or contribute to an exceedance. Joint responsibility, as applied by the Los Angeles MS4 Order, is thus consistent with our expectation that ultimate responsibility for addressing an exceedance rests with those Permittees that actually cause or contribute to the exceedance and consistent with the regulatory direction that co-permittees need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.

While the result is that the burden rests on the Permittee to demonstrate that its commingled discharge is not the source of an exceedance, rather than on the Los Angeles Water Board to demonstrate that a Permittee's commingled discharge is causing or contributing to the exceedance, the result is not contrary to law. The Los Angeles Water Board has the initial burden to show that a violation of the Los Angeles MS4 Order has occurred,[200] but the Board can do so by establishing an exceedance of a limitation by jointly responsible Permittees and need not identify the exact source of the exceedance. This scheme represents a reasonable policy approach to a complicated compliance question where the Permittees are more closely familiar than the Los Angeles Water Board with their outfalls and their discharges in the extensive and interconnected MS4 network.

We are, however, concerned that the Los Angeles MS4 Order's treatment of the joint responsibility issue is too narrow. The Los Angeles Water Board addresses the issue of joint responsibility primarily in the context of compliance with the TMDL requirements of the Order. Commingled discharges pose the same questions of assigning responsibility where receiving water limitations are exceeded in water bodies receiving MS4 discharges from multiple jurisdictions, but where the pollutant is not addressed by a TMDL. A similar approach to

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[199] In a "joint and several liability" scheme, a plaintiff may collect his or her entire damages from any one defendant, and the defendants must then rely on principles of indemnity or contribution to apportion ultimate liability amongst themselves. (See *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 586-590.) Because the Los Angeles MS4 Order's joint responsibility scheme does not equate to joint liability, and because we do not find such liability appropriate from a policy perspective, we do not address Petitioners' legal arguments as to whether joint or joint and several liability in the storm water context would be consistent with applicable law.

[200] See e.g. *Sackett v. E.P.A.* (9th Cir. 2010) 622 F.3d 1139 rev'd on other grounds *Sackett v. E.P.A.* (2012) 132 S. Ct. 1367.

assigning responsibility for addressing the exceedances is appropriate there. We will add new language to the Los Angeles MS4 Order mirroring Part VI.E.2.b., but applying the principles more generally.

We also take this opportunity to emphasize that all MS4 permits should be drafted to avoid one potential, but likely unintended, result arising from *Natural Resources Defense Council v. County of Los Angeles*. The broadest reading of the Ninth Circuit's holding following remand from the U.S. Supreme Court would assign joint liability to all Permittees for any exceedance at a monitoring location designated for the purpose of compliance determination, even if the particular pollutant is not typically found in storm water and has a likely alternative source such as an industrial discharger or waste water treatment plan. Providing municipalities an opportunity to demonstrate that they did not contribute to a pollutant present in receiving waters above standards will prevent this outcome.

We shall amend Part VI.B. as follows:

B. Monitoring and Reporting Program (MRP) Requirements

1. Dischargers shall comply with the MRP and future revisions thereto, in Attachment E of this Order or may, in coordination with an approved Watershed Management Program per Part VI.C, implement a customized monitoring program that achieves the five Primary Objectives set forth in Part II.A. of Attachment E and includes the elements set forth in Part II.E. of Attachment E.

2. Compliance Determination for Commingled Discharges

a. For commingled discharges addressed by a TMDL, a Permittee shall demonstrate compliance with the requirements of Part E as specified at Part E.2.b.

b. For commingled discharges not addressed by a TMDL, a Permittee shall demonstrate compliance with the requirements of Part V.A as follows:

i. Pursuant to 40 CFR section 122.26(a)(3)(vi), each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.

ii. Where Permittees have commingled discharges to the receiving water, or where Permittees' discharges commingle in the receiving water, compliance in the receiving water shall be determined for the group of Permittees as a whole unless an individual Permittee demonstrates that its discharge did not cause or contribute to the exceedance, pursuant to subpart iv. below.

iii. **For purposes of compliance determination, each Permittee is responsible for demonstrating that its discharge did not cause or contribute to an exceedance of the receiving water limitation in the target receiving water.**

iv. **A Permittee may demonstrate that its discharge did not cause or contribute to an exceedance of a receiving water limitation in one of the following ways:**

(1) **Demonstrate that there was no discharge from the Permittee's MS4 into the applicable receiving water during the relevant time period;**

(2) **Demonstrate that the discharge from the Permittee's MS4 was controlled to a level that did not cause or contribute to the exceedance in the receiving water;**

(3) **Demonstrate that there is an alternative source of the pollutant that caused the exceedance, that the pollutant is not typically associated with MS4 discharges, and that the pollutant was not discharged from the Permittee's MS4; or**

(4) **Demonstrate that the Permittee is in compliance with the Watershed Management Programs provisions under VI.C.**

G. Separation of Functions in Advising the Los Angeles Water Board

Petitioners Cities of Duarte and Huntington Park (Duarte and Huntington Park) argue that their rights to due process of law were violated when the same attorneys advised both the Los Angeles Water Board staff and the Board itself in the course of the proceedings to adopt the Los Angeles MS4 Order. We disagree and reaffirm our position that permitting actions do not require the water boards to separate functions when assigning counsel to advise in development and adoption of a permit.

A water board proceeding to adopt a permit, including an NPDES permit, waste discharge requirements, or a waiver of waste discharge requirements, is an adjudicative proceeding subject to the Administrative Procedure Act's administrative adjudication statutes in Government Code section 11400 et seq.[201] Section 11425.10, part of the "Administrative Adjudication Bill of Rights," provides that "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions with the agency . . . ."[202] In accordance with

[201] See Cal. Code Regs., tit. 23, § 648, subd. (b).

[202] Gov. Code, § 11425.10, subd. (a)(4). Subdivision (a)(4) references section 11425.30, which addresses disqualification of a presiding officer that has served as "investigator, prosecutor, or advocate" in the proceeding or its preadjudicative stage or is subject to "the authority, direction, or discretion" of a person who has served in such roles.

this directive, the water boards separate functions in all enforcement cases, assigning counsel and staff to prosecute the case, and separate counsel and staff to advise the board.

In a permitting action, water board counsel have an advisory role, not an investigative, prosecutorial, or advocacy role. Permitting actions are not investigative in nature and there is no consideration of liability or penalties that would make the action prosecutorial in nature. Further, while both counsel and staff are expected to develop recommendations for their boards, the role of counsel and staff is not to act as an advocate for one particular position or party concerning the permitting action, but to advise the board as neutrals, with consideration of the legal, technical, and policy implications of all options before the board. In the case of counsel, such consideration and advice includes not just legal evaluation of the substantive options for permitting but also of procedural issues such as admissibility of the evidence, conduct of the hearing, and avoidance of board member conflicts. Because counsel and staff are advisors to the board rather than advocates for a particular position, the same counsel may advise staff in the course of development of the permit and the board in the adoption proceedings.

A primary purpose of separation of functions in adjudicatory proceedings is the need to prevent improper ex parte communications.[203] The exceptions to the ex parte communications rules further support the position that counsel advising board staff may also advise the board itself. While section 11430.10 of the Government Code generally prohibits communications concerning issues in a pending administrative proceeding between the presiding officer and an employee of the agency that is a party,[204] one exception provides that a communication "for the purpose of assistance and advice to the presiding officer," in this case the board, "from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage" is permissible. Even if board counsel could be considered an advocate in the proceeding, another provision (specifically referencing the water boards) excepts the communication from the general ex parte communications rules. A communication is not an ex parte communication if:

> (c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is nonprosecutorial in character:

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[203] See *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 9-10.

[204] Government Code section 11430.10 prohibits communications between an employee that is a "party" to a pending proceeding and the presiding officer. We disagree that Los Angeles Water Board staff, as an advisor to the Board, was a "party" to the proceedings for adoption of the Los Angeles MS4 Order, but, even if staff could be considered a party, the cited exceptions to the ex parte communications rules would apply.

. . .

(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.[205]

The fact that communications that would otherwise be considered prohibited ex parte communications are specifically permitted in non-prosecutorial adjudicative proceedings of the water boards further supports the position that the water boards are not obligated by law to separate functions in permitting actions.

We acknowledge that there may be some unique factual circumstances under which a permitting proceeding could violate due process or the Administrative Procedure Act because board counsel either acted or gave the appearance of acting as a prosecutor or advocate. Duarte and Huntington Park point to a writ of mandate issued by the Los Angeles Superior Court in 2010,[206] holding that a 2006 proceeding to incorporate provisions of the Santa Monica Bay Beaches TMDL into the 2001 Los Angeles MS4 Order was not fairly conducted because Los Angeles Water Board counsel had acted as an advocate for Board staff, directly examining Board staff witnesses, cross-examining witnesses called by permittees, objecting to questions asked by permittees, and making a closing argument on behalf of Board staff, while simultaneously advising the Board. The proceedings to adopt the Los Angeles MS4 Order did not follow the type of adversarial structure that led the Superior Court to find a violation of separation of functions in the 2006 proceedings.[207] Further, nothing in the conduct of the Los Angeles Water Board attorneys in the Los Angeles MS4 Order proceedings leads us to find that they acted as advocates for a particular position or party, rather than as advisors to the Board.

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[205] Gov. Code, § 11430.30. We note that the Law Revision Commission comments on section 11430.30, subdivision (c), state that "[s]ubdivision (c) applies to nonprosecutorial types of administrative adjudications, such as . . . proceedings . . . setting *water quality protection...requirements.*" (Emphasis added.) The notes further state that "[t]he provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for any agency to adhere to the restrictions of [ex parte communications], given limited staffing and personnel." (25 Cal.L.Rev.Comm. Reports 711 (1995).) We agree that the lengthy and complex nature of permitting proceedings, and the limited staffing resources of the water boards, caution against an expansive interpretation of separation of functions in non-prosecutorial adjudications.

[206] *County of Los Angeles v. State Water Resources Control Board* (Super. Ct., Los Angeles Co. (June 2, 2010, Minute Order) No. BS122724) (Administrative Record, section 10.II, RB-AR23665-23667.)

[207] We also note that, although the writ directed that petitioners were entitled to a new hearing "in which the same person does not act as both an advocate before the Board and an advisor to the Board," the writ had no direct bearing on the separate proceedings to adopt the Los Angeles MS4 Order. In any case, as discussed, Board attorneys did not act as advocates in the proceedings to adopt the Los Angeles MS4 Order.

The two specific cases pointed to by Duarte and Huntington Park – advice by Board counsel to Board member Mary Ann Lutz regarding recusal due to ex parte communications and advice to the Board generally on the lack of a cost-benefit analysis requirement in federal law – may be contrary to the legal position held by Duarte and Huntington Park, but there is nothing in the record to suggest that the advice was driven by biased advocacy for a Board staff position.[208] In the absence of such evidence, we find no reason to depart from the general rule that separation of functions is not required in a permitting proceeding[209] and find that Los Angeles Water Board counsel acted in accordance with applicable laws in advising Board staff and the Board itself.

H. Signal Hill's Inclusion in the Order

The City of Signal Hill (Signal Hill) argues that the Los Angeles Water Board acted contrary to relevant law when it issued the system-wide Los Angeles MS4 Order that included Signal Hill, even though Signal Hill had submitted an application for an individual permit.[210] We disagree.

Signal Hill points out that the federal regulations allow an operator of an MS4 to choose between submitting an application jointly with one or more other operators for a joint permit or individually for a distinct permit.[211] However, the choice of application does not necessarily dictate the type of permit that the permitting authority ultimately deems appropriate. The permitting authority in turn has discretion to determine if the permit should be issued on a

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[208] See Administrative Record, section 7, RB-AR18309-18316, RB-AR18397-18400 (Transcript of Proceedings on Oct. 4, 2012), section 7, RB-AR18892-18894 (Transcript of Proceedings on Oct. 5, 2012).

[209] Although *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731 concerned an enforcement proceeding and therefore is not on point for our legal determination above, we take note of the direction by the California Supreme Court that separation of functions in an administrative tribunal should not be expanded beyond its appropriate scope: "In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular . . . [and where proper procedure is followed and in the absence of a specific demonstration of bias or unacceptable risk of bias] we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions." (*Morongo Band of Mission Indians, supra*, at pp. 741-742.)

[210] Signal Hill was one of several permittees under the 2001 Los Angeles MS4 Order that elected not to submit an application jointly with the other permittees for the renewed permit. The other parties have not challenged their inclusion under the Los Angeles MS4 Order. The Los Angeles Water Board rejected Signal Hill's application as incomplete; however, our determination that the Los Angeles Water Board had the discretion to issue the system-wide Los Angeles MS4 Order is not dependent on that fact.

[211] 40 C.F.R. § 122.26(a)(3)(iii). Signal Hill has also cited regulations applicable to Small MS4s at 40 Code of Federal Regulations sections 122.30 through 122.37. These regulations are not applicable here because the Los Angeles Water Board has designated the Greater Los Angeles County MS4, which includes the incorporated cities and the unincorporated areas of Los Angeles County within coastal watersheds, as a large MS4 pursuant to 40 Code of Federal Regulations section 122.26(b)(4).

jurisdictional or system-wide basis.[212] While the federal regulations do not specifically state that, in exercising that discretion, the permitting authority may override the permit applicant's preference for an individual permit, nothing in the regulations constrains its authority to do so. Section 122.26(a)(3)(iii) of 40 Code of Federal Regulations does not require the permitting authority to take any specific action in response to the submission of an individual application. And sections 122.26(a)(3)(ii) and 122.26(a)(3)(iv) provide that the permitting authority "may issue" system-wide or distinct permits. The preamble to the regulations similarly contemplates wide discretion for the permitting authority to choose system-wide permits, including a permit that would allow an entire system in a geographical region to be designated under one permit.[213] Particularly because the option of a system-wide permit would be significantly frustrated if MS4 operators were allowed to opt out at their discretion, the most reasonable reading of the regulations is that the permitting authority, not the applicant, makes the ultimate decision as to the scope of the permit that will be issued. Accordingly, we find that the Los Angeles Water Board had the discretion under the relevant law to issue the Los Angeles MS4 Order with Signal Hill as a permittee.

We also find that the Los Angeles Water Board's decision regarding Signal Hill was appropriately supported by findings in the Order and in the Fact Sheet.[214] Finding C of the Los Angeles MS4 Order, as well as discussion in the Fact Sheet,[215] establishes that the Los Angeles Water Board found a system-wide permit to be appropriate for a number of reasons, including that Permittees' MS4s comprise a large interconnected system with frequently commingled discharges, that the TMDLs to be implemented apply to the jurisdictional areas of multiple Permittees, that the passage of Assembly Bill 2554[216] in 2010 provided a potential means for funding collaborative water quality improvement plans among Permittees, and that the results of an online survey conducted by Los Angeles Water Board staff showed that the

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[212] 33 U.S.C. § 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(a)(1)(v), (a)(3)(ii), (a)(3)(iv).

[213] See 55 Fed. Reg. 47990, 48039-48043 (preamble to the Phase I regulations noting that section 122.26(a)(3)(iv) would allow an entire system in a geographical region to be designated under one permit and further discussing that sections 122.26(a)(1)(v) and (a)(3)(ii) allow the permitting authority broad discretion in issuing system-wide permits).

[214] *Topanga Assn.*, *supra*, 11 Cal.3d at 515.

[215] Los Angeles MS4 Order, Part II.C., pp. 14-15; id., Att. F, Fact Sheet, pp. F-15-F-18.

[216] Assembly Bill No. 2554, Chapter 602, an act to amend sections 2 and 16 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), relating to the Los Angeles County Flood Control District, Sept. 30, 2010 (Administrative Record, section 10.VI.C., RB-AR29172-29179). The Bill allows the Los Angeles County Flood Control District to assess a property-related fee or charge, subject to voter approval in accordance with proposition 218, for storm water and clean water programs.

majority of Permittees favored either a single MS4 permit for Los Angeles County or several watershed-based permits.

Signal Hill points out that the reasons enumerated by the Los Angeles Water Board as grounds for issuance of a system-wide permit did not preclude the Los Angeles Water Board from issuing an individual permit to the City of Long Beach (Long Beach).[217] The Los Angeles Water Board has provided the rationale for distinguishing Signal Hill and Long Beach in its October 15, 2013 Response. The Los Angeles Water Board explains that Long Beach has had an individual permit for more than a decade and that, unlike Signal Hill, it was not permitted under the 2001 Los Angeles MS4 Order. The Board's decision to issue a separate permit to Long Beach was originally the result of a settlement agreement that resolved litigation on the MS4 permit issued by the Los Angeles Water Board in 1996, and Long Beach has a proven track record in implementing the individual permit while cooperating with Permittees under the Los Angeles MS4 Order.[218] We find that the Los Angeles Water Board reasonably distinguished between Long Beach and the Permittees under the Los Angeles MS4 Order in making determinations as to individual permitting. We will not reverse its determination but we will add a brief statement reflecting that reasoning to the Fact Sheet.

We shall amend section III.D.1.a. at page F-18, Attachment F, Fact Sheet, as follows:

> The Regional Water Board determined that the cities of Signal Hill and Downey, the five upper San Gabriel River cities, and the LACFCD are included as Permittees in this Order. **In making that determination, the Regional Water Board distinguished between the permitting status of those cities and the permitting status of the City of Long Beach at this time because the City of Long Beach has a proven track record in implementing an individual permit and developing a robust monitoring program under that individual permit, as well as in cooperation with other MS4 dischargers on watershed based implementation. While all other incorporated cities with discharges within the coastal watersheds of Los Angeles County, as well as Los Angeles County and the Los Angeles County Flood Control District, are permitted under this Order,** ~~I~~individually tailored permittee requirements are provided in this Order, where appropriate.

[217] Signal Hill is located in the geographical middle of Long Beach and is entirely surrounded by that city.

[218] Los Angeles Water Board, October 15, 2013 Response, p. 25, fn. 78.

III. CONCLUSION

Based on the above discussion, we conclude as follows:

1. Although we are not bound by federal law or state law to require compliance with water quality standards in municipal storm water permits, we will not depart from our prior precedent regarding compliance with water quality standards. The regional water boards shall continue to require compliance with receiving water limitations in municipal storm water permits through incorporation of receiving water limitations provisions consistent with State Water Board Order WQ 99-05.

2. However, we find that municipal storm water dischargers may not be able to achieve water quality standards in the near term and therefore that it is appropriate for municipal storm water permits to incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.

3. We find that the WMP/EWMP provisions of the Los Angeles MS4 Order, with minor revisions that we incorporate herein, are an appropriate alternative to immediate compliance with receiving water limitations. The WMP/EWMP provisions are ambitious, yet achievable, and include clear and enforceable deadlines for the achievement of receiving water limitations and a rigorous and transparent process for development and implementation of the WMPs/EWMPs.

4. We find that the WMP/EWMP provisions do not violate anti-backsliding requirements.

5. We find that the WMP/EWMP provisions do not violate antidegradation requirements; however, we find that the antidegradation findings made by the Los Angeles Water Board are too cursory and revise those findings consistent with the federal and state antidegradation policies.

6. We find that issuance of time schedule orders is appropriate where a final receiving water limitations deadline set in the WMP/EWMP or a final TMDL-related deadline is not met; however we find that the WMP/EWMP compliance schedule need not otherwise be structured as an enforcement order.

7. We clarify the WMP/EWMP provisions to make it clear that final compliance with receiving water limitations and final WQBELs and other TMDL-specific limitations must be verified through monitoring.

8. We clarify the WMP/EWMP provisions to make it clear that Permittees may request extensions of deadlines incorporated into the WMPs/EWMPs except those final deadlines established in a TMDL. However, any deadline extensions must be approved by the Executive Officer after public review and comment.

9. In order to add greater rigor and accountability to the process of achieving receiving water limitations, we revise the WMP/EWMP provisions to add that the Permittees must comprehensively evaluate new data and information and revise the WMPs/EWMPs, including the supporting reasonable assurance analysis, by June 30, 2021, for approval by the Executive Officer.

10. We find that the storm water retention approach is a promising approach to achieving receiving water limitations, but also find that the Administrative Record does not support a finding that the approach will necessarily lead to achievement of water quality standards in all cases. We revise the WMP/EWMP provisions to clarify that, in the case of implementation of an EWMP with the storm water retention approach, if compliance with a final WQBEL or other TMDL-specific limitation is not in fact achieved in the drainage area, a Permittee will be considered in compliance with the relevant limitation only if the Permittee continues to adaptively manage the EWMP to achieve ultimate compliance with the WQBEL or other TMDL limitation.

11. We find reasonable the WMP/EWMP provisions that allow permittees to be deemed in compliance with receiving water limitations during the planning and development phase of the WMP/EWMP. We revise the WMP/EWMP provisions to state that, if a Permittee fails to meet one of the deadlines, the Permittee may still develop a WMP/EWMP for approval by the Los Angeles Water Board or its Executive Officer; however, the Permittee will not be deemed in compliance with receiving water limitations or WQBELs and other TMDL-specific limitations during the subsequent WMP/EWMP development period.

12. We recognize that the Los Angeles MS4 Order WMP/EWMP compliance path alternative may not be appropriate in all MS4 permits. In order to provide guidance to regional water boards preparing Phase I MS4 permits, we lay out several principles to be followed in drafting receiving water limitations compliance alternatives: Phase I MS4 permits should (1) continue to require compliance with water quality standards in accordance with our Order WQ 99-05; (2) allow compliance with TMDL requirements to constitute compliance with receiving water limitations; (3) provide for a compliance

alternative that allows permittees to achieve compliance with receiving water limitations over a period of time as described above; (4) encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements; (5) encourage the use of green infrastructure and the adoption of low impact development principles; (6) encourage the use of multi-benefit regional projects that capture, infiltrate, and reuse storm water; and (7) require rigor, accountability, and transparency in identification and prioritization of issues in the watershed, in proposal and implementation of control measures, in monitoring of water quality, and in adaptive management of the program. We expect the regional water boards to follow these principles unless the regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.

13. We recognize that the success of the WMP/EWMP approach depends in large part on the steps that follow adoption of the provisions, including the development and approval of rigorous WMPs/EWMPs and the implementation and appropriate enforcement of the programs once approved. We direct the Los Angeles Water Board to periodically report specific information to the State Water Board regarding implementation of the WMPs/EWMPs, including on-the-ground structural control measures completed, monitoring data evaluating the effectiveness of such measures, control measures proposed to be completed and proposed funding and schedule, trends in receiving water quality related to storm water discharges, and compliance and enforcement data.

14. We find that the Los Angeles Water Board acted in a manner consistent with the law when establishing numeric WQBELs. We further find that the development of numeric WQBELs was a reasonable exercise of the Los Angeles Water Board's policy discretion, given its experience in developing the relevant TMDLs and the significance of storm water impacts in the region. However, we find that numeric WQBELs are not necessarily appropriate in all MS4 permits or for all parameters in any single MS4 permit.

15. We find that the Los Angeles Water Board's choice of BMP-based WQBELs, to be proposed by the Permittee in the WMP/EWMP to address USEPA-established TMDLs was reasonable.

16. We find that the Los Angeles Water Board did not act contrary to federal law when it prohibited the discharge of non-storm water "through the MS4 to receiving water" instead of "into" the MS4. Regardless of the exact wording of the prohibition, the standard that applies to non-storm water is the requirement of "effective prohibition." However, the Los Angeles Water Board also has authority to regulate any dry weather discharges from the MS4s under the applicable TMDLs.

17. We find that the monitoring and reporting provisions of the Los Angeles MS4 Order are consistent with applicable law and reasonable.

18. We find that assigning joint responsibility for commingled discharges that cause exceedances is not contrary to applicable law. Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order, the joint responsibility regime also constitutes a reasonable policy choice. The Los Angeles MS4 Order specifically allows a permittee to avoid joint responsibility by demonstrating that its commingled discharge is not the source of an exceedance.

19. We find that representation of the Los Angeles Water Board and the Los Angeles Water Board staff by the same attorneys in the proceedings to adopt the Los Angeles MS4 Order was lawful and reasonable.

20. We find that the Los Angeles Water Board acted in a manner consistent with applicable law and reasonably when it issued a system-wide permit that included Signal Hill.

Addressing the water quality impacts of municipal storm water is a complex and difficult undertaking, requiring innovative approaches and significant investment of resources. We recognize and appreciate the commendable effort of the Los Angeles Water Board to come up with a workable and collaborative solution to the difficult technical, policy, and legal issues, as well as the demonstrated commitment of many of the area's MS4 dischargers and of the environmental community to work with the Los Angeles Water Board in the development and implementation of the proposed solution. We also recognize the extensive work that interested persons from across the state, including CASQA, have invested in assisting us in understanding how the watershed-based alternative compliance approach developed by the Los Angeles Water Board may inform statewide approaches to addressing achievement of water quality requirements. While storm water poses an immediate water quality problem, we believe that a rigorous and transparent watershed-based approach that emphasizes low impact development, green infrastructure, multi-benefit projects, and capture, infiltration, and reuse of storm water is

a promising long-term approach to addressing the complex issues involved. We must balance requirements for and enforcement of immediate, but often incomplete, solutions with allowing enough time and leeway for dischargers to invest in infrastructure that will provide for a more reliable trajectory away from storm water-caused pollution and degradation. We believe that the Los Angeles MS4 Order, with the revisions we have made, strikes that balance at this stage in our storm water programs, but expect that we will continue to revisit the question of the appropriate balance as the water boards' experience in implementing watershed-based solutions to storm water grows.

IV. ORDER

IT IS HEREBY ORDERED that the Los Angeles MS4 Order is amended as described above in this order. The Los Angeles Water Board is directed to prepare a complete version of the Los Angeles MS4 Order (including any necessary non-substantive conforming corrections), post the conformed Los Angeles MS4 Order on its website, and distribute it as appropriate.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held June 16, 2015.

AYE:	Chair Felicia Marcus Vice Chair Frances Spivy-Weber Board Member Tam M. Doduc Board Member Steven Moore Board Member Dorene D'Adamo
NAY:	None
ABSENT:	None
ABSTAIN:	None

Jeanine Townsend
Clerk to the Board

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 August 1, 2017, I served the:

- **Claimants' Response to the Notice of Incomplete Joint Test Claim filed July 31, 2017**

  Santa Ana Region Water Permit – County of San Bernardino, 10-TC-10
  County of San Bernardino, San Bernardino County Flood Control District,
  Cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Highland,
  Montclair, Ontario, and Rancho Cucamonga, Co-Claimants

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 1, 2017 at Sacramento, California.

Jill Magee

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 7/11/17

Claim Number: 10-TC-10

Matter: Santa Ana Region Water Permit - County of San Bernardino

Claimants: City of Big Bear Lake
City of Chino
City of Chino Hills
City of Colton
City of Fontana
City of Highland
City of Montclair
City of Ontario
City of Rancho Cucamonga
County of San Bernardino
San Bernardino County Flood Control District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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