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March 15, 2018

VIA DROPBOX

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

Re: California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036, Rebuttal Comments of Joint Test Claimants

Dear Ms. Halsey:

As Claimant Representative for all test claimants in the above-referenced Joint Test Claim, the San Bernardino County Flood Control District, the County of San Bernardino and the Cities of Big Bear Lake, Chino, Chino Hills, Fontana, Highland, Montclair, Ontario and Rancho Cucamonga, I am filing on their behalf the attached Rebuttal Comments on the Joint Test Claim.

The documents being filed with the Commission on State Mandates are this cover letter, the Rebuttal Comments themselves, Attachments 1 and 2 (plus exhibits), and Rebuttal Documents.

Claimants appreciate the Commission's granting of an extension in order for them to prepare these documents. Thank you for your consideration of these matters.

Very truly yours,

David W. Burhenn

DB:dwb

REBUTTAL COMMENTS OF JOINT TEST CLAIMANTS, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SANTA ANA REGION, ORDER NO. R8-2010-0036, 10-TC-10

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REBUTTAL COMMENTS OF JOINT TEST CLAIMANTS, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SANTA ANA REGION, ORDER NO. R8-2010-0036, 10-TC-10

Joint Test Claimants County of San Bernardino ("County"), San Bernardino County Flood Control District ("District") and the Cities of Big Bear Lake, Chino, Chino Hills, Fontana, Highland, Montclair, Ontario and Rancho Cucamonga (collectively, "Claimants"), herewith file this Rebuttal to the comments of the State Water Resources Control Board and the California Regional Water Quality Control Board, Santa Ana Region ("Santa Ana Water Board") (collectively, "Water Boards") and the Department of Finance ("DOF") concerning Test Claim 10-TC-10, *California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036* (the "Joint Test Claim").

This Rebuttal will address each of the comments made by the Water Boards and the DOF concerning the validity of the Joint Test Claim. In summary, the Water Boards contend that Claimants are not entitled to a subvention of state funds for the mandates contained in Order No. R8-2010-0036 (the "2010 Permit") because (a) the mandates were neither "new programs" nor represented "higher levels of service;" (b) the mandates were federal, not state in nature; (c) the 2010 Permit did not impose requirements unique to local agencies; and (d) Claimants had fee authority to fund the mandates. Water Boards' Comments ("WB Comments") at 11-20. The DOF argues only that the Claimants had fee authority to fund the mandates, and does not otherwise address the Joint Test Claim. DOF Comments at 1-2.

These arguments have already been made, and addressed, in other test claims decided before the Commission as well as by California appellate courts. In addressing the comments of the Water Boards and the DOF, Claimants demonstrate in this rebuttal that the state agencies' comments lack factual or legal support and that a subvention of funds for the mandates contained in the 2010 Permit is required under article XIII B, section 6 of the California Constitution.

REBUTTAL TO COMMENTS OF WATER BOARDS

I. GENERAL COMMENTS

This section addresses contentions made by the Water Boards in their general comments on the Joint Test Claim. WB Comments at 1-20. Those contentions are addressed further in Section II below, which responds to the comments on each mandate in the 2010 Permit.

A. *The Supreme Court's Decision in* Department of Finance v. Commission on State Mandates *is Directly Applicable to this Joint Test Claim*

The Water Boards argue (WB Comments at 2-4) that the issues in this Joint Test Claim can be distinguished from those before the California Supreme Court in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749 ("*Dept. of Finance*"), the seminal case on what constitutes a state, versus a federal, mandate in determining the existing of an unfunded state mandate. In relevant part, the Water Boards argue that the 2010 Permit can be distinguished from the Los Angeles County MS4 permit at issue in *Dept. of Finance* because in the former, the Santa

Ana Water Board made findings required under *Dept. of Finance* to establish that "requirements in the Permit, including each of the challenged terms, were necessary to comply with the CWA and its implementing regulations and thus was based entirely on federal authority." WB Comments at 3 (footnote omitted). The Santa Ana Water Board did not, however, make such findings, as will be discussed below.

The holdings in *Dept. of Finance* are directly applicable to this Joint Test Claim, and most particularly the following three holdings:[1]

- *How is a mandate in a stormwater permit to be determined to be a "federal" or a "state" mandate?*

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," that requirement is not federally mandated.

1 Cal. 5th at 765. In particular, the Court noted the wide discretion afforded the State in determining what requirements would meet the MEP standard. *Id.* at 768.

- *Must the Commission defer to the Water Boards' determination of what constitutes a federal mandate?*

The Supreme Court refused to grant such deference. The Court found that in issuing the Los Angeles County 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.* at 768. The Court cited as authority *City of Burbank v. State Water Resources Control Board* (2005) 5 Cal. 4th 613, 627-28,[2] where it held that a federal National Pollution Discharge Elimination System ("NPDES") permit issued by a regional water board (such as the 2010 Permit) may contain State-imposed conditions that are more stringent than federal law requirements.

The Court squarely addressed the Water Boards' argument here that the Commission should defer to the Santa Ana Water Board's determination that the challenged requirements in the 2010 Permit were federal mandates. Finding that this determination "is largely a question of law," the Court distinguished situations where the question involved the regional board's authority to *impose* specific permit conditions from those involving the question of who would *pay* for them. 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,

[1] *See also* discussion in Claimants' Section 5 Narrative Statement at 9-15.

[2] Included in Exhibit J to Section 7 Documentation in Support of Joint Test Claim.

> 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.[3]

- *Who Has the Burden of Establishing an Exception to Reimbursement of State-Mandated Costs?*

The Supreme Court placed the burden of establishing that a mandate was federal, rather than state, on the Water Boards. In placing that burden, 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 "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.* Looking to the policies underlying article XIII B, section 6, the Court 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 held that the only circumstance under which deference to the Water Boards' expertise would be appropriate was if a regional board had "found, when imposing the disputed permit conditions, that those conditions were *the only means* by which the [MEP] standard could be implemented," which must be a "case specific" finding, taking into account "local factual circumstances." 1 Cal. 5th at 768 and n.15 (emphasis supplied). As discussed below, there are no such explicit findings in the 2010 Permit, despite assertions by the Water Boards to the contrary.

The Supreme Court further found that in assessing whether federal law or regulation required imposing a particular requirement, it was important to examine the scope of the regulatory language. In discussing inspection requirements in the federal stormwater regulations, for example, the Court rejected the Water Boards' argument that all permit-required inspections were federally mandated "because the CWA [Clean Water Act] required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required." *Id.* at 771. In response, the Court held that the mere fact that the 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.*

This last holding is important for the Commission to consider in assessing the federal versus state character of the requirements at issue in the Joint Test Claim. Repeatedly, the Water

[3] *See also* discussion in Section I.C, below.

Boards cite general federal regulatory language as requiring the Santa Ana Water Board to impose specific and prescriptive requirements in the 2010 Permit. However, as the Supreme Court held, the existence of general federal permit regulations does not mean that those regulations "required the scope and detail" of the 2010 Permit provisions at issue in this Joint Test Claim.

B. *The Mandates in the 2010 Permit Set Forth in the Joint Test Claim Were In Fact New Programs and/or Represented Requirements for Higher Levels of Service*

The Water Boards assert that the 2010 Permit provisions in the Joint Test Claim do not impose new programs or require higher levels of service by the Claimants (WB Comments at 12-14.) This assertion is supported neither by the facts or the law.

First, as set forth in the Narrative Statement filed in support of the Joint Test Claim dated July 31, 2017 ("Narrative Statement"), the requirements of the 2010 Permit were new programs because they were not contained in the previous, 2002 MS4 permit. These are the provisions relating to: Local Implementation Plans ("LIPs"), requirements to evaluate authorized non-stormwater discharges to determine if they were a significant source of pollutants to the MS4, incorporation of Total Maximum Daily Load ("TMDL") programs for the Middle Santa River and Big Bear Lake and pre-TMDL monitoring of Knickerbocker Creek and Big Bear Lake, the promulgation and implementation of ordinances to address bacteria sources, the enhancement of Illicit Connections/Illegal Discharges ("IC/ID") programs, the inventorying of septic systems and establishment of failure reduction programs, permittee inspection requirements, enhanced new development and significant redevelopment requirements, the requirement to annually assess public education and outreach programs, new permittee facility and activities requirements, enhanced training requirements, non-compliant facility reporting requirements and requirements for assessment of the Municipal Storm Water Management Plan ("MSWMP"). While all of the above-mentioned Permit requirements were new programs, in some cases they added new obligations to requirements first established in the 2002 Permit.

Claimants respond in detail in Section II on whether specific 2010 Permit requirements represented a new program or higher level of service. But the following points can be made here.

1. The Mandated Programs Set Forth in the Joint Test Claim Represented "New Programs" as a Matter of Fact and Law

As the Water Boards concede, a "program is 'new' if the local government had not previously been required to institute it." WB Comments at 12, citing *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189. As noted above, all of the mandated programs identified in the Joint Test Claim are "new" in that they were not previously required to be performed by Claimants under the previous MS4 permit or were new obligations imposed on existing permit requirements.

Arguing that the requirements of the 2010 Permit were not new programs, the Water Boards cite "more than two decades" of NPDES stormwater permits which included such requirements as management program, monitoring, annual reporting, land development,

enforcement obligations, discharge prohibitions, and the requirement to comply with receiving water limitations through an iterative process. WB Comments at 13. That is not the point. The fact that previous permits may have included provisions implementing these requirements does not mean that the *specific requirements* of the 2010 Permit at issue in this Joint Test Claim were also included in previous stormwater permits. They were not.

The question for the Commission is whether the executive order at issue, *i.e.*, the 2010 Permit, contained new mandates not in the previous permit. In previous test claims, the Commission has held that any new requirements not contained in a previous permit, even when those programs were expanding on a program contained in the previous permit, were a new program or higher level of service. *See, e.g.*, *Statement of Decision,* Case No. 07-TC-09, *In re San Diego Regional Water Quality Control Board Order No. R9-2007-0001* ("SD County SOD"),[4] at 53-54 (even though previous MS4 permit required adoption of Model Standard Urban Storm Water Mitigation Plan ("SUSMP") and local SUSMPs, requirement in succeeding permit to submit an Model SUSMP with specific Low Impact Development BMP requirements constituted a new program or higher level of service). The same analysis applies to the requirements at issue in this Joint Test Claim.

2. The Mandated Programs Identified in the Joint Test Claim Imposed Higher Levels of Service on the Claimants

Claimants have demonstrated that the requirements of the 2010 Permit at issue here were new programs, eligible for a subvention of funds. Having established this, Claimants need go no further. Yet, to the extent that such requirements instead represented a "higher level of service," this fact also has been established. In the Narrative Statement, Claimants set forth precisely how the requirements of the 2010 Permit were additional to those in the 2002 Permit. These additional requirements imposed separate and additional costs on Claimants. These requirements were not simply a "refinement" or "reallocation" of existing Claimant responsibilities, as the Water Boards argue. WB Comments at 13. It is not that the 2010 Permit required only that "municipalities reallocate some of their resources in a particular way." *Id.* And, the Water Boards never explain how, as a factual matter, the mandates at issue in the Joint Test Claim could be paid for with a "reallocation" of local agency resources. The requirements in the 2010 Permit imposed actual and distinct increased costs on Claimants. *See* Narrative Statement, Sections VI.A.5-M.5, and Section 6 Declarations, Paragraphs 7(a)-(m).

The Water Boards' citation of *County of Los Angeles*, *supra*, is inapposite. In that case, the court held that a state requirement that county law enforcement be trained in domestic violence did not impose a higher level of service because the mandate involved adding a course to "an already existing framework of training." *Id.* at 1194. The mandate, concluded the court, "directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training." *Id.*

This is not what the Santa Ana Water Board did in mandating the 2010 Permit programs set forth in the Joint Test Claim. The Water Boards contend that the "iterative" process for improvement of the MEP standard means that higher levels of permit specificity are "consistent"

[4] Section 7 Supplemental Documentation, Exhibit SD-4.

with EPA guidance and thus not a higher level of service. WB Comments at 13. The Commission, however, has rejected a similar argument. In the San Diego County test claim, the DOF similarly argued that since additional permit requirements were necessary for the claimants to continue to comply with the CWA and reduce pollutants to the MEP, they were not new requirements. SD County SOD at 49. In response, the Commission stated that it did "not read the federal [CWA] so broadly" and that "[u]nder the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service." *Id.* The Commission rejected that standard and found that the requirements in question in fact represented a new program or higher level of service. *Id.* at 49-50.

The Water Boards also argue that the "costs incurred must involve programs previously funded exclusively by the state." WB Comments at 13. This argument, and the cases cited, also are inapposite. For example, *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802 involved a statute which authorized counties to charge cities and other local entities for the costs of booking persons into county jails. The court determined that the financial and administrative responsibility for the operation of county jails and detention of prisoners had been the sole responsibility of counties prior to adoption of the statute. The shifting of responsibility was thus from the *county* to the cities, not from the *State* to the cities, and because of that, the statute did not impose a state mandate. *Id.* at 1812. Here, the requirements in the Joint Test Claim involved imposition of a mandate by a state agency, *e.g.*, the Santa Ana Water Board, on local government, *e.g.*, Claimants.

County of Sonoma v. Commission on State Mandates (2000) 84 Cal.App.4th 1264 also is inapposite. The court found there that the statute at issue merely reallocated property tax revenues for public education, which for years had been a shared state and local responsibility, and that there was no evidence of any increased costs imposed on local government by operation of the statute. *Id. at* 1283. By contrast, this Joint Test Claim involves the adoption of specific new provisions in an executive order which require the Claimants to incur new costs. *See* Narrative Statement at 15-52, Section 6 Declarations at Paragraphs 7(a)-(m).

The requirements of the 2010 Permit at issue represent the imposition of a higher level of service on the Claimants.

C. *The Water Boards Have Not Met the Burden of Establishing That Federal Law Mandated the Requirements in the 2010 Permit*

As discussed above, the Supreme Court has held that water boards have the burden of establishing that a requirement in a stormwater permit is federally mandated. *Dept. of Finance,* 1 Cal.5th at 769. The Water Boards have not met that burden here.

The Water Boards assert that because the CWA authorized it to "exercise its discretion, as required by federal law" to "impose requirements that it determined were necessary to implement federal law and meet the CWA standards in the Permit supports the conclusion that the permit provisions are federal, not state mandates." WB Comments at 15. This statement, however, ignores *Dept. of Finance.* It is the very exercise of that discretion which the Supreme Court found to be a state mandate. 1 Cal. 5th at 767-68.

Additionally, the record does not reflect any finding by the Santa Ana Water Board that in adopting the 2010 Permit mandates at issue here, the Board found that such mandates represented the *only* method for achieving the MEP standard.

1. The Santa Ana Water Board's Findings as to the Federal Law Basis for 2010 Permit Requirements Are Not Entitled to Deference

The Water Boards contend that in issuing the 2010 Permit, the Santa Ana Water Board made a specific finding that "when issuing this Permit, Santa Ana Water Board implemented *only federal law."* WB Comments at 15, emphasis in original. In support of this assertion, the Water Boards quote various findings in the 2010 Permit Fact Sheet, including from a finding stating that "*it is entirely federal authority that forms the legal basis to establish the permit provisions."* WB Comments at 16, emphasis in original. Citing this language, the Water Boards conclude that the "Santa Ana Water Board made findings in connection with specific challenged provisions, that such provisions were necessary to implement the maximum extent practicable standard." *Id.*

The Water Boards argue further that since "the legal standard is the 'maximum extent practicable,' determining whether it has been exceeded necessarily rests on whether the Permit includes requirements which are impracticable. Practicability is a matter squarely within the Santa Ana Water Board's jurisdiction and technical expertise." *Id.* Hence, the Water Boards argue, the Commission "must defer to the board's findings." WB Comments at 16.

The Water Boards here ignore the actual test set forth by the Supreme Court in *Dept. of Finance* (requiring a case-specific finding that a particular provision is the *only* way that the MEP standard can be achieved, 1 Cal. 5th at 768 and n.5) and improperly try to shift the burden of proof of a federal mandate to Claimants. That burden lies with the State. 1 Cal. 5th at 769. And, the argument ignores the holding in *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 ("*Dept. of Finance II),* that in determining what provisions constitute MEP, the Water Boards are in fact exercising their discretion, not following a federal mandate. This decision is discussed in Section I.C.6 below.

The record, however, does not reveal findings which meet the Supreme Court's exacting standard for giving deference to a regional board. The Water Boards' "technical expertise" argument ignores the fact that the burden rests on the Water Boards to point to evidence in the record showing how imposed conditions in the 2010 Permit were the only means by which the MEP standard could be achieved. Nothing in the Water Boards' comments or the authority which they cite establish this key fact.

In addition to these governing legal precepts, the facts in the record do not support deference to the Water Boards' determination of what constitutes a federal mandate in the 2010 Permit. First, both the 2010 Permit and Fact Sheet recite that *both* federal *and* state law provisions formed the basis for the provisions at issue in this Joint Test Claim. Second, the language cited by the Water Boards (WB Comments at 15-16) as support for the alleged "federal law only" finding is largely boilerplate, inserted in multiple stormwater permits across the state (*See* Declaration of David W. Burhenn, filed herewith as Attachment 1, and exhibits thereto).

2. The 2010 Permit Recites That It Is Based on Both Federal And State Law

In Finding II.B.1 of the 2010 Permit, the Santa Ana Water Board stated:

> This Order is issued pursuant to CWA Section 402(p) (USC §1342(p)) and implementing regulations adopted by the United States Environmental Protection Agency (USEPA) as codified in Code of Federal Regulations, Title 40, Parts 122, 123, and 124 (40 CFR 122, 123 & 124); the *Porter Cologne Water Quality Control Act (Division 7 of the Water Code, commencing with Section 13000); all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Resources Control Board (State Board); the Water Quality Control Plan for the Santa Ana River Basin (Basin Plan);* the California Toxics Rule (CTR); *and the California Toxics Rule Implementation Plan. The Basin Plan also incorporates all state water quality control plans and policies. This Order also serves as Waste Discharge requirements (WDRs) pursuant to Article 4, Chapter 4, Division 7 of the Water Code (commencing with Section 13260).*

2010 Permit at 9 (Administrative Record ("AR" 11575) (emphasis supplied). Each of the italicized authorities in Finding II.B.1 is California, not federal, authority.

The 2010 Permit Fact Sheet[5] further evidences the California law basis for the permit, stating in Section I that "[t]he requirements included in this Order are consistent with the CWA, the federal regulations governing urban storm water discharges, *the Water Quality Control Plan for the Santa Ana River Basin (Basin Plan), the CWC [California Water Code], and the State Board's Plans and Policies.*" Fact Sheet, Section I, at 7 (AR 11720). The italicized authorities are, again, California authorities.

The Fact Sheet further recites that even in interpreting the meaning of MEP, the Santa Ana Water Board considered requirements more stringent than those required by the CWA regulations: "Any requirements included in the Order that are more stringent than the federal storm water regulations is in accordance with the CWA Section 402(p)(3)(iii) [sic] and the California Water Code Section 13377 and are consistent with the Regional Board's interpretation of the requisite MEP standard." Fact Sheet, Section IX, at 27 (AR 11740).

The cited statutes authorize regional boards to exercise their discretion to include more stringent requirements in permits than are required by (a) the federal MEP standard and (b) federal requirements for NPDES permits. First, 33 U.S.C. § 1342(p)(3)(B)(iii) provides that a state (here, acting through the Santa Ana Water Board) may adopt "such other provisions" as are determined "appropriate for the control of . . . pollutants." Second, Water Code § 13377 provides that water boards must, in addition to ensuring that waste discharge requirements ("WDRs") issued under the Porter Cologne Water Quality Act (the 2010 Permit is a WDR, *see* 2010 Permit at 1 (AR 11567)) meet the requirements of the CWA, must also include "any more stringent effluent standards or

[5] As set forth in the Narrative Statement at 18 n.6, a permit Fact Sheet is required to 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).

limitations necessary to implement water quality control plans [basin plans], or for the protection of beneficial uses, or to prevent nuisance." (The Porter-Cologne Act regulates discharges of waste to waters of the state. *See* Water Code § 13260.)

Moreover, even a regional board's determination that a particular provision in a permit represented "MEP" does not mean, *ipso facto*, that the board was acting under a federal mandate when it included the provision in the permit. First, the regional board must have determined that the provision was the *only* way that the MEP standard could be achieved, a determination that must be "case specific," and "based among other things on local factual circumstances." *Dept. of Finance,* 1 Cal. 5th at 768 and n.15. Second, a regional board's determination of what permit requirements would constitute MEP is itself an exercise of discretion and not a federal mandate. *Dept. of Finance,* 1 Cal. 5th at 767-68 (EPA regulations "gave the board discretion to determine which specific controls were necessary to meet the [MEP] standard."); *Dept. of Finance II,* 18 Cal.App..5th at 682 ("That the San Diego Regional Board found the permit requirements were 'necessary' to meet the [MEP] standard establishes only that the San Diego Regional Board exercised its discretion.")

3. The 2010 Permit Findings Cited by the Water Boards Is Boilerplate Language, Not Entitled to Deference

Notwithstanding textual evidence that the 2010 Permit was based on both federal and state law, the Water Boards contend that language in the Fact Sheet supports deference to the Santa Ana Water Board's conclusion that the Permit conditions were federally mandated. The language cited by the Water Boards (WB Comments at 15) in Section II of the Fact Sheet begins: "This Order does not constitute an unfunded local governmental mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution" and then lists five arguments in support. 2010 Permit Fact Sheet at 5-7 (AR 11718-11720). The Water Boards further cite 2010 Permit Finding II.B.6 (a condensed version of the Fact Sheet discussion) as support. WB Comments at 15, citing 2010 Permit at 10 (AR 11576).

This language is entitled neither to deference or even any weight for several reasons. First, *Dept. of Finance* explicitly rejected the Water Boards' contention that board findings on whether a permit requirement was a federal or state mandate was entitled to deference: "We also disagree that the Commission should have deferred to the Regional Board's conclusion that the challenged requirements were federally mandated." 1 Cal. 5th at 768. "The State's proposed rule, 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.* at 769.

Second, the Water Boards' arguments (as well as Permit Finding II.B.6 and the Fact Sheet language) ignore the fact that the Legislature placed with the Commission exclusive jurisdiction to determine if a mandate is entitled to reimbursement under article XIII B, section 6. Govt. Code § 17552; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333.

Third, neither Permit Finding II.B.6 nor the Fact Sheet discussion refer to, or are based on, the requirements of the 2010 Permit. The Santa Ana Water Board made no reference to evidence

in the record to support its unfunded mandates findings. Instead, Finding II.B.6 and the Fact Sheet discussion repeat, almost word for word, findings placed in other municipal stormwater permits across the state issued prior to, or contemporaneous with, the 2010 Permit. For example, Finding E.7 in the municipal stormwater permit issued by the Los Angeles Water Board to Ventura County dischargers, issued in May 2009, contains nearly the same language as in the 2010 Permit Fact Sheet.[6] The Ventura County permit was not the first where this language appeared. One year earlier, on June 12, 2008, the Central Valley Water Board incorporated a finding in the municipal stormwater permit for the City of Modesto that tracked the discussion of unfunded state mandates in the Fact Sheet.[7]

Other water boards have inserted this same language. In the municipal stormwater permit issued by the San Francisco Bay Water Board for San Francisco Bay municipalities (as revised in 2011), that permit's Fact Sheet discussion of why the Permit "does not constitute an unfunded local government mandate" is again nearly the same as the 2010 Permit Fact Sheet.[8] A nearly identical fact sheet discussion was adopted by the San Diego Water Board in a municipal stormwater permit issued to dischargers in Orange County in 2009.[9] Finally, the Santa Ana Water Board itself, on the same date it adopted the 2010 Permit, adopted a nearly identical discussion in a fact sheet for a permit issued to Riverside County municipalities.[10]

This pattern establishes that Finding II.B.6 and the Fact Sheet discussion at 5-7 is not based on any specific Santa Ana Water Board determination as to the alleged federal mandate requirements of the 2010 Permit, but rather was "boilerplate" language inserted by regional boards

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[6] *Compare* Ventura County Municipal Separate Storm Sewer System Permit, Order No. 09-0057, Finding E.7 (pages 11-13) *with* 2010 Permit Fact Sheet at 5-7. An excerpt of the permit is attached as Exhibit A to the Declaration of David W. Burhenn ("Burhenn Dec."), attached hereto as Attachment 1. As with all such exhibits, the Commission may take administrative notice of this evidence pursuant to Evidence Code § 452(c) (official acts of the legislative departments of any state of the United States) (Rebuttal Documents, Tab 3), Govt. Code § 11515 (Rebuttal Documents, Tab 3) and Cal. Code Regs., tit.2, section 1187.5, subd. (c).

[7] *Compare* Waste Discharge Requirements for City of Modesto, Order No. R5-2008-0092, Finding 30 *with* 2010 Permit Fact Sheet at 5-7. An excerpt of this permit is attached as Exhibit B to the Burhenn Dec., attached hereto.

[8] *Compare* Fact Sheet, Order No. R2-2009-0074 (San Francisco Water Board) (as revised November 28, 2011), Pages App I-12 to 14 *with* 2010 Permit Fact Sheet at 5-7. An excerpt of this fact sheet is attached as Exhibit C to the Burhenn Dec.

[9] *Compare* Fact Sheet, Order No. R9-2009-0002, Water Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4) Draining the Watershed of the County of Orange, The Incorporated Cites of Orange County, and The Orange County Flood Control District Within the San Diego Region, pages 91-92 *with* 2010 Permit Fact Sheet at 5-7. An excerpt of this fact sheet is attached as Exhibit D to Burhenn Dec.

[10] *Compare* Order No. R8-2010-0033, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge requirements for the Riverside County Flood Control and Water Conservation District, the County of Riverside, and the Incorporated Cities of Riverside County within the Santa Ana Region, Finding B.10, *with* 2010 Permit Fact Sheet at 5-7. An excerpt of this permit is attached as Exhibit E to the Burhenn Dec.

across the state. It is not a case specific finding as required by the Supreme Court in *Dept. of Finance.* 1 Cal. 5th at 768 and n.15.

For all of these reasons, the discussion in 2010 Permit Fact Sheet and Finding II.B.6 are not the type of specific findings which the Supreme Court identified in *Dept. of Finance* as worthy of deference to the regional board, *i.e.,* where a regional board finds that the requirements "were the only means by which the maximum extent practicable standard could be implemented," a case specific finding taking into account local circumstances. 1 Cal. 5th at 768 and n.15.

4. *Dept. of Finance* Applies as Well to the Requirement to Effectively Prohibit the Discharge of Non-Stormwater into MS4s

The Water Boards contend (WB Comments at 17) that *Dept. of Finance* was limited to a consideration of the MEP standard as it applied to trash receptacle and inspection requirements in the Los Angeles County MS4 permit. Thus, they argue, the holdings in that case do not extend to the independent CWA requirement that MS4 permittees effectively prohibit the discharge of non-stormwater to the MS4, found at 33 U.S.C. § 1342(p)(3)(B)(ii). *Id.*

This argument, however, ignores the plain language of *Dept. of Finance* and the analysis used by the Supreme Court to derive the test to identify whether a mandate was federal or state. In deriving that test, the Court analyzed three unfunded mandates cases, none of which involved stormwater permits: *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 and *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564. *See Dept. of Finance,* 1 Cal. 5th at 765 ("From *City of Sacramento, County of Los Angeles, and Hayes,* we distill the following principle").

The Supreme Court's statement of that principle, that if "federal law gives the state discretion whether to impose a particular implement requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated," is without any linkage to stormwater permit requirements, much less the MEP standard. And, to illustrate the principle, the Court cited yet another non-CWA case, *Division of Occupational Safety & Health v. State Bd. Of Control* (1987) 189 Cal. App. 3d 794.[11]

It is thus incorrect for the Water Boards to argue that "the Supreme Court decision has limited application when the federal standard compelling a challenged permit provision is wholly separate from the MEP standard and those specific implementing regulations." WB Comments at 17. To the contrary, the high court spoke broadly and relied on existing mandates jurisprudence when it formulated its test. That test is as applicable to provisions allegedly justified by the "effective prohibition" requirement for non-stormwater as it is to requirements allegedly based on the MEP standard. Thus, to the extent that the Santa Ana Water Boards exercised its discretion to impose requirements relating to non-stormwater discharges to the MS4, such requirements would be state mandates.

[11] Rebuttal Documents, Tab 1.

5. That the Santa Ana Water Board Allegedly Found that the Provisions of the 2010 Permit Were "Necessary" to Meet the MEP Standard Does Not Establish a Federal Mandate

The Water Boards further attempt to distinguish the 2010 Permit from the Los Angeles County permit at issue in *Dept. of Finance* by arguing that, unlike in the Los Angeles County permit, the Santa Ana Water Board "made findings in connection with the specific challenged provisions in the Permit that such provisions were necessary to implement the MEP standard." WB Comments at 16. However, the cited finding, Finding II.B.3, makes no mention of the "specific challenged provisions in the Permit" at issue in this Joint Test Claim and that such specific provisions were "necessary to implement the MEP standard." The finding recites that the requirements in the permit were necessary "to protect water quality standards" and "to implement the plans and policies described in [2010 Permit Finding II.B.1]," which included both federal law and California-required plans and policies.[12] The Finding then recites that the permit "requires the Permittees to develop and implement programs and policies necessary to reduce the discharge of pollutants in Urban Runoff to Waters of the U.S. to the maximum extent practicable (MEP)." 2010 Permit Finding II.B.3 (AR 11575).

Notwithstanding the Water Boards' attempt to distinguish 2010 Permit provisions from those at issue in *Dept. of Finance,* the recent decision of the Court of Appeal in *Dept. of Finance II* specifically addresses whether a regional board's finding that a permit's provisions were "necessary" to meet the MEP standard meant that the provisions were a federal, as opposed to state, mandate.[13]

Dept. of Finance II involved a 2007 stormwater permit adopted by the San Diego Water Board (and the review of the Commission's San Diego County SOD, discussed previously). 18 Cal.App.5th at 671. That permit recited that it contained "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." *Id.* In attempting to distinguish that permit from the one at issue in *Dept. of Finance,* the State argued that "the San Diego Regional Board here made a finding its requirements were 'necessary' in order to reduce pollutant discharge to the maximum extent practicable, a finding the Los Angeles Regional Board in *Department of Finance* did not expressly make." *Id.* at 682.

The court did not find this distinction to be of any importance in determining the existence of a federal mandate:

[12] The Water Boards similarly contend, at WB Comments 15 n.16, that "[t]he finding that the permit terms are necessary to satisfy the federal MEP standard under the factual circumstances presented means the Santa Ana Water Board did not impose more stringent terms under the Porter-Cologne Water Quality Control Act, which it is authorized to do." This assertion is belied by the specific findings made in the Fact Sheet by the Santa Ana Water Board as to its authority to go beyond the federal MEP standard, as well as the specific California authorities cited as further authority. *See* discussion at Section I.C.2.

[13] Claimants do not object to the Water Boards providing further briefing on the impact of *Dept. of Finance II* on this Joint Test Claim, WB Comments at 18, so long as Claimants have the opportunity to provide briefing in response.

> The use of the word "necessary" also does not distinguish this case from *Department of Finance.* By law, a regional board cannot issue an NPDES permit to MS4's without finding it has imposed conditions "necessary to carry out the provisions of [the Clean Water Act]. That requirement includes imposing conditions necessary to meet the "maximum extent practicable" standard, and the regional board in *Department of Finance* found the condition it imposed had done so. . . .
>
> Third, the Supreme Court in *Department of Finance* rejected the State's argument that the permit application somehow limited a board's discretion or denied it a true choice. "While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make those practices conditions of the permit." . . .
>
> The State had a true choice and exercised its discretion in determining and imposing the conditions it concluded were necessary to reduce stormwater pollutants to the [MEP]. Because the State exercised this discretion, the permit requirements it imposed were not federal mandates.

Id. at 683 (citations omitted).

Under *Dept. of Finance II*, the fact that a water board may have determined that its required permit conditions were "necessary" to meet the MEP standard is irrelevant to the question of whether those conditions were federal mandates.

6. *Dept. of Finance II* is Directly Applicable to This Joint Test Claim

The holdings in *Dept. of Finance II* directly apply to the analysis of the mandates in this Joint Test Claim. In addition to the holdings relating to the discretionary nature of the MEP standard and the irrelevance of a finding that a permit condition was "necessary" to meet that standard, the opinion contains other holdings of relevance to this Joint Test Claim.

First, the opinion is firmly rooted in the teachings of *Dept. of Finance,* despite the Water Boards' contention (WB Comments at 17) that it "appears to be in conflict with key provisions" of that decision. The court cited *Dept. of Finance* in all of its holdings, and stated specifically that it was "[f]ollowing the analytical regime established by *Department of Finance."* 18 Cal.App.5th at 667. In upholding the Commission's decision, the court stated that it reached that conclusion "on the same grounds the high court in *Department of Finance* reached its conclusion." *Id.* Indeed, much of the opinion consisted of either direct quotation of *Dept. of Finance* or a detailed description of the high court's analysis. *Id.* at 668-70; 676-80.

Second, *Dept. of Finance II* affirmed the Supreme Court's holding that reliance on general regulations describing what must be included in an NPDES permit application did not establish a federal mandate: "To be a federal mandate for purposes of section 6 [of article XIII B of the California Constitution], however, the federal law or regulation must 'expressly' or 'explicitly require the condition imposed in the permit." *Id.* at 683. In particular, the court found that federal stormwater permit application requirements in 40 C.F.R. § 122.26(d) did not render as federal

mandates any of the permit conditions at issue in that case. *Id.* at 684-89. This holding is directly relevant to the Joint Test Claim, as the Water Boards have justified the bulk of the provisions at issue by reference to those regulations. *See, e.g.,* WB Comments at 21, 24, 31, 33, 35, 36, 38, 43, 45, 47 and 50 (discussing provisions in 40 CFR § 122.26(d) as authority for 2010 Permit provisions).

Third, unlike in *Dept. of Finance*, where the Court considered only limited provisions of the Los Angeles County MS4 permit dealing with the placement of trash receptacles and facility inspections, *Dept. of Finance II* considered several complex programmatic permit conditions, including the permittees' jurisdictional management programs, watershed management programs, urban runoff management programs and assessment programs. *Id.* at 671-72. *Dept. of Finance II* has direct application to the specific provisions of the 2010 Permit at issue in this Joint Test Claim, which in some respects are similar to those at issue in the San Diego Water Board permit at issue in that case.

7. The EPA-Issued Permits Cited by the Water Boards Do Not Support Their Argument that the Mandates in this Joint Test Claim Are Federally Mandated

The Water Boards further contend (WB Comments at 18) that U.S. EPA has "issued permits requiring either equivalent or substantially similar provisions" to some of the mandates in the Joint Test Claim, thus demonstrating that "[i]f the State had not issued the Permit, the U.S. EPA would have done so," and that "the Santa Ana Water Board effectively administered federal requirements concerning permit requirements."

The Water Boards made a similar argument before the Supreme Court, and it was rejected:

> [T]he State contends the Permit itself is the best indication of what requirements *would have been imposed* by the EPA if the Regional Board had not done so . . . .
>
> We disagree that the Permit itself demonstrates what conditions would have been imposed had the EPA granted the Permit. 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.

Dept. of Finance, 1 Cal. 5th at 768 (emphasis in original). As discussed above, the 2010 Permit explicitly incorporates both federal and state authority as the basis for its provisions.

Moreover, as set forth in the Declaration of Karen Ashby filed herewith and the exhibits thereto (Attachment 2 to the Rebuttal Comments), the specific mandates in the Joint Test Claim are *not* contained in the permits cited by the Water Boards. Please see discussion of individual mandates in Section II.A-M below. The Supreme Court rightly cited the lack of such evidence as undermining "the argument that the requirement was federally mandated." *Id.* at 772.

As also set forth in the Ashby Declaration and the exhibits thereto, some provisions similar to (but not the same as) those in the 2010 Permit can be found in certain of the EPA-issued MS4

permits. The EPA Administrator has discretion under 33 U.S.C. § 1342(p)(3)(B)(iii) to impose "such other provisions as the Administrator or the States determines appropriate for the control of [MS4-discharged] pollutants." This does not mean that such "other provisions" are federally mandated. While the absence of such provisions in any U.S. EPA-issued MS4 permit, as the Supreme Court stated, "undermines the argument" that a permit provision was federally mandated, it does not follow that the presence of similar, but less stringent provisions, confirms the argument. The Supreme Court did not so hold.

D. *The 2010 Permit Imposed Unique Requirements on Local Agencies*

The Water Boards argue that the 2010 Permit is "not imposed uniquely upon local government." WB Comments at 18. The Water Boards further argue that compliance with "NPDES regulations and permits, and specifically with stormwater permits, is required by private industry as well as state and federal government agencies," and thus, "[l]ocal government is not subject to 'unique' requirements." *Id.* at 19. These arguments ignore the facts and the law.

First, it cannot be disputed that the 2010 Permit is "imposed uniquely upon local government." The first page of the permit states that the County, the District and 16 cities within the Santa Ana region "are subject to waste discharge requirements as set forth in this Order." 2010 Permit at 1 (AR 11567). The remainder of the requirements in the permit, including those at issue in this Joint Test Claim, are exclusively directed to those permittees, including the Claimants. The 2010 Permit is imposed uniquely on local agencies, and it serves a public purpose, *e.g.*, the regulation of pollutants in discharges. *See* 2010 Permit Section I.B (AR at 11572-73).

The permit, moreover, was directed at regulating a core duty of local government, the protection of the life and property of residents from flood waters. Unlike industrial or commercial NPDES permittees, municipalities must ensure the safe conveyance and discharge of stormwater in order to protect public health and property. An industrial facility can choose not to discharge by, for example, changing its operations. By contrast, a local agency operating an MS4 must safely handle stormwater or face inverse condemnation and tort liability for flooding resulting from a failure to do so. *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722.[14] Thus, an MS4 operator is legally compelled to obtain an MS4 permit so it can continue to carry out the uniquely governmental function of safely handling and discharging stormwater.

Second, with respect to the argument that NPDES permits, such as the 2010 Permit, apply to both governmental and private dischargers, the Commission previously has held that such permits issued to local agencies do in fact impose unique requirements on local agencies. *See* SD County SOD at 36-37, in which the Commission determined that the stormwater permit at issue imposed unique requirements on local agencies in San Diego County. The Commission noted that the focus on the inquiry must be on the executive order itself, *e.g.*, the permit: "[W]hether 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." SD County SOD at 36 (emphasis supplied). The Commission found that the San Diego County permit applied only to municipalities, that no private entities were regulated thereunder, and that the permit provided a service to the public through its requirement

[14] Rebuttal Documents Tab 1.

for the permittees "to reduce the discharge in urban runoff to the maximum extent practicable." *Id.* Those same facts, and the Commission's analysis, apply as well to the 2010 Permit.

The Commission correctly held that the question of what constitutes a "unique governmental function" relates to the "executive order" (i.e., the 2010 Permit) itself. For that reason, the Water Boards citation to *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 is inapposite. In *City of Richmond*, a statute had amended a previous statute limiting the right of survivors of deceased public employees from receiving both public retirement and workers compensation benefits. The amendment referred to "local safety members" of the public retirement system, such as police officers. As a result, the city alleged that a state mandate had been created, since it was now responsible for the payment of increased survivor benefits. *Id.* at 1194. The court found that the resulting higher cost to the local government for compensating its employees was "not the same as a higher cost of providing services to the public." *Id.* at 1196. The court distinguished cases like *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, where "executive orders applied only to fire protection, a peculiarly governmental function." *Id.* That phrase precisely defines the 2010 Permit, which applies only to the operation and discharge of municipal storm drain systems, another "peculiarly governmental function."

City of Richmond is also distinguishable because that case involved a statute which covered a subject of general application, employment benefits. By removing the limitation, "the law makes the workers' compensation death benefit requirements as applicable to local governments as they are to private employers. It imposes no 'unique requirements' on local governments." *Id.* at 1199. Also, the governmental mandate at issue in *City of Richmond* was a statute, not an executive order applying to a "peculiarly governmental function," as was the case in *Carmel Valley Fire Protection Dist.*

The Water Boards claim that "where local agencies are required to perform the same functions as private industry, no subvention is required." WB Comments at 19. As evident from a review of the provisions of the 2010 Permit at issue in this Joint Test Claim, none require "private industry" to perform the same functions as the District, the County or the city permittees. Private industry is not required to develop and implement LIPs, to evaluate non-stormwater discharges, to implement municipal monitoring and other programs to implement TMDLs, to adopt and implement municipal ordinances to address bacteria sources, to investigate and track illicit connections/illicit discharges, to create a septic system database, to inspect permittees, to develop and implement programs covering new development, to review and assess public education and outreach requirements, to inventory and inspect public facilities, operations and drainage facilities, to update municipal training programs, to notify the Santa Ana Water Board of facilities operating without a proper permit or to assess the effectiveness of local government stormwater management plans. These all are uniquely governmental functions.

Finally, the Water Boards' argument that the NPDES requirements are "[l]aws of general applicability" (WB Comments at 18) ignores the fact that both the California Supreme Court and the Court of Appeal have decided mandates cases involving stormwater NPDES permits and in so doing have interpreted the California Constitution. Had those courts had any sympathy for the "law of general applicability" argument raised by the Water Boards, it is doubtful that they would

have gone through a constitutional analysis when a fairly simple statutory analysis would have sufficed to deny the viability of the test claims at issue.

E. *Claimants Lack Fee Authority to Fund the Mandates at Issue in the Joint Test Claim*

The Claimants respond to the funding arguments made by the Water Boards on pages 19-20 of the WB Comments in Section III, Response to the Comments of the DOF and the Water Boards' Regarding Fund Issues ("Funding Rebuttal"), below.[15]

II. SPECIFIC RESPONSES

Below, Claimants respond to the Water Boards' comments on the specific provisions of the 2010 Permit at issue in the Joint Test Claim. While the individual provisions raise individual issues, the common themes discussed in Section I apply equally to the discussion of these provisions:

- The mandates at issue in the Joint Test Claim represent new programs and/or higher levels of service imposed on Claimants;
- The findings made by the Santa Ana Water Board in adopting the 2010 Permit as to its allegedly federal character are not entitled to deference under the Supreme Court's test in *Dept. of Finance* and in fact those mandates are state mandates;
- The 2010 Permit is an order imposing unique requirements on local agencies and was not entered into voluntarily by Claimants; and
- Claimants do not have fee authority to fund the mandates at issue in the Joint Test Claim.

A. *Requirement to Develop and Implement Local Implementation Plans*

Section III and various other sections of the 2010 Permit (as identified in the Narrative Statement at 15-18) required the permittees, including Claimants, to among other things create an areawide "model" "Local Implementation Plan" ("LIP") to be used to develop detailed documentation for each permittee's individual program element of the MSWMP, including a description of each program element; the departments and personnel responsible for its implementation; and, applicable standard operating procedures, plans and tools and resources needed for its implementation. The 2010 Permit also required 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,

[15] The Water Boards argue, in a single sentence and without citation to any evidence, that the costs to implement the mandates at issue in the Joint Test Claim "are *de minimis"* and therefore not entitled to subvention. WB Comments at 16 n.119. As a matter of fact, the actual costs to implement those mandated requirements are not *de minimis. See* Section 6 Declarations filed in Support of Joint Test Claim, at Paragraphs 7(a)-(m).

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.

1. The LIP Requirements Were Not Federally Mandated

The Water Boards contend (WB Comments at 22) that the Santa Ana Water Board "determined that a lack of individual stormwater management programs constituted a significant barrier to effective pollutant control and MS4 program implementation" and thus included the LIP in the Permit to "remedy this deficiency" and to meet the "minimum federal MEP standard. This determination and the resulting challenged provisions are entitled to deference, as the Santa Ana Water Board found that these provisions were necessary to meet the requirements of federal law."

Claimants have several responses. First, the Water Boards cite to the results of Program Evaluation Reports ("PERs") conducted by a federal contractor, Tetra Tech, Inc. ("Tetra Tech ") of the stormwater programs of the County and the Cities of Redlands (not a Claimant) and Fontana.[16] As a review of the PERs indicate that the finding cited by the Water Boards (WB Comments at 22) was identified by Tetra Tech as a program "deficiency," which the contractor identified as "areas of concern for successful program implementation." *E.g.*, County PER at i. Tetra Tech did not find that the alleged failure of the audited programs to have an individual Storm Water Management Plan ("SWMP") violated the 2002 Permit. Indeed, Tetra Tech noted that a SWMP was "not specifically required in the permit." County PER at 5.

More significantly, Tetra Tech did not find that the failure of the audited programs to have an individual SWMP *violated the CWA.* The most that can be said of the "deficiency" identified by the contractor is that having an individual SWMP would address "the unique legal and organizational structure in that permittee's jurisdiction." County PER at 5, *quoted in* WB Comments at 22. The findings of a federal contractor of an inspection of a permittee, moreover, do not constitute a finding under federal law that the permittee was in violation of the CWA, such that the regional board would be under a federal mandate to remedy that violation.

Second, the Water Boards cite unspecified "U.S. EPA guidance" as well as EPA's "MS4 Permit Improvement Guide" as further support for the inclusion of the LIP requirements as a federal mandate. WB Comments at 21-22. The Water Boards' citation of the Guide (hereafter, "EPA Permit Guide") is problematic for two reasons. As the Water Boards themselves admit, the Guide was not "formally released" until "several months following the adoption of the Permit." *Id.* at 21, n.126. As a matter of fact, the EPA Permit Guide could not have served as authority for the 2010 Permit.[17]

Even had the Permit Guide been issued prior to the 2010 Permit and thus included in the administrative record for the permit, it still could not provide any binding authority from which the Water Boards could infer a federal mandate. As the Guide itself states, on page 3: "This Guide does not impose any new legally binding requirements on EPA, States, or the regulated

[16] These PER documents are attached to the WB Comments as supplemental materials. They are not, however, part of the Administrative Record for the 2010 Permit. Their citation as authority for the Santa Ana Water Board's inclusion of the LIP provisions in the 2010 Permit (and other provisions discussed below) is thus unwarranted.

[17] And, like the PERs, the EPA Permit Guide is not cited as part of the Administrative Record for the 2010 Permit.

community, and does not confer legal rights or impose legal obligations upon any member of the public." Moreover, the United States Department of Justice has issued a policy expressly prohibiting federal prosecutors from using use their enforcement authority to "effectively convert agency guidance documents into binding rules" and also from using "noncompliance with guidance documents as a basis for proving violations of applicable law" in affirmative civil enforcement cases.[18] If guidance documents cannot be used to establish a basis for compliance with federal law, they cannot be cited as federal authority for the water boards.[19]

Third, having established that neither the EPA Permit Guide nor the PERs relied upon by the Water Boards establish any federal mandate for the LIP provisions, the Water Boards' claim that the Santa Ana Water Board established that the LIP provisions were "necessary to meet the requirements of federal law" (WB Comments at 22) is unsupported. In fact, the LIP provisions were added to the 2010 Permit as an exercise of the discretion of the Santa Ana Water Board and, as such, are state mandates. *Dept. of Finance,* 1 Cal. 5th at 767-68; *Dept. of Finance II,* 18 Cal.App.5th at 682.

2. The Inclusion of the LIP Provisions in the 2010 Permit Was Not at the Request of the Permittees

The Water Boards contend (WB Comments at 23) that the permittees made a "choice" to include LIP provisions in their MSWMP and also in the Report of Waste Discharge ("ROWD") for the 2010 Permit. While the permittees, including Claimants, stated in the ROWD that they would "develop an LIP for its jurisdiction based on a model developed by the Management Committee," (ROWD, Section 5.3.4 (AR 6817)), and later incorporated a LIP section in the MSWMP, the permittees did not recommended or agree to the detailed requirements set forth in the 2010 Permit governing the content of the LIP.

By way of comparison, the entire LIP section of the MSWMP reads:

> A Local Implementation Plan (LIP) can facilitate intra-agency coordination by defining roles and responsibilities and a clear process for the implementation of Stormwater Management Program activities. During the next permit term, each permittee will develop an LIP for its jurisdiction based on a model developed by the Management Committee. Examples of the types of information that could be documented in the LIP include identification of:

[18] Memorandum regarding Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases, January 25, 2018, attached as Exhibit F to Burhenn Declaration filed herewith. Claimants request that, pursuant to Evidence Code § 452(c), the Commission take administrative notice of the Memorandum as an official act of an executive department of the United States. While this memorandum was issued recently, it reflects jurisprudence going back a number of years. *See, e.g., Appalachian Power Co. v. EPA* (D.C. Circuit 2000) 208 F.3d 1015, where the Circuit Court of Appeals for the District of Columbia set aside an EPA guidance document relating to Clean Air Act emission monitoring on the ground that the guidance broadened a previous rulemaking and thus should have itself been subject to rulemaking procedures. 208 F.3d at 1028. Rebuttal Documents, Tab 1.

[19] The Water Boards contend that while the EPA Permit Guide was issued after the 2010 Permit, EPA "had been providing similar guidance to Santa Ana Water Board staff during the Permit development process." This unsupported assertion still provide no evidence of federal authority for the LIP provisions, since the informal opinions of EPA staff have even less authority than written guidance.

- The roles and responsibilities of each department within a permittee's jurisdiction for implementation of the Stormwater Management Program;
- The types of reporting information that will be provided by each department to fulfill annual reporting requirements;
- The process for the review of program-related documents and sharing of information between departments, for example how the WQMP is developed, reviewed and approved; and
- The tools (for example, checklists or BMP handouts) that are used to support program elements.

MSWMP, Section 2.4 (Intra-Agency Activities) at 2-7 (AR 6694).

In contrast, the 2010 Permit set forth detailed and specific requirements as to what the LIP must include. These provisions are set forth in the Narrative Statement at 15-18 and among other things, include:

- Preparation of an area-wide model LIP for review by the Santa Ana Water Board Executive Officer, describing each program element in the MSWMP, the departments and personnel responsible for implementation; applicable standard operating procedures, plans, policies, checklists and drainage area maps; and tools and resources for implementation. The model LIP must also establish internal and external reporting and notification requirements and describe mechanisms, procedures and/or programs whereby individual permittee LIPs would be coordinated through the Watershed Action Plan;
- Development of a District-specific LIP, and tracking, monitoring and retention of training records of all personnel involved in implementation of the District's LIP;
- Solicitation of public input for any proposed major changes to the LIP or MSWMP, among other documents;
- Preparation by each permittee of a LIP for its jurisdiction, describing legal authority, ordinances, policies and standard operating procedures, identification of departments and personnel for each task, as well as needed tools and resources, plus tracking, monitoring and retention of all personnel involved in the implementation of the permittee LIP;
- Identification of legal authorities and mechanisms used to implement program elements required by the 2010 Permit, including citations to ordinances, identification of department jurisdictions and key personnel in the implement and enforcement of the ordinances, as well as procedures, tools and timeframes for "progressive" enforcement actions and procedures for tracking compliance;
- Inclusion of a WQMP review checklist that incorporates required elements of the WQMP, which must include involvement of the permittee's planning and engineering departments during WQMP review to incorporate project-specific water quality measures and watershed protection principles in a CEQA analysis;
- Procedures to facilitate long term maintenance and operation of structural BMPs; and
- Specification of training requirements for permittee staff and contractors involved in implementing the requirements of the 2010 Permit, and maintenance of a written record of all training provided to permittee stormwater and related program staff.

2010 Permit, excerpts of Sections III.A. and B, VII.H and XI.H.

These excerpts do not encompass the entirety of the LIP provisions in the 2010 Permit but are set forth in part to reflect the scope and detail of the LIP provisions required by the Santa Ana Water Board in the 2010 Permit, none of which was proposed by the permittees (beyond the general categories set forth in the ROWD and MSWMP). Claimants did not make the "choice" to include those provisions in the 2010 Permit.

3. The LIP Provisions Were a New Program and/or Required a Higher Level of Service

A mandate is "new" if the local government entity had not previously been required to institute it. *County of Los Angeles, supra,* 110 Cal. 4th at 1189. A "higher level of service" exists where the mandate results in an increase in the actual level or quality of governmental services provided. *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal. 4th 859, 877. These determinations are made by comparing the mandate with pre-existing requirements. *Id.* at 878.

The Water Boards contend (WB Comments at 23) that the multiple and detailed LIP provisions in Section III and other sections of the 2010 Permit are merely "a refinement of the MSWMP" and do "not constitute a new program or require higher levels of service." The Water Boards further contend that the permit's LIP requirements "simply require better implementation of existing requirements at the local municipal levels." *Id.*

These contentions do not survive even a cursory examination of the LIP provisions in the 2010 Permit. As noted above, those provisions set forth, define, and delineate the content of the LIP, what it must consider, what permittees must document, how permittees must cooperate, and how permittees must account. None of these provisions was contained in the 2002 Permit. All are new, and all require higher levels of service in the provision of uniquely governmental functions. The LIP provisions in the 2010 Permit were a new program and/or required a higher level of service.

4. The LIP Requirements in the 2010 Permit Are Not Found in Other U.S. EPA-Issued Permits

As set forth in the Ashby Declaration (Attachment 2), none of the U.S. EPA-issued permits cited by the Water Boards in their comments required permittees to prepare LIPs in addition to their stormwater management plans, as is required in the 2010 Permit. Ashby Dec., ¶ 8. In addition, while the Boston, Albuquerque, Worcester, District of Columbia and Boise permits required the development of a stormwater management plan, none of these permits included the level of prescriptiveness as to what was required in those plans as in the 2010 Permit's requirements. *Id.* As the Supreme Court observed, the fact that EPA-issued permits do not contain similar prohibitions undermines the argument that the requirement is federally mandated. *Dept. of Finance,* 1 Cal. 5th at 772.

B. *Requirement to Evaluate Specified Categories of Non-Prohibited Non-Stormwater Discharges*

Section V.A.16 of the 2010 Permit required the permittees, including Claimants, to evaluate specified categories of non-stormwater discharges that were authorized for discharge into permittees' MS4 to determine whether such discharges were a significant source of pollutants to the MS4 and if so, either to prohibit the discharge, allow the discharge but ensure that source control BMPs and treatment control were implemented to reduce or eliminate pollutants resulting from the discharge, or require or obtain coverage under a separate Santa Ana Water Board or State Water Board permit for discharges into the MS4.

1. The Requirements to Evaluate Specified Non-Stormwater Discharges Were Not Federally Mandated

The Water Boards argue (WB Comments at 24) that the evaluation requirements "derive directly from . . . federal regulations." The federal stormwater regulations cited by the Water Boards (and in the Fact Sheet at 28) exempt certain categories of non-stormwater discharges or flows from the need to effectively prohibit the discharge of into the MS4, unless "where such discharges are identified by the municipality as sources of pollutants to waters of the United States." 40 C.F.R. § 122.26(d)(2)(iv)(B)(1).

Despite the Water Boards' claim that the regulations "clearly require" permittees to "affirmatively screen, or evaluate, the levels of pollutants in non-stormwater dischargers" (WB Comments at 24), in fact the regulations do not mandate that a municipality *affirmatively evaluate* those non-stormwater discharges to determine if they are such a source of pollutants, as required by Section V.A.16 of the 2010 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.

Further, the Santa Ana Water Board has, in these requirements, mandated the "scope and detail" of what permittees must do. Such a mandate is state, not federal, in nature because federal law and regulations do not impose these requirements but instead give discretion to the RWQCB "whether to impose a particular implementing requirement." *Dept. of Finance,* 1 Cal. 5th at 765. Under *Dept. of Finance II,* in order to be a federal mandate, the law or regulation "must 'expressly' or 'explicitly' require the condition imposed in the permit." *Id.* at 683. The general federal stormwater regulations in 40 C.F.R. Part 122.26(d) do not "expressly" or "explicitly" require permittees to affirmative evaluate non-stormwater discharges as a source of pollutants that exceed water quality standards.

Moreover, 40 C.F.R. § 122.26(d)(2)(iv)(B)(1) requires that if there is a finding of a significant pollutant source, the permittee are required only to *address* the discharge. This can be done through public information and education or other means, and not necessarily through a strict prohibition of such discharges, imposition of BMPs, or permitting. By mandating those responses, the Santa Ana Water Board usurped the permittees' ability to design their own program and imposed requirements that exceed the federal regulation. *See Long Beach Unified, supra,* 225 Cal.App.3d at 173.

Finally, none of the stormwater permits issued by EPA contains this prohibition, including permits issued to Albuquerque in 2014, to Boise in 2012, to Washington D.C. in 2011 (modified in 2012) to Boston in 1999 and Worcester in 1998. Declaration of Karen Ashby, ¶ 9. The fact that EPA-issued permits do not contain similar prohibitions undermines the argument that the requirement is federally mandated. *Dept. of Finance,* 1 Cal. 5th at 772.

Accordingly, there is no evidence that federal law mandated the requirements of Section V.A.16 of the 2010 Permit. The State has the burden of proving that a mandate is federal. *Id*. at 769. The Water Boards have not met their burden here. The Santa Ana Water Board's imposition of this requirement is a state, not a federal mandate. *Dept. of Finance,* 1 Cal. 5th at 765.

2. These Requirements Were a New Program or Required a Higher Level of Service

As noted above, a mandate is "new" if the local government entity had not previously been required to institute it. *County of Los Angeles, supra,* 110 Cal. 4th at 1189. A "higher level of service" exists where the mandate results in an increase in the actual level or quality of governmental services provided. *San Diego Unified School Dist., supra,* 33 Cal. 4th at 877. These determinations are made by comparing the mandate with pre-existing requirements. *Id.* at 878.

The Water Boards contend that the affirmative evaluation of non-stormwater discharge categories is not a new program or higher level of service. While they admit that the previous 2002 Permit "did not expressly require an affirmative evaluation of discharges," the Water Boards argue that there was an "implicit" requirement to evaluate the discharges since any identified by the permittees or the Santa Ana Water Board's executive officer as a significant source of pollutants would have to receive coverage under a separate permit. WB Comments at 25. This argument again ignores the plain requirements of Section V.A.16, which were for permittees to conduct an affirmative evaluation of *all* categories of exempt non-stormwater discharges. This was not a "refinement" of the 2002 Permit, but rather an entirely new requirement, with new, separate and additional costs. *See* Section 6 Declarations at ¶ 7.b.

Moreover, the requirements of Section V.A.16 impose a higher level of service; Claimants were not required to affirmatively evaluate non-stormwater discharge categories under the 2002 Permit, but were required to do so under the 2010 Permit. *San Diego Unified School Dist.*, 33 Cal. 4th at 878 (requirements constitute a higher level of service where "the requirements are new in comparison with the preexisting scheme in view of the circumstance that they did not exist prior to enactment of [the statutes]").

C. *Requirement to Incorporate and Implement TMDLs*

Section V.D of the 2010 Permit required permittees, including Claimants, to undertake various tasks related to the incorporation and implementation of Total Maximum Daily Loads ("TMDL") programs for bacteria indicators in the Middle Santa Ana River ("MSAR") and Big Bear Lake ("BBL"), as well as requirements for monitoring for mercury in BBL and monitoring for pathogens in Knickerbocker Creek. *See* Narrative Statement at 21-29.

Claimants challenge several aspects of the implementation of the TMDLs or projected TMDLs as unfunded state mandates, including reference to a regulation cited as authority for the implementation of TMDL wasteload allocations ("WLAs") in NPDES permits which, on its terms, does not apply to MS4 permits. *See* discussion of this regulation, 40 C.F.R. § 122.44(d)(1)(vii)(B), in Narrative Statement at 22-23.

With respect to the MSAR TMDL, Claimants have challenged as an unfunded state mandate the implementation of the Comprehensive Bacteria Reduction Plan ("CBRP") to the extent that the Santa Ana Water Board would require not a BMP-based approach[20] but one which would apply strict numeric water quality standards. *See* Narrative Statement at 24. Requiring MS4 permittees to meet water quality standards, including in the implementation of TMDLs, is a discretionary act by the state pursuant to 33 U.S.C. § 1342(p)(3)(B)(iii). *See Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159. In that case, the Ninth Circuit held that MS4 permittees were not required under the CWA to meet strict water quality standards but that the state, as a matter of its discretion, could impose such standards. 191 F.3d at 1166. The State Water Board itself has acknowledged this discretion in its precedential Order No. WQ 2015-0075, *In the Matter of Review of Order No. R4-2010-0176*. *See* Narrative Statement at 23.

With regard to the BBL TMDL, Claimants have challenged as an unfunded state mandate requirements in Section V.D of the 2010 Permit which required the BBL TMDL permittees (County, District and City of Big Bear Lake) to undertake requirements which went beyond requirements intended to address the impact of MS4 discharges to the Lake. *See* Narrative Statement at 25-28.

With regard to the proposed BBL Mercury TMDL and the monitoring of Knickerbocker Creek for pathogens, Claimants challenged a requirement in Section V.D.5-6 in the 2010 Permit for the City of Big Bear Lake to, *inter alia*, conduct an investigation and monitor in advance of development of a TMDL for those waterbodies and pollutants. *See* Narrative Statement at 28.

1. The TMDL Requirements in the 2010 Permit Were Not Federally Mandated

The Water Boards argue that the requirements in Section V.D were mandated by federal law (WB Comments at 25-30). They quote from page 6 of the Fact Sheet to the effect that "the provisions of this Order to implement total maximum daily loads (TMDLs) are federal mandates." WB Comments at 26. As previously discussed, this Fact Sheet discussion is part of the boilerplate unfunded state mandates language inserted in MS4 permits across the state. *See* Ventura County, Modesto, San Francisco Bay, and Riverside County permit and fact sheet excerpts attached as Exhibits A-C and E to the Burhenn Declaration.

The Water Boards also contend that the provisions of 40 C.F.R. § 122.44(d)(1)(vii)(b) are applicable to MS4 permits, but provide no authority for their alternative explanation that the regulation should be read to mean "those permits with identified sources of discharges that may contribute to an impairment in the affected receiving waters." WB Comments at 27. As the

[20] Which is set forth in 2010 Permit Finding II.L.3 (AR 11601) as the approach to be followed by the Board.

Narrative Statement at 23 (and Section 7, Exhibit E exhibits in support thereof) set forth, this interpretation does not reflect the regulatory history of the regulation.

The Water Boards also cite a 2014 guidance memorandum from U.S. EPA allowing, under certain circumstances and where "feasible," inclusion of numeric effluent limitations as necessary to meet water quality standards. As previously noted, EPA guidance is not binding on the Water Boards, a fact noted in the 2014 guidance memorandum itself: "This memorandum is guidance. It is not a regulation and does not impose legally binding requirements on EPA or States." Guidance at 1. And, as also previously noted, the Department of Justice has expressly forbidden federal prosecutors from using guidance to form the basis for enforcement actions. Thus, the 2014 guidance provides no support for the argument that the federal MEP standard does not apply to the implementation of TMDLs.[21]

Moreover, as set forth in the Ashby Declaration at ¶ 10, none of the U.S. EPA-issued MS4 permits cited by the Water Boards include the specific requirements set forth in the 2010 Permit. The permits for the Cities of Boise, Boston and Worcester and Joint Base Lewis-McChord do not incorporate TMDL requirements. The Albuquerque permit requires the stormwater management plan to include controls targeting pollutants identified in the TMDLs, but limits those controls to discharges from the MS4. Similarly, the District of Columbia permit, while it requires the adoption of TMDL implementation plans, again only addresses the permittee's MS4 discharges. *Id.* Moreover, none of the EPA-issued MS4 permits include numeric effluent limits, unlike those set forth in 2010 Permit Section V.D. *Id.*

a. MSAR TMDL Implementing Provisions

With regard to the MSAR bacteria indicator TMDL implementing provisions, the Water Boards correctly state that Claimants are not challenging as an unfunded state mandate the CBRP for dry weather, but rather that the Santa Ana Water Board could "disavow the BMP-based approach . . . in favor of numeric final effluent limitations," limitations which also are in the MSAR bacteria indicator TMDL for wet weather. WB Comments at 28-29. In arguing that the Santa Ana Water Board can impose those numeric limits, the Water Boards cite the same authority (40 C.F.R. § 122.44(d)(1)(vii)(B) and the 2014 guidance memorandum) which were addressed above. The Santa Ana Water Board is not compelled by federal law to mandate such limits.

b. BBL Nutrient TMDL Implementing Provisions

The Water Boards contend that federal regulations required the Santa Ana Water Board to include provisions "consistent with the implementation plan the Board adopted for the BBL TMDL." WB Comments at 29. As set forth in Claimants' Narrative Statement, however, the regulation in question, 40 C.F.R. § 122.44(d)(1)(vii)(B), even if applicable to MS4 permits, required that NPDES permits be consistent with "any wasteload allocation for the discharge prepared by the State and approved by EPA . . . ." Narrative Statement at 25.

[21] With regard to State Board Order No. WQ 2015-0075, discussed by the Water Boards in their comments at 28, the point of the citation in the Narrative Statement was that the water boards in fact have discretion, in incorporating Water Quality Based Effluent Limitations for TMDLs, *either* to impose strict numeric limitations or BMPs. State Board Order No. WQ 2015-0075 at 57.

Here, the Santa Ana Water Board incorporated the requirements of the BBL TMDL implementation plan, which included a number of provisions that were not legally required to be performed by the BBL TMDL permittees, as set forth in the Narrative Statement at 25-27. These include, *inter alia*, requirements for monitoring, feasibility and implementation plans unrelated to the WLAs attributed to the permittees, and which instead are aimed at impairments in the lake attributable to non-MS4 and non-permittee sources.

The Water Boards' comments do not address these specific points.[22] The Water Boards instead argue that these requirements are not new programs or require higher levels of service because the receiving water limitations ("RWL") provisions in the 2010 Permit were in previous permits "and WLAs function to meet this fundamental requirement." This argument, which is addressed in Section II.C.2 below, lacks any basis in fact or law.

c. Knickerbocker Creek Pathogen Investigation and Prospective BBL Mercury TMDL

These provisions were included in the Joint Test Claim because they represented the discretionary choice of the Santa Ana Water Board to require monitoring and other requirements for pathogens Knickerbocker Creek and for Mercury in the BBL prior to the development of the TMDL for such waterbodies and pollutants. With respect to the former, the Water Boards contend that the work required came under the 2002 Permit. That Permit, however, did not explicitly require the Knickerbocker Creek work. With regard to the prospective BBL Mercury TMDL, the Water Boards argue, as they do with regard to the BBL nutrient TMDL requirements in the 2010 Permit, that these requirements were required to meet RWL requirements. This argument is addressed below.

2. The TMDL Provisions in the 2010 Permit Were New Programs and/or Required a Higher Level of Service

The Water Boards argue that "while the TMDL-related provisions may be new" in the 2010 Permit, because the RWL limitations were found in prior permits, "the objectives to be achieved through compliance with these provisions are not." WB Comments at 30. This argument, however, ignores both the text of the 2010 Permit and the fact that this argument would essentially disallow this Joint Test Claim and any other test claim challenging unfunded state mandates in a municipal stormwater permit. The Commission, rightfully, has previously rejected a very similar argument.

First, the RWL provisions in Section VI of the 2010 Permit are completely separate from the TMDL implementation provisions in Section V.D. Second, neither the text of the 2010 Permit nor the Fact Sheet indicate that the TMDL implementation requirements in Section V.D of the

[22] The Water Boards discuss monitoring requirements in a footnote (WB Comments at 26 n.157). While federal regulations applicable to NPDES permits require monitoring, the monitoring at issue with respect to implementation of the BBL TMDL relates to discharges and conditions which were not the result of discharges from the BBL permittees. As such, that monitoring (and related implementation requirements) are not federally required but represent the imposition of those requirements on permittees by the Santa Ana Water Board as a result of its discretion. *See generally* Narrative Statement at 25-28.

permit were intended for permittees to comply with the RWL provision. In fact, the permit states that permittees "shall comply [with the RWL] through timely implementation of control measures and other actions to reduce pollutants in urban and storm water runoff in accordance with the MSWMP and its components and other requirements of this Order, including any modifications thereto." No specific reference is made to the TMDL implementation requirements of Section V.D.

Third, under the Water Boards' argument, any newly imposed provision in an MS4 Permit would never qualify as a new program or require a higher level of service since the RWL provision (which itself is a state imposed requirement) was found in previous permits. This argument is similar to the one made by the State (and rejected by the Commission) in the San Diego SOD, where the DOF had argued that since the CWA requirements and the MEP provision had been in effect for years, the San Diego County MS4 permit programs at issue in that test claim were not new programs. SD County SOD at 49. As noted in Section I.B.2 above, the Commission responded that it did "not read the federal [CWA] so broadly" and that "[u]nder the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service." *Id.* That same analysis would apply to the Water Boards' argument here.

As the Water Boards admit, the TMDL-related provisions at issue in this Joint Test Claim are new. They represent a new program and/or require a higher level of government service (in the monitoring, reporting and development of plans for stormwater program implementation). *County of Los Angeles, supra,* 110 Cal. 4th at 1189; *San Diego Unified School Dist., supra,* 33 Cal. 4th at 877. These determinations are made by comparing the mandate with pre-existing requirements. *Id.* at 878.

D. *Requirements to Promulgate and Implement Ordinances to Address Bacteria Sources*

Section VII.D of the 2010 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 were present within their jurisdictions. No federal statute or regulation mandated the adoption and implementation of such ordinances. *See* Narrative Statement at 29-30.

1. The Bacteria Ordinance Requirements Were Not Federally Mandated

The Water Boards contend that Section VIII.C is federally mandated because (i) permits must contain a provision to effectively prohibit non-stormwater discharges into storm sewers, 33 U.S.C. § 1342(p)(3)(B)(ii); (ii) permittees must have "sufficient legal authority" to control discharges to the MS4; (iii) the Santa Ana Water Board adopted a TMDL that required control of bacteria indicators; and, (iv) that it was a "logical and practicable approach to reducing the discharge of pollutants to meet the federal minimum MEP standard." WB Comments at 31-32.

In response, first, neither the CWA nor its implementing regulations, including those relating to "sufficient legal authority," explicitly or expressly require the adoption and implementation of ordinances to control bacteria sources. Thus, under *Dept. of Finance II,* no federal mandate has been imposed. 18 Cal.App.5th at 683. 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." *Dept. of Finance,* 1 Cal. 5th at 765.

Second, the Water Boards' argument that bacteria ordinances were a way to comply with the WLAs in the MSAR TMDL conflates using such ordinances as a TMDL compliance option with their requirement in the permit as a mandate. 2010 Permit Section VII.D mandated the promulgation and implementation of such ordinances. The imposition of this requirement was similar to the imposition of mandatory biennial surveys and plans to alleviate and prevent segregation at issue in *Long Beach Unified School Dist*. There, while surveys and plans were "reasonably feasible" steps that a school district could take to address segregation, when a state executive order mandated them, they no longer became optional. 225 Cal.App.3d at 173. Although the adoption of bacteria ordinances might be one option to address pollutants in non-stormwater discharges from entering Claimants' MS4, to comply with the TMDL, or otherwise to reduce pollutants in discharges, when the Santa Ana Water Board ordered the adoptions of the ordinances, that requirement was a state mandate.

Third, the Water Boards' argument that ordinance promulgation is "a logical and practicable" approach (WB Comments at 32) to achieving the MEP standard does not change the fact that the Santa Ana Water Board was exercising its discretion in mandating to the permittees how to achieve that standard. As such, the Board was exercising a state mandate. *Dept. of Finance,* 1 Cal. 5th at 767-68 (EPA regulations "gave the board discretion to determine which specific controls were necessary to meet the [MEP] standard."); *Dept. of Finance II,* 18 Cal.App.5th at 682 ("That the San Diego Regional Board found the permit requirements were 'necessary' to meet the [MEP] standard establishes only that the San Diego Regional Board exercised its discretion.") As with the "reasonably feasible" steps in *Long Beach Unified School Dist.,* these "logical and practicable" tools required by the State were state mandates. Finally, there is no evidence in the record that the Santa Ana Water Board determined that the ordinance requirements were the *only* way to achieve the MEP standard, the standard required by the Supreme Court in order to defer to a regional board on the presence of a federal mandate. 1 Cal. 5th at 768.

The bacteria ordinance requirements in Section VII.D of the 2010 Permit were a state, not federal, mandate.

2. The Bacteria Ordinance Requirement was a New Program and/or Required a Higher Level of Service

The Water Boards argue that the "requirement to demonstrate and take action to ensure adequate legal authority through the adoption and implementation of appropriate local ordinances is a continuing requirement from the prior-term 2002 Permit." WB Comments at 32. This assertion is not correct. Neither of the provisions of the 2002 Permit[23] cited by the Water Boards, which required (i) a general evaluation of ordinance adequacy to comply with permit requirements and (ii) a report reviewing ordinances and the permittees' enforcement practices, required adoption

[23] 2002 Permit, Sections VI.1 and VI.5.

and implementation of bacteria source ordinances. Section VII.D of the 2010 Permit was not a "refinement" of the requirement in the previous permit, but an entirely new requirement.

Again, a mandate is "new" if the local government entity had not previously been required to institute it. *County of Los Angeles, supra,* 110 Cal. 4th at 1189. A "higher level of service" exists where the mandate results in an increase in the actual level or quality of governmental services provided. *San Diego Unified School Dist., supra,* 33 Cal. 4th at 877. These determinations are made by comparing the mandate with pre-existing requirements. *Id.* at 878. Under these tests, the fact that the 2002 Permit did not require the promulgation and implementation of bacteria source ordinances, and that such promulgation and implementation would require an increase in the "actual level or quality of governmental services" (i.e., adoption and enforcement of a municipal ordinance) demonstrate that the requirements of 2010 Permit Section VII.D were a new program and/or higher level of service.

3. The Bacteria Ordinance Requirement is Not Found in Other EPA-Issued MS4 Permits

The Water Boards also contend that a similar requirement is contained in an EPA-issued permit to the District of Columbia. WB Comments at 32-33. The facts show otherwise. The District of Columbia permit did not order the District government to adopt an ordinance but rather required the District to simply review its current codes and regulations to remove barriers and facilitate the implementation of standards required by the permit. Ashby Dec. at ¶ 11. In any event, other EPA-issued permits do not contain this requirement. *Id.* These facts undermine any argument that the bacteria ordinance requirement was federally mandated. *Dept. of Finance,* 1 Cal. 5th at 772.

E. *Requirements to Enhance Illicit Discharges/Illicit Connections Programs*

Sections VIII.A-B and IV.B.3 of the 2010 Permit (as well as provisions in the 2010 Permit's Monitoring and Reporting Program ("MRP")) required the permittees, including Claimants, to develop a "pro-active" illicit discharges/illicit connections or Illicit Discharge Detection and Elimination ("IDDE") program using a specified U.S. EPA manual or equivalent program. The IDDE program then was 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.

As set forth in the Narrative Statement, there was no requirement for the IDDE program in the 2002 Permit. In their comments, the Water Boards make no claim that these requirements were not a new program and/or compelled a higher level of service. Because the IDDE requirements were not in the prior permit and because they require an increase in the level and quality of government service provided, they were a new program and/or higher level of service. *County of Los Angeles, supra,* 110 Cal. 4th at 1189; *San Diego Unified School Dist., supra,* 33 Cal. 4th at 877.

1. The IDDE Requirements Were Not Federally Mandated

In their comments, the Water Boards cite (but do not discuss) four regulatory provisions in 40 CFR Part 122.26(d), which set forth the requirements for applications for MS4 permits. WB Comments at 33 n.197. None of those provisions explicitly or expressly required the IDDE enhancements required in the 2010 Permit. None of the provisions required or limited the Santa Ana Water Board's discretion to not impose the IDDE requirements. As such, these regulations cannot, as a matter of law, support the Water Boards' contention that the IDDE requirements are "necessary to implement federal law." *Dept. of Finance II*, 18 Cal.App.5th at 683 (federal regulation must expressly or explicitly require permit requirement to find that the requirement is a federal mandate).

The Water Boards cite (WB Comments at 33) as "guidance" recommendations in the EPA Permit Guide for an IDDE program. As previously noted, the Guide itself cautions that it is not intended "to impose any new legally binding requirements on EPA, States, or the regulated community, and does not confer legal rights or impose legal obligations upon any member of the public." And, as noted, the Department of Justice has issued a policy barring federal prosecutors from using noncompliance with such guidance documents as a basis for proving violations of applicable law in civil enforcement cases. Given these limitations, the EPA Permit Guide cannot support a claim that it was federal law which, using the Supreme Court's language in *Dept. of Finance*, "compelled" the Santa Ana Water Board to impose the IDDE requirements. 1 Cal. 5th at 765. (The Center for Watershed Protection, author of the "IDDE Manual" cited in the EPA Permit Guide and mentioned by the Water Boards in their comments, is not a federal agency, so its manual cannot be cited as support for the claim that federal law compelled the IDDE requirement).

2. The Specific IDDE Requirements in the 2010 Permit Are Not Found in Other EPA-Issued MS4 Permits

The Water Boards assert that permits adopted by the U.S. EPA "universally include IDDE programs outlining the process to eliminate illicit connections/illegal discharges into MS4s." WB Comments at 34 and n. 201. Although EPA-issued permits contain illicit discharge detection programs, the provisions are not the same as, and are less stringent than, those set forth in the Permit. Ashby Dec., ¶ 12.[24] For example, the Albuquerque, Boise and District of Columbia permits do not include indicator tracking or linkage to other urban watershed protection efforts. *Id.* The Boston and Worcester permits focus only on sanitary sewer overflows, disposal of used motor vehicle fluids and hazardous waste, eliminate of illicit connection and the prevention and containment of spills. *Id.* The Joint Base Lewis-McChord permit does not require linkage of the IDDE program to other watershed protection efforts. *Id.*

[24] While the Water Boards cite to the MS4 permit issued to Joint Base Lewis-McChord, NPDES Permit NO. WAS-026638, with respect to the IDDE program and other mandates at issue here, that permit is a "Phase II" permit, not a "Phase I" permit issued to large or medium sized municipalities, such as the 2010 Permit. Ashby Dec., ¶ 4. As such, the Joint Base Lewis–McChord Permit is of limited relevance to the issues in this Joint Test Claim.

F. *Septic System Inventory and Failure Reduction Program Requirements*

Pursuant to Section IX.F of the 2010 Permit, permittees, including Claimants, 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. The Septic System Requirements in the 2010 Permit Were Not Federally Mandated

The requirements of 2010 Permit Section IX.F were not federally mandated. The federal stormwater regulations cited by the Water Boards (WB Comments at 35) do not explicitly or expressly require the creation or updating of this database or establish a failure rate minimization program. The first, 40 C.F.R. § 122.26(d)(2)(iv)(B)(1), required permit applications to include a program to prevent illicit discharges. It does not specify the inclusion of septic system databases. As the Supreme Court held, a general stormwater regulation does not render a specific permit requirement imposed by a regional board to be federally mandated where the Regional Board imposed that permit requirement as a matter of its discretion. *Dept. of Finance*, 1 Cal. 5th at 771 (general federal regulation contemplating inspections does not compel detailed inspections mandated by permit). *Accord, Dept. of Finance II*, 18 Cal.App.5th at 683. Similarly, the second regulation, 40 C.F.R. § 122.26(d)(2)(iv)(B)(7), also did not address septic systems but instead seepage from "municipal sanitary sewers." This regulation plainly does not "explicitly" or "expressly" require the mandates in 2010 Permit Section IX.F. *Division of Finance II*, 18 Cal.App.5th at 683.

For the reasons previously discussed, the EPA Permit Guide (cited by the Water Boards on 35) does not support a claim that the septic database is a federal mandate, since it does not "impose legal obligations upon any member of the public." Indeed, the section of the Guide cited by the Water Boards only says that permit writers should consider pollutants of concern when developing permit provisions, and the Water Boards do not contend that the guide stated that a septic system database should be required. WB Comments at 35.

Nor is there any finding by the Santa Ana Water Board or evidence in the record to support a contention that these septic system requirements were the only means by which to implement the MEP standard. The Water Boards argue that "MS4 Program audits" indicated that a "majority" of permittees with septic systems "had inadequate information with regard to the number and location of septic systems within their jurisdiction." WB Comments at 35.[25] These PERs, discussed in Section II.A above, state that they were intended to identify "potential permit violations, program deficiencies, and positive attributes. This report is not a formal finding of violation."[26] As also previously discussed, the conclusions in the PERs do not represent federal

[25] Of the three Tetra Tech PERs cited by the Water Boards, only that for the City of Redlands mentioned septic systems. PER for City of Redlands, at 10 (attached as supplemental materials to WB Comments). That deficiency did not relate to the lack of a database, but rather the City's alleged failure to identify "a mechanism to determine the effect of septic system failures on stormwater quality and a mechanism to address such failures."

[26] PER for County, at 1 (attached as supplemental materials to WB Comments).

law or regulation, but the opinions of a federal contractor (Tetra Tech) regarding the stormwater program of the audited municipality.

No EPA-issued permit contains these requirements (Ashby Dec., ¶ 13), a fact which undermines any argument that the septic system requirements were federally mandated. *Dept. of Finance, supra,* 1 Cal. 5th at 772.

Absent any evidence of a federal mandate, the Water Boards have not met their burden. Additionally, it is the obligation of the Santa Ana Water Board, not Claimants, to regulate discharges from individual septic systems because the California Water Code obliges the Board to regulate discharges to waters of the state. Water Code §§ 13260 and 13263; *Dept. of Finance,* 1 Cal. 5th at 770. In requiring Claimants to prepare and maintain a database of septic system discharges, the Santa Ana Water Board shifted its own obligation onto Claimants. This is precisely the type of cost-shifting activity that article XIII B, section 6, was meant to address. *Dept. of Finance,* 1 Cal. 5th at 770-71; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1594.

2. The Septic System Requirements in the 2010 Permit Were a New Program and/or Required a Higher Level of Service

Section IX.F of the 2010 Permit was a new program and/or required a higher level of governmental service. The Water Boards contend that because Provision XI.2 of the 2002 Permit required jurisdictions with 50 or more septic systems to identify a procedure for controlling septic system failures, permittees fitting that qualification "should already have compiled, or have access to, a list of septic systems installed within its jurisdiction." WB Comments at 35. Thus, argue the Water Boards, the requirements of Section IX.F are "a continuation and refinement" of the requirements in the 2002 Permit and thus do not constitute a new program or higher level of service.

Section XI.2 of the 2002 Permit required that "July 1, 2003, the permittees, whose jurisdictions have 50 or more septic tank sub-surface disposal systems in use, shall identify with the appropriate governing agency a mechanism to determine the effect of septic system failures on storm water quality and a mechanism to address such failures." (AR 1747). There was no requirement to create a database. The Water Boards themselves admit that "this requirement has been expanded." WB Comments at 35.

In any event, the requirements of 2010 Permit XI.F were not in the previous permit and require a higher level of governmental service than in the previous permit. As such, they were a new program and/or a higher level of service. *County of Los Angeles, supra,* 110 Cal. 4th at 1189; *San Diego Unified School Dist., supra,* 33 Cal. 4th at 877.

G. *Requirements for Inspections by Permittees*

As set forth in detail in the Narrative Statement at 34-37, Section X of the 2010 Permit established a number of new 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, 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 were required to evaluate their residential program in their annual reports. These enhanced responsibilities related to requirements to add additional facilities to the inspection, BMP development and enforcement responsibilities of the permittees, including Claimants.

1. The Inspection and Other Section X Requirements in the 2010 Permit Were Not Federally Mandated

The Water Boards argue that the inspection requirements set forth in Section X for industrial and commercial facilities are supported both by the general requirement to reduce pollutants in MS4 discharges to the MEP standard and also by general stormwater regulations found in 40 C.F.R. § 122.26(d)(2)(IV)(A-D). WB Comments at 36. Two responses are in order.

First, the Water Boards do not cite anything in the Permit or the record to the effect that the Santa Ana Water Board determined that the precise menu of requirements set forth in Section X was the only means by which the MEP standard could be achieved. In the absence of such evidence, no deference need be given to that argument. *Dept. of Finance,* 1 Cal. 5th at 768.

Second, the general regulations cited by the Water Boards do not explicitly or expressly mandate the specific Section X requirements. In fact, the only inspection requirement in the stormwater regulations, in 40 C.F.R. § 122.26(d)(2)(iv)(C), requires the following categories of facilities to be inspected: 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.

This regulation does not obligate inspections of construction sites, much less require the tasks set forth in Section X or the inspection of the categories of commercial facilities required by the 2010 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 2010 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." 2010 Permit, Finding II.E.16 (AR 11581-82).

The Water Boards argue that "federal regulations mandate the development of a residential program to address the discharge of pollutants," citing 40 C.F.R. § 122.26(d)(2)(iv)(A). WB Comments at 36. That regulation requires MS4 permit applications to set forth

> 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.

40 C.F.R. § 122.26(d)(2)(iv)(A). While the 2010 Permit Fact Sheet cited this regulation as support for the requirement to address residential areas (Fact Sheet at 32 (AR 11745)), the regulation neither expressly nor explicitly mandates the specific 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. *Accord, Dept. of Finance II,* 18 Cal.App.5th at 683.[27]

In addition, unlike a situation where a fee might be imposed to recover the reasonable costs for a specific service, Claimants cannot simply impose a fee on residential property to pay for such a broad program as the development of BMPs and the other programs required in Section X for residential areas. Such a fee would constitute a "property-related" fee for a property-related service and would be subject to voter approval.[28] The Commission has already determined 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."[29]

Further, voters in 2010 approved Proposition 26. Proposition 26 added article XIII C, section 1(e) to the California Constitution and prohibits charging a fee for a service that is also of benefit to others who are not charged.[30] If Claimants charge a user fee to comply with the Permit requirements, it must be charged to all users in the watershed who drain into the MS4. If they charge a smaller class of users than all those who benefit from the stormwater program, such as residential properties, they may run afoul of Proposition 26 for charging a smaller class than those who benefit from the MS4 service. For these reasons, Claimants do not have authority to impose a fee on residential properties for the sake of complying with the Section X requirements in the Permit.

2. The Inspection and Other Section X Requirements in the 2010 Permit Were a New Program and/or Required a Higher Level of Service

The Water Boards make two arguments to assert that the inspection and other requirements are not new programs or required a higher level of service. First, they argue that "some" of the inspection requirements in Section X of the 2010 Permit were "substantively similar to those contained in the 2002 Permit." WB Comments at 37 and n.216. While the examples cited by the Water Boards are limited to the documentation of municipal inspections of construction sites and industrial and commercial facilities, there are differences and higher levels of service required. For example, the entry of information in the electronic municipal inspection database must include GIS data, which was "recommended, but not required" in the 2002 Permit. *Compare* 2010 Permit Section X.A.3 (AR 11631) *with, e.g.,* 2002 Permit Section VIII.1 (AR 1742). And there are other significant differences, even in the inspection requirements, that reflect new programs and/or

[27] The Water Boards also argue that the 2002 permit "required compliance with receiving water limitations through timely implementation of control measures and BMPs." WB Comments at 36. This general requirement had no specific application to the requirement for inspections set forth in Section X of the 2010 Permit. Like the general MEP standard addressed in the San Diego County SOD, it does not support an argument that the new inspection requirements in the 2010 Permit did not represent a new program or higher level of service.

[28] *Howard Jarvis Taxpayer Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1354.

[29] San Diego County SOD at 106.

[30] Cal. Const. art. XIII C, section 1, subd. (e)(2).

requirements of higher levels of service. For example, in the list of commercial facilities to be included in the database are 12 categories that were not included in the 2002 Permit. *Compare* 2010 Permit, Section X.D.1 (AR 11635), *with* 2002 Permit, Section X.1 (AR 1745-46).

The second argument made by the Water Boards is that there is no new program or higher degree of service in the 2010 Permit because "the underlying federal MEP standard and regulations requiring programs to address pollutants from commercial, industrial, and residential areas has not changed since the 2002 Permit was adopted." WB Comments at 37. This argument has already been considered and rejected by the Commission. *See* discussion regarding the Commission's dismissal of a similar argument in the San Diego County SOD in Section I.B.2 above.

As set forth in greater detail in the Narrative Statement at 35-36, there are numerous and distinct new programs and requirements for higher levels of service in Section X of the 2010 Permit, which are thus new programs and/or a higher level of service. *County of Los Angeles, supra*, 110 Cal. 4th at 1189; *San Diego Unified School Dist., supra*, 33 Cal. 4th at 877.

3. The Inspection and Other Requirements of Section X in the 2010 Permit Are Not "Substantially Similar" to the Requirements in EPA-Issued MS4 Permits

The Water Boards contend (WB Comments at 37) that permits issued by U.S. EPA "contain substantially similar inspection requirements," and that this "demonstrates that these requirements are necessary to implement the federal MEP standard and consistent with U.S. EPA practice."

This contention, however, does not follow from an examination of the terms of those other permits. As set forth in Paragraph 14 of the Ashby Declaration, while some EPA-issued permits contain inspection programs, none contains the Section X requirements to develop an extensive inspection database, perform verification and enforcement of state-issued permits, address and develop BMPs for commercial facilities, including mobile businesses, or to develop a residential inspection program.

H. *Enhanced New Development and Significant Redevelopment Requirements*

Section XI of the 2010 Permit imposed a number of requirements that expanded the responsibilities of the permittees, including Claimants, with respect to the regulation of stormwater discharges from areas of new development and significant re-development, including the development of a Watershed Action Plan ("WAP") and the required incorporation of Low Impact Development ("LID") principles.

1. The New Development and Significant Redevelopment Requirements of Section XI of the 2010 Permit Were Not Federally Mandated

The Water Boards again contend that the Santa Ana Water Board "made express findings that all provisions in the 2010 Permit are necessary to implement [the] applicable federal MEP standard." WB Comments at 38. As discussed in Section I.C.3 above, such findings are entitled to no deference, as it is boilerplate language, inserted into MS4 permits and permit fact sheets across the state. Moreover, the Santa Ana Water Board nowhere found that the requirements of

the 2010 Permit, including the Section XI new development requirements, were the only way by which the MEP standard could be achieved. Under *Dept. of Finance,* the lack of such a finding prevents the Commission from affording deference. 1 Cal. 5th at 768.

The Water Boards also state that "both the Permit and Permit Fact Sheet contain extensive findings justifying the new development and significant development provisions" and that such findings "are entitled to deference." WB Comments at 38. A review of those findings (Section II.G of the 2010 Permit (AR 11595-99)) and Fact Sheet Section IX.8 (AR 11745-47) reflects that in no case did the Santa Ana Water Board state that the new development requirements of Section XI were required by federal law or regulation (beyond a reference to the permit application regulations at 40 C.F.R. § 122.26(d)(2)(iv)(A)(2)) or were required to achieve the MEP standard. Absent a reference to any law or regulation explicitly or expressly requiring the specific requirements of Section XI at issue in this Joint Test Claim, or an express finding that those requirements were the only way by which the MEP standard could be achieved, the findings are entitled to no deference. *Dept. of Finance,* 1 Cal. 5th at 768; *Dept. of Finance II,* 18 Cal.App.5th at 683.

Additionally, none of the U.S. EPA-issued MS4 permits cited by the Water Boards contain all of the development requirements set forth in the 2010 Permit. Ashby Dec., ¶ 15. While MS4 permits for Albuquerque, Boise, the District of Columbia and Joint Base Lewis-McChord contain some similar provisions, none contain provisions as stringent as those in the 2010 Permit. *Id.*

The Water Boards have commented on eight distinct features of the Section XI requirements (WB Comments at 38-45), and Claimants will address each in turn.

(a) Control Measures to Reduce Erosion and Maintain Stream Geomorphology for New and Replacement Culverts and/or Bridge Crossings

Section XI.A.7 of the 2010 Permit required that permittees "shall ensure that appropriate control measures to reduce erosion and maintain stream geomorphology are included in the design for replacement of existing culverts or construction of new culverts and/or bridge crossings."

The Water Boards argue that these requirements are "consistent" with the EPA Permit Guide and that BMPs that would accomplish those objectives would "implement the federal mandate to reduce pollutants to the MEP standard." WB Comments at 38-39. This is not, however, the test for determining a federal mandate. The Water Boards cite to no stormwater law or regulation requiring specific design requirements for culverts and bridge crossings. Citation to the pre-Permit EPA Permit Guide does not, for the reasons discussed above, support a federal mandate, because the Guide itself disclaims such a role. And, the Water Boards can point to no finding by the Santa Ana Water Board that this provision was the only way to implement the MEP standard. Under *Dept. of Finance,* no deference can be afforded to the Water Board claim of alleged consistency with federal law. 1 Cal. 5th at 768.

(b) Requirement to Develop a Watershed Action Plan ("WAP")

Section XI.B of the 2010 Permit contained detailed and multi-faceted requirements for the content of a new document required under the 2010 Permit, the WAP. These requirements are summarized in Claimants' Narrative Statement at 40-41 and include, in Phase 2, to develop and implement a hydromodification plan ("HMP") to evaluate impacts of flow on stream segments. In

response, the Water Boards quote at length from the 2010 Permit Fact Sheet on the merits of a watershed-based approach (WB Comments at 39) but nothing in those findings states that the WAP requirements were the only means by which the MEP standard could be achieved. Nothing cited by the Water Boards supports their assertion that the WAP requirements of the 2010 Permit were mandated by federal law.

The Water Boards (WB Comments at 40) also mention provisions of the WQMP developed during the 2002 Permit term which concerned hydromodification and water quality impairments of CWA Section 303(d) listed waterbodies. The Water Boards argue that requirements in 2010 Permit Section XI.B.3.a(v)(1-2) (AR 11640) to identify and delineate existing unarmored or soft-armored stream channels that are vulnerable to hydromodification impacts from new development or significant redevelopment projects and those on the Section 303(d) list "is a local and practical next step to address impacts caused by hydromodification in accordance with the federal MEP standard." The focus of the Water Boards on these two isolated WQMP requirements, which in any event were not part of the 2002 Permit, does not demonstrate that these requirements, or any others in Section XI.B of the 2010 Permit, were a federal mandate.

The requirement for an HMP to address standards of runoff flow for channel segments already was determined by the court in *Dept. of Finance II* to constitute a state mandate subject to section 6 of article XIIIB of the California Constitution, and thus requiring a subvention of funds. 18 Cal.App.5th at 684-85.

(c) Requirement to Review Permittee General Plans and Related Documents to Eliminate Barriers to Implementation of LID Principles and Hydromodification Requirements, with Changes in Project Approval Process or Procedures to be reflected in the LIP

This provision, which requires review and if necessary modification of permittee planning documents to eliminate barriers to LID principles and hydromodification requirements, is neither explicitly nor expressly required by federal law or regulations, and the Water Boards (WB Comments at 40) cite none. Instead, the Water Boards argue that the provision is "consistent with U.S. EPA guidance" and "fulfills the minimum federal mandate of reducing pollutants to the MEP." *Id.*

As previously discussed, neither of these rationales constitutes a federal mandate. The planning review requirement is a state mandate.

(d) General Requirements to Update the WQMP to include LID Principles and Hydromodification Provisions

The 2010 Permit contained numerous requirements in Section XI, and specifically in Section XI.E, relating to the need to incorporate LID and hydromodification provisions into new development. These requirements are summarized in the Narrative Statement at 40-42. As with other Section XI requirements at issue in the Joint Test Claim, the Water Boards cite no federal law or regulation explicitly or expressly mandating them. Instead, they argue (WB Comments at 41-42) that the requirements are consistent with recommendations in the aforementioned EPA Permit Guide and a National Research Council (a private non-governmental organization) report. These recommendations are not mandates, as has been previously discussed. The Water Boards also cite language in a preamble to a regulation governing so-called "Phase II" stormwater

permittees, which is not applicable to Claimants. WB Comments at 42. There is no federal mandate for the requirements of Section XI.[31]

The Water Boards contend that "Claimants have not alleged that the consideration of the physical impacts of flow have led to any requirements to go beyond those required to reduce pollutants to the MEP." WB Comments at 42. This assertion ignores the fact that it is the State, not Claimants, which has the burden to show that the federal mandate exception applies to bar a test claim. *Dept. of Finance,* 1 Cal. 5th at 769. Claimants have demonstrated that the mandates in Section XI, including those related to LID and hydromodification requirements, were discretionary decisions by a state agency, the Santa Ana Water Board. That fact alone establishes the existence of a state mandate. *Dept. of Finance II,* 18 Cal.App.5th at 682. Even if the Santa Ana Water Board were to have made a specific finding in the record (which it did not) that the inclusion of LID and hydromodification provisions met the MEP standard, that would not have meant that the provisions were federally mandated. *Id.* And, as has already been discussed, nowhere in the record has the Santa Ana Water Board found that the particular LID and hydromodification provisions in Section XI were the only means by which the MEP standard could be achieved.

The similar incorporation of LID principles into management plans was determined to be a "state mandate subject to subvention" by the Court of Appeal in *Dept. of Finance II,* 18 Cal.App.5th at 685. There, the court noted that nothing in the MS4 permit application regulations "required the San Diego Regional Board to impose these specific requirements." *Id.*

There is another reason the hydromodification requirements are not federally mandated. These requirements seek to regulate the volume of water being discharged from development projects. The NPDES program, however, regulates the "discharge of pollutants," not the flow or volume of water. *See* 33 U.S.C. § 1342(p)(3)(B)(iii) (municipal stormwater permits shall require controls "to reduce the discharge of pollutants to the maximum extent practicable"). *See also* 33 U.S.C. § 1342(a)(1) ("The Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants").

"Discharge of pollutants" is defined to be "the addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12).[32] "Pollutant" is defined to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The volume of water is not included in this definition. Moreover, under the CWA, the Water Boards may not regulate flow as a surrogate for CWA-regulated pollutants. *See Virginia Dept. of Transp. v. EPA*, Civil Action No. 1:12-CV-775 (U.S. District Court, E.D. Va.) (January 3, 2013) (slip op.)[33] (invalidating EPA TMDL which sought to regulate flow of water as a surrogate

[31] The Water Boards also cite a Washington Pollution Control Hearings Board decision, which found that a Washington State permit was required, under the federal MEP standard and Washington state law, that the permit did not require LID at the parcel and subdivision level. WB Comments at 42. This out-of-state administrative decision, made by a state body, is not precedent for the Commission, and, in any event, does not establish the existence of a *federal* mandate.

[32] Rebuttal Documents, Tab 2.

[33] Rebuttal Documents, Tab 1.

for pollutants such as sediment). Because volume of water is not subject to NPDES regulation, the 2010 Permit's hydromodification requirements are not derived from federal law.

(e) Requirement to Submit Revised WQMP to Incorporate New Permit Elements

Section XI.E.9 of the 2010 Permit required the permittees, including Claimants, to submit the updated WQMP Guidance and Template to the Santa Ana Water Board executive officer for review and approval, as well as to submit project-specific analysis of LID BMP feasibility. The Water Boards cite no federal law or regulation explicitly or expressly requiring these steps.

The Water Boards argue that "it is entirely appropriate and practicable" to require that the permittees update the WQMP. WB Comments at 42. With respect, what may be "entirely appropriate and practicable" is not the issue before the Commission. That issue is whether these requirements, and all the requirements of the 2010 Permit at issue in this Joint Test Claim, are federally mandated. The Water Boards cite no evidence to support their claim that revisions of the WQMP are necessary "so that the Permit can meet the minimum federal MEP standard." *Id.* For the reasons previously discussed relating to the determination of what constitutes MEP and how that must be documented in findings, the Water Boards have not shown that this requirement is a federal mandate.

(f) Requirement to Develop and Implement Standard Design and Post Development BMPs Guidance for Street, Road, Highway and Freeway Improvement Projects

Section XI.F of the 2010 Permit contained requirements for the design of roads and streets. The Water Boards assert that the permittees proposed these requirements during the 2010 Permit adoption process. WB Comments at 43. While the Water Boards are correct that the permittees suggested some aspects of Section XI.F, other provisions, including the requirement to submit the guidance to the Santa Ana Water Board Executive Officer and to meet performance standards for site design/LID BMPs, source control and treatment control BMPs, as well as hydrologic constituents of concern criteria, were imposed by the Santa Ana Water Board. The Board also imposed the requirement to incorporate principles contained in US EPA "Green Streets" guidance. *Compare* Section XI.F *with* comments of San Bernardino County Flood Control District, September 9, 2009, Attachment I-C at 25 (AR 9491). Again, the Water Boards provide no citation to any federal law or regulations suggesting that additional requirements are mandated by federal law or regulation.

(g) Requirement to Maintain Database to Track Operation and Maintenance of Structural Post-Construction BMPs, and to Inspect Post-Construction BMPs

Section XI.K.2 of the 2010 Permit required that permittees, including Claimants, develop a database to track operation and maintenance of post-construction BMPs, with specified requirements as to the content of the database. In addition, Section XI.I.2 required permittees to inspect post-construction BMPs prior to the rainy season within three years after project completion and every three years thereafter, and to verify through visual observation that the BMPs are properly maintained, operated and functional. The results of the inspections and a copy of the database are required to be submitted with the permittees' annual reports.

In support of the argument that these requirements were federally mandated, the Water Boards cite 40 C.F.R. § 122.26(d)(iv)(A)(1), which requires in the permit application a "description of maintenance activities and a maintenance schedule for structural controls." WB Comments at 43. This regulation does not, however, explicitly or expressly require the database or inspection requirements set forth in Section XI.I or K of the 2010 Permit at issue in this Joint Test Claim. *See also Dept. of Finance II,* 18 Cal.App.5th at 684-89 (finding that various regulations set forth in 40 C.F.R. § 122.26(d)(2) did not support the specific requirements in the San Diego County MS4 permit).

The Water Boards also again cite the EPA Permit Guide and a model stormwater ordinance developed by US EPA in support of their contention that the Section XI requirements are "consistent" with that guidance. WB Comments at 43-44. Neither the Permit Guide nor the model ordinance constitute law or regulation, and for the reasons set forth above, do not constitute federal authority sufficient to establish a mandate.

Indeed, the requirement to inspect BMPs on private developments in the 2010 Permit is similar to the requirement to inspect commercial, industrial and construction sites that was at issue in *Dept. of Finance*. There, the Supreme Court noted that "neither the CWA's 'maximum extent practicable' provision nor the EPA regulations on which the State relies expressly required the Operators to inspect these particular facilities or construction sites." 1 Cal. 5th at 770. The Court also rejected the argument that the inspection requirements were federally mandated because the CWA required the Los Angeles Water Board to impose permit controls to the MEP and that EPA regulations contemplated that some kind of inspections would be required. The Supreme Court found that while "the EPA 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.* at 771.

The same rule applies here. Nothing in the MEP standard or the federal regulations cited by the Water Boards requires the BMP database and tracking program set forth in the 2010 Permit. This program imposes requirements that exceed federal law. *See Long Beach Unified School Dist.*, 25 Cal.App.3d at 173.

The BMP maintenance tracking program is a state mandate for another reason. As discussed in Section I.C.2 above, the Porter-Cologne Act regulates discharges of waste to waters of the state. Under Porter-Cologne, water boards are obliged to control such discharges from all dischargers, including any private property developments subject to the BMP maintenance tracking program. Water Code §§ 13260 and 13263. Under Porter-Cologne, it is the regional boards' obligation to track and verify these private discharges and private BMPs. The Santa Ana Water Board could have performed this task itself. When the Santa Ana Water Board freely chose to shift this obligation onto the Claimants, it created a state mandate. *Hayes, supra,* 11 Cal.App.4th at 1594.

(h) MRP Provisions

Section IV.B.4 of the 2010 Permit MRP required permittees, including Claimants, as part of the development and implementation of a HMP as part of the WAP, to include protocols for ongoing monitoring to assess drainage channels deemed most susceptible to degradation and to assess the effectiveness in preventing or reducing hydromodification impacts and models to predict the effects of urbanization. Section V.B.2 of the MRP required the District, as principal permittee

under the 2010 Permit, to continue to participate in data collection and monitoring as part of a regional study of site design/LID BMPs in Southern California.

The Water Boards again contend that these requirements are "consistent" with the EPA Permit Guide (WB Comments at 44-45) and further that the "Santa Ana Water Board found that they were necessary to meet the federal MEP standard and implement federal regulations. As such, they do not represent a true choice and do not constitute an unfunded state mandate." WB Comments at 45.

As previously discussed, the findings of the Santa Ana Water Board are not entitled to deference because their findings were mere boilerplate language, not rooted to any evidence in the record. The MRP provisions in the 2010 Permit which are at issue in the Joint Test Claim represent the discretionary act of the Water Board and such are state, not federal, mandates. *Dept. of Finance*, 1 Cal. 5th at 767-68. And, similar MRP provisions in the 2007 San Diego County MS4 permit were determined to be state mandates subject to a subvention of funds. *Dept. of Finance II,* 18 Cal.App.5th at 684-85.

2. The New Development and Significant Redevelopment Requirements in 2010 Permit Were New Programs and/or Required a Higher Level of Service

The Water Boards, while admitting that the new development and significant redevelopment provisions of the 2010 Permit are "enhanced" from those in the 2002 Permit, contend that "the federal standards underpinning the [2010] Permit have remained constant." WB Comments at 45. The Water Boards conclude that these provisions have been included "to better align the Permit with these federal requirements." *Id.* This argument, which has been made throughout the WB Comments, has been rejected by the Commission. *See* discussion in Section I.B.2, above.

The Water Boards do not dispute that the provisions in Section XI and relevant portions of the MRP of the 2010 Permit are new and are not reflected in the earlier 2002 Permit. They do not dispute that these provisions require more of the municipalities subject to them in terms of governmental functions. Under governing case law, these facts establish that they represent a new program and/or higher level of service.

I. *Public Education and Outreach Requirements*

Section XII.A of the 2010 Permit required permittees, including Claimants, to annually review their public education and outreach efforts and revise those efforts to adapt to needs identified in the annual reassessment.

1. The Requirements of Section XII.A of the 2010 Permit Were Not Federally Mandated

The Water Boards, in asserting that the requirements of Section XII.A were necessary to implement federal law, again cite the MEP requirement previously discussed above. WB Comments at 45. That argument can, however, be reduced to, "the Santa Ana Water Board can use its discretion to determine what constitutes MEP." As the Supreme Court in *Dept. of Finance* and the Court of Appeal in *Dept. of Finance II* have held, having the free choice to exercise that discretion means that the mandate is state, not federal. 1 Cal. 5th at 767-68; 18 Cal.App.5th at 682.

The Water Boards also make a combined MEP and regulatory requirement argument, citing two regulations identified in the 2010 Permit Fact Sheet, 40 C.F.R. § 122.26(d)(2)(iv)[34] and 40 C.F.R. § 122.26(d)(2)(iv)(B)(6), and arguing that because the MEP standard "requires an iterative implementation approach," the requirements of Section XII.A were consistent with that approach. WB Comments at 45-46. This argument, however, does not survive application of the holdings of *Dept. of Finance* and *Dept. of Finance II* to the Santa Ana Water Board's discretionary act in determining what constitutes MEP. It is that discretion, combined with the lack of any requirement in the cited regulations for the assessment requirements in 2010 Permit Section XII.A, which make those requirements a state mandate. Moreover, neither of the two cited regulations provides explicit or express requirements for the mandates contained in Section XII.A.

In fact, *Dept. of Finance II* specifically examined a somewhat similar requirement in the 2007 San Diego County MS4 permit, which required an annual assessment of various components of the storm water management program. 18 Cal.App.5th at 687-88. There, the State also cited 40 C.F.R. § 122.26(d)(2)(v) as well as 40 C.F.R. § 122.42(c) as mandating the assessment. The court found that the specific requirements of the San Diego County permit went beyond the requirements of those regulations, and that the San Diego Water Board "exercised its discretion" to impose the permit requirements. 18 Cal.App.5th at 688. Here, too, the Santa Ana Water Board, by requiring assessment of the public education and outreach program (which was not expressly or explicitly required by the two regulations cited in the 2010 Permit Fact Sheet or 40 C.F.R. § 122.42(c)), exercised its discretion and was not mandated by federal law to impose the assessment requirements.[35]

The Water Boards again cite the Tetra Tech PERs, which suggested various enhancements in the stormwater programs of the County and the Cities of Fontana and Redlands. As discussed above, the audits do not reflect federal law or regulation, but rather the evaluation of a private contractor hired by US EPA. The Water Boards argue that the "recommendations" carry the weight of US EPA. WB Comments at 46. "Recommendations" are not requirements. They do not bear the force of law. In fact, as noted above, the Tetra Tech PERs state that they are "not a formal finding of violation" and nowhere state that the audited stormwater programs were in violation of the CWA. The Tetra Tech PERs cannot be used to establish a federal mandate.

Finally, as set forth in the Ashby Declaration, none of the U.S. EPA-issued MS4 permits cited by the Water Boards contain requirements such as those in 2010 Permit Section XII.A. Again, this fact undermines the argument that those requirements are federally mandated. *Dept. of Finance*, 1 Cal. 5th at 772.

2. The Requirements of Section XII.A in the 2010 Permit Were a New Program and/or Required a Higher Level of Service

As is the case with other requirements of the 2010 Permit at issue in this Joint Test Claim, the requirements of Section XII.A were a new program, in that they required the permittees, including Claimants, to undertake steps not required in the previous 2002 Permit and to perform

[34] Erroneously identified in the Fact Sheet as "40 CFR 122.26(d)(iv)."

[35] The Water Boards again cite the EPA Permit Guide, arguing that the requirements of Section XII.D are "consistent" with what the Guide "recommends." WB Comments at 46. For the reasons previously discussed, the EPA Permit Guide provides no basis in fact or law for the Commission to determine that the Guide's recommendations represent a federal mandate.

governmental services at a higher level of service. *See County of Los Angeles, supra,* 110 Cal. 4th at 1189; *San Diego Unified School Dist., supra,* 33 Cal. 4th at 877.

The Water Boards again argue (WB Comments at 46) that these requirements did not constitute a new program or higher level of service because "the federal standards underpinning the Permit have remained constant." This argument has been previously addressed by the Commission and in these Rebuttal Comments and is not further addressed here. And, it is not the "federal standards" which set the standard for a state or federal mandate – it is the particular way in which the state agency, here the Santa Ana Water Board, implemented, through its discretion, requirements intended to address those federal standards. *See* San Diego County SOD at 53-54 (even though previous MS4 permit required adoption of Model Standard Urban Storm Water Mitigation Plan ("SUSMP") and local SUSMPs, requirement in succeeding permit to submit an Model SUSMP with specific Low Impact Development BMP requirements constituted a new program or higher level of service).

J. *Requirements Regarding Permittee Facilities*

Relevant provisions of Section XIII of the 2010 Permit required 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. The Requirements of Section XIII of the 2010 Permit Were Not Federally Mandated

The Water Boards argue that the Santa Ana Water Board found that the requirements of Section XIII of the 2010 Permit were necessary to implement "applicable federal law and, as such, the board is entitled to deference in making this determination." WB Comments at 49. Such a conclusion is unsupported by the law or the facts.

First, the stormwater regulations cited by the Water Boards in their comments, 40 C.F.R. § 122.26(d)(2)(iv)(A) and (C), neither explicitly nor expressly require the specific mandates in 2010 Permit Section XIII which are at issue in this Joint Test Claim. The first regulation, relating to the management program that must accompany an application for an MS4 permit, nowhere requires the specific inventory, inspection and recording of those results in a database (Section XIII.A); the annual evaluation of the inspection and cleanout frequency of drainage facilities, including catch basins, based on specified factors, to revise inspection and cleanout schedules and frequency, justify any proposed cleanout frequency of less than once per year, and include this evaluation in the annual report (Section XIII.E); and, the annual evaluation of information provided to permittee field staff during maintenance to direct public outreach efforts and determine the need for revision of existing maintenance procedures or schedules, with the results being provided in the annual report (Section XIII.I).[36]

[36] Both the Water Boards (WB Comments at 47) and the 2010 Permit Fact Sheet (Fact Sheet at 34-35) (AR 11747-48) state that "40 C.F.R. § 122.26(d)(iv(A)" requires permittees "to ensure that public agency activities and facilities do not cause or contribute to violations of water quality standards in receiving

With respect to municipal facilities, 40 C.F.R. § 122.26(d)(2)(iv)(A) requires only "a description of practices for operating and maintaining public streets, roads and highways," a description of procedures to assure that flood management projects "assess the impacts on the water quality of receiving water bodies" and that "existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible," a description of a program to monitor pollutants in runoffs from municipal landfills or other waste treatment facilities, including identifying priorities and procedures for inspections and control measures for such discharges, and a program to reduce to the MEP pollutants in MS4 discharges from the application of pesticides, herbicides and fertilizer, including for application at public right-of-ways and at municipal facilities.

The only inspection requirement relate to "operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste." 40 C.F.R. § 122.26(d)(2)(iv)(A)(5). Of the 15 categories of municipal facilities that must be inspected under 2010 Permit Section VIII.A, only three, solid waste transfer facilities, land application sites and household hazardous waste collection facilities, arguably come under the purview of types of municipal "treatment, storage or disposal facilities" mentioned in the regulation. And, the regulation specifies no inspection frequency or any other requirements relating to such facilities.

The second regulation cited by the Water Boards, 40 C.F.R. § 122.26(d)(2)(iv)(C), similarly contains no express or explicit requirement for the specific inspection and program requirements of Section XIII. It requires, *inter alia,* the identification of priorities and procedures for discharges from "municipal landfills" and "hazardous waste treatment, disposal and recovery facilities," neither of which fit the categories of facilities in Section XIII.A. The regulations, unlike Section XIII, do not specify inspection frequency.

Second, the Water Boards cite excerpts from the EPA Permit Guide (WB Comments at 47-48) as support for the requirements of Section XIII, stating that "the board included the challenged provisions as recommended by U.S. EPA and as required by federal law and regulations." WB Comments at 48. As previously discussed, the EPA cautioned that the EPA Permit Guide was not "a regulation itself" and thus did not "impose legally binding requirements on EPA, state, territories, authorized tribes, local governments, watershed organizations, or the public." Given that neither the regulations nor the EPA Permit Guide legally mandated the specific requirements of Section XIII, the Santa Ana Water Board was exercising its discretion to impose those requirements.

Third, as also has been previously discussed, there is nothing in the record to indicate that the Santa Ana Water Board found that the provisions of Section XIII of the 2010 Permit were the

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waters." This is not correct. The regulation, correctly cited as 40 C.F.R. § 122.26(d)(2)(iv)(A), does not contain the "cause or contribute" language, which in fact is a State-imposed receiving water limitation requirement, untethered to any federal regulation. *See* State Board Order WQ 2016-0075 at 11. The regulation instead only requires that the management program set forth in Subsection (A) describe "structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharges from the [MS4] 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."

only way by which the MEP standard could be attained. Thus, under *Dept. of Finance*, no deference is owed to the Water Board on that issue. 1 Cal. 5th at 768.

Fourth, as set forth in the Ashby Declaration, none of the U.S. EPA-issued MS4 permits cited by the Water Boards contained all of the requirements in Section XIII. The Albuquerque, District of Columbia, Boston, Worcester and Joint Base Lewis-McChord MS4 permits do not contain any of such requirements. Ashby Dec., ¶ 17. The Boise permit contains requirements to inventory and inspect municipal facilities, but these requirements apply only to storm drain infrastructure, street road maintenance and permittee-owned facilities. *Id.* In addition, the Boise permit does not require an annual evaluation and possible revision of cleanout frequencies or maintenance procedures.

For all these reasons, no deference should be afforded the Santa Ana Water Board on the question of whether the requirements of Section XIII were federally mandated. Under the governing law, the inclusion of those provisions in the 2010 Permit was a discretionary act of the Santa Ana Water Board, which made them state mandates. *Dept. of Finance,* 1 Cal. 5th at 767-68; *Dept. of Finance II* at 682.

2. The Requirements of Section XIII of the 2010 Permit Were a New Program and/or Required a Higher Level of Service

The Water Boards acknowledge that while Section XIII of the 2010 Permit "enhances" the public facility provisions of the previous 2002 Permit "by requiring inventory and inspection of the Permittees' fixed facilities, field operations, and drainage facilities on an annual basis, annual programmatic review and, if necessary, revisions to the program," this enhancement did not constitute a new program or higher level of service because "the federal standards underpinning the [2010] Permit have remained constant." WB Comments at 49. This is the same argument rejected by the Commission in the San Diego County SOD (see discussion in Section I.C.2 above). As the Commission found, if the Water Boards' position were correct, no new provision in an MS4 permit could ever constitute a "new program."

As the Water Boards acknowledge (WB Comments at 49), Section XIII of the 2010 Permit included a number of new requirements not found in the 2002 Permit. Moreover, even with respect to the evaluation of drainage facilities, which the Water Boards contend was in Section XIV.9 of the 2002 Permit (AR 1757), the requirements of Section XIII.E went beyond those of the 2002 Permit. In the 2002 Permit, the Santa Ana Water Board only required that the inspection frequency "be evaluated annually." 2002 Permit, Section XIV.9. The 2010 Permit required that this evaluation include consideration of a number of factors, and must be based on a "prioritized list of drainage facilities considering specified factors.[37] Even with respect to the drainage facility inspection requirements, the requirements of Section XIII of the 2010 Permit represent new programs and/or a higher level of service.

K. *Training Requirements*

Section XVI of the 2010 Permit set forth detailed and prescriptive requirements for both the District as "Principal Permittee" and each other permittee, including Claimants. These specified new and upgraded requirements relating to the subject matter of the training, updating to

[37] *Compare* 2010 Permit, Section XIII.E (AR 11611) *with* 2002 Permit, Section XIV.9 (AR 1757).

reflect new or revised program elements, including training on new programs required by the 2010 Permit, curriculum content, definition of required competencies, post-training testing, training of municipal contractors and prior notification to Santa Ana Water Board staff regarding training events. *See* Narrative Statement at 47-48.

1. The Training Requirements in Section XVI Were Not Federally Mandated

In their comments, the Water Boards reprise the argument they make elsewhere, that the MEP standard is "flexible" and "iterative" and that successive permits "require greater levels of specificity over time in defining what constitutes MEP." WB Comments at 49. This argument, again, ignores the fact that, absent an explicit or express requirement of federal law, it is an exercise of a regional board's discretion in determining whether a permit requirement meets MEP in the first place that constitutes a state mandate. *Dept. of Finance,* 1 Cal. 5th at 767-68; *Dept. of Finance II,* 18 Cal.App.5th at 682. Again, nowhere in the 2010 Permit was there any determination by the Santa Ana Water Board that the specific training requirements in Section XVI represented the only means by which the MEP standard could be attained, the test for determining whether deference to the Board is appropriate. 1 Cal. 5th at 768.

Without specific citation to the record, the Water Boards contend further that although "the 2010 Permit contains a more refined level of specificity, the training requirements in the 2010 Permit are not much different than those in the 2002 Permit." WB Comments at 50. This contention can be disproved, however, by comparing the specific and detailed training requirements in Section XVI of the 2010 Permit with the training requirements in the 2002 Permit.[38] The 2002 Permit training requirements lack, among other things:

- Requirements to update the existing training program to address the development of the LID program, a revised WQMP, and the establishments of LIPs for each permittee;
- Requirements for training schedules, curriculum content and the preparation of defined expertise and competencies for storm water managers, inspectors, maintenance staff, WQMP review and approval staff, public works employees, community planners, CEQA documentation preparers and reviewers and municipal contractors working on permittee projects;
- Requirements for the specific content for the curriculum, including the LIP, LID principles and hydrologic conditions of concern, the CASQA Construction Stormwater Guidance Manual, an enforcement response manual and an illicit discharge/illegal connection training program;
- Requirements for testing at the end of training and providing evidence that contractors who perform municipal operations have received the same level of training as municipal employees; and
- Requirements for training of public employees and interested consultants as to the requirements of the 2010 Permit related to new development and significant re-

[38] *Compare* 2010 Permit Section XVI.A-H. (AR 11663-64) *with* 2002 Permit Section VIII.6 (AR 1743) (construction sites), IX.9 (AR 1745) and X.10 (AR 1745) (identical provisions relating to industrial and commercial facilities) and XIV.6 (AR 1757) (training of public agency staff).

development and 401 certifications, and model CEQA review for preparation of environmental documentation.[39]

These additional and specific requirements are not a mere refinement of those in the 2002 Permit. And, they reflect the Santa Ana Water Board's discretion to include them, which constitutes a state mandate. *Dept. of Finance,* 1 Cal. 5th at 767-68; *Dept. of Finance II,* 18 Cal.App.5th at 682.

In addition, none of the U.S. EPA-issued MS4 permits cited by the Water Boards contain training requirements on all the topics required by 2010 Permit Section XVI, and no such permit contains the schedule called for by the 2010 Permit. Ashby Dec., ¶ 18.

2. The Requirements in Section XVI Were a New Program and/or Required a Higher Level of Service

The Water Boards argue that the Section XVI provisions "are continuations, refinements, and enhancements of substantially similar provisions" in the 2002 Permit and thus do not "create new programs or higher levels of service." WB Comments at 50. As shown above, however, Section XVI of the 2010 Permit imposed new requirements not found in the 2002 Permit and with respect to certain existing training programs, a higher level of service by governmental agencies performing uniquely governmental functions (stormwater pollution control, land use planning and maintenance of municipal properties). Section XVI thus constitutes a new program and/or requirement for a higher level of service. *See County of Los Angeles, supra,* 110 Cal. 4th at 1189; *San Diego Unified School Dist., supra,* 33 Cal. 4th at 877.

L. *Requirements Regarding Reporting of Non-Compliant Facilities*

Section XVII.D of the 2010 Permit required permittees, including Claimants, to follow specified new procedures with respect to the response to facilities operating without a statewide general industrial or construction permit or which may be required to obtain a certification under Section 401 of the CWA.

1. The Requirements of Section XVII.D of the 2010 Permit Were Not Federally Mandated

The Water Boards (WB Comments at 50) mention 40 C.F.R. § 122.26(d)(2)(i), another of the MS4 permit application regulations, as apparent negative authority for the reporting requirements of Section XVII.D. This regulation requires that the permittee demonstrate that it has "adequate legal authority" to, among other things, enforce local ordinances concerning stormwater. Because these requirements relate to local ordinances, and local agencies cannot enforce the requirement to obtain 401 certification or statewide general permits, the Water Boards argue that it is a "logical action" for permittees to notify the Water Boards of such failings. Again, a "logical action" does not translate into a federal mandate. The Water Boards mention no specific federal or regulation which explicitly or expressly requires the inclusion of Section XVIII.D in the 2010 Permit. This fact alone confirms that the provisions were mandated by the state. *Dept. of Finance,* 1 Cal. 5th at 767-68; *Dept. of Finance II,* 18 Cal.App.5th at 682.

[39] 2010 Permit Section XVI (AR 11663-64).

The Water Boards again cite the EPA Permit Guide (WB Comments at 50, n.265) but, for the reasons already discussed, the Guide expressly is not a source of any federal mandate and the Water Boards' assertion that the Section XVII.D requirement "is consistent with federal guidance" is not relevant to the issue of a whether a federal mandate has been created.

Additionally, none of the U.S. EPA-issued MS4 permits cited by the Water Boards contain all of the requirements set forth in 2010 Permit Section XVII.D. The permits for Albuquerque, Boston and Worcester contain no such reporting requirements. Ashby Dec., ¶ 19. The Boise, District of Columbia and Joint Base Lewis-McChord permits require permittees only to report concerning construction sites, not industrial sites or sites requiring a Section 401 certification. *Id.* None of these three permits require the permittee to deem the sites to be in significant non-compliance. *Id.*

2. Section XVII.D of the 2010 Permit Was a New Program and/or Required a Higher Level of Service

The Water Boards argue (WB Comments at 51) that verification of coverage under general permits for construction and industrial facilities was not a new program or higher level of service because it was "consistent" with elements of the 2006 MSWMP. Claimants have several responses. First, the 2002 Permit did not mandate reporting to the Santa Ana Water Board of the absence of general permit, a Section 401 certification or the specific items required to be in the report that are set forth in Section XVII.D of the 2010 Permit. Second, the MSWMP also did not require all of the items set forth Section XVII.D, including the specific content of the report to be made to the Water Board, the 14-day deadline or the requirement relating to 401 certifications. These differences are evident in a comparison of the sections of the MSWMP cited by the Water Boards and Section XVII.D. WB Comments at 51 and nn. 268 and 269.

Section XVII.D imposed new requirements not contained in the previous permit and required a higher level of government service (with regard to the level of review and content of reporting). *See County of Los Angeles, supra,* 110 Cal. 4th at 1189; *San Diego Unified School Dist., supra,* 33 Cal. 4th at 877.

M. ***Requirements for Program Management Assessment***

Section XVIII.B.3 of the 2010 Permit contained a requirement, not found in the previous 2002 Permit, that permittees, including Claimants, assess program effectiveness in their MSWMPs on an area-wide and jurisdictional basis, using permit-specified guidance.

1. The Program Management Assessment Requirements in the 2010 Permit Were Not Federally Mandated

The Water Boards (WB Comments at 52) again argue that the requirements of Section XVIII.B.3 were "necessary to implement the federal MEP standard," that the requirements were "consistent" with the EPA Permit Guide, and that there were recommendations for "more robust program assessment" in the Tetra Tech PERs. As Claimants have previously pointed out, none of these arguments establishes that the requirements of Section XVIII.B.3 were expressly or explicitly required by federal law or regulation. And, neither recommendations in the EPA Permit Guide nor the contractor audits impose binding requirements of federal law.

Additionally, the requirement for permit program assessment in an MS4 permit has already been determined to be a state mandate. In *Dept. of Finance II*, the court found that the San Diego Water Board "exercised its discretion to mandate how and to what degree of specificity" in the assessments required of the water quality programs in the 2007 San Diego County MS4 permit. 18 Cal.App.5th at 688. The assessment provisions in the San Diego County permit, like those in Section XVIII.B.3 and Section VII.E.4 of the MRP, required assessment of program effectiveness on both local and watershed levels and use of outcome levels for the assessment. *Id.* The Court of Appeal there found that such requirements were state mandates requiring a subvention of funds. *Id.*

Also, none of the U.S. EPA-issued MS4 permits cited by the Water Boards contained a requirement for an evaluation of program effectiveness on an area-wide basis, as does the program assessment requirements of the 2010 Permit. Ashby Dec., ¶ 20.

The Santa Ana Water Board's exercise of its discretion to require the area-wide and jurisdiction-wide assessment in Section XVIII.B.3, as well as the companion requirements of Section VII.E.4 of the 2010 Permit MRP, also constituted a state mandate.

2. The Program Management Assessment Requirements in the 2010 Permit Were a New Program and/or Required a Higher Level of Service

The requirements of 2010 Permit Section XVIII.B.3 and those in MRP Section VII.E.4, were additional to those in the 2002 Permit and its MRP. First, nothing in the 2002 Permit required an assessment based on a jurisdictional basis. This is a distinct requirement from those for an areawide assessment, and required the assemblage of monitoring and other data from each permittee. Second, nothing in the 2002 Permit required assessment of "each program element," using "measureable target outcomes," such as those in the CASQA Guidance cited in Section XVIII.B.3. These new requirements constitute a new program and/or the mandate for a higher level of service in the performance of a governmental function. *See County of Los Angeles, supra,* 110 Cal. 4th at 1189; *San Diego Unified School Dist., supra,* 33 Cal. 4th at 877.

III. REBUTTAL TO COMMENTS OF DEPARTMENT OF FINANCE AND TO COMMENTS OF WATER BOARDS ON FEE AUTHORITY (FUNDING REBUTTAL COMMENTS)

A. *Claimants Do Not Have Authority to Levy Service Charges, Fees or Assessments to Fund the Mandated Programs*

Test claimants are not entitled to reimbursement if they have the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service. Govt. Code § 17556(d). Like the exception for federal mandates set forth in Govt. Code § 17556(c), the State bears the burden of proving that Claimants have this authority. As the Supreme Court said with respect to the federal mandate exception, "the State must explain why" the Claimants can assess service charges, fees or assessments to pay for the mandates set forth above. *Dept. of Finance,* 1 Cal. 5th at 769.

The Water Boards and the DOF have not met this burden. The Water Boards' chief contention is that Claimants can levy fees to pay for the 13 programs at issue in this Joint Test Claim. WB Comments at 19-20. DOF's chief contention, also raised by the Water Boards, is that

the fact that Claimants must seek voter approval pursuant to Proposition 218, articles XIII C and D of the California Constitution, to assess a fee or tax does not mean that they do not have authority to do so within the meaning of Govt. Code § 17556(d). DOF Comments at 1-2.

Neither of these contentions meets the State's burden of explaining why Claimants can assess charges, fees or assessments to fund the mandates in this Joint Test Claim. First, under article XIII C of the California Constitution, when providing services or conferring benefits, Claimants cannot assess a fee that covers more than the reasonable cost of providing the benefit, privilege, service or product. Additionally, the manner in which those costs are allocated to a payor must bear a fair and reasonable relationship to the payor's burdens or benefits received from the governmental activity. In this regard, when assessing a fee, Claimants bear the burden of proving by a preponderance of the evidence that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity. Cal. Const., article XIII C § 1(e). Otherwise the fee would be considered a tax subject to the requirements of article XIII C of the California Constitution. Cal. Const., article XIII C § 1(e). *See Jacks v. City of Santa Barbara* (2017) 3 Cal. 5th 248, 261.[40]

The mandates at issue in this Joint Test Claim are not the types of programs for which the Claimants can assess a fee. Requirements to develop and implement LIPs, to evaluate non-stormwater discharges, to incorporate and implement TMDL implementation requirements, to adopt and implement municipal ordinances to address bacteria sources, to investigate and track illicit connections/illicit discharges, to create a septic system database, to inspect facilities (to the extent such requirements cannot be recovered by fees, or are already subject to fees, see discussion below), to develop and implement programs covering new development and significant redevelopment, to review and assess public education and outreach requirements, to inventory and inspect public facilities, operations and drainage facilities, to update municipal training programs, to notify the Santa Ana Water Board of facilities operating without a proper permit and to assess the effectiveness of local government stormwater management plans, are programs intended to improve the overall water quality in the Santa Ana River watershed, which benefits all persons within the jurisdiction. It is not possible to identify benefits that any individual resident, business or property owner within the jurisdiction would be receiving that is distinct from benefits that all other persons within the jurisdiction are receiving.

Likewise, 2010 Permit requirements that apply to Claimants' own activities as municipal governments address requirements imposed on Claimants themselves. Again, there is no individual resident, business or property owner upon whom a fee can be assessed to pay for these requirements. These new development requirements includes LID, hydromodification costs and construction costs incurred in conjunction with municipal projects. *See* Narrative Statement at 37-43. Nor are these costs voluntarily incurred.

Similarly, Claimants would have difficulty assessing a fee for inspection of industrial or construction sites, at least to the extent those sites hold general industrial or general construction stormwater permits for which the State Board already assesses a fee to pay for inspections and

[40] Rebuttal Documents, Tab 1.

where the state has not itself inspected the facilities. This issue is relevant to the mandate in the 2010 Permit for inspection of industrial and commercial facilities (*see* Section II.G above). The State assesses a fee for these inspections, pursuant to Water Code § 13260(d)(2)(B).

Second, any assessment would be considered to be a "special tax," and, as such, could not be imposed without a vote of the electorate. Under the Constitution, a tax is defined to be "any levy, charge, or exaction of any kind imposed by a local government . . . ." Cal. Const., article XIII C, § 1(e). A "special tax" is defined to be "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." *Id.*, article XIII C § 1(d). Under the Constitution, "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote." Cal. Const., article XIII C § 2(d).

Article XIII C, section 1(e), sets forth certain charges that are excepted from the definition of a tax. Those exceptions are:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
(6) A charge imposed as a condition of property development.
(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

Cal. Const., article XIII C § 1(e).

None of these exceptions applies here. As discussed above, any fee or assessment to pay to develop and implement LIPs, to evaluate non-stormwater discharges, to incorporate and implement TMDL implementation requirements, to adopt and implement municipal ordinances to address bacteria sources, to investigate and track illicit connections/illicit discharges, to create a septic system database, to inspect facilities (to the extent such requirements cannot be recovered by fees, or are already subject to fees), to develop and implement programs covering new development, to review and assess public education and outreach requirements, to inventory and inspect public facilities, operations and drainage facilities, to update municipal training programs, to notify the Santa Ana Water Board of facilities operating without a proper permit or to assess the effectiveness of local government stormwater management plans, would be a fee or assessment to pay for the costs of a general program, not one directed towards a specific benefit, privilege,

service or product. As for the other mandates, such as discharges from commercial, industrial or construction sites, the State is already regulating or has the authority to regulate those activities.

Article XIII D of the California Constitution also restricts the Claimants' ability to assess property-related fees. Under article XIII D, section 3(a), no tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership, unless it is for "property-related services"[41] or certain other exceptions, except upon a two-thirds vote of the electorate. Under article XIII D, section 6(c), except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed unless approved by a majority vote of property owners of the property subject to the fee or charge or by two-thirds vote of the electorate residing the affected area. In *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1354,[42] the Court of Appeal held that a general stormwater fee is a property-related fee that is not excepted as a charge for water or sewer services, but instead is a property-related fee subject to the two-thirds electoral vote requirement. *Id.* at 1354-55, 1357-59.[43]

Accordingly, the Claimants do not have the authority to levy fees or assessments to pay for the mandates that are the subject of this Test Claim. Such fees or assessments can be levied only upon the vote of the electorate.

The DOF and the Water Boards contend that even though Cal. Const. articles XIII C and D require Claimants to submit a fee to the electorate for approval, this does not mean that Claimants lack authority to assess a fee. This contention also lacks merit. Indeed, the Commission has already considered and rejected this contention. In the San Diego County test claim, DOF and the Water Boards made the same contention that they make here, that municipalities have authority to levy service charges, fees or assessments within the meaning of Govt. Code § 17556(d), even though they lack such authority under articles XIII C and D unless the charges, fees or assessments are submitted to the electorate and approved by a two-thirds vote. The Commission held:

> 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

[41] "Property-related services" means "a public service having a direct relationship to property ownership." Article XIII D, § 2(h).

[42] Rebuttal Documents, Tab 1.

[43] The Water Boards cite "as relevant" a newly adopted statute, Senate Bill 231, which took effect on January 1, 2018 and which amended the definition of "sewer" in Govt. Code § 53750 and added a new Govt. Code § 53751 "clarifying" the Legislature's intent regarding the use of the term "sewer" and its relationship to Proposition 218. WB Comments at 20 n.122. This retroactive legislative attempt to overrule *Howard Jarvis Taxpayers Assn.*, even if eventually upheld by the courts (which, unlike the Legislature, have the final word in the interpretation of the California Constitution), would not affect any amounts already spent by Claimants and the other permittees under the 2010 Permit over the more than 8 years that the permit has been in effect.

> service.' . . . 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 "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 taxing and spending limitations that articles XIII A and XIII B impose."

SD County SOD at 106 (emphasis in original; citation omitted).

In reaching this result, the Commission rejected the Water Boards' contention, also made here, that *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, in which the court held that economic impracticability is not a bar to levying charges or fees within the meaning of section 17556, was applicable. The Commission held:

> 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 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.

SD County SOD at 107 (emphasis added).

As a result, the Commission found the following state mandates in the San Diego County stormwater permit to be reimbursable: (1) street sweeping; (2) street sweeping reporting; (3) conveyance system cleaning; (4) conveyance system cleaning reporting; (5) educational programs; (6) watershed activities and collaboration in the Watershed Urban Runoff Management Program; (7) the Regional Urban Runoff Management Program; (8) program effectiveness assessment; (9) long-term effectiveness assessment; and (10) permittee collaboration requirements. *Id.* at 1-2.

The Commission reached the same conclusion in that test claim with respect to property-related fees under article XIII D of the Constitution. To the extent that any fees imposed for the programs at issue here would be considered property-related fees, rather than a special tax, the fee would still be subject to voter approval or approval by a majority of property owners under article XIII D, section 6(c). *See Howard Jarvis Taxpayers Assn., supra,* 98 Cal.App.4th at 1354. As the Commission found in the San Diego County Test Claim, this requirement also means that Claimants lack authority to impose fees for property-related services. SD County SOD at 106-07.

The Commission reiterated this principle in *In Re Test Claim on Water Code Division 6, Part 2.5 [Sections 10608 through 10608.41] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4,* Test Claim Nos. 10-TC-12

and 12-TC-01 (December 5, 2014).[44] In these test claims, certain water suppliers sought reimbursement for new activities imposed on urban and agricultural water suppliers. With respect to the application of article XIII D, the Commission found that the water suppliers had fee authority, in that their fees were for water services within the meaning of article XIII D, section 6(e), and therefore the fee was subject only to a majority protest, not a vote of the electorate or property owners. *Id.* at 78. In doing so, the Commission noted that the San Diego County Stormwater Test Claim was distinguishable and that, with respect to in the mandates in that test claim, "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)." Test Claim Nos. 10-TC-12 and 12-TC-01, Decision at 77.

The Water Boards and DOF nevertheless contend that Claimants have the ability to submit fees to the voters for approval, and that under *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, this ability by itself meets the requirements of Govt. Code § 17556(d). (WB comments at 20; DOF comments at 1).

Clovis is not applicable. In *Clovis* the school district was authorized to collect health fees but voluntarily chose not to do so. 188 Cal.App.4th at 810. In those circumstances, the Court of Appeal held that the Controller's office properly offset the authorized fees, whether the school district collected them or not, because the district had the authority to assess those fees. *Id*. at 812. Here, Claimants have not been authorized to collect fees or taxes; they currently have no such power as such authority resides directly with the electorate, pursuant to Prop 218, for any stormwater related pollution control charge. Therefore this is not a circumstance in which Claimants can assess fees but have voluntarily chosen not to do so. Indeed, if one accepted this argument, article XIII B, section 6 would be written out of the Constitution because the argument could always be made that a city or county could submit a tax or fee to the electorate. If that ability was all that was required to meet Government Code § 17556(d), a city or county could never obtain a subvention of funds. Such a result would be contrary to the people of California's intent in adopting article XIII B, section 6.[45]

The Water Boards and DOF have not met their burden of showing that Claimants have the authority to levy service charges, fees or assessments sufficient to pay for the mandated programs at issue here. Govt. Code § 17556(d) does not apply.

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[44] Rebuttal Documents, Tab 4.

[45] The Water Boards reference the decision made by some jurisdictions to impose local stormwater fees and attach excerpts from stormwater fee ordinances adopted by the Cities of Alameda and Palo Alto. WB Comments at 18 and Attachments 8 and 9. Neither of the excerpts supports the Water Boards' argument. First, the excerpt of the Alameda ordinance only refers to inspections. A local agency can recover reasonable fees for the cost of inspections related to stormwater compliance, provided that the fee is in accord with the requirements of the California Constitution. Second, the Palo Alto stormwater fee ordinance was passed by the voters in 2005 in compliance with the requirements of the California Constitution, not simply imposed by the city council. *See* Exhibit G to Burhenn Declaration, an excerpt from a Question and Answer document prepared by the City describing the background of its stormwater fee ordinance. Claimants request that the Commission take administrative notice of this document pursuant to Evidence Code § 452(b) as a legislative enactment issued by a public entity in the United States.

IV. CONCLUSION

For the foregoing reasons, each of the 13 mandates at issue in this Joint Test Claim are state mandates for which Claimants are entitled to reimbursement. Claimants respectfully request that the Commission find that Claimants are entitled to a subvention of funds for each mandate in accordance with article XIII B, section 6, of the California Constitution.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my personal knowledge.

Dated: March 15, 2018

David W. Burhenn

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ATTACHMENTS IN SUPPORT OF REBUTTAL COMMENTS OF JOINT TEST CLAIMANTS

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SANTA ANA REGION

ORDER NO. R8-2010-0036, 10-TC-10

ATTACHMENT 1: Declaration of David W. Burhenn and Exhibits A-G thereto

ATTACHMENT 2: Declaration of Karen Ashby and Exhibits 1-7 thereto

ATTACHMENT 1

DECLARATION OF DAVID W. BURHENN ON BEHALF OF JOINT TEST CLAIMANTS IN SUPPORT OF REBUTTAL COMMENTS

I, DAVID W. BURHENN, hereby declare and state as follows:

1. I am a partner in the firm of Burhenn & Gest LLP and am the representative for the Joint Test Claimants in Test Claim 10-TC-10, California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036. As such, I have personal knowledge of the matters set forth in this Declaration and could, if called upon, testify competently thereto.

2. Exhibit A to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit issued by the California Regional Water Quality Control Board, Los Angeles Region ("LARWQCB") to permittees in the County of Ventura on or about May 7, 2009. On December 8, 2017, I downloaded that excerpt from the website of the LARWQCB at the following address: https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057__01-13-2010.

3. Exhibit B to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit issued by the California Regional Water Quality Control Board, Central Valley Region ("CVRWQCB") to the City of Modesto on or about June 12, 2008. On December 8, 2017, I downloaded that excerpt from the website of the CVRWQCB at the following address: https://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/stanislaus/r5-2008-0092.pdf

4. Exhibit C to this Declaration is a true and correct copy of excerpts of a municipal stormwater permit Fact Sheet issued by the California Regional Water Quality Control Board, San Francisco Bay Region ("SFBRWQCB") to permittees in the San Francisco Bay area on or

about October 14, 2009. On December 8, 2017, I downloaded that excerpt from the website of the SFBRWQCB at the following address: https://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/R2-2009-0074_Revised.pdf

5. Exhibit D to this Declaration is a true and correct copy of an excerpt of a municipal stormwater permit Fact Sheet issued by the California Regional Water Quality Control Board, San Diego Region ("SDRWQCB") to permittees in Orange County on or about December 16, 2009. On December 8, 2017, I downloaded that excerpt from the website of the SDRWQCB at the following address: https://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/oc_permit/updates_012710/FINAL_R9_2009_0002_Fact%20Sheet.pdf

6. Exhibit E to this Declaration is a true and correct copy of an excerpt of a municipal stormwater permit Fact Sheet issued by the California Regional Water Quality Control Board, Santa Ana Region ("SARWQCB") to permittees in Riverside County on or about January 29, 2010. On December 8, 2017, I downloaded that excerpt from the website of the SARWQCB at the following address: https://www.waterboards.ca.gov/santaana/board_decisions/adopted_orders/orders/2010/10_033_RC_MS4_Permit_01_29_10.pdf

7. I reviewed the permit issued by the LARWQCB to the Ventura County permittees and determined that corrections to the permit dated January 13, 2010 did not include revisions to Finding E.7, which is included in Exhibit A.

8. I have reviewed the permit issued by the SFBRWQCB to the San Francisco Bay permittees and determined that revisions to the permit dated November 28, 2011 did not include revisions to those provisions in the Fact Sheet included in Exhibit C.

9. Exhibit F to this Declaration is a true and correct copy of a January 25, 2018 Memorandum from the Associate Attorney General, U.S. Department of Justice, regarding "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases." On February 21, 2018, I downloaded this document from the U.S. Department of Justice website at the address: www.justice.gov/file/1028756/download

10. Exhibit G to this Declaration is a true and correct copy of an excerpt from a document from the City of Palo Alto Storm Water Management Program and dated December 16, 2016 entitled "City of Palo Alto Storm Water Management Fee Background and Frequently Asked Questions." On March 12, 2018, I downloaded this document from the City of Palo Alto website at the address: www.cityofpaloalto.org/civicax/filebank/documents/56164

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

Executed March 15, 2018 at Los Angeles, California.

David W. Burhenn

EXHIBIT A

STATE OF CALIFORNIA

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

ORDER 09-0057
NPDES PERMIT NO. CAS004002
WASTE DISCHARGE REQUIREMENTS
FOR
STORM WATER (WET WEATHER) AND NON-STORM WATER (DRY WEATHER) DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS WITHIN THE VENTURA COUNTY WATERSHED PROTECTION DISTRICT, COUNTY OF VENTURA AND THE INCORPORATED CITIES THEREIN.

May 7, 2009

May 7, 2009
Final – Corrected January 13, 2010

contain certain basic information and information for proposed changes and improvements to the storm water management program and monitoring program.

3. The U.S. EPA has entered into a Memorandum of Agreement (MOA) with the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service for enhancing coordination regarding the protection of endangered and threatened species under section 7 of the Endangered Species Act, and the CWA's water quality standards and NPDES programs. Among other actions, the MOA establishes a framework for coordination of actions by the U.S. EPA, the Services, and CWA delegated States on CWA permit issuance under § 402 of the CWA [66 Fed. Reg. 11202-11217].

4. The CWA allows the U.S. EPA to authorize states with an approved environmental regulatory program to administer the NPDES program in lieu of the U.S. EPA. The State of California is a delegated State. The Porter-Cologne Water Quality Control Act (California Water Code) authorizes the State Water Resources Control Board (State Water Board), through the Regional Water Boards, to regulate and control the discharge of wastes that could affect the quality of waters of the State, including waters of the United States, and tributaries thereto.

5. Under CWA § 303(d) of the CWA, States are required to identify a list of impaired water-bodies and develop and implement TMDLs for these waterbodies (33 USC § 1313(d)(1)). The most recent 303(d) list's U.S. EPA approval date was June 28, 2007. The U.S. EPA entered into a consent decree with the Natural Resources Defense Council (NRDC), Heal the Bay, and the Santa Monica Baykeeper on March 22, 1999, under which the Regional Water Board must adopt all TMDLs for the Los Angeles Region within 13 years from that date. This Order incorporates provisions incorporating approved WLAs for municipal storm water discharges and requires amending the SMP after subsequent pollutant loads have been allocated and approved.

6. Collectively, the restrictions contained in the TMDL Provisions for Storm Water (Wet Weather) Discharges and Non-Storm Water (Dry Weather) Discharges of this Order on individual pollutants are no more stringent than required to implement the provisions of the TMDL, which have been adopted and approved in a manner that is consistent with the CWA. Where a TMDL has been approved, NPDES permits must contain effluent limits and conditions consistent with the assumptions and requirements of the available WLAs in TMDLs (40 CFR122.44(d)(1)(vii)(B)).

7. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. This Order implements federally mandated requirements under CWA § 402, subdivision (p)(3)(B)(33 U.S.C. § 1342(p)(3)(B)) This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State

determines appropriate for the control of such pollutants. Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (Natural Resources Defense Council, Inc. v. U.S. E.P.A. (9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.) The authority exercised under this Order is not reserved state authority under the Clean Water Act's savings clause (cf. Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region (2006) 135 Cal.App.4th 1377, 1389; Building Industry Ass'n of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 882-883.)

Likewise, the provisions of this Order to implement TMDLs are federal mandates. The CWA requires TMDLs to be developed for waterbodies that do not meet federal water quality standards (33 U.S.C. § 1313(d)). Once the U.S. EPA or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation.
(40 CFR 122.44(d)(1)(vii)(B)).

Second, the local agency Permittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges. With a few inapplicable exceptions, the Clean Water Act regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Wat. Code, § 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].)

The Clean Water Act and the Porter-Cologne Water Quality Control Act largely regulate storm water with an even hand, but to the extent there is any relaxation of this even-handed regulation, it is in favor of the local agencies. Except for municipal separate storm sewer systems, the Clean Water Act requires point source dischargers, including discharges of storm water associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1165 [noting that industrial storm water discharges must strictly comply with water quality standards].) As discussed in prior State Water Resources Control Board decisions, in many respects this Order does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Order, therefore, regulates the

discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

Third, the local agency Permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order subject to certain voting requirements contained in the California Constitution. (See California Constitution XIII D, section 6, subdivision (c); see also *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal. App. 4th 1351, 1358-1359.). The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the municipal separate storm sewer system. Local agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The ability of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487-488.)

Fourth, the Permittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their discharges. (See finding C.5., supra.) To the extent that the local agencies have voluntarily availed themselves of the permit, the program is not a state mandate. (Accord *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 107-108.) Likewise, where MS4 Permittees are regulated under a Best Management Practices (BMP) based storm water management program rather than end-of-pipe numeric limits, there exists no compulsion of a specific regulatory scheme that would violate the 10th Amendment to the United States Constitution. (See *City of Abilene v. U.S. E.P.A.* (5th Cir. 2003) 325 F.3d 657, 662-663 [noting that municipalities can choose between a management permit or a permit with numeric limits].) The local agencies' voluntary decision to file a report of waste discharge proposing a program-based permit is a voluntary decision not subject to subvention. (See *Environmental Defense Center v. USEPA* (9th Cir. 2003) 344 F.3d 832, 845-848.)

Fifth, the local agencies' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under state law predates the enactment of Article XIIIB, Section (6) of the California Constitution.

8. Under § 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), Coastal States with approved coastal zone management programs are required to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: 1) agriculture; 2) silviculture; 3) urban; 4) marinas; and 5) hydromodification. This Waste Discharge Requirement addresses the management measures required for the urban category and the hydromodification category, with the exception of septic systems.

EXHIBIT B

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ORDER NO. R5-2008-0092

NPDES NO. CAS083526

WASTE DISCHARGE REQUIREMENTS FOR CITY OF MODESTO STORM WATER DISCHARGE FROM MUNICIPAL SEPARATE STORM SEWER SYSTEM STANISLAUS COUNTY

The California Regional Water Quality Control Board, Central Valley Region (hereafter Regional Water Board) finds that:

1. The City of Modesto submitted a Report of Waste Discharge (ROWD) on 2 April 2007 and requested reissuance of Waste Discharge Requirements (WDR) under the National Pollutant Discharge Elimination System (NPDES) area-wide municipal separate storm sewer system (MS4) permit to discharge storm water runoff from storm drains and watercourses within the jurisdiction of the Discharger and to implement a Storm Water Management Plan (hereafter SWMP) for the City of Modesto.

2. Prior to issuance of this Order, the City of Modesto was covered under the NPDES area-wide MS4 permit, Order No. R5-2002-0182 (NPDES No. CA0083526) adopted on 1 October 2002.

3. The City of Modesto is located in Stanislaus County at the confluence of Dry Creek and the Tuolumne River (tributaries of the San Joaquin River). The City encompasses 36 square miles[1] with an average elevation of 91 feet above sea level. The average annual precipitation is approximately 12.2 inches.[2] The storm drain system has approximately 77 miles of storm drain lines and 20 pump stations within the City. Storm water discharges from the City drain to detention/retention basins (13 detention and 11 retention basins in the City), approximately 18 major outfalls to receiving waters (Tuolumne River or Dry Creek), Modesto Irrigation District (MID) laterals/drains, or rock wells (approximately 11,000). **Attachment A** shows a map of the City of Modesto and the service area covered under this permit.

4. Surface water discharges occur generally in the older areas of the City or those areas immediately adjacent to the Tuolumne River, Dry Creek or irrigation canals. Forty percent of storm water discharges to detention/retention basins, twenty percent to

[1] U.S. Census Bureau, 2000.
[2] Modesto Irrigation District, Water Years 2002-2007.

municipal, or industrial activities. Any person discharging waste or proposing to discharge waste that could affect the quality of the waters of the state must file a ROWD (California Water Code (CWC) § 13260(a)(1).). Any person operating an injection well must file a ROWD. (CWC § 13260(a)(3).). The Regional Water Board shall prescribe requirements that implement the Basin Plan, take into consideration the beneficial uses to be protected and the water quality reasonably required for that purpose (CWC § 13263).

27. The Discharger's publicly-owned rock wells are Class 5 injection wells under the U.S. EPA's Underground Injection Control program. The U.S. EPA does not provide regulation of these wells beyond registration.

28. Due to the discharge of storm water to shallow groundwater through rock wells and the large number of these wells operated by the City of Modesto, this discharge represents a potential threat to groundwater quality. It is the intent of these requirements to quantify the magnitude of this threat, determine if historic discharge to groundwater has impacted groundwater and to minimize the discharge of pollutants to groundwater. Privately-owned rock wells (a.k.a. spin-out or backhole wells) within the Modesto urbanized area are not regulated as storm water discharges as part of this Order, because they are not part of the MS4 regulated by this Order. However, if the groundwater assessment determines that other rock wells (including individual rock wells, or rock well systems smaller than the Discharger's 11,000 wells) pose a threat to groundwater, such wells will be subject to requirements for the protection of shallow groundwater.

STATUTORY AND REGULATORY CONSIDERATIONS

29. The CWA authorizes the U.S. EPA to permit a state to serve as the NPDES permitting authority in lieu of the U.S. EPA. The State of California has in-lieu authority for an NPDES program. The Porter-Cologne Water Quality Control Act authorizes the State Water Resource Control Board (State Water Board), through the Regional Water Boards, to regulate and control the discharge of pollutants into waters of the State. The State Water Board entered into a Memorandum of Agreement with the U.S. EPA, on September 22, 1989, to administer the NPDES Program governing discharges to waters of the United States.

30. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Order implements federally mandated requirements under federal Clean Water Act section 402, subdivision (p)(3)(B). (33 U.S.C. § 1342(p)(3)(B).) This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (*Natural Resources Defense*

Council, Inc. v. U.S. E.P.A. (9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.) The authority exercised under this Order is not reserved state authority under the Clean Water Act's savings clause (*cf. Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883.)

Likewise, the provisions of this Order to implement total maximum daily loads (TMDLs) are federal mandates. The federal Clean Water Act requires TMDLs to be developed for water bodies that do not meet federal water quality standards. (33 U.S.C. § 1313(d).) Once the U.S. Environmental Protection Agency or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 C.F.R. § 122.44(d)(1)(vii)(B).)]

Second, the local agency Discharger's obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges or waste discharge requirements for discharges to underground injection wells. With a few inapplicable exceptions, the Clean Water Act regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Wat. Code, §§ 13260, 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].). As noted above, private dischargers to underground injection wells who cause similar threats to groundwater would be subject to similar regulation.

The Clean Water Act and the Porter-Cologne Water Quality Control Act largely regulate storm water with an even hand, but to the extent there is any relaxation of this even-handed regulation, it is in favor of the local agencies. Except for municipal separate storm sewer systems, the Clean Water Act requires point source dischargers, including discharges of storm water associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1165 [noting that industrial storm water discharges must strictly comply with water quality standards].) As discussed in prior State Water Board decisions, this Order does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Order, therefore, regulates the discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

Third, the local agency Discharger has the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the municipal separate storm sewer system. Local agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The ability of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487-488).

Fourth, the Discharger has requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their discharges. To the extent, the local agencies have voluntarily availed themselves of the permit, the program is not a state mandate. (Accord *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 107-108.) Likewise, the Discharger has voluntarily sought a program-based municipal storm water permit in lieu of a numeric limits approach. (See *City of Abilene v. U.S. E.P.A.* (5th Cir. 2003) 325 F.3d 657, 662-663 [noting that municipalities can choose between a management permit or a permit with numeric limits].) The local agency's voluntary decision to file a report of waste discharge proposing a program-based permit is a voluntary decision not subject to subvention. (See *Environmental Defense Center v. USEPA* (9th Cir. 2003) 344 F.3d 832, 845-848.)

Fifth, the local agency's responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under state law predates the enactment of Article XIIIB, Section (6) of the California Constitution.

31. The Water Quality Act of 1987 added Section 402(p) to the CWA (33 U.S.C. § 1251-1387). This section requires the U.S. EPA to establish regulations setting forth NPDES requirements for storm water discharges in two phases:

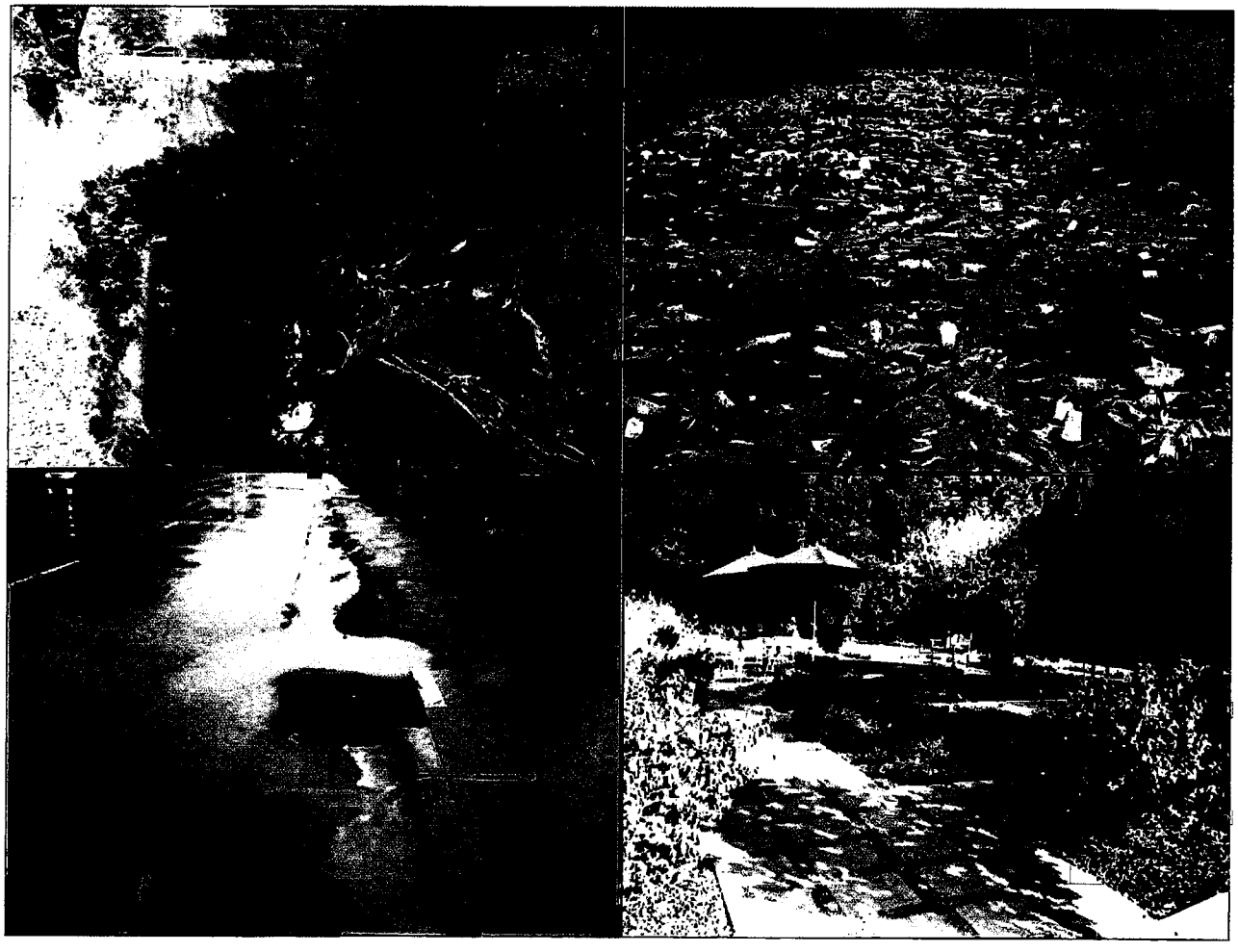
a. The U.S. EPA Phase I storm water regulations were directed at MS4s serving a population of 100,000 or more, including interconnected systems and storm water discharges associated with industrial activities, including construction activities. The Phase I Final Rule was published on November 16, 1990 (55 *Fed. Reg.* 47990).

b. The U.S. EPA Phase II storm water regulations are directed at storm water discharges not covered in Phase I, including small MS4s (serving a population of less than 100,000), small construction projects (one to five acres), municipal facilities with delayed coverage under the Intermodal Surface Transportation Efficiency Act of 1991, and other discharges for which the U.S. EPA Administrator or the State determines that the storm water discharge contributes

EXHIBIT C

California Regional Water Quality Control Board
San Francisco Bay Region
Municipal Regional Stormwater NPDES Permit

Order R2-2009-0074
NPDES Permit No. CAS612008
Adopted October 14, 2009
Revised November 28, 2011



FACT SHEET/RATIONALE
TECHNICAL REPORT

for

ORDER NO. R2-2009-0074

NPDES Permit No. CAS612008

Municipal Regional Stormwater NPDES Permit
and
Waste Discharge Requirements

for

The cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City, Alameda County, the Alameda County Flood Control and Water Conservation District, and Zone 7 of the Alameda County Flood Control and Water Conservation District, which have joined together to form the Alameda Countywide Clean Water Program

The cities of Clayton, Concord, El Cerrito, Hercules, Lafayette, Martinez, Orinda, Pinole, Pittsburg, Pleasant Hill, Richmond, San Pablo, San Ramon, and Walnut Creek, the towns of Danville and Moraga, Contra Costa County, and the Contra Costa County Flood Control and Water Conservation District, which have joined together to form the Contra Costa Clean Water Program

The cities of Campbell, Cupertino, Los Altos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, and Sunnyvale, the towns of Los Altos Hills and Los Gatos, the Santa Clara Valley Water District, and Santa Clara County, which have joined together to form the Santa Clara Valley Urban Runoff Pollution Prevention Program

The cities of Belmont, Brisbane, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo, and South San Francisco, the towns of Atherton, Colma, Hillsborough, Portola Valley, and Woodside, the San Mateo County Flood Control District, and San Mateo County, which have joined together to form the San Mateo Countywide Water Pollution Prevention Program

The cities of Fairfield and Suisun City, which have joined together to form the Fairfield-Suisun Urban Runoff Management Program

The City of Vallejo and the Vallejo Sanitation and Flood Control District

inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer."

40 CFR 122.26(d)(2)(iv) – Federal NPDES regulation 40 CFR 122.26(d)(2)(iv) requires "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. [...] Proposed programs may impose controls on a system wide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. [...] Proposed management programs shall describe priorities for implementing controls."

40 CFR 122.26(d)(2)(iv)(A -D) – Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A - D) 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. Control of illicit discharges is also required.

CWC 13377 – CWC section 13377 requires that "Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the CWA, 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 anymore stringent effluent standards or limitation necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance."

Order No. R2-2009-0074 is an essential mechanism for achieving the water quality objectives that have been established for protecting the beneficial uses of the water resources in the San Francisco Bay Region. Federal NPDES regulation 40 CFR 122.44(d)(1) requires MS4 permits to include any requirements necessary to "achieve water quality standards established under CWA section 303, including State narrative criteria for water quality." The term "water quality standards" in this context refers to a water body's beneficial uses and the water quality objectives necessary to protect those beneficial uses, as established in the Basin Plan.

State Mandates

This Permit does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Permit implements federally mandated requirements under CWA section 402, subdivision (p)(3)(B). (33 U.S.C. § 1342(p)(3)(B).) This includes federal requirements to effectively prohibit non-stormwater discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held that these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (Natural Resources Defense Council, Inc. v. USEPA

(9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.) The authority exercised under this Permit is not reserved state authority under the CWA's savings clause (cf. Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements that are not less stringent than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for MS4. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region (2006) 135 Cal.App.4th 1377, 1389; Building Industry Association of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 882-883.)

Likewise, the provisions of this Permit to implement total maximum daily loads (TMDLs) are federal mandates. The CWA requires TMDLs to be developed for waterbodies that do not meet federal water quality standards. (33 U.S.C. § 1313(d).) Once USEPA or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable WLA. (40 CFR 122.44(d)(1)(vii)(B).)

Second, the local agencies' (Permittees') obligations under this Permit are similar to, and in many respects less stringent than, the obligations of nongovernmental dischargers who are issued NPDES permits for stormwater discharges. With a few inapplicable exceptions, the CWA regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Water Code, section 13263), both without regard to the source of the pollutant or waste. As a result, the costs incurred by local agencies to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].)

The CWA and the Porter-Cologne Water Quality Control Act largely regulate stormwater with an even hand, but to the extent that there is any relaxation of this evenhanded regulation, it is in favor of the local agencies. Except for MS4s, the CWA requires point source dischargers, including discharges of stormwater associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), Defenders of Wildlife v. Browner (1999) 191 F.3d 1159, 1164-1165 [noting that industrial stormwater discharges must strictly comply with water quality standards].) As discussed in prior State Water Board decisions, this Permit does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Permit, therefore, regulates the discharge of waste in municipal stormwater more leniently than the discharge of waste from nongovernmental sources.

Third, the Permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Permit. The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the MS4. Permittees can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., Apartment Association of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The ability of a local agency to defray the cost of a program without raising

taxes indicates that a program does not entail a cost subject to subvention. (County of Fresno v. State of California (1991) 53 Cal.3d 482, 487-488.)

Fourth, the Permittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their discharges. To the extent Permittees have voluntarily availed themselves of the Permit, the program is not a state mandate. (Accord County of San Diego v. State of California (1997) 15 Cal.4th 68, 107-108.) Likewise, the Permittees have voluntarily sought a program-based municipal stormwater permit in lieu of a numeric limits approach. (See City of Abilene v. USEPA (5th Cir. 2003) 325 F.3d 657, 662-663 [noting that municipalities can choose between a management permit or a permit with numeric limits].) The Permittees' voluntary decision to file a report of waste discharge proposing a program-based permit is a voluntary decision not subject to subvention. (See Environmental Defense Center v. USEPA (9th Cir. 2003) 344 F.3d 832, 845-848.)

Fifth, the Permittees' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under State law predates the enactment of Article XIIIB, Section (6) of the California Constitution.

This Permit is based on the federal CWA, the Porter-Cologne Water Quality Control Act (Division 7 of the CWC, commencing with Section 13000), applicable State and federal regulations, all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Board, the Basin Plan, the California Toxics Rule, and the California Toxics Rule Implementation Plan.

Discussion: In 1987, Congress established CWA Amendments to create requirements for storm water discharges under the NPDES program, which provides for permit systems to regulate the discharge of pollutants. Under the Porter-Cologne Water Quality Control Act, the State Water Board and Regional Water Quality Control Boards (Water Boards) have primary responsibility for the coordination and control of water quality, including the authority to implement the CWA. Porter-Cologne (section 13240) directs the Water Boards to set water quality objectives via adoption of Basin Plans that conform to all state policies for water quality control. As a means for achieving those water quality objectives, Porter-Cologne (section 13243) further authorizes the Water Boards to establish waste discharge requirements (WDRs) to prohibit waste discharges in certain conditions or areas. Since 1990, the Water Board has issued area-wide MS4 NPDES permits. The Permit will re-issue Order Nos. 99-058, 99-059, 01-024, R2-2003-0021, R2-2003-0034 to comply with the CWA and attain water quality objectives in the Basin Plan by limiting the contributions of pollutants conveyed by urban runoff. Further discussions of the legal authority associated with the prohibitions and directives of the Permit are provided in section V. of this document.

This Permit supersedes NPDES Permit Nos. CAS029718, CAS029831, CAS029912, CAS029921, CAS612005, and CAS612006.

EXHIBIT D

California Regional Water Quality Control Board
San Diego Region

Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watershed of the County of Orange, The Incorporated Cities of Orange County, and The Orange County Flood Control District Within the San Diego Region

Order No. R9-2009-0002
NPDES NO. CAS0108740

December 16, 2009

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

FACT SHEET / TECHNICAL REPORT

FOR

ORDER NO. R9-2009-0002
NPDES NO. CAS0108740

WASTE DISCHARGE REQUIREMENTS

FOR

DISCHARGES OF RUNOFF FROM
THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)
DRAINING THE WATERSHEDS OF THE
COUNTY OF ORANGE,
THE INCORPORATED CITIES OF ORANGE COUNTY,
AND THE ORANGE COUNTY FLOOD CONTROL DISTRICT
WITHIN THE SAN DIEGO REGION

December 16, 2009

Discussion of Finding E.6. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Order implements federally mandated requirements under federal Clean Water Act section 402, subdivision (p)(3)(B). (33 U.S.C. § 1342(p)(3)(B).) This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants in storm water to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (Natural Resources Defense Council, Inc. v. U.S. E.P.A. (9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.)

The authority exercised under this Order is not reserved state authority under the Clean Water Act's savings clause (cf. Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region (2006) 135 Cal.App.4th 1377, 1389; Building Industry Ass'n of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 882-883.)

Second, the local agency Copermittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges. With a few inapplicable exceptions, the Clean Water Act regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Wat. Code, § 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].)

The Clean Water Act and the Porter-Cologne Water Quality Control Act largely regulate storm water with an even hand, but to the extent there is any relaxation of this even-handed regulation, it is in favor of the local agencies. Except for municipal separate storm sewer systems, the Clean Water Act requires point source dischargers, including discharges of storm water associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), Defenders of Wildlife v. Browner (1999) 191 F.3d 1159, 1164-1165 [noting that industrial storm water discharges must strictly comply with water quality standards].) As discussed in prior State Water Resources Control Board decisions, this Order does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Order, therefore, regulates the discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

Third, the local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the municipal separate storm sewer system. Local agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The ability of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention. (County of Fresno v. State of California (1991) 53 Cal.3d 482, 487-488.)

Fourth, the Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their storm water discharges. To the extent, the local agencies have voluntarily availed themselves of the permit, the program is not a state mandate. (Accord County of San Diego v. State of California (1997) 15 Cal.4th 68, 107-108.) Likewise, the Copermittees have voluntarily sought a program-based municipal storm water permit in lieu of a numeric limitations approach on their storm water discharge. (See City of Abilene v. U.S. E.P.A. (5th Cir. 2003) 325 F.3d 657, 662-663 [noting that municipalities can choose between a management permit or a permit with numeric limitations].) The local agencies' voluntary decision to file a report of waste discharge proposing a program-based permit is a voluntary decision not subject to subvention. (See Environmental Defense Center v. USEPA (9th Cir. 2003) 344 F.3d 832, 845-848.)

Fifth, the local agencies' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under state law predates the enactment of Article XIIIB, Section (6) of the California Constitution.

EXHIBIT E

STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION

ORDER NO. R8-2010-0033
NPDES NO. CAS 618033

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT AND WASTE DISCHARGE REQUIREMENTS FOR THE RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, THE COUNTY OF RIVERSIDE, AND THE INCORPORATED CITIES OF RIVERSIDE COUNTY WITHIN THE SANTA ANA REGION

AREA-WIDE URBAN RUNOFF MANAGEMENT PROGRAM

The following Discharger(s) are subject to waste discharge requirements as set forth in this Order:

Table 1. Municipal Permittees (Dischargers)

Principal Permittee	Riverside County Flood Control and Water Conservation District (RCFC&WCD)*	
Co–Permittees	1. Beaumont	9. Moreno Valley
	2. Calimesa	10. Murrieta
	3. Canyon Lake	11. Norco
	4. Corona	12. Perris
	5. County of Riverside (County)	13. Riverside
	6. Hemet	14. San Jacinto
	7. Lake Elsinore	15. Wildomar
	8. Menifee	

The Principal Permittee and the Co-Permittees are collectively referred to as the Permittees or the Dischargers.

Table 2. - Administrative Information

This Order was adopted by the Regional Water Board on:	**January 29, 2010**
This Order will become effective on:	**January 29, 2010**
This Order will expire on:	**January 29, 2015**
The U.S. Environmental Protection Agency (USEPA) and the California Regional Water Quality Control Board have classified this discharge as a major discharge.	
The Discharger must file a Report of Waste Discharge in accordance with Title 23, California Code of Regulations, as application for issuance of new waste discharge requirements no later than 180 days in advance of the Order expiration date.	

APPENDIX 6

FACT SHEET

ORDER NO. R8-2010-0033

~~The~~ CWA prohibits the discharge of any Pollutant to navigable waters from a Point Source ~~unless an~~ NPDES permit authorizes the discharge. Efforts to improve water quality under the NPDES ~~program~~ traditionally and primarily focused on reducing Pollutants in discharges of industrial ~~process~~ wastewater and municipal sewage. The 1987 amendments to the CWA required MS4s ~~and industrial~~ facilities, including construction sites, to obtain NPDES permits for storm water ~~runoff~~ from their facilities. On November 16, 1990, the USEPA promulgated the final NPDES Phase I storm water regulations. The storm water regulations are contained in 40 CFR Parts ~~122, 123 and 124.~~This Order does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Order implements federally mandated requirements under federal Clean Water Act section 402, subdivision (p)(3)(B). (33 U.S.C. § 1342(p)(3)(B).) This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (*Natural Resources Defense Council, Inc. v. U.S.E.P.A.* (9th Cir. 1992) 966 F.2d 1292, 1308, fn.17). The authority exercised under this Order is not reserved state authority under the Clean Water Act's savings clause (*cf. Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883.)

Likewise, the provisions of this Order to implement total maximum daily loads (TMDLs) are federal mandates. The federal Clean Water Act requires TMDLs to be developed for water bodies that do not meet federal water quality standards. (33 U.S.C. § 1313(d).) Once the U.S. Environmental Protection Agency or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 C.F.R. § 122.44(d)(1)(vii)(B).)

Second, the local agency permittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges. With a few inapplicable exceptions, the Clean Water Act regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the

discharge of waste (Wat. Code, § 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].)

The Clean Water Act and the Porter-Cologne Water Quality Control Act largely regulate storm water with an even hand, but to the extent there is any relaxation of this even-handed regulation, it is in favor of the local agencies. Except for municipal separate storm sewer systems, the Clean Water Act requires point source dischargers, including discharges of storm water associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1165 [noting that industrial storm water discharges must strictly comply with water quality standards].) As discussed in prior State Water Resources Control Board decisions, this Order does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Order, therefore, regulates the discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

Third, the local agency permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the municipal separate storm sewer system. Local agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The ability of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487-488.)

Fourth, the Permittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in federal Clean Water Act section 301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their discharges. To the extent, the local agencies have voluntarily availed themselves of the permit, the program is not a state mandate. (Accord *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 107-108.) Likewise, the Permittees have voluntarily sought a program-based municipal storm water permit in lieu of a numeric limits approach. (See *City of Abilene v. U.S. E.P.A.* (5th Cir. 2003) 325 F.3d 657, 662-663 [noting that municipalities can choose between a management permit or a permit with numeric limits].) The local agencies' voluntary decision to file a report of waste discharge proposing a program-based

permit is a voluntary decision not subject to subvention. (See *Environmental Defense Center v. USEPA* (9th Cir. 2003) 344 F.3d 832, 845-848.)

Fifth, the local agencies' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under state law predates the enactment of Article XIIIB, Section (6) of the California Constitution.

On July 13, 1990, the Regional Board adopted the first term Riverside County Area-wide MS4 Permit, Order No. 90-104 (NPDES No. CA 8000192), for Urban Runoff from areas in Riverside County within the Permit Area. On March 8, 1996, the Regional Board renewed Order No. 90-104 by adopting the second term area-wide MS4 Permit, Order No. 96-30, (NPDES No. CAS618033). On October 25, 2002, the Regional Board renewed Order No. 96-30 by adopting the third term area-wide MS4 Permit, Order No. R8-2002-0011.

This Order renews the area-wide NPDES MS4 Permit for the Permit Area for the fourth-term, in accordance with Section 402 (p) of the CWA and all requirements applicable to an NPDES permit issued under the issuing authority's discretionary authority. The requirements included in this Order are consistent with the CWA, the federal regulations governing urban storm water discharges, the Water Quality Control Plan for the Santa Ana River Basin (Basin Plan), the California Water Code, and the State Water Resources Control Board's (State Board) Plans and Policies.

The Basin Plan is the basis for the Regional Board's regulatory programs. The Basin Plan was developed and is periodically reviewed and updated in accordance with relevant federal and state law and regulation, including the CWA and the California Water Code. As required, the Basin Plan designates the Beneficial Uses of the waters of the Region and specifies Water Quality Objectives intended to protect those uses. (Beneficial Uses and Water Quality Objectives, together with an anti-degradation policy, comprise federal "Water Quality Standard"). The Basin Plan also specifies an implementation plan, which includes certain discharge prohibitions. In general, the Basin Plan makes no distinctions between wet and dry weather conditions in designating Beneficial Uses and setting Water Quality Objectives, i.e., the Beneficial Uses, and correspondingly, the Water Quality Objectives are assumed to apply year-round. (Note: In some cases, Beneficial Uses for certain surface waters are designated as "I", or intermittent, in recognition of the fact that surface flows (and Beneficial Uses) may be present only during wet weather.) Most Beneficial Uses and Water Quality Objectives were established in the 1971, 1975, 1983, and 1995 Basin Plans. The 1995 Basin Plan was updated in February 2008[5]. Amendments to the Basin Plan included new nitrate-nitrogen and TDS objectives for specified

[5] http://www.waterboards.ca.gov/santaana/water_issues/programs/basin_plan/index.shtml

EXHIBIT F

U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

January 25, 2018

MEMORANDUM FOR: HEADS OF CIVIL LITIGATING COMPONENTS
UNITED STATES ATTORNEYS

CC: REGULATORY REFORM TASK FORCE

FROM: THE ASSOCIATE ATTORNEY GENERAL

SUBJECT: Limiting Use of Agency Guidance Documents
In Affirmative Civil Enforcement Cases

On November 16, 2017, the Attorney General issued a memorandum ("Guidance Policy") prohibiting Department components from issuing guidance documents that effectively bind the public without undergoing the notice-and-comment rulemaking process. Under the Guidance Policy, the Department may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments), or to create binding standards by which the Department will determine compliance with existing statutory or regulatory requirements.

The Guidance Policy also prohibits the Department from using its guidance documents to coerce regulated parties into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or lawful regulation. And when the Department issues a guidance document setting out voluntary standards, the Guidance Policy requires a clear statement that noncompliance will not in itself result in any enforcement action.

The principles from the Guidance Policy are relevant to more than just the Department's own publication of guidance documents. These principles also should guide Department litigators in determining the legal relevance of other agencies' guidance documents in affirmative civil enforcement ("ACE").[1]

[1] As used in this memorandum, "guidance document" means any agency statement of general applicability and future effect, whether styled as "guidance" or otherwise, that is designed to advise parties outside the federal Executive Branch about legal rights and obligations. This memorandum does not apply to adjudicatory actions that do not have the aim or effect of binding anyone beyond the parties involved, documents informing the public of agency enforcement priorities or factors considered in exercising prosecutorial discretion, or internal directives, memoranda, or training materials for agency personnel. For more information, see "Memorandum for All Components: Prohibition of Improper Guidance Documents," from Attorney General Jefferson B. Sessions III, November 16, 2017. "Affirmative civil enforcement" refers to the Department's filing of civil lawsuits on behalf of the United States to

Guidance documents cannot create binding requirements that do not already exist by statute or regulation.

Accordingly, effective immediately for ACE cases, the Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules.

Likewise, Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases.

The Department may continue to use agency guidance documents for proper purposes in such cases. For instance, some guidance documents simply explain or paraphrase legal mandates from existing statutes or regulations, and the Department may use evidence that a party read such a guidance document to help prove that the party had the requisite knowledge of the mandate.

However, the Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation. That a party fails to comply with agency guidance expanding upon statutory or regulatory requirements does not mean that the party violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations.

This memorandum applies only to future ACE actions brought by the Department, as well as (wherever practicable) those matters pending as of the date of this memorandum. This memorandum is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to, does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

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recover government money lost to fraud or other misconduct or to impose penalties for violations of Federal health, safety, civil rights or environmental laws. For example, this memorandum applies when the Department is enforcing the False Claims Act, alleging that a party knowingly submitted a false claim for payment by falsely certifying compliance with material statutory or regulatory requirements.

EXHIBIT G

City of Palo Alto Storm Water Management Fee

Background and Frequently Asked Questions

Palo Alto's Storm Water Management Fee funds projects and services that reduce street flooding and protect creeks. Property owners will be voting on whether to continue the monthly fee that fund these critical construction projects and services. **Ballots will be mailed to Palo Alto property owners on February 24, 2017.**

Voting "yes" on the ballot to renew the Storm Water Management Fee would increase the existing monthly Fee by an average of 62 cents. The monthly Fee would be approximately $13.65 for a typical home. The Fee would fund new projects and rebates that reduce flooding, water pollution, and the maintenance of existing storm drain infrastructure and programs. This Fee amounts to a 2.3% increase above the pattern of annual rate increases that has occurred since 2005.

Quick Information

Background

In 1989, the City of Palo Alto established the "Storm Drainage Fee" to pay for storm drain system construction, maintenance, and water quality protection. Voters approved the continuation of this "enterprise fund" fee in 2005 which is similar to fees for other utilities such as the sanitary sewer, gas, electricity, water, and refuse.

Palo Alto's current monthly "Storm Drainage Fee" for a typical single family residence is $13.03 and is included in the monthly utility bill. The Fee funds the maintenance and improvements to Palo Alto's storm water system, in addition to urban pollution prevention services and rebate programs. Several of these services are mandated by the State of California. This Fee sunsets on June 1, 2017. If continued funding is not approved by a majority of property owners, it will revert to its pre-2005 level of $4.25 per month. Without a continuation of the current Fee, funding to make all of the necessary storm water system repairs and improvements would not be available.

To address this funding concern, Palo Alto City Manager Jim Keene appointed a Storm Drain Blue Ribbon Committee comprised of Palo Alto residents in January 2016. The Committee recommended a Storm Water Management Fee of approximately $13.65 per month for a typical home (62 cents more than the current Fee). This proposed Fee amounts to a 2.3% increase above the pattern of annual rate increases that have occurred since 2005. The Fee would fund new projects and rebates that reduce flooding, water pollution, and allow for the maintenance of existing storm water system infrastructure and continuation of programs. Palo Alto City Council approved the recommendations in August 2016.

Frequently Asked Questions

1. How would the proposed Storm Water Management Fee be approved?

ATTACHMENT 2

Review of Unfunded Mandates Contained in Santa Ana Regional Board Order No. R8-2010-0036

(Waste Discharge Requirements for the County of San Bernardino, San Bernardino County Flood Control District, and the Incorporated Cities of San Bernardino County within the Santa Ana Region)

Prepared by:
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Davis, CA 95618-4889

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DECLARATION OF KAREN ASHBY

I, Karen Ashby, hereby declare:

1. I am a Vice President at Larry Walker Associates, Inc., an environmental engineering and consulting firm that specializes in, amongst other matters, water quality management. In my capacity as a Vice President I serve as a Project Manager for stormwater and watershed management projects.

2. I have a Bachelor of Science (BS) from the University of California at Irvine and am certified as a Professional in Storm Water Quality (CPSWQ) from Envirocert International, Inc. I have been an active member of the California Stormwater Quality Association (CASQA) since 1999 as well as a Board of Director, Vice Chair and Chair of the Association. I have over 25 years of experience in stormwater quality matters, including but not limited to providing regulatory assistance; facilitating stakeholder groups; developing and implementing stormwater management programs and Total Maximum Daily Loads (TMDLs); developing and conducting training modules; evaluating and reporting on stormwater program effectiveness; and preparing various technical reports on stormwater management issues. Prior to joining Larry Walker Associates, I managed the area-wide municipal stormwater program for the County of Orange.

3. I have personal knowledge of the matters set forth herein and, if called to testify, could and would testify competently thereto.

4. I was requested to perform a survey of Phase I National Pollutant Discharge Elimination System (NPDES) municipal separate storm sewer systems (MS4) permits issued by the United States Environmental Protection Agency (EPA) and to review a Phase II NPDES MS4 permit for Joint Base Lewis-McChord (Lewis-McChord), a United States Military installation located in the State of Washington, also issued by EPA. (A Phase II MS4 permit regulates small MS4s not already covered by the Phase I stormwater program and includes, at a minimum, all small MS4s located outside of an urbanized area serving a jurisdiction with a population of at least 10,000 and a population density of at least 1,000 people/square mile.) I was further asked to review those permits to determine if they included the requirements that are the subject of the Test Claim

filed with the Commission on State Mandates by the County of San Bernardino and certain cities located within the County.

5. The Permit subject to the test claim is a Phase I, not a Phase II permit. EPA currently issues Phase I NPDES MS4 permits in four jurisdictions: Idaho, Massachusetts, New Mexico and Washington, D.C. I reviewed five currently effective Phase I permits issued to municipalities in those jurisdictions, Albuquerque, Boise/Garden City Area (Boise), Washington, D.C., Boston, and Worcester.

6. EPA issued the currently effective Albuquerque permit in 2014 and the currently effective Boise permit in 2012. EPA issued the currently effective Washington D.C. permit in 2011 and modified this permit in 2012. The Boston and Worcester permits are older, EPA having issued the Boston Permit in 1999 and the Worcester Permit in 1998. EPA issued the Phase II Lewis-McChord permit in 2014.

7. I reviewed these six EPA-issued permits to determine if they included the provisions that are the subject of the test claim filed by San Bernardino County and certain cities concerning provisions in Santa Ana Regional Board Order No. R8-2010-0036 (the "Permit"). Attached as Exhibit 1 is a chart that summarizes my review. The Albuquerque, Boise, Washington D.C., Boston, Worcester and Lewis-McChord permits are attached hereto as Exhibits 2, 3, 4, 5, 6 and 7 respectively.

8. **Local Implementation Plan Requirement.** Permit Section III.A.1.o requires the permittees to prepare a model Local Implementation Plan (LIP) setting forth the manner in which the permittees' municipal stormwater management plan would be implemented. Permit Sections III.A.2.a and B.1 then require each permittee to prepare a permittee-specific LIP based on the model LIP. Permit Sections VII through XI, XIII, XIV, and XVI, all contain prescriptive requirements that must be included in these LIPs. No EPA-issued permit requires the permittees to prepare a model local implementation plan in addition to their individual stormwater management plans as is required here. In addition, although the Boston, Albuquerque, Worcester, District of Columbia, and Boise permits require the development of a stormwater management

plan, they do not include the level of prescriptiveness as to what is required within the management plan that is in the Permit.

9. **Evaluation of Non-Stormwater Discharges.** Permit Section V.A sets forth a list of authorized non-stormwater discharges that need not be prohibited by the permittees. Permit Section V.A.16 imposes an obligation on the permittees to evaluate each of the authorized discharges to determine if any are a significant source of pollutants to the MS4, and to notify the executive officer if any are a significant source of pollutants. If a permittee determines that any are a source of pollutants, the permittee shall either prohibit that discharge from entering the MS4, authorize the discharge category but ensure that BMPs are implemented to reduce or eliminate the pollutants, or require the discharger to obtain a separate NPDES permit. Neither the Boise, District of Columbia, Boston, Worcester, nor Lewis-McChord permits contain this requirement.

10. **Incorporation of TMDLs**. Permit Section V.D incorporates requirements relating to the Middle Santa Ana River Watershed Bacteria Indicator TMDL and Big Bear Lake Nutrient TMDL for dry hydrological conditions. It further includes requirements relating to a pathogen investigation for Knickerbocker Creek and requirements with respect to the anticipated adoption of a Big Bear Lake Mercury TMDL. These incorporated requirements include addressing conditions that may have been caused by sources other than the permittees' MS4. No EPA-issued permit requires permittees to address conditions from sources other than permittee's MS4. The Boise, Boston, Worcester, and Lewis-McChord permits do not incorporate TMDL requirements. The Albuquerque permit requires the stormwater management plan to include controls targeting pollutants identified in the TMDLs, but limits those controls to discharges from the MS4. The District of Columbia permit requires the development of a consolidated TMDL implementation plan. Permit Section V.D indicates that the MSAR bacteria indicator TMDL urban waste load allocations may become the final numeric water quality-based effluent limits if the various tasks outlined within the Permit are not completed. No EPA-issued permit includes numeric effluent limits. Instead, permittees comply through implementation of best management practices (BMPs). For example, the Albuquerque permit requires development of a stormwater management program

designed to reduce the discharge of pollutants to the "maximum extent practicable", which shall incorporate BMPs consistent with the assumptions and requirements of adopted TMDLs. The District of Columbia permit similarly does not impose numeric limits, rather it provides that compliance with the performance standards and provisions of the permit constitute adequate progress towards compliance with the TMDL waste load allocations. The Boise permit does not contain numeric effluent limits or TMDLs. The Boston, Worcester, and Lewis-McChord permits only require a storm water program designed to reduce the discharge of pollutants to the maximum extent practicable. These permits also do not contain numeric effluent limits.

11. **Promulgation and Implementation of Ordinances to Address Bacteria Sources**. Permit Section VII.D requires permittees to adopt and implement ordinances that control known pathogen or bacterial sources if such sources are present within their jurisdiction. No EPA-issued permit contains this requirement. Although the District of Columbia permit includes a provision requiring the permittee to generally review and revise codes and regulations to facilitate the implementation of the standards required by the permit, there is no specific requirement that the permittee adopt an ordinance specifying controls for known pathogens or bacterial sources.

12. **Illicit Discharge Detection and Elimination Program**. Permit Section VIII requires the permittees to implement an Illicit Discharge Detection and Elimination Program. The Permit contains detailed requirements for this program, including field investigations, outfall surveys, indicator monitor, tracking of discharges to their sources, and linkage of the program to other urban watershed protection efforts. The EPA-issued permits contain Illicit Discharge Detection and Elimination Programs, but not as stringent or as detailed as that required by the Permit. For example, the Albuquerque, Boise, and District of Columbia permits do not include indicator tracking or linkage to other urban watershed protection efforts. The Boston and Worcester permits are even more limited, focusing only on sanitary sewer overflows, disposal of used motor vehicle fluids and hazardous waste, elimination of illicit connections and the prevention and containment of spills. The Lewis-McChord permit does not require linkage of the program to other watershed protection efforts.

13. **Septic System Inventory and Failure Reduction Program.** Permit Section IX.F requires permittees to create an inventory of all septic systems in their jurisdiction and establish a program to minimize the failure of these systems. No EPA-issued permit contains these requirements.

14. **Permittee Inspection Requirements.** Permit Section X requires the inspection of commercial, industrial and construction sites, including the creation of a database of such facilities, determination of compliance with appropriate BMPS, and the development of BMPs for commercial facilities. It also requires permittees to adopt a residential program designed to reduce discharges from residential facilities. Although some EPA-issued permits contain inspection programs, no EPA-issued permit contains requirements to develop an extensive inspection database, conduct verification and enforcement of state-issued permits, address and develop BMPs for the Permit's list of commercial facilities, including mobile businesses or to develop a residential inspection program.

15. **Enhanced New and Redevelopment Requirements.** Permit Section XI contains numerous requirements with respect to new development and significant redevelopment. These requirements include the development of watershed action plans, identification and development of specific retrofit studies, specific requirements for culverts and bridge crossings as well as design and post-development BMP guidance for road projects, and the tracking and inspection of post-construction BMPs. The Boston and Worcester permits do not contain any of these requirements. Whereas the Albuquerque, Boise, District of Columbia, and Lewis-McChord permits contain some similar provisions, those provisions are not as stringent and none of these permits contain all of the new development and significant redevelopment requirements set forth in the Permit. For example, none of these permits require the development of design and post-development BMP guidance for road projects. Neither the Albuquerque nor Boise permits require the development of specific retrofit studies, and neither the District of Columbia nor the Lewis-McChord permits require the permittees to address culverts and bridge crossings.

16. **Public Education and Outreach**. Permit Section XII.A requires permittees to annually review their public education and outreach efforts and to revise those efforts in order to meet needs identified in their annual reassessment. No EPA-issued permit contains this requirement.

17. **Permittee Facilities and Activities Requirements**. Permit Section XIII requires permittees 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, to annually evaluate information presented to field staff to determine if there is a need to revise permittee's activities, and to determine the need for revisions to maintenance procedures or schedules. Neither the Albuquerque, District of Columbia, Boston, Worcester nor Lewis-McChord permits contain these requirements. They do not contain requirements to inventory or inspect the range of facilities set forth under Permit Section XIII.A, nor do they require an annual evaluation and revision of cleanout frequencies or maintenance procedures. The Boise permit contains some requirements to inventory and inspect municipal facilities, but only as applied to storm drain infrastructure, street road maintenance and permittee-owned facilities. It does not require an annual evaluation and revision of cleanout frequencies or maintenance procedures and otherwise is not as extensive or as stringent as Permit Section XIII.

18. **Training.** Permit Section XVI.A requires permittees, within 24 months, to update their training programs to incorporate new or revised program elements relating to the development of the Low Impact Development program, the revised Water Quality Management Program and the Local Implementation Plans. Permit Section XVI.A.1 requires the permittees, within 36 months, to update their training program again, and Permit Section XVI.A.2 requires permittees, within 48 months, to have a completely revised training program. Permit Section XVI.B, D and E sets forth specific topics that must be included in the training programs. Permit Section XVI.E and F require the principal permittee to train not only its own employees but also interested consultants and municipal contractors. No EPA-issued permit requires training on all

the topics required by Permit Sections XVI.B, D and E and no EPA-issued permit contains the schedule called for by the Permit.

19. **Reporting of Non-Compliant Facilities.** Permit Section XVII.D requires permittees to report to the Regional Board (within 14 calendar days) the names of facilities operating without a required Industrial or Construction General Stormwater Permit or a required Section 401 certification. The Albuquerque, Boston and Worcester permits do not contain this requirement. The Boise, District of Columbia and Lewis-McChord permits require permittees only to address construction sites, not industrial sites or sites requiring a Section 401 certification. These three permits also do not require the municipality to deem the sites to be in significant non-compliance.

20. **Program Effectiveness Assessments.** Permit Section XVIII.B requires permittees annually to evaluate their Municipal Stormwater Management Plan to determine the need for revisions. Permit Section XVIII.B.3 requires an evaluation of the plan's effectiveness on an area-wide and jurisdictional basis, and include water quality outcomes and municipal enforcement activities. No EPA-issued permit requires an evaluation on an area-wide basis.

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

Executed this 13th day of March, 2018 at Davis, California.

Karen Ashby

Karen Ashby

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EXHIBIT 1

Summary of USEPA Permit Requirements

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City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

Item # in Narrative Statement	Santa Ana Region Permit Mandated Activity	Does this EPA-Issued Permit have the Same Requirement as the Santa Ana Region Permit Issued to the San Bernardino Claimants?	Page Number	Description
VI.A	**Local Implementation Plan Requirement** Provisions of Sections III, VII, VIII, IX, X, XI, XIII, XIV, XVI - Requirement to develop an areawide "model" local implementation plan (LIP) - Requirement to develop a permittee-specific LIP based on the "model" LIP	No	Pages 10, 12, 23, 24, 26, 41 and 49 of Part I	**- No model program document (LIP) required.** **- Permittees are required to implement and update the existing SWMP, however the provisions are not as prescriptive.** **- Joint efforts are allowed, but do not require duplication within the SWMPs.**
VI. B	**Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Are Significant Sources of Pollutants to the MS4.** Provisions of Section V - Requirement to evaluate specified categories of discharges that were authorized for discharge into the MS4 to determine if such discharges are a significant source of pollutants to the MS4.	Similar Provisions	Page 7 of of Part I	**- Permittee must document why the categories of discharges are not expected to be significant contributors of pollutants to the MS4.**
VI. C	**Incorporation of TMDLs** Provisions of Section V.D - Requirements for numeric water quality based effluent limits (WQBELs) - Requirements other entities or non-MS4 requirements (source or jurisdictions) - Watershed-based monitoring or planning	Permittees' SWMP shall include controls targeting pollutants identified in TMDLs; no requirement to address pollutants not coming from the MS4.	Pages 15-23 of Part I Page I of Part II Appendix B	**Permittee must develop a Stormwater Management Program designed to reduce the discharge of pollutants to the maximum extent practicable, to protect water quality and satisfy applicable surface water quality standards. Stormwater Management Plan shall incorporate best management practices consitent with the assumptions and requirements of adopted TMDLs (inlcuded within Appendix B of the Permit).** **- No numeric effluent limits** **- Pollutant of concern-based strategies and planning**
VI. D	**Promulgation and Implementation of Ordinances to Address Bacteria Sources** Provisions of Section VII.D - Requirement to promulgate and implement ordinances that would control known pathogen or bacterial sources such as animal wastes, if sources are present within their jurisdiction.	No	Pages 16-17 and 23-24 of Part I	**- Permittees required to establish and maintain legal authority as it pertains to illicit discharges, spills, dumping or diposal of materials other than stormwater into the MS4.** **- Specific legal authorities/ordinances not required for sources of pathogens/bacteria indicators.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

VI. E	**Incorporation of IDDE Program to Enhance Illicit Connections/Illegal Discharges Requirements** Provisions of Sections VIII Monitoring and Reporting Program Section IV.B.3 - Requirement to develop a "pro-active" illicit connections/illicit discharges (IC/ID) program using an EPA manual or equivalent program - Program required to specify a procedure to conduct field investigations, outfall reconnaissance surveys, indicator monitoring, and tracking of discharges to their sources, and linked to urban watershed protection efforts	Contains Illicit Discharge Detection and Elimination Program, but not as stringent	Pages 17, 19-20, 39-43 of Part I Table 6 on Page 42-43 Pages 1 and 4 of Part III	**- Permittees required to detect and remove illicit discharges and develop and implement a program to prevent, contain, and respond to spills that may discharge into or through the MS4.** **- Some targeted investigations, monitoring and linkage to other programs required.**
VI. F	**Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program** Section IX.F - Requirement to inventory septic systems and establish a program to ensure that failure rates were minimized pending adoption of septic system regulations.	No	Pages 16 and 45 of Part I	**No requirement for septic system inventory or establishment of a program for failure rates.**
VI. G	**Permittee Inspection Requirements** Provisions of Section X - municipal inspection program database - permit verification - development of a new program related to residential areas, fact sheets, CIAs, HOAs - development of BMPs and BMP fact sheets for new categories of commerical facilities, including mobile businesses	No	-	**No specific requirements to develop robust inspection database, incorporate state permit verification/enforcement, address a range of commercial facilities, develop a mobile business program, or develop a residential program.**
VI. H	**Enhanced New Development Requirements** Provisions of Section XI - A.7 - Culverts and bridge crossings	Similar provisions, not as stringent	Page 31 of Part I	**No specific requirements for culverts**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

	Provisions of Section XI - A.9 and B - Develop a Watershed Action Plan (WAP) - Integration of water quality, stream protection, stormwater management, water conservation, flood protection, land use - Develop a Hyrdomodification Plan (HMP) (management and monitoring)	Similar provisions, not as stringent	Pages 31-32 of Part I	**-Permittees may but not required to participate in locally-based watershed planning efforts with a focus on new development and redevelopment** **- Encouragement of hydromodification concepts**
	Provisions of Section XI - B.3.a.ix - Identify opportunities to retrofit and develop recommendations for specific retrofit studies	No	Page 31 and 36 of Part I	**-Similar retrofit evaluation requirements for MS4-owned property and infrastructure.** **- No requirement for specific retrofit study recommendations.**
	Provisions of Section XI - F - Develop design and post-development BMP guidance for road projects	No	-	**Separate new development/redevelopment guidance for roads, streets, highways not required**
	Provisions of Section XI - I, J, and K - Maintain a database to track O&M (and ownership) and conduct inspections of post-construction BMPs.	Similar provisions, not as stringent	Pages 28-29 of Part I	**Consideration of tracking and requirements for inspection of post construction BMPs, but not required.**
VI. I	**Public Education and Outreach** Section XII.A - Annually review the public education and outreach efforts and revise those efforts to adapt to needs identified in the annual reassessment.	No	Page 45 of Part I	**No requirement to annually revise the public education and outreach efforts to address the most critical behaviors.**
VI. J	**Permittee Facilities and Activities Requirements** Provisions of Section XIII - inventory the MS4 fixed facilities, field operations and drainage facilities (list of 15 types of facilities) - inspect those facilities on an annual basis - annually evaluate the inspection and cleanout frequency of the drainage facilities, including catch basins and need to revise - annually evaluate information provided to field staff and need to revise - determine need for revisions to maintenance procedures or schedules	No	Pages 35-36 of Part I	- **No requirement to inventory or inspect a range of municipal facilities and infrastructure.** **- No requirement to annually evaluate and revise inspection/clean out frequencies or maintenance procedures or schedules.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

VI. K	**Training Requirements** Section XVI - Requirement to conduct formal training of employees responsible for implementing the Permit. - Requirement for the Principal Permittee to conduct additional training.	No	Pages 25, 29, and 35 of Part I	**Includes basic training requirements, however it does not include prescriptive detail or requirements regarding the training approach, strategy or focus.**
VI. L	**Reporting of Non-Compliance Facilities** Section XVII.D - Require Permittees to deem facilities operating without a permit to be in significant non-compliance and reported to the RWQCB (based on a specified set of requirements).	No	-	**No requirement to deem a facility/site out of compliance if they have not obtained coverage under other NPDES permits.**
VI. M	**Program Management Assessment/MSWMP Review** Section XVIII.B.3 - New requirement to assess program effectiveness in the MSWMP on an area-wide and jurisdictional basis, using specified guidance.	No	Pages 16-17, and 49 of Part I Page I of Part III	**- No requirements to assess the program effectivenss on an area-wide basis.** **- No requirements to use specified guidance.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boise/Garden City, ID	Medium MS4	IDS-027561	2012	Boise MS4

Item # in Narrative Statement	Santa Ana Region Permit Mandated Activity	Does this EPA-Issued Permit have the Same Requirement as the Santa Ana Region Permit Issued to the San Bernardino Claimants?	Page Number	Description
VI.A	**Local Implementation Plan Requirement** Provisions of Sections III, VII, VIII, IX, X, XI, XIII, XIV, XVI - Requirement to develop an areawide "model" local implementation plan (LIP) - Requirement to develop a permittee-specific LIP based on the "model" LIP	No	Pages 6-8, 33, and 39 of 66	**- No model program document (LIP) required.** - **Permittees are required to implement and update the existing SWMP.**
VI. B	**Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Are Significant Sources of Pollutants to the MS4.** Provisions of Section V - Requirement to evaluate specified categories of discharges that were authorized for discharge into the MS4 to determine if such discharges are a significant source of pollutants to the MS4.	No	Page 4 of 66	**No requirement to evaluate the authorized non-stormwater discharges.**
VI. C	**Incorporation of TMDLs** Provisions of Section V.D - Requirements for numeric water quality based effluent limits (WQBELs) - Requirements other entities or non-MS4 requirements (source or jurisdictions) - Watershed-based monitoring or planning	No	Pages 7-8, and 33 of 66	**- Requirements to prepare two subwatershed plans.** **- No numeric effluent limits.** **- No TMDLs - 303(d) consituents are treated as "pollutants of concern".**
VI. D	**Promulgation and Implementation of Ordinances to Address Bacteria Sources** Provisions of Section VII.D - Requirement to promulgate and implement ordinances that would control known pathogen or bacterial sources such as animal wastes, if sources are present within their jurisdiction.	No	Page 20 of 66	**- Permittees required to establish and maintain legal authority as it pertains to illicit discharges, spills, dumping or diposal of materials other than stormwater into the MS4.** **- Specific legal authorities/ordinances not required for sources of pathogens/bacteria indicators.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boise/Garden City, ID	Medium MS4	IDS-027561	2012	Boise MS4

VI. E	**Incorporation of IDDE Program to Enhance Illicit Connections/Illegal Discharges Requirements** Provisions of Sections VIII Monitoring and Reporting Program Section IV.B.3 - Requirement to develop a "pro-active" illicit connections/illicit discharges (IC/ID) program using an EPA manual or equivalent program - Program required to specify a procedure to conduct field investigations, outfall reconnaissance surveys, indicator monitoring, and tracking of discharges to their sources, and linked to urban watershed protection efforts	Contains Illicit Discharge Detection and Elimination Program, but not as stringent	Pages 26-29 of 66	**- Permittees required to detect and remove illicit discharges and develop and implement a program to prevent, contain, and respond to spills that may discharge into or through the MS4.** **- Some targeted investigations and monitoring required.**
VI. F	**Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program** Section IX.F - Requirement to inventory septic systems and establish a program to ensure that failure rates were minimized pending adoption of septic system regulations.	No	Page 29 of 66	**No requirement for septic system inventory or establishment of a program for failure rates.**
VI. G	**Permittee Inspection Requirements** Provisions of Section X - municipal inspection program database - permit verification - development of a new program related to residential areas, fact sheets, CIAs, HOAs - development of BMPs and BMP fact sheets for new categories of commerical facilities, including mobile businesses	No	Pages 9-10, 20-21, and 30 of 66	**No specific requirements to develop robust inspection database, incorporate state permit verification/enforcement, address a range of commercial facilities, develop a mobile business program, or develop a residential program.**
VI. H	**Enhanced New Development Requirements** Provisions of Section XI - A.7 - Culverts and bridge crossings	Similar provisions, not as stringent	Pages 8 and 64	**No specific requirements for culverts**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boise/Garden City, ID	Medium MS4	IDS-027561	2012	Boise MS4

	Provisions of Section XI - A.9 and B - Develop a Watershed Action Plan (WAP) - Integration of water quality, stream protection, stormwater management, water conservation, flood protection, land use - Develop a Hyrdomodification Plan (HMP) (management and monitoring)	Similar provisions, not as stringent	Pages 7-8 of 66	**- Requirement to complete only two subwatershed planning documents** **- Encouragement of hydromodification concepts**
	Provisions of Section XI - B.3.a.ix - Identify opportunities to retrofit and develop recommendations for specific retrofit studies	No	Page 25 of 66	**- Similar retrofit evaluation requirements for existing stormwater control devices.** **- No requirement for specific retrofit study recommendations.**
	Provisions of Section XI - F - Develop design and post-development BMP guidance for road projects	No	Pages 17 of 66	**Although the program applies to roads and streets, separate new development/redevelopment guidance for roads, streets, highways not required**
	Provisions of Section XI - I, J, and K - Maintain a database to track O&M (and ownership) and conduct inspections of post-construction BMPs.	Similar provisions	Pages 18-19 of 66	**O&M, inspection, and enforcement of permanent storm water management controls required.**
VI. I	**Public Education and Outreach** Section XII.A - Annually review the public education and outreach efforts and revise those efforts to adapt to needs identified in the annual reassessment.	No	Pages 31-32 of 66	**No requirement to annually review and revise the public education and outreach efforts to address the most critical behaviors.**
VI. J	**Permittee Facilities and Activities Requirements** Provisions of Section XIII - inventory the MS4 fixed facilities, field operations and drainage facilities (list of 15 types of facilities) - inspect those facilities on an annual basis - annually evaluate the inspection and cleanout frequency of the drainage facilities, including catch basins and need to revise - annually evaluate information provided to field staff and need to revise - determine need for revisions to maintenance procedures or schedules	Similar provisions, not as stringent	Pages 21-23 of 66	**The requirements to inventory or inspect municipal facilities and infrastructure and annually evaluate and revise inspection/clean out frequencies or maintenance procedures or schedules are only applied to storm drain infrastructure, street and road maintenance, and Permittee-owned facilities.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boise/Garden City, ID	Medium MS4	IDS-027561	2012	Boise MS4

VI. K	**Training Requirements** Section XVI - Requirement to conduct formal training of employees responsible for implementing the Permit. - Requirement for the Principal Permittee to conduct additional training.	Similar provisions, not as stringent	Pages 12-13, 19-20, 26, 29, 32 of 66	**Includes similar training requirements, however it does not include prescriptive detail regarding core competencies, completion certificates, the full range of topics to be addressed.**
VI. L	**Reporting of Non-Compliance Facilities** Section XVII.D - Require Permittees to deem facilities operating without a permit to be in significant non-compliance and reported to the RWQCB (based on a specified set of requirements).	No	Pages 9-12 of 66	**No requirement to deem a facility/site out of compliance if they have not obtained coverage under other NPDES permits.**
VI. M	**Program Management Assessment/MSWMP Review** Section XVIII.B.3 - New requirement to assess program effectiveness in the MSWMP on an area-wide and jurisdictional basis, using specified guidance.	No	Page 40 of 66	**- No requirements to assess the program effectivenss on an area-wide basis.** **- No requirements to use specified guidance.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
District of Columbia	MS4-Phase I	DC0000221, Modification #1	2011 (modified in 2012)	DC MS4

Item # in Narrative Statement	Santa Ana Region Permit Mandated Activity	Does this EPA-Issued Permit have the Same Requirement as the Santa Ana Region Permit Issued to the San Bernardino Claimants?	Page Number	Description
VI.A	**Local Implementation Plan Requirement** Provisions of Sections III, VII, VIII, IX, X, XI, XIII, XIV, XVI - Requirement to develop an areawide "model" local implementation plan (LIP) - Requirement to develop a permittee-specific LIP based on the "model" LIP	No	Pages 8-9 Fact Sheet Page 8	**- Mandated activity is not as applicable since permit is issued to one Permittee. No model program document (LIP) required.** **- Permittee is required to implement and update the SWMP, however the provisions are not prescriptive.**
VI. B	**Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Are Significant Sources of Pollutants to the MS4.** Provisions of Section V - Requirement to evaluate specified categories of discharges that were authorized for discharge into the MS4 to determine if such discharges are a significant source of pollutants to the MS4.	No	Page 5	**No requirement to evaluate the authorized non-stormwater discharges.**
VI. C	**Incorporation of TMDLs** Provisions of Section V.D - Requirements for numeric water quality based effluent limits (WQBELs) - Requirements other entities or non-MS4 requirements (source or jurisdictions) - Watershed-based monitoring or planning	Requires development of consolidated TMDL implementation plan	Pages 6, 29-30 Fact Sheet Page 14	**- Permit requires consolidated implementation plan for identified TMDLs.** **- Compliance with the performance standards and provisions of the permit constitute adequate progress towards compliance with TMDL waste load allocations (no numeric limitations).**
VI. D	**Promulgation and Implementation of Ordinances to Address Bacteria Sources** Provisions of Section VII.D - Requirement to promulgate and implement ordinances that would control known pathogen or bacterial sources such as animal wastes, if sources are present within their jurisdiction.	No	Pages 26 and 32	**- Permittees required to establish and maintain legal authority as it pertains to illicit discharges, spills, dumping or diposal of materials other than stormwater into the MS4.** **- Specific legal authorities/ordinances not required for sources of pathogens/bacteria indicators.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
District of Columbia	MS4-Phase I	DC0000221, Modification #1	2011 (modified in 2012)	DC MS4

VI. E	**Incorporation of IDDE Program to Enhance Illicit Connections/Illegal Discharges Requirements** Provisions of Sections VIII Monitoring and Reporting Program Section IV.B.3 - Requirement to develop a "pro-active" illicit connections/illicit discharges (IC/ID) program using an EPA manual or equivalent program - Program required to specify a procedure to conduct field investigations, outfall reconnaissance surveys, indicator monitoring, and tracking of discharges to their sources, and linked to urban watershed protection efforts	Contains Illicit Discharge Detection and Elimination Program, but not as stringent	Pages 24-26, 36	**- Permittees required to detect and remove illicit discharges and develop and implement a program to prevent, contain, and respond to spills that may discharge into or through the MS4.** **- Some targeted investigations and monitoring required.**
VI. F	**Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program** Section IX.F - Requirement to inventory septic systems and establish a program to ensure that failure rates were minimized pending adoption of septic system regulations.	No	-	**No requirement for septic system inventory or establishment of a program for failure rates.**
VI. G	**Permittee Inspection Requirements** Provisions of Section X - municipal inspection program database - permit verification - development of a new program related to residential areas, fact sheets, CIAs, HOAs - development of BMPs and BMP fact sheets for new categories of commerical facilities, including mobile businesses	No	Page 22-25, and 28	**No specific requirements to develop robust inspection database, incorporate state permit verification/enforcement, address a range of commercial facilities, develop a mobile business program, or develop a residential program.**
VI. H	**Enhanced New Development Requirements** Provisions of Section XI - A.7 - Culverts and bridge crossings	No	-	-
	Provisions of Section XI - A.9 and B - Develop a Watershed Action Plan (WAP) - Integration of water quality, stream protection, stormwater management, water conservation, flood protection, land use - Develop a Hyrdomodification Plan (HMP) (management and monitoring)	Similar provisions, not as stringent	Page 11	**- Some watershed focus within the Permit, but no overarching requirement to develop a Watershed-based Plan** **- No hydromodification requirements**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
District of Columbia	MS4-Phase I	DC0000221, Modification #1	2011 (modified in 2012)	DC MS4

	Provisions of Section XI - B.3.a.ix - Identify opportunities to retrofit and develop recommendations for specific retrofit studies	Similar provisions	Pages 13 and 27	-**Requirement to develop a retrofit program for existing discharges** **- Requirement to evaluate the feasibility of retrofitting existing flood control devices**
	Provisions of Section XI - F - Develop design and post-development BMP guidance for road projects	No	Pages 12-13	**Green landscaping incentives program, however, separate new development/redevelopment guidance for roads, streets, highways not required**
	Provisions of Section XI - I, J, and K - Maintain a database to track O&M (and ownership) and conduct inspections of post-construction BMPs.	Similar provisions, not as stringent	Page 12	**Requires establishment of a formal process for site plan reviews and post-construction verification progress (including inspections)**
VI. I	**Public Education and Outreach** Section XII.A - Annually review the public education and outreach efforts and revise those efforts to adapt to needs identified in the annual reassessment.	No	Page 28	**No requirement to annually review and revise the public education and outreach efforts to address the most critical behaviors.**
VI. J	**Permittee Facilities and Activities Requirements** Provisions of Section XIII - inventory the MS4 fixed facilities, field operations and drainage facilities (list of 15 types of facilities) - inspect those facilities on an annual basis - annually evaluate the inspection and cleanout frequency of the drainage facilities, including catch basins and need to revise - annually evaluate information provided to field staff and need to revise - determine need for revisions to maintenance procedures or schedules	No	Pages 17-20	- **No requirement to inventory or inspect a range of municipal facilities and infrastructure.** **- No requirement to annually evaluate and revise inspection/clean out frequencies or maintenance procedures or schedules.**
VI. K	**Training Requirements** Section XVI - Requirement to conduct formal training of employees responsible for implementing the Permit. - Requirement for the Principal Permittee to conduct additional training.	No	Pages 15-16, 21-22, and 26	**Includes similar training requirements, however it does not include prescriptive detail or requirements regarding the training approach, strategy or focus.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
District of Columbia	MS4-Phase I	DC0000221, Modification #1	2011 (modified in 2012)	DC MS4

VI. L	**Reporting of Non-Compliance Facilities** Section XVII.D - Require Permittees to deem facilities operating without a permit to be in significant non-compliance and reported to the RWQCB (based on a specified set of requirements).	No	Page 24	**No requirement to deem a facility/site out of compliance if they have not obtained coverage under other NPDES permits.**
VI. M	**Program Management Assessment/MSWMP Review** Section XVIII.B.3 - New requirement to assess program effectiveness in the MSWMP on an area-wide and jurisdictional basis, using specified guidance.	No	Pages 40 and 42	**- No requirements to assess the program effectivenss on an area-wide basis.** **- No requirements to use specified guidance.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boston, MA	MS4-Phase I	MAS010001	1999* [Still valid]	Boston MS4

* EPA currently developing a permit to replace the older one.

Item # in Narrative Statement	Santa Ana Region Permit Mandated Activity	Does this EPA-Issued Permit have the Same Requirement as the Santa Ana Region Permit Issued to the San Bernardino Claimants?	Page Number	Description
VI.A	**Local Implementation Plan Requirement** Provisions of Sections III, VII, VIII, IX, X, XI, XIII, XIV, XVI - Requirement to develop an areawide "model" local implementation plan (LIP) - Requirement to develop a permittee-specific LIP based on the "model" LIP	No	Pages 3, 4, 5, 11, and 12 of 20	**- Mandated activity is not as applicable since permit is issued to one Permittee. No model program document (LIP) required.** **- Permittee is required to implement and update the SWMP, however the provisions are not prescriptive.** **- Joint efforts are allowed, but do not require duplication within the SWMPs.**
VI. B	**Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Are Significant Sources of Pollutants to the MS4.** Provisions of Section V - Requirement to evaluate specified categories of discharges that were authorized for discharge into the MS4 to determine if such discharges are a significant source of pollutants to the MS4.	No	Page 6-7 of 20	**No requirement to evaluate the authorized non-stormwater discharges.**
VI. C	**Incorporation of TMDLs** Provisions of Section V.D - Requirements for numeric water quality based effluent limits (WQBELs) - Requirements other entities or non-MS4 requirements (source or jurisdictions) - Watershed-based monitoring or planning	No	Page 13 of 20 Page 2, 5 of the Fact Sheet	-**Permittee required to develop a storm water program designed to reduce the discharge of pollutants to the maximum extent practicable.** **- Not required to address TMDLs.** **- No watershed-based plans required.** **- No numeric effluent limits.**
VI. D	**Promulgation and Implementation of Ordinances to Address Bacteria Sources** Provisions of Section VII.D - Requirement to promulgate and implement ordinances that would control known pathogen or bacterial sources such as animal wastes, if sources are present within their jurisdiction.	No	Pages 7, 9, and 10 of 20	**- Permittees required to establish and maintain legal authority as it pertains to illicit discharges, spills, dumping or diposal of materials other than stormwater into the MS4.** **- Specific legal authorities/ordinances not required for sources of pathogens/bacteria indicators.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boston, MA	MS4-Phase I	MAS010001	1999* [Still valid]	Boston MS4

* EPA currently developing a permit to replace the older one.

VI. E	**Incorporation of IDDE Program to Enhance Illicit Connections/Illegal Discharges Requirements** Provisions of Sections VIII Monitoring and Reporting Program Section IV.B.3 - Requirement to develop a "pro-active" illicit connections/illicit discharges (IC/ID) program using an EPA manual or equivalent program - Program required to specify a procedure to conduct field investigations, outfall reconnaissance surveys, indicator monitoring, and tracking of discharges to their sources, and linked to urban watershed protection efforts	No	Pages 6-8 of 20 Attachment C Page 2	**- Permittees required to detect and remove illicit discharges and develop and implement a program to prevent, contain, and respond to spills that may discharge into or through the MS4.** **- Focused, systematic investigations, tracking, surveys, etc. and linking the program to watershed protection efforts and monitoring is not required.**
VI. F	**Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program** Section IX.F - Requirement to inventory septic systems and establish a program to ensure that failure rates were minimized pending adoption of septic system regulations.	No	-	**No requirement for septic system inventory or establishment of a program for failure rates.**
VI. G	**Permittee Inspection Requirements** Provisions of Section X - municipal inspection program database - permit verification - development of a new program related to residential areas, fact sheets, CIAs, HOAs - development of BMPs and BMP fact sheets for new categories of commerical facilities, including mobile businesses	No	-	**No specific requirements to develop robust inspection database, incorporate state permit verification/enforcement, address a range of commercial facilities, develop a mobile business program, or develop a residential program.**
VI. H	**Enhanced New Development Requirements** Provisions of Section XI - A.7 - Culverts and bridge crossings	No	-	-
	Provisions of Section XI - A.9 and B - Develop a Watershed Action Plan (WAP) - Integration of water quality, stream protection, stormwater management, water conservation, flood protection, land use - Develop a Hyrdomodification Plan (HMP) (management and monitoring)	No	-	**Watershed-based plans and hydromodification plans are not required.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boston, MA	MS4-Phase I	MAS010001	1999* [Still valid]	Boston MS4

* EPA currently developing a permit to replace the older one.

	Provisions of Section XI - B.3.a.ix - Identify opportunities to retrofit and develop recommendations for specific retrofit studies	No	-	**No requirement for retrofit evaluation or study recommendations.**
	Provisions of Section XI - F - Develop design and post-development BMP guidance for road projects	No	Page 5 of 20 Attachment C	**Separate new development/redevelopment guidance for roads, streets, highways not required**
	Provisions of Section XI - I, J, and K - Maintain a database to track O&M (and ownership) and conduct inspections of post-construction BMPs.	No	-	**-**
VI. I	**Public Education and Outreach** Section XII.A - Annually review the public education and outreach efforts and revise those efforts to adapt to needs identified in the annual reassessment.	No	-	**No requirement to annually review and revise the public education and outreach efforts to address the most critical behaviors.**
VI. J	**Permittee Facilities and Activities Requirements** Provisions of Section XIII - inventory the MS4 fixed facilities, field operations and drainage facilities (list of 15 types of facilities) - inspect those facilities on an annual basis - annually evaluate the inspection and cleanout frequency of the drainage facilities, including catch basins and need to revise - annually evaluate information provided to field staff and need to revise - determine need for revisions to maintenance procedures or schedules	No	Pages 5-6 of 20	- **No requirement to inventory or inspect a range of municipal facilities and infrastructure.** **- No requirement to annually evaluate and revise inspection/clean out frequencies or maintenance procedures or schedules.**
VI. K	**Training Requirements** Section XVI - Requirement to conduct formal training of employees responsible for implementing the Permit. - Requirement for the Principal Permittee to conduct additional training.	No	Page 9 of 20	**Includes basic training requirements, however it does not include prescriptive detail or requirements regarding the training approach, strategy or focus.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boston, MA	MS4-Phase I	MAS010001	1999* [Still valid]	Boston MS4

* EPA currently developing a permit to replace the older one.

VI. L	**Reporting of Non-Compliance Facilities** Section XVII.D - Require Permittees to deem facilities operating without a permit to be in significant non-compliance and reported to the RWQCB (based on a specified set of requirements).	No	-	**No requirement to deem a facility/site out of compliance if they have not obtained coverage under other NPDES permits.**
VI. M	**Program Management Assessment/MSWMP Review** Section XVIII.B.3 - New requirement to assess program effectiveness in the MSWMP on an area-wide and jurisdictional basis, using specified guidance.	No	Pages 11 and 18 of 20 Fact Sheet Page 9	**- No requirements to assess the program effectivenss on an area-wide basis.** **- No requirements to use specified guidance.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4

* EPA currently developing a permit to replace the older one.

Item # in Narrative Statement	Santa Ana Region Permit Mandated Activity	Does this EPA-Issued Permit have the Same Requirement as the Santa Ana Region Permit Issued to the San Bernardino Claimants?	Page Number	Description
VI.A	**Local Implementation Plan Requirement** Provisions of Sections III, VII, VIII, IX, X, XI, XIII, XIV, XVI - Requirement to develop an areawide "model" local implementation plan (LIP) - Requirement to develop a permittee-specific LIP based on the "model" LIP	No	Pages 3, 5, and 13 of 21	**- Mandated activity is not as applicable since permit is issued to one Permittee. No model program document (LIP) required.** **- Permittee is required to implement and update the SWMP, however the provisions are not prescriptive.** **- Joint efforts are allowed, but do not require duplication within the SWMPs.**
VI. B	**Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Are Significant Sources of Pollutants to the MS4.** Provisions of Section V - Requirement to evaluate specified categories of discharges that were authorized for discharge into the MS4 to determine if such discharges are a significant source of pollutants to the MS4.	No	Page 8 of 21	**No requirement to evaluate the authorized non-stormwater discharges.**
VI. C	**Incorporation of TMDLs** Provisions of Section V.D - Requirements for numeric water quality based effluent limits (WQBELs) - Requirements other entities or non-MS4 requirements (source or jurisdictions) - Watershed-based monitoring or planning	No	Page 15 of 21	**-Permittee required to develop a storm water program designed to reduce the discharge of pollutants to the maximum extent practicable.** **- Not required to address TMDLs.** **- No watershed-based plans required.** **- No numeric effluent limits.**
VI. D	**Promulgation and Implementation of Ordinances to Address Bacteria Sources** Provisions of Section VII.D - Requirement to promulgate and implement ordinances that would control known pathogen or bacterial sources such as animal wastes, if sources are present within their jurisdiction.	No	Pages 9 and 11-12	**- Permittees required to establish and maintain legal authority as it pertains to illicit discharges, spills, dumping or diposal of materials other than stormwater into the MS4.** **- Specific legal authorities/ordinances not required for sources of pathogens/bacteria indicators.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4

* EPA currently developing a permit to replace the older one.

VI. E	**Incorporation of IDDE Program to Enhance Illicit Connections/Illegal Discharges Requirements** Provisions of Sections VIII Monitoring and Reporting Program Section IV.B.3 - Requirement to develop a "pro-active" illicit connections/illicit discharges (IC/ID) program using an EPA manual or equivalent program - Program required to specify a procedure to conduct field investigations, outfall reconnaissance surveys, indicator monitoring, and tracking of discharges to their sources, and linked to urban watershed protection efforts	No	Pages 8-9 and 18 of 21	**- Permittees required to detect and remove illicit discharges and develop and implement a program to prevent, contain, and respond to spills that may discharge into or through the MS4.** **- Focused, systematic investigations, tracking, surveys, etc. and linking the program to watershed protection efforts and monitoring is not required.**
VI. F	**Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program** Section IX.F - Requirement to inventory septic systems and establish a program to ensure that failure rates were minimized pending adoption of septic system regulations.	No	-	**No requirement for septic system inventory or establishment of a program for failure rates.**
VI. G	**Permittee Inspection Requirements** Provisions of Section X - municipal inspection program database - permit verification - development of a new program related to residential areas, fact sheets, CIAs, HOAs - development of BMPs and BMP fact sheets for new categories of commerical facilities, including mobile businesses	No	-	**No specific requirements to develop robust inspection database, incorporate state permit verification/enforcement, address a range of commercial facilities, develop a mobile business program, or develop a residential program.**
VI. H	**Enhanced New Development Requirements** Provisions of Section XI - A.7 - Culverts and bridge crossings	No	-	-
	Provisions of Section XI - A.9 and B - Develop a Watershed Action Plan (WAP) - Integration of water quality, stream protection, stormwater management, water conservation, flood protection, land use - Develop a Hyrdomodification Plan (HMP) (management and monitoring)	No	-	**Watershed-based plans and hydromodification plans are not required.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4

* EPA currently developing a permit to replace the older one.

	Provisions of Section XI - B.3.a.ix - Identify opportunities to retrofit and develop recommendations for specific retrofit studies	No	Page 7 of 21	**With the exception of flood control projects, no general requirement for retrofit evaluation or study recommendations.**
	Provisions of Section XI - F - Develop design and post-development BMP guidance for road projects	No	Page 7 of 21	**Separate new development/redevelopment guidance for roads, streets, highways not required**
	Provisions of Section XI - I, J, and K - Maintain a database to track O&M (and ownership) and conduct inspections of post-construction BMPs.	No	-	**-**
VI. I	**Public Education and Outreach** Section XII.A - Annually review the public education and outreach efforts and revise those efforts to adapt to needs identified in the annual reassessment.	No	-	**No requirement to annually review and revise the public education and outreach efforts to address the most critical behaviors.**
VI. J	**Permittee Facilities and Activities Requirements** Provisions of Section XIII - inventory the MS4 fixed facilities, field operations and drainage facilities (list of 15 types of facilities) - inspect those facilities on an annual basis - annually evaluate the inspection and cleanout frequency of the drainage facilities, including catch basins and need to revise - annually evaluate information provided to field staff and need to revise - determine need for revisions to maintenance procedures or schedules	No	Pages 6-7 of 21	- **No requirement to inventory or inspect a range of municipal facilities and infrastructure.** **- No requirement to annually evaluate and revise inspection/clean out frequencies or maintenance procedures or schedules.**
VI. K	**Training Requirements** Section XVI - Requirement to conduct formal training of employees responsible for implementing the Permit. - Requirement for the Principal Permittee to conduct additional training.	No	Page 11 of 21	**Includes basic training requirements, however it does not include prescriptive detail or requirements regarding the training approach, strategy or focus.**

		City - State	Permit Type	Permit Number	Year Issued	Internet Link
		Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4
		* EPA currently developing a permit to replace the older one.				
VI. L	**Reporting of Non-Compliance Facilities** Section XVII.D - Require Permittees to deem facilities operating without a permit to be in significant non-compliance and reported to the RWQCB (based on a specified set of requirements).	No	-	**No requirement to deem a facility/site out of compliance if they have not obtained coverage under other NPDES permits.**		
VI. M	**Program Management Assessment/MSWMP Review** Section XVIII.B.3 - New requirement to assess program effectiveness in the MSWMP on an area-wide and jurisdictional basis, using specified guidance.	No	Pages 13 and 19 of 21	**- No requirements to assess the program effectivenss on an area-wide basis.** **- No requirements to use specified guidance.**		

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Joint Base Lewis-McChord, Washington	MS4-Phase II	WAS-026638	2013	Base Permit

Item # in Narrative Statement	Santa Ana Region Permit Mandated Activity	Does this EPA-Issued Permit have the Same Requirement as the Santa Ana Region Permit Issued to the San Bernardino Claimants?	Page Number	Description
VI.A	**Local Implementation Plan Requirement** Provisions of Sections III, VII, VIII, IX, X, XI, XIII, XIV, XVI - Requirement to develop an areawide "model" local implementation plan (LIP) - Requirement to develop a permittee-specific LIP based on the "model" LIP	No model document (LIP) requirement. Requires development of SWMP that sets forth requirements of permit	Pages 6-7, 9, 15 and 20 of 69 Table III	**- Mandated activity is not as applicable since permit is issued to one Permittee. No model program document (LIP) required.** **- Permittee is required to implement and update the SWMP annually.** **- Functionally equivalent documents are allowed.** **- Joint efforts are allowed.**
VI. B	**Requirement to Evaluate Authorized Non-Stormwater Discharges to Determine if They Are Significant Sources of Pollutants to the MS4.** Provisions of Section V - Requirement to evaluate specified categories of discharges that were authorized for discharge into the MS4 to determine if such discharges are a significant source of pollutants to the MS4.	No	Page 4-5 and 11-12 of 69	**- No requirement to evaluate the authorized non-stormwater discharges.** **- Subset of discharges are conditionally allowable.**
VI. C	**Incorporation of TMDLs** Provisions of Section V.D - Requirements for numeric water quality based effluent limits (WQBELs) - Requirements other entities or non-MS4 requirements (source or jurisdictions) - Watershed-based monitoring or planning	No	Page 24 of 69	**- No numeric effluent limits.** **- No TMDLs .**
VI. D	**Promulgation and Implementation of Ordinances to Address Bacteria Sources** Provisions of Section VII.D - Requirement to promulgate and implement ordinances that would control known pathogen or bacterial sources such as animal wastes, if sources are present within their jurisdiction.	No	Page 11 of 69	**- Permittees required to establish and maintain legal authority as it pertains to illicit discharges, spills, dumping or diposal of materials other than stormwater into the MS4.** **- Specific legal authorities/ordinances not required for sources of pathogens/bacteria indicators.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Joint Base Lewis-McChord, Washington	MS4-Phase II	WAS-026638	2013	Base Permit

VI. E	**Incorporation of IDDE Program to Enhance Illicit Connections/Illegal Discharges Requirements** Provisions of Sections VIII Monitoring and Reporting Program Section IV.B.3 - Requirement to develop a "pro-active" illicit connections/illicit discharges (IC/ID) program using an EPA manual or equivalent program - Program required to specify a procedure to conduct field investigations, outfall reconnaissance surveys, indicator monitoring, and tracking of discharges to their sources, and linked to urban watershed protection efforts	Contains Illicit Discharge Detection and Elimination Program, but not as stringent	Pages 10-14 of 69 Table III Page 29 of 69	**- Permittees required to detect and remove illicit discharges and develop and implement a program to prevent, contain, and respond to spills that may discharge into or through the MS4.** **- Some targeted investigations and monitoring required.**
VI. F	**Creation of Septic System Inventory and Requirement to Establish Failure Reduction Program** Section IX.F - Requirement to inventory septic systems and establish a program to ensure that failure rates were minimized pending adoption of septic system regulations.	No	-	**No requirement for septic system inventory or establishment of a program for failure rates.**
VI. G	**Permittee Inspection Requirements** Provisions of Section X - municipal inspection program database - permit verification - development of a new program related to residential areas, fact sheets, CIAs, HOAs - development of BMPs and BMP fact sheets for new categories of commerical facilities, including mobile businesses	No	Pages 8 and 15-16 of 69	**No specific requirements to develop robust inspection database, incorporate state permit verification/enforcement, address a range of commercial facilities, develop a mobile business program, or develop a residential program.**
VI. H	**Enhanced New Development Requirements** Provisions of Section XI - A.7 - Culverts and bridge crossings	No	-	-
	Provisions of Section XI - A.9 and B - Develop a Watershed Action Plan (WAP) - Integration of water quality, stream protection, stormwater management, water conservation, flood protection, land use - Develop a Hyrdomodification Plan (HMP) (management and monitoring)	No	-	**Watershed-based plans and hydromodification plans are not required.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Joint Base Lewis-McChord, Washington	MS4-Phase II	WAS-026638	2013	Base Permit

	Provisions of Section XI - B.3.a.ix - Identify opportunities to retrofit and develop recommendations for specific retrofit studies	Similar provisions	Page 24 of 69	**- Requirement to develop a stormwater retrofit plan**
	Provisions of Section XI - F - Develop design and post-development BMP guidance for road projects	No	-	**Although the program applies to roads and streets, separate new development/redevelopment guidance for roads, streets, highways not required**
	Provisions of Section XI - I, J, and K - Maintain a database to track O&M (and ownership) and conduct inspections of post-construction BMPs.	Similar provisions	Pages 19-20 of 69	**O&M, inspection, and enforcement of permanent storm water management controls required.**
VI. I	**Public Education and Outreach** Section XII.A - Annually review the public education and outreach efforts and revise those efforts to adapt to needs identified in the annual reassessment.	No	Page 9 of 69	**No requirement to annually review and revise the public education and outreach efforts to address the most critical behaviors.**
VI. J	**Permittee Facilities and Activities Requirements** Provisions of Section XIII - inventory the MS4 fixed facilities, field operations and drainage facilities (list of 15 types of facilities) - inspect those facilities on an annual basis - annually evaluate the inspection and cleanout frequency of the drainage facilities, including catch basins and need to revise - annually evaluate information provided to field staff and need to revise - determine need for revisions to maintenance procedures or schedules	No	Pages 21-22 of 69	- **No requirement to inventory or inspect a broad range of municipal facilities and infrastructure.** **- No requirement to annually evaluate and revise inspection/clean out frequencies or maintenance procedures or schedules.**
VI. K	**Training Requirements** Section XVI - Requirement to conduct formal training of employees responsible for implementing the Permit. - Requirement for the Principal Permittee to conduct additional training.	No	Pages 14, 16, 20, and 23 of 69	**Includes basic training requirements, however it does not include prescriptive detail or requirements regarding the training approach, strategy or focus.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Joint Base Lewis-McChord, Washington	MS4-Phase II	WAS-026638	2013	Base Permit

VI. L	**Reporting of Non-Compliance Facilities** Section XVII.D - Require Permittees to deem facilities operating without a permit to be in significant non-compliance and reported to the RWQCB (based on a specified set of requirements).	No	Pages 14-15 of 69	**No requirement to deem a facility/site out of compliance if they have not obtained coverage under other NPDES permits.**
VI. M	**Program Management Assessment/MSWMP Review** Section XVIII.B.3 - New requirement to assess program effectiveness in the MSWMP on an area-wide and jurisdictional basis, using specified guidance.	No	Pages 32 and 38 of 69	**- No requirements to assess the program effectivenss on an area-wide basis.** **- No requirements to use specified guidance.**

EXHIBIT 2

Albuquerque, NM – Middle Rio Grande Watershed Based MS4 Permit

(NPDES General Permit No. NMR04A000)

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Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

NPDES General Permit No. NMR04A000

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Clean Water Act, as amended, (33 U.S.C. 1251 et. seq; the "Act"), except as provided in Part I.A.5 of this permit, operators of municipal separate storm sewer systems located in the area specified in Part I.A.1 are authorized to discharge pollutants to waters of the United States in accordance with the conditions and requirements set forth herein.

Only operators of municipal separate storm sewer systems in the general permit area who submit a Notice of Intent and a storm water management program document in accordance with Part I.A.6 of this permit are authorized to discharge storm water under this general permit.

This is a renewal NPDES permit issued for these portions of the small municipal separate storm sewer systems covered under the NPDES permit No NMR040000 and NMR04000I and the large municipal separate storm sewer systems covered under the NPDES permit No NMS000101.

This permit is issued on and shall become effective on the date of publication in the Federal Register. DEC 2 2 2014

This permit and the authorization to discharge shall expire at, midnight, December 19, 2019.

Signed by

William K. Honker, P.E.
Director
Water Quality Protection Division

Prepared by

Nelly Smith
Environmental Engineer
NPDES Permits and TMDLs Branch

MIDDLE RIO GRANDE WATERSHED BASED MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT

Table of Contents

PART I. INDIVIDUAL PERMIT CONDITIONS

A. DISCHARGES AUTHORIZED UNDER THIS PERMIT

1. **Permit Area.** This permit is available for MS4 operators within the Middle Rio Grande Sub-Watersheds described in Appendix A. This permit may authorize stormwater discharges to waters of the United States from MS4s within the Middle Rio Grande Watershed provided the MS4:

   a. Is located fully or partially within the corporate boundary of the City of Albuquerque;

   b. Is located fully or partially within the Albuquerque urbanized area as determined by the 2000 and 2010 Decennial Census. Maps of Census 2010 urbanized areas are available at: http://water.epa.gov/polwaste/npdes/stormwater/Urbanized-Area-Maps-for-NPDES-MS4-Phase-II-Stormwater-Permits.cfm;

   c. Is designated as a regulated MS4 pursuant to 40 CFR 122.32; or

   d. This permit may also authorize an operator of a MS4 covered by this permit for discharges from areas of a regulated small MS4 located outside an Urbanized Areas or areas designated by the Director provided the permittee complies with all permit conditions in all areas covered under the permit.

2. **Potentially Eligible MS4s.** MS4s located within the following jurisdictions and other areas, including any designated by the Director, are potentially eligible for authorization under this permit:

   - City of Albuquerque
   - AMAFCA (Albuquerque Metropolitan Arroyo Flood Control Authority)
   - UNM (University of New Mexico)
   - NMDOT (New Mexico Department of Transportation District 3)
   - Bernalillo County
   - Sandoval County
   - Village of Corrales
   - City of Rio Rancho
   - Los Ranchos de Albuquerque
   - KAFB (Kirtland Air Force Base)
   - Town of Bernalillo
   - EXPO (State Fairgrounds/Expo NM)
   - SSCAFCA (Southern Sandoval County Arroyo Flood Control Authority)
   - ESCAFCA (Eastern Sandoval County Arroyo Flood Control Authority)
   - Sandia Laboratories, Department of Energy (DOE)
   - Pueblo of Sandia
   - Pueblo of Isleta
   -Pueblo of Santa Ana

3. **Eligibility**. To be eligible for this permit, the operator of the MS4 must provide:

   a. Public Participation: Prior submitting the Notice of Intent (NOI), the operator of the MS4 must follow the local notice and comment to procedures at Part I.D.5.h.(i).

   b. National Historic Preservation Act (NHPA) Eligibility Provisions

   In order to be eligible for coverage under this permit, the applicant must be in compliance with the National Historic Preservation Act. Discharges may be authorized under this permit only if:

(i) Criterion A: storm water discharges, allowable non-storm water discharges, and discharge-related activities do not affect a property that is listed or is eligible for listing on the National Register of Historic Places as maintained by the Secretary of the Interior; or

(ii) Criterion B: the applicant has obtained and is in compliance with a written agreement with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) (or equivalent tribal authority) that outlines all measures the MS4 operator will undertake to mitigate or prevent adverse effect to the historic property.

Appendix C of this permit provides procedures and references to assist with determining permit eligibility concerning this provision. You must document and incorporate the results of your eligibility determination in your SWMP.

The permittee shall also comply with the requirements in Part IV.U.

4. **Authorized Non-Stormwater Discharges**. The following non-stormwater discharges need not be prohibited unless determined by the permittees, U.S. Environmental Protection Agency (EPA), or New Mexico Environment Department (NMED) to be significant contributors of pollutants to the municipal separate storm sewer system (MS4). Any such discharge that is identified as significant contributor pollutants to the MS4, or as causing or contributing to a water quality standards violation, must be addressed as an illicit discharge under the illicit discharge and improper disposal practices established pursuant to Part I.D.5.e of this permit. For all of the discharges listed below, not treated as illicit discharges, the permittee must document the reason these discharges are not expected to be significant contributors of pollutants to the MS4. This documentation may be based on either the nature of the discharge or any pollution prevention/treatment requirements placed on such discharges by the permittee.

- potable water sources, including routine water line flushing;
- lawn, landscape, and other irrigation waters provided all pesticides, herbicides and fertilizers have been applied in accordance with approved manufacturing labeling and any applicable permits for discharges associated with pesticide, herbicide and fertilizer application;
- diverted stream flows;
- rising ground waters;
- uncontaminated groundwater infiltration (as defined at 40 CFR §35.2005 (20));
- uncontaminated pumped groundwater;
- foundation and footing drains;
- air conditioning or compressor condensate;
- springs;
- water from crawl space pumps;
- individual residential car washing;
- flows from riparian habitats and wetlands;
- dechlorinated swimming pool discharges;
- street wash waters that do not contain detergents and where no un-remediated spills or leaks of toxic or hazardous materials have occurred;
- discharges or flows from fire fighting activities (does not include discharges from fire fighting training activities); and,
- other similar occasional incidental non-stormwater discharges (e.g. non-commercial or charity car washes, etc.)

5. **Limitations of Coverage**. This permit does not authorize:

a. Non-Storm Water: Discharges that are mixed with sources of non-storm water unless such non-storm water discharges are:

(i) In compliance with a separate NPDES permit; or

(ii) Exempt from permitting under the NPDES program; or

(iii) Determined not to be a substantial contributor of pollutants to waters of the United States. See Part I.A.4.

b. Industrial Storm Water: Storm water discharges associated with industrial activity as defined in 40 CFR §122.26(b)(14)(i)-(ix) and (xi).

c. Construction Storm Water: Storm water discharges associated with construction activity as defined in 40 CFR §122.26(b)(14)(x) or 40 CFR §122.26(b)(15).

d. Currently Permitted Discharges: Storm water discharges currently covered under another NPDES permit.

e. Discharges Compromising Water Quality: Discharges that EPA, prior to authorization under this permit, determines will cause, have the reasonable potential to cause, or contribute to an excursion above any applicable water quality standard. Where such a determination is made prior to authorization, EPA may notify you that an individual permit application is necessary in accordance with Part IV.M. However, EPA may authorize your coverage under this permit after you have included appropriate controls and implementation procedures in your SWMP designed to bring your discharge into compliance with water quality standards.

f. Discharges Inconsistent with a TMDL: You are not eligible for coverage under this permit for discharges of pollutants of concern to waters for which there is an applicable total maximum daily load (TMDL) established or approved by EPA unless you incorporate into your SWMP measures or controls that are consistent with the assumptions and requirements of such TMDL. To be eligible for coverage under this general permit, you must incorporate documentation into your SWMP supporting a determination of permit eligibility with regard to waters that have an EPA-established or approved TMDL. If a wasteload allocation has been established that would apply to your discharge, you must comply with the requirements established in Part I.C.2.b.(i). Where an EPA-approved or established TMDL has not specified a wasteload allocation applicable to municipal storm water discharges, but has not specifically excluded these discharges, adherence to a SWMP that meets the requirements in Part I.C.2.b.(ii) of this general permit will be presumed to be consistent with the requirements of the TMDL. If the EPA-approved or established TMDL specifically precludes such discharges, the operator is not eligible for coverage under this general permit.

6. **Authorization Under This General Permit**

a. Obtaining Permit Coverage.

(i) An MS4 operator seeking authorization to discharge under this general permit must submit electronically a complete notice of intent (NOI) to the e-mail address provided in Part I.B.3 (see suggested EPA R6 MS4 NOI format located in EPA website at http://epa.gov/region6/water/npdes/sw/ms4/index.htm), in accordance with the deadlines in Part I.B.1 of this permit. The NOI must include the information and attachments required by Parts I.B.2, Part I.A.3, Part I.D.5.h.(i), and I.A.5.f of this permit. By submitting a signed NOI, the applicant certifies that all eligibility criteria for permit coverage have been met. If EPA notifies a discharger (either directly, by public notice, or by making information available on the Internet) of other NOI options that become available at a later date, such as electronic submission of forms or information, the MS4 operator may take advantage of those options to satisfy the NOI submittal requirements.

(ii) If an operator changes or a new operator is added after an NOI has been submitted, the operator must submit a new or revised NOI to EPA.

(iii) An MS4 operator who submits a complete NOI and meets the eligibility requirements in Part I of this permit is authorized to discharge storm water from the MS4 under the terms and conditions of this general permit only upon written notification by the Director. After review of the NOI and any public comments on the NOI, EPA may condition permit coverage on correcting any deficiencies or on including a schedule to respond to any public comments. (See also Parts I.A.3 and Part I.D.5.h.(i).)

(iv) If EPA notifies the MS4 operator of deficiencies or inadequacies in any portion of the NOI (including the SWMP), the MS4 operator must correct the deficient or inadequate portions and submit a written statement to EPA certifying that appropriate changes have been made. The certification must be submitted within the time-frame specified by EPA and must specify how the NOI has been amended to address the identified concerns.

(v) The NOI must be signed and certified in accordance with Parts IV.H.1 and 4. Signature for the NOI, which effectively takes the place of an individual permit application, may not be delegated to a lower level under Part IV.H.2

b. Terminating Coverage.

(i) A permittee may terminate coverage under this general permit by submitting a notice of termination (NOT). Authorization to discharge terminates at midnight on the day the NOT is post-marked for delivery to EPA.

(ii) A permittee must submit an NOT to EPA within 30 days after the permittee:

(a) Ceases discharging storm water from the MS4,

(b) Ceases operations at the MS4, or

(c) Transfers ownership of or responsibility for the facility to another operator.

(iii) The NOT will consist of a letter to EPA and must include the following information:

(a) Name, mailing address, and location of the MS4 for which the notification is submitted;

(b) The name, address and telephone number of the operator addressed by the NOT;

(c) The NPDES permit number for the MS4;

(d) An indication of whether another operator has assumed responsibility for the MS4, the discharger has ceased operations at the MS4, or the storm water discharges have been eliminated; and

(e) The following certification:

I certify under penalty of law that all storm water discharges from the identified MS4 that are authorized by an NPDES general permit have been eliminated, or that I am no longer the operator of the MS4, or that I have ceased operations at the MS4. I understand that by submitting this Notice of Termination I am no longer authorized to discharge storm water under this general permit, and that discharging pollutants in storm water to waters of the United States is unlawful under the Clean Water Act where the discharge is not authorized by an NPDES permit. I also understand that the submission of this Notice of Termination does not release an operator from liability for any violations of this permit or the Clean Water Act.

(f) NOTs, signed in accordance with Part IV.H.1 of this permit, must be sent to the e-mail address in Part I.B.3. Electronic submittal of the NOT required in the permit using a compatible Integrated Compliance Information System (ICIS) format would be allowed if available.

B. NOTICE OF INTENT REQUIREMENTS

1. **Deadlines for Notification**.

a. Designations: Small MS4s automatically designated under 40 CFR 122.32(a)(1), large MS4s located within the corporate boundary of the COA including the COA and former co-permittees under the NPDES permit No

NMS000101, and MS4s designated under 40 CFR 122.26(a)(1)(v), 40 CFR 122.26(a)(9)(i)(C) or (D), or 40 CFR 122.32(a)(2) are required to submit individual NOIs by the dates listed in Table 1. Any MS4 designated as needing a permit after issuance of this permit will be given an individualized deadline for NOI submittal by the Director at the time of designation.

In lieu of creating duplicate program elements for each individual permittee, implementation of the SWMP, as required in Part I.D, may be achieved through participation with other permittees, public agencies, or private entities in cooperative efforts to satisfy the requirements of Part D. For these programs with cooperative elements, the permittee may submit individual NOIs as established in Table 1. See also "Permittees with Cooperative Elements in their SWMP " under Part.I.B.4 and "Shared Responsibilities and Cooperative Programs" under Part I.D.3.

Table 1 Deadlines to Submit NOI

Permittee Class Type	NOI Deadlines
Class A: MS4s within the Cooperate Boundary of the COA including former co-permittees under the NPDES permit No NMS000101	90 days from effective date of the permit or 180 days from effective date of the permit if participating in cooperative programs for one or more program elements.
Class B: MS4s designated under 40 CFR 122.32(a)(1). Based on 2000 Decennial Census Map	90 days from effective date of the permit or 180 days from effective date of the permit if participating in cooperative programs for one or more program elements.
Class C: MS4s designated under 40 CFR 122.26(a)(1)(v), 40 CFR 122.26(a)(9)(i)(C) or (D), or 40 CFR 122.32(a)(2) or MS4s newly designated under 122.32(a)(1) based on 2010 Decennial Census Map	180 days from effective date of the permit or notice of designation, unless the notice of designation grants a later date or; 180 days from effective date of the permit if participating in cooperative programs for one or more program elements.
Class D: MS4s within Indian Country Lands designed under 40 CFR 122.26(a)(1)(v), 122.26(a)(9)(i)(C) or (D), 122.32(a)(1), or 122.32(a)(2)	180 days from effective date of the permit or notice of designation, unless the notice of designation grants a later date or; 180 days from effective date of the permit if participating in cooperative programs for one or more program elements.

See Appendix A for list of potential permittees in the Middle Rio Grande Watershed

b. New Operators. For new operators of all or a part of an already permitted MS4 (due to change on operator or expansion of the MS4) who will take over implementation of the existing SWMP covering those areas, the NOI must be submitted 30 days prior to taking over operational control of the MS4. Existing permittees who are expanding coverage of their MS4 area (e.g., city annexes part of unincorporated county MS4) are not required to submit a new NOI, but must comply with Part I.D.6.d.

c. Submitting a Late NOI. MS4s not able to meet the NOI deadline in Table I and Part I.B.1.b due to delays in determining eligibility should notify EPA of the circumstance and progress to date at the address in Part I.B.3 and then proceed with a late NOI. MS4 operators are not prohibited from submitting an NOI after the dates provided in Table 1 and Part I.B.1.b. If a late NOI is submitted, the authorization is only for discharges that occur after permit coverage is effective. The permitting authority reserves the right to take appropriate enforcement actions for any unpermitted discharges.

d. End of Administrative Continued Coverage under Previous Permit. Administrative continuance is triggered by a timely reapplication. Discharges submitting an NOI for coverage under this permit are considered to have met

the timely reapplication requirement if NOI is submitted by the deadlines included in Table 1 of Part I.B.1. For MS4s previously covered under either NMS000101 or NMR040000, continued coverage under those permits ends: a) the day after the applicable deadline for submittal of an NOI if a complete NOI has not been submitted or b) upon notice of authorization under this permit if a complete and timely NOI is submitted.

2. **Contents of Notice of Intent**. An MS4 operator eligible for coverage under this general permit must submit an NOI to discharge under this general permit. The NOI will consist of a letter to EPA containing the following information (see suggested EPA R6 MS4 NOI Format located in EPA website at http://www.epa.gov/region6/water/npdes/sw/ms4/index.htm) and must be signed in accordance with Part IV.H of this permit:

   a. The legal name of the MS4 operator and the name of the urbanized area and core municipality (or Indian reservation/pueblo) in which the operator's MS4 is located;

   b. The full facility mailing address and telephone number;

   c. The name and phone number of the person or persons responsible for overall coordination of the SWMP;

   d. An attached location map showing the boundaries of the MS4 under the applicant's jurisdiction. The map must include streets or other demarcations so that the exact boundaries can be located;

   e. The area of land served by the applicant's MS4 (in square miles);

   f. The latitude and longitude of the approximate center of the MS4;

   g. The name(s) of the waters of the United States that receive discharges from the system.

   h. If the applicant is participating in a cooperative program element or is relying on another entity to satisfy one or more permit obligations (see Part I.D.3), identify the entity(ies) and the element(s) the entity(ies) will be implementing;

   i. Information on each of the storm water minimum control measures in Part I.D.5 of this permit and how the SWMP will reduce pollutants in discharges to the Maximum Extent Practicable. For each minimum control measure, include the following:

      (i) Description of the best management practices (BMPs) that will be implemented;

      (ii) Measurable goals for each BMP; and

      (iii) Time frames (i.e., month and year) for implementing each BMP;

   j. Based on the requirements of Part I.A.3.b describe how the eligibility criteria for historic properties have been met;

   k. Indicate whether or not the MS4 discharges to a receiving water for which EPA has approved or developed a TMDL. If so, describe how the eligibility requirements of Part I.A.5.f and Part I.C.2 have been met.

      Note: If an individual permittee or a group of permittees seeks an alternative sub-measureable goal for TMDL controls under Part I.C.2.b.(i).(c).B, the permittee or a group of permittees must submit a preliminary proposal with the NOI. This proposal shall include, but is not limited to, the elements included in Appendix B under Section B.2.

   l. Signature and certification by an appropriate official (see Part IV.H). The NOI must include the certification statement from Part IV.H.4.

3. **Where to Submit.** The MS4 operator must submit the signed NOI to EPA via e-mail at R6_MS4Permits@epa.gov (note: there is an underscore between R6 and MS4) and NMED to the address provided in Part III.D.4. See also Part III.D.4 to determine if a copy must be provided to a Tribal agency.

   The following MS4 operators: AMAFCA, Sandoval County, Village of Corrales, City of Rio Rancho, Town of Bernalillo, SSCAFCA, and ESCAFCA must submit the signed NOI to the Pueblo of Sandia to the address provided in Part III.D.4.

   Note: See suggested EPA R6 MS4 NOI Format located in EPA website at http://www.epa.gov/region6/water/npdes/sw/ms4/index.htm. A complete copy of the signed NOI should be maintained on site. Electronic submittal of the documents required in the permit using a compatible Integrated Compliance Information System (ICIS) format would be allowed if available.

4. **Permittees with Cooperative Elements in their SWMP.** Any MS4 that meets the requirements of Part I.A of this general permit may choose to partner with one or more other regulated MS4 to develop and implement a SWMP or SWMP element. The partnering MS4s must submit separate NOIs and have their own SWMP, which may incorporate jointly developed program elements. If responsibilities are being shared as provided in Part I.D.3 of this permit, the SWMP must describe which permittees are responsible for implementing which aspects of each of the minimum measures. All MS4 permittees are subject to the provisions in Part I.D.6.

   Each individual MS4 in a joint agreement implementing a permit condition will be independently assessed for compliance with the terms of the joint agreement. Compliance with that individual MS4s obligations under the joint agreement will be deemed compliance with that permit condition. Should one or more individual MS4s fail to comply with the joint agreement, causing the joint agreement program to fail to meet the requirements of the permit, the obligation of all parties to the joint agreement is to develop within 30 days and implement within 90 days an alternative program to satisfy the terms of the permit.

C. SPECIAL CONDITIONS

1. **Compliance with Water Quality Standards**. Pursuant to Clean Water Act §402(p)(3)(B)(iii) and 40 CFR §122.44(d)(1), this permit includes provisions to ensure that discharges from the permittee's MS4 do not cause or contribute to exceedances of applicable surface water quality standards, in addition to requirements to control discharges to the maximum extent practicable (MEP) set forth in Part I.D. Permittees shall address stormwater management through development of the SWMP that shall include the following elements and specific requirements included in Part VI.

   a. Permittee's discharges shall not cause or contribute to an exceedance of surface water quality standards (including numeric and narrative water quality criteria) applicable to the receiving waters. In determining whether the SWMP is effective in meeting this requirement or if enhancements to the plan are needed, the permittee shall consider available monitoring data, visual assessment, and site inspection reports.

   b. Applicable surface water quality standards for discharges from the permittees' MS4 are those that are approved by EPA and any other subsequent modifications approved by EPA upon the effective date of this permit found at New Mexico Administrative Code §20.6.4. Discharges from various portions of the MS4 also flow downstream into waters with Pueblo of Isleta and Pueblo of Sandia Water Quality Standards;

   c. The permittee shall notify EPA and the Pueblo of Isleta in writing as soon as practical but not later than thirty (30) calendar days following each Pueblo of Isleta water quality standard exceedance at an in-stream sampling location. In the event that EPA determines that a discharge from the MS4 causes or contributes to an exceedance of applicable surface water quality standards and notifies the permittee of such an exceedance, the permittee shall, within sixty (60) days of notification, submit to EPA, NMED, Pueblo of Isleta (upon request) and Pueblo of Sandia (upon request), a report that describes controls that are currently being implemented and additional controls that will be implemented to prevent pollutants sufficient to ensure that the discharge will no longer cause or contribute to an exceedance of applicable surface water quality standards. The permittee shall implement such additional controls upon notification by EPA and shall incorporate such measures into their SWMP as described in Part I.D of this permit. NMED or the affected Tribe may provide information

documenting exceedances of applicable water quality standards caused or contributed to by the discharges authorized by this permit to EPA Region 6 and request EPA take action under this paragraph.

d. Phase I Dissolved Oxygen Program (Applicable only to the COA and AMAFCA as a continuation of program in 2012 NMS000101 individual permit): Within one year from effective date of the permit , the permittees shall revise the May 1, 2012 Strategy to continue taking measures to address concerns regarding discharges to the Rio Grande by implementing controls to eliminate conditions that cause or contribute to exceedances of applicable dissolved oxygen water quality standards in waters of the United States. The permittees shall:

(i) Continue identifying structural elements, natural or man-made topographical and geographical formations, MS4 operations activities, or oxygen demanding pollutants contributing to reduced dissolved oxygen in the receiving waters of the Rio Grande. Both dry and wet weather discharges shall be addressed. Assessment may be made using available data or collecting additional data;

(ii) Continue implementing controls, and updating/revising as necessary, to eliminate structural elements or the discharge of pollutants at levels that cause or contribute to exceedances of applicable water quality standards for dissolved oxygen in waters of the United States;

(iii) To verify the remedial action in the North Diversion Channel Embayment, the COA and AMAFCA shall continue sampling for DO and temperature until the data indicate the discharge does not exceed applicable dissolved oxygen water quality standards in waters of the United States; and

(iv) Submit a revised strategy to FWS for consultation and EPA for approval from a year of effective date of the permit and progress reports with the subsequent Annual Reports. Progress reports to include:

(a) Summary of data.

(b) Activities undertaken to identify MS4 discharge contribution to exceedances of applicable dissolved oxygen water quality standards in waters of the United States. Including summary of findings of the assessment required in Part I.C.1.d.(i).

(c) Conclusions drawn, including support for any determinations.

(d) Activities undertaken to eliminate MS4 discharge contribution to exceedances of applicable dissolved oxygen water quality standards in waters of the United States.

(e) Account of stakeholder involvement.

e. PCBs (Applicable only to the COA and AMAFCA as a continuation of program in 2012 NMS000101 individual permit and Bernalillo County): The permittee shall address concerns regarding PCBs in channel drainage areas specified in Part I.C.1.e.(vi) by developing or continue updating/revising and implementing a strategy to identify and eliminate controllable sources of PCBs that cause or contribute to exceedances of applicable water quality standards in waters of the United States. Bernalillo County shall submit the proposed PCB strategy to EPA within two (2) years from the effective date of the permit and submit a progress report with the third and with subsequent Annual Reports. COA and AMAFCA shall submit a progress report with the first and with the subsequent Annual Reports. The progress reports shall include:

(i) Summary of data.

(ii) Findings regarding controllable sources of PCBs in the channel drainages area specified in Part I.C.1.e.(vi) that cause or contribute to exceedances of applicable water quality standards in waters of the United States via the discharge of municipal stormwater.

(iii) Conclusions drawn, including supporting information for any determinations.

(iv) Activities undertaken to eliminate controllable sources of PCBs in the drainage areas specified in Part I.C.1.e.(vi) that cause or contribute to exceedances of applicable water quality standards in waters of the United States via the discharge of municipal stormwater including proposed activities that extend beyond the five (5) year permit term.

(v) Account of stakeholder involvement in the process.

(vi) Channel Drainage Areas: The PCB strategy required in Part I.C.1.e is only applicable to:

COA and AMAFCA Channel Drainage Areas:
- San Jose Drain
- North Diversion Channel

Bernalillo County Channel Drainage Areas:
- Adobe Acres Drain
- Alameda Outfall Channel
- Paseo del Norte Outfall Channel
- Sanchez Farm Drainage Area

A cooperative strategy to address PCBs in the COA, AMAFCA and Bernalillo County's drainage areas may be developed between Bernalillo County, AMAFCA, and the COA. If a cooperative strategy is developed, the cooperative strategy shall be submitted to EPA within three (3) years from the effective date of the permit and submit a progress report with the fourth and with subsequent Annual Reports,

Note: COA and AMAFCA must continue implementing the existing PCB strategy until a new Cooperative PCB Strategy is submitted to EPA.

f. Temperature (Applicable only to the COA and AMAFCA as a continuation of program in 2012 NMS000101 individual permit): The permittees must continue assessing the potential effect of stormwater discharges in the Rio Grande by collecting and evaluating additional data. If the data indicates there is a potential of stormwater discharges contributing to exceedances of applicable temperature water quality standards in waters of the United States, within thirty (30) days such as findings, the permittees must develop and implement a strategy to eliminate conditions that cause or contribute to these exceedances. The strategy must include:

(i) Identify structural controls, post construction design standards, or pollutants contributing to raised temperatures in the receiving waters of the Rio Grande. Both dry and wet weather discharges shall be addressed. Assessment may be made using available data or collecting additional data;

(ii) Develop and implement controls to eliminate structural controls, post construction design standards, or the discharge of pollutants at levels that cause or contribute to exceedances of applicable water quality standards for temperature in waters of the United States; and

(iii) Provide a progress report with the first and with subsequent Annual Reports. The progress reports shall include:

(a) Summary of data.

(b) Activities undertaken to identify MS4 discharge contribution to exceedances of applicable temperature water quality standards in waters of the United States.

(c) Conclusions drawn, including supporting information for any determinations.

(d) Activities undertaken to reduce MS4 discharge contribution to exceedances of applicable temperature water quality standards in waters of the United States.

(e) Accounting of stakeholder involvement.

2. **Discharges to Impaired Waters with and without approved TMDLs**. Impaired waters are those that have been identified pursuant to Section 303(d) of the Clean Water Act as not meeting applicable surface water quality standards. This may include both waters with EPA-approved Total Maximum Daily Loads (TMDLs) and those for which a TMDL has not yet been approved. For the purposes of this permit, the conditions for discharges to impaired waters also extend to controlling pollutants in MS4 discharges to tributaries to the listed impaired waters in the Middle Rio Grande watershed boundary identified in Appendix A.

   a. Discharges of pollutant(s) of concern to impaired water bodies for which there is an EPA approved total maximum daily load (TMDL) are not eligible for this general permit unless they are consistent with the approved TMDL. A water body is considered impaired for the purposes of this permit if it has been identified, pursuant to the latest EPA approved CWA §303(d) list, as not meeting New Mexico Surface Water Quality Standards.

   b. The permittee shall control the discharges of pollutant(s) of concern to impaired waters and waters with approved TMDLs as provided in sections (i) and (ii) below, and shall assess the success in controlling those pollutants.

      (i) Discharges to Water Quality Impaired Water Bodies with an Approved TMDL
      If the permittee discharges to an impaired water body with an approved TMDL (see Appendix B), where stormwater has the potential to cause or contribute to the impairment, the permittee shall include in the SWMP controls targeting the pollutant(s) of concern along with any additional or modified controls required in the TMDL and this section. The SWMP and required annual reports must include information on implementing any focused controls required to reduce the pollutant(s) of concern as described below:

         (a) Targeted Controls: The SWMP submitted with the first annual report must include a detailed description of all targeted controls to be implemented, such as identifying areas of focused effort or implementing additional Best Management Practices (BMPs) that will be implemented to reduce the pollutant(s) of concern in the impaired waters.

         (b) Measurable Goals: For each targeted control, the SWMP must include a measurable goal and an implementation schedule describing BMPs to be implemented during each year of the permit term. Where the impairment is for bacteria, the permittee must, at minimum comply with the activites and schedules described in Table 1.a of Part I.C.2.(iii).

         (c) Identification of Measurable Goal: The SWMP must identify a measurable goal for the pollutant(s) of concern. The value of the measurable goal must be based on one of the following options:

            A. If the permittee is subject to a TMDL that identifies an aggregate Waste Load Allocation (WLA) for all or a class of permitted MS4 stormwater sources, then the SWMP may identify such WLA as the measurable goal. Where an aggregate WLA measurable goal is used, all affected MS4 operators are jointly responsible for progress in meeting the measurable goal and shall (jointly or individually) develop a monitoring/assessment plan. This program element may be coordinated with the monitoring required in Part III.A.

            B. Alternatively, if multiple permittees are discharging into the same impaired water body with an approved TMDL (which has an aggregate WLA for all permitted stormwater MS4s), the MS4s may combine or share efforts, in consultation with/and the approval of NMED, to determine an alternative sub-measurable goal derived from the WLA for the pollutant(s) of concern (e.g., bacteria) for their respective MS4. The SWMP must clearly define this alternative approach and must describe how the sub-measurable goals would cumulatively support the aggregate WLA. Where an aggregate WLA measurable goal has been broken into sub-measurable goals for individual MS4s, each permittee is only responsible for progress in meeting its WLA sub-measurable goal.

C. If the permittee is subject to an individual WLA specifically assigned to that permittee, the measurable goal must be the assigned WLA. Where WLAs have been individually assigned, or where the permittee is the only regulated MS4 within the urbanized area that is discharging into the impaired watershed with an approved TMDL, the permittee is only responsible for progress in meeting its WLA measurable goal.

(d) Annual Report: The annual report must include an analysis of how the selected BMPs have been effective in contributing to achieving the measurable goal and shallll include graphic representation of pollutant trends, along with computations of annual percent reductions achieved from the baseline loads and comparisons with the target loads.

(e) Impairment for Bacteria: If the pollutant of concern is bacteria, the permittee shall include focused BMPs addressing the five areas below, as applicable, in the SWMP and implement as appropriate. If a TMDL Implementation Plan (a plan created by the State or a Tribe) is available, the permittee may refer to the TMDL Implementation Plan for appropriate BMPs. The SWMP and annual report must include justification for not implementing a particular BMP included in the TMDL Implementation Plan. The permittee may not exclude BMPs associated with the minimum control measures required under 40 CFR §122.34 from their list of proposed BMPs. The BMPs shall, as appropriate, address the following:

A. Sanitary Sewer Systems
- Make improvements to sanitary sewers;
- Address lift station inadequacies;
- Identify and implement operation and maintenance procedures;
- Improve reporting of violations; and
- Strengthen controls designed to prevent over flows

B. On-site Sewage Facilities (for entities with appropriate jurisdiction)
- Identify and address failing systems; and
- Address inadequate maintenance of On-Site Sewage Facilities (OSSFs).

C. Illicit Discharges and Dumping
- Place additional effort to reduce waste sources of bacteria; for example, from septic systems, grease traps, and grit traps.

D. Animal Sources
- Expand existing management programs to identify and target animal sources such as zoos, pet waste, and horse stables.

E. Residential Education: Increase focus to educate residents on:
- Bacteria discharging from a residential site either during runoff events or directly;
- Fats, oils, and grease clogging sanitary sewer lines and resulting overflows;
- Decorative ponds; and
- Pet waste.

(f) Monitoring or Assessment of Progress: The permittee shall monitor or assess progress in achieving measurable goals and determining the effectiveness of BMPs, and shall include documentation of this monitoring or assessment in the SWMP and annual reports. In addition, the SWMP must include methods to be used. This program element may be coordinated with the monitoring required in Part III.A. The permittee may use the following methods either individually or in conjunction to evaluate progress towards the measurable goal and improvements in water quality as follows:

A. Evaluating Program Implementation Measures: The permittee may evaluate and report progress towards the measurable goal by describing the activities and BMPs implemented, by identifying the appropriateness of the identified BMPs, and by evaluating the success of implementing the measurable goals. The permittee may assess progress by using program implementation indicators

such as: (1) number of sources identified or eliminated; (2) decrease in number of illegal dumping; (3) increase in illegal dumping reporting; (4) number of educational opportunities conducted; (5) reductions in SSOs; or, 6) increase in illegal discharge detection through dry screening, etc.; and

B. Assessing Improvements in Water Quality: The permittee may assess improvements in water quality by using available data for segment and assessment units of water bodies from other reliable sources, or by proposing and justifying a different approach such as collecting additional instream or outfall monitoring data, etc. Data may be acquired from NMED, local river authorities, partnerships, and/or other local efforts as appropriate. Progress towards achieving the measurable goal shall be reported in the annual report. Annual reports shall report the measurable goal and the year(s) during the permit term that the MS4 conducted additional sampling or other assessment activities.

(g) Observing no Progress towards the Measurable Goal: If, by the end of the third year from the effective date of the permit, the permittee observes no progress toward the measurable goal either from program implementation or water quality assessments, the permittee shall identify alternative focused BMPs that address new or increased efforts towards the measurable goal. As appropriate, the MS4 may develop a new approach to identify the most significant sources of the pollutant(s) of concern and shall develop alternative focused BMPs (this may also include information that identifies issues beyond the MS4's control). These revised BMPs must be included in the SWMP and subsequent annual reports.

Where the permittee originally used a measurable goal based on an aggregated WLA, the permittee may combine or share efforts with other MS4s discharging to the same impaired stream segment to determine an alternative sub-measurable goal for the pollutant(s) of concern for their respective MS4s, as described in Part I.C.2.b.(i).(c).B above. Permittees must document, in their SWMP for the next permit term, the proposed schedule for the development and subsequent adoption of alternative sub-measurable goals for the pollutant(s) of concern for their respective MS4s and associated assessment of progress in meeting those individual goals.

(ii) Discharges Directly to Water Quality Impaired Water Bodies without an Approved TMDL:
The permittee shall also determine whether the permitted discharge is directly to one or more water quality impaired water bodies where a TMDL has not yet been approved by NMED and EPA. If the permittee discharges directly into an impaired water body without an approved TMDL, the permittee shall perform the following activities:

(a) Discharging a Pollutant of Concern: The permittee shall:

A. Determine whether the MS4 may be a source of the pollutant(s) of concern by referring to the CWA §303(d) list and then determining if discharges from the MS4 would be likely to contain the pollutant(s) of concern at levels of concern. The evaluation of CWA §303(d) list parameters should be carried out based on an analysis of existing data (e.g., Illicit Discharge and Improper Disposal Program) conducted within the permittee's jurisdiction.

B. Ensure that the SWMP includes focused BMPs, along with corresponding measurable goals, that the permittee will implement, to reduce, the discharge of pollutant(s) of concern that contribute to the impairment of the water body. (note: Only applicable if the permittee determines that the MS4 may discharge the pollutant(s) of concern to an impaired water body without a TMDL. The SWMP submitted with the first annual report must include a detailed description of proposed controls to be implemented along with corresponding measurable goals.

C. Amend the SWMP to include any additional BMPs to address the pollutant(s) of concern.

(b) Impairment for Bacteria: Where the impairment is for bacteria, the permittee shall identify potential significant sources and develop and implement targeted BMPs to control bacteria from those sources (see Part I.C.2.b.(i).(e).A through E.. The permittee must, at minimum comply with the activities and

schedules described in Table 1.a of Part I.C.2.(iii). The annual report must include information on compliance with this section, including results of any sampling conducted by the permittee.

Note: Probable pollutant sources identified by permittees should be submitted to NMED on the following form: ftp://ftp.nmenv.state.nm.us/www/swqb/Surveys/PublicProbableSourceIDSurvey.pdf

(c) Impairment for Nutrients: Where the impairment is for nutrients (e.g., nitrogen or phosphorus), the permittee shall identify potential significant sources and develop and implement targeted BMPs to control nutrients from potential sources. The permittee must, at minimum comply with the activities and schedules described in Table 1.b of Part I.C,2, (iii). The annual report must include information on compliance with this section, including results of any sampling conducted by the permittee.

(d) Impairment for Dissolved Oxygen: See Endangered Species Act (ESA) Requirements in Part I.C.3. These program elements may be coordinated with the monitoring required in Part III.A.

(iii) Program Development and Implementation Schedules: Where the impairment is for nutrient constituent (e.g., nitrogen or phosphorus) or bacteria, the permittee must at minimum comply with the activities and schedules in Table 1.a and Table 1.b.

Table 1.a. Pre-TMDL Bacteria Program Development and Implementation Schedules

Activity	Class Permittee				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
Identify potential significant sources of the pollutant of concern entering your MS4	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Sixteen (16) months from effective date of permit
Develop (or modify an existing program ***) and implement a public education program to reduce the discharge of bacteria in municipal storm water contributed by (if applicable) by pets, recreational and exhibition livestock, and zoos.	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit	Fourteen (14) months from effective date of permit	Sixteen (16) months from effective date of permit
Develop (or modify an existing program ***) and implement a program to reduce the discharge of bacteria in municipal storm water contributed by areas within your MS4 served by on-site wastewater treatment systems.	Fourteen (14) months from effective date of permit	Fourteen (14) moths from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit
Review results to date from the Illicit Discharge Detection and Elimination program (see Part I.D.5.e) and modify as necessary to prioritize the detection and elimination of discharges contributing bacteria to the MS4	Fourteen (14) months from effective date of permit	Fourteen (14) months from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit

Develop (or modify an existing program ***) and implement a program to reduce the discharge of bacteria in municipal storm water contributed by other significant source identified in the Illicit Discharge Detection and Elimination program (see Part I.D.5.e)	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit	Eighteen (18) months from effective date of permit	Twenty (20) months from effective date of permit
Include in the Annual Reports progress on program implementation and reducing the bacteria and updates their measurable goals as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs
(**) or MS4s designated by the Director
(***) Permittees previously covered under permit NMS000101 or NMR040000
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

Table 1.b. Pre-TMDL Nutrient Program Development and Implementation Schedules

Activity	Class Permittee				
	A Phase I MS4s	**B Phase II MS4s (2000 Census)**	**C New Phase II MS4s (2010 Census **)**	**D MS4s within Indian Lands**	**Cooperative (*) Any Permittee with cooperative programs**
Identify potential significant sources of the pollutant of concern entering your MS4	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Sixteen (16) months from effective date of permit
Develop (or modify an existing program ***) and implement a public education program to reduce the discharge of pollutant of concern in municipal storm water contributed by residential and commercial use of fertilizer	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Sixteen (16) months from effective date of permit
Develop (or modify an existing program ***) and implement a program to reduce the discharge of the pollutant of concern in municipal storm water contributed by fertilizer use at municipal operations (e.g., parks, roadways, municipal facilities)	One (1) year from effective date of permit	One (1) year from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit

Develop (or modify an existing program ***) and implement a program to reduce the discharge of the pollutant of concern in municipal storm water contributed by municipal and private golf courses within your jurisdiction	One (1) year from effective date of permit	One (1)year from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit
Develop (or modify an existing program ***) and implement a program to reduce the discharge of the pollutant of concern in municipal storm water contributed by other significant source identified in the Illicit Discharge Detection and Elimination program (see Part I.D.5.e)	One (1) year from effective date of permit	One (1) year from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit
Include in the Annual Reports progress on program implementation and reducing the nutrient pollutant of concern and updates their measurable goals	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs
(**) or MS4s designated by the Director
(***) Permittees previously covered under permit NMS000101 or NMR040000
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

These program elements may be coordinated with the monitoring required in Part III.A.

3. **Endangered Species Act (ESA) Requirements**. Consistent with U.S. FWS Biological Opinion dated August 21, 2014 to ensure actions required by this permit are not likely to jeopardize the continued existence of any currently listed as endangered or threatened species or adversely affect its critical habitat, permittees shall meet the following requirements and include them in the SWMP:

   a. Dissolved Oxygen Strategy in the Receiving Waters of the Rio Grande:

      (i) The permittees must identify (or continue identifying if previously covered under permit NMS000101) structural controls, natural or man-made topographical and geographical formations, MS4 operations, or oxygen demanding pollutants contributing to reduced dissolved oxygen in the receiving waters of the Rio Grande. The permittees shall implement controls, and update/revise as necessary, to eliminate discharge of pollutants at levels that cause or contribute to exceedances of applicable water quality standards for dissolved oxygen in waters of the Rio Grande. The permittees shall submit a summary of findings and a summary of activities undertaken under Part I.C.3.a.(i) with each Annual Report. The SWMP submitted with the first and fourth annual reports must include a detailed description of controls implemented (or/and proposed control to be implemented) along with corresponding measurable goals. (Applicable to all permittees).

      (ii) As required in Part I.C.1.d, the COA and AMAFCA shall revise the May 1, 2012 Strategy for dissolved oxygen to address dissolved oxygen at the North Diversion Channel Embayment and/or other MS4 locations. The permittees shall submit the revised strategy to FWS and EPA for approval within a year of permit issuance and progress reports with the subsequent Annual Reports (see also Part I.C.1.d.(iv)). The permittees shall ensure that actions to reduce pollutants or remedial activities selected for the North Diversion Channel Embayment and its watershed are implemented such that there is a reduction in

frequency and magnitude of all low oxygen storm water discharge events that occur in the Embayment or downstream in the MRG as indicated in Table 1.c. Actions to meet the year 3 measurable goals must be taken within 2 years from the effective date of the permit. Actions to meet the year 5 measurable goals must be taken within 4 years from the effective date of the permit.

Table 1.c Measurable Goals of Anoxic and Hypoxia Levels Measured by Permit Year

Permit Year	*Anoxic Events*, max*	*Hypoxic Events**, max*
Year 1	*18*	*36*
Year 2	*18*	*36*
Year 3	*9*	*18*
Year 4	*9*	*18*
Year 5	*4*	*9*

Notes:

- * Anoxic Events: See Appendix G, for oxygen saturation and dissolved oxygen concentrations at various water temperatures and atmospheric pressures for the North Diversion Channel area that are considered anoxic and associated with the Rio Grande Silvery minnow lethality.
- ** Hypoxic Events: See Appendix for G, for oxygen saturation and dissolved oxygen concentrations at various water temperatures and atmospheric pressures for the North Diversion Channel area that are considered hypoxic and associated with the Rio Grande silvery minnow harassment.

(a) The revised strategy shall include:

A. A Monitoring Plan describing all procedures necessary to continue conducting continuous monitoring of dissolved oxygen (DO) and temperature in the North Diversion Channel Embayment and at one (1) location in the Rio Grande downstream of the mouth of the North Diversion Channel within the action area (e.g., Central Bridge). The monitoring plan to be developed will describe the methodology used to assure its quality, and will identify the means necessary to address any gaps that occur during monitoring, in a timely manner (that is, within 24 to 48 hours).

B. A Quality Assurance and Quality Control (QA/QC) Plan describing all standard operating procedures, quality assurance and quality control plans, maintenance, and implementation schedules that will assure timely and accurate collection and reporting of water temperature, dissolved oxygen, oxygen saturation, and flow. The QA/QC plan should include all procedures for estimating oxygen data when any oxygen monitoring equipment fail. Until a monitoring plan with quality assurance and quality control is submitted by EPA, any data, including any provisional or incomplete data from the most recent measurement period (e.g. if inoperative monitoring equipment for one day, use data from previous day) shall be used as substitutes for all values in the calculations for determinations of incidental takes. Given the nature of the data collected as surrogate for incidental take, all data, even provisional data (e.g., oxygen/water temperature data, associated metadata such as flows, date, times), shall be provided to the Service in a spreadsheet or database format within two weeks after formal request.

(b) Reporting: The COA and AMAFCA shall provide

A. An Annual Incidental Take Report to EPA and the Service that includes the following information: beginning and end date of any qualifying stormwater events, dissolved oxygen values and water temperature in the North Diversion Channel Embayment, dissolved oxygen values and water temperature at a downstream monitoring station in the MRG, flow rate in the North Diversion Channel, mean daily flow rate in the MRG, evaluation of oxygen and temperature data

as either anoxic or hypoxic using Table 2 of the BO, and estimate the number of silvery minnows taken based on Appendix A of the BO. Electronic copy of The Annual Incidental Take Report should be provided with the Annual Report required under Part III.B no later than December 1 for the proceeding calendar year.

B. A summary of data and findings with each Annual Report to EPA and the Service. All data collected (including provisional oxygen and water temperature data, and associated metadata), transferred, stored, summarized, and evaluated shall be included in the Annual Report. If additional data is requested by EPA or the Service, The COA and AMAFCA shall provide such as information within two weeks upon request,

The revised strategy required under Part I.C.3.a.(ii),the Annual Incidental Take Reports required under Part I.C.3.a.(ii).(b).A, and Annual Reports required under Part III.B can be submitted to FWS via e-mail nmesfo@fws.gov and joel_lusk@fws.gov, or by mail to the New Mexico Ecological Services field office, 2105 Osuna Road NE, Albuquerque, New Mexico 87113. (Only Applicable to the COA and AMAFCA

b. Sediment Pollutant Load Reduction Strategy (Applicable to all pemittees): The permittee must develop, implement, and evaluate a sediment pollutant load reduction strategy to assess and reduce pollutant loads associated with sediment (e.g., metals, etc. adsorbed to or traveling with sediment, as opposed to clean sediment) into the receiving waters of the Rio Grande. The strategy must include the following elements:

(i) Sediment Assessment: The permittee must identify and investigate areas within its jurisdiction that may be contributing excessive levels (e.g., levels that may contribute to exceedance of applicable Water Quality Standards) of pollutants in sediments to the receiving waters of the Rio Grande as a result of stormwater discharges. The permittee must identify structural elements, natural or man-made topographical and geographical formations, MS4 operations activities, and areas indicated as potential sources of sediments pollutants in the receiving waters of the Rio Grande. At the time of assessment, the permittee shall record any observed erosion of soil or sediment along ephemeral channels, arroyos, or stream banks, noting the scouring or sedimentation in streams. The assessment should be made using available data from federal, state, or local studies supplemented as necessary with collection of additional data. The permittee must describe, in the first annual report, all standard operating procedures, quality assurance plans to assure that accurate data are collected, summarized, evaluated and reported.

(ii) Estimate Baseline Loading: Based on the results of the sediment pollutants assessment required in Part I.C.3.b.(i) above the permittee must provide estimates of baseline total sediment loading and relative potential for contamination of those sediments by urban activities for drainage areas, sub-watersheds, Impervious Areas (IAs), and/or Directly Connected Impervious Area (DCIAs) draining directly to a surface waterbody or other feature used to convey waters of the United States. Sediment loads may be provided for targeted areas in the entire Middle Rio Grande Watershed (see Appendix A) using an individual or cooperative approach. Any data available and/or preliminary numeric modeling results may be used in estimating loads.

(iii) Targeted Controls: Include a detailed description of all proposed targeted controls and BMPs that will be implemented to reduce sediment pollutant loads calculated in PartI.C.3.b.(ii) above during the next ten (10) years of permit issuance. For each targeted control, the permittee must include interim measurable goals (e.g., interim sediment pollutant load reductions) and an implementation and maintenance schedule, including interim milestones, for each control measure, and as appropriate, the months and years in which the MS4 will undertake the required actions. Any data available and/or preliminary numeric modeling results may be used in establishing the targeted controls, BMPs, and interim measurable goals. The permittee must prioritize pollutant load reduction efforts and target areas (e..g. drainage areas, sub-watersheds, IAs, DCIAs) that generate the highest annual average pollutant loads.

(iv) Monitoring and Interim Reporting: The permittee shall monitor or assess progress in achieving interim measurable goals and determining the effectiveness of BMPs, and shall include documentation of this

monitoring or assessment in the SWMP and annual reports. In addition, the SWMP must include methods to be used. This program element may be coordinated with the monitoring required in Part III.A.

(v) Progress Evaluation and Reporting: The permittee must assess the overall success of the Sediment Pollutant Load Reduction Strategy and document both direct and indirect measurements of program effectiveness in a Progress Report to be submitted with the fifth Annual Report. Data must be analyzed, interpreted, and reported so that results can be applied to such purposes as documenting effectiveness of the BMPs and compliance with the ESA requirements specified in Part I.C.3.b. The Progress Report must include:

(a) A list of species likely to be within the action area:

(b) Type and number of structural BMPs installed;

(c) Evaluation of pollutant source reduction efforts;

(d) Any recommendation based on program evaluation;

(e) Description of how the interim sediment load reduction goals established in Part I.C.3.b.(iii) were achieved; and

(f) Future planning activities needed to achieve increase of sediment load reduction required in Part I.C.3.d.(iii).

(vi) Critical Habitat (Applicable to all permittees): Verify that the installation of stormwater BMPs will not occur in or adversely affect currently listed endangered or threatened species critical habitat by reviewing the activities and locations of stormwater BMP installation within the location of critical habitat of currently listed endangered or threatened species at the U.S. Fish and Wildlife service website http://criticalhabitat.fws.gov/crithab/.

D. STORMWATER MANAGEMENT PROGRAM (SWMP)

1. **General Requirements**. The permittee must develop, implement, and enforce a SWMP designed to reduce the discharge of pollutants from a MS4 to the maximum extent practicable (MEP), to protect water quality (including that of downstream state or tribal waters), and to satisfy applicable surface water quality standards. The permittees shall continue implementation of existing SWMPs, and where necessary modify or revise existing elements and/or develop new elements to comply with all discharges from the MS4 authorized in Part I.A. The updated SWMP shall satisfy all requirements of this permit, and be implemented in accordance with Section 402(p)(3)(B) of the Clean Water Act (Act), and the Stormwater Regulations (40 CFR §122.26 and §122.34). This permit does not extend any compliance deadlines set forth in the previous permits (NMS000101 with effective date March 1, 2012 and permits No: NM NMR040000 and NMR04000I with effective date July 1, 2007).

   If a permittee is already in compliance with one or more requirements in this section because it is already subject to and complying with a related local, state, or federal requirement that is at least as stringent as this permit's requirement, the permittee may reference the relevant requirement as part of the SWMP and document why this permit's requirement has been satisfied. Where this permit has additional conditions that apply, above and beyond what is required by the related local, state, or federal requirement, the permittee is still responsible for complying with these additional conditions in this permit.

2. **Legal Authority**. Each permittee shall implement the legal authority granted by the State or Tribal Government to control discharges to and from those portions of the MS4 over which it has jurisdiction. The difference in each co-permittee's jurisdiction and legal authorities, especially with respect to third parties, may be taken into account in developing the scope of program elements and necessary agreements (i.e. Joint Powers Agreement, Memorandum of Agreement, Memorandum of Understanding, etc.). Permittees may use a combination of statute, ordinance, permit, contract, order, interagency or inter-jurisdictional agreement(s) with other permittees to:

a. Control the contribution of pollutants to the MS4 by stormwater discharges associated with industrial activity and the quality of stormwater discharged from sites of industrial activity (applicable only to MS4s located within the corporate boundary of the COA);

b. Control the discharge of stormwater and pollutants associated with land disturbance and development activities, both during the construction phase and after site stabilization has been achieved (post-construction), consistent with Part I.D.5.a and Part I.D.5.b;

c. Prohibit illicit discharges and sanitary sewer overflows to the MS4 and require removal of such discharges consistent with Part I.D.5.e;

d. Control the discharge of spills and prohibit the dumping or disposal of materials other than stormwater (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4;

e. Control, through interagency or inter-jurisdictional agreements among permittees, the contribution of pollutants from one (1) portion of the MS4 to another;

f. Require compliance with conditions in ordinances, permits, contracts and/or orders; and

g. Carry out all inspection, surveillance and monitoring procedures necessary to maintain compliance with permit conditions.

3. **Shared Responsibility and Cooperative Programs**.

a. The SWMP, in addition to any interagency or inter-jurisdictional agreement(s) among permittees, (e.g., the Joint Powers Agreement to be entered into by the permittees), shall clearly identify the roles and responsibilities of each permittee.

b. Implementation of the SWMP may be achieved through participation with other permittees, public agencies, or private entities in cooperative efforts to satisfy the requirements of Part I.D in lieu of creating duplicate program elements for each individual permittee.

(i) Implementation of one or more of the control measures may be shared with another entity, or the entity may fully take over the measure. A permittee may rely on another entity only if:

(a) the other entity, in fact, implements the control measure;

(b) the control measure, or component of that measure, is at least as stringent as the corresponding permit requirement; or,

(c) the other entity agrees to implement the control measure on the permittee's behalf. Written acceptance of this obligation is expected. The permittee must maintain this obligation as part of the SWMP description. If the other entity agrees to report on the minimum measure, the permittee must supply the other entity with the reporting requirements in Part III.D of this permit. The permittee remains responsible for compliance with the permit obligations if the other entity fails to implement the control measure component.

c. Each permittee shall provide adequate finance, staff, equipment, and support capabilities to fully implement its SWMP and all requirements of this permit.

4. **Measurable Goals**. The permittees shall control the discharge of pollutants from its MS4. The permittee shall implement the provisions set forth in Part I.D.5 below, and shall at a minimum incorporate into the SWMP the control measures listed in Part I.D.5 below. The SWMP shall include measurable goals, including interim milestones, for each control measure, and as appropriate, the months and years in which the MS4 will undertake the required actions and the frequency of the action.

5. **Control Measures**.

a. Construction Site Stormwater Runoff Control.

(i) The permittee shall develop, revise, implement, and enforce a program to reduce pollutants in any stormwater runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of stormwater discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. **Permittees previously covered under permit NMS000101 or NMR040000 must continue existing programs, updating as necessary, to comply with the requirements of this permit.** (Note: Highway Departments and Flood Control Authorities may only apply the construction site stormwater management program to the permittees's own construction projects)

(ii) The program must include the development, implementation, and enforcement of, at a minimum:

(a) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal or local law;

(b) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices (both structural and non-structural);

(c) Requirements for construction site operators to control waste such as, but not limited to, discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality (see EPA guidance at http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=117);

(d) Procedures for site plan review which incorporate consideration of potential water quality impacts. The site plan review must be conducted prior to commencement of construction activities, and include a review of the site design, the planned operations at the construction site, the planned control measures during the construction phase (including the technical criteria for selection of the control measures), and the planned controls to be used to manage runoff created after the development;

(e) Procedures for receipt and consideration of information submitted by the public;

(f) Procedures for site inspection (during construction) and enforcement of control measures, including provisions to ensure proper construction, operation, maintenance, and repair. The procedures must clearly define who is responsible for site inspections; who has the authority to implement enforcement procedures; and the steps utilized to identify priority sites for inspection and enforcement based on the nature of the construction activity, topography, and the characteristics of soils and the quality of the receiving water. If a construction site operator fails to comply with procedures or policies established by the permittee, the permittee may request EPA enforcement assistance. The site inspection and enforcement procedures must describe sanctions and enforcement mechanism(s) for violations of permit requirements and penalties with detail regarding corrective action follow-up procedures, including enforcement escalation procedures for recalcitrant or repeat offenders. Possible sanctions include non-monetary penalties (such as stop work orders and/or permit denials for non-compliance), as well as monetary penalties such as fines and bonding requirements;

(g) Procedures to educate and train permittee personnel involved in the planning, review, permitting, and/or approval of construction site plans, inspections and enforcement. Education and training shall also be provided for developers, construction site operators, contractors and supporting personnel, including requiring a stormwater pollution prevention plan for construction sites within the permitee's jurisdiction;

(h) Procedures for keeping records of and tracking all regulated construction activities within the MS4, i.e. site reviews, inspections, inspection reports, warning letters and other enforcement documents. A

summary of the number and frequency of site reviews, inspections (including inspector's checklist for oversight of sediment and erosion controls and proper disposal of construction wastes) and enforcement activities that are conducted annually and cumulatively during the permit term shall be included in each annual report; and

(iii) Annually conduct site inspections of 100 percent of all construction projects cumulatively disturbing one (1) or more acres within the MS4 jurisdiction. Site inspections are to be followed by any necessary compliance or enforcement action. Follow-up inspections are to be conducted to ensure corrective maintenance has occurred; and, all projects must be inspected at completion for confirmation of final stabilization.

(iv) The permittee must coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area to ensure that the construction stormwater runoff controls eliminate erosion and maintain sediment on site. Planning documents include, but are not limited to: comprehensive or master plans, subdivision ordinances, general land use plan, zoning code, transportation master plan, specific area plans, such as sector plan, site area plans, corridor plans, or unified development ordinances.

(v) The site plan review required in Part I.D.5.a.(ii)(d) must include an evaluation of opportunities for use of GI/LID/Sustainable practices and when the opportunity exists, encourage project proponents to incorporate such practices into the site design to mimic the pre-development hydrology of the previously undeveloped site. For purposes of this permit, pre-development hydrology shall be met according to Part I.D.5.b of this permit. (consistent with any limitations on that capture). Include a reporting requirement of the number of plans that had opportunities to implement these practices and how many incorporated these practices.

(vi) The permittee must include in the SWMP a description of the mechanism(s) that will be utilized to comply with each of the elements required in Part I.D.5.a.(i) throughout Part I.D.5.a.(v), including description of each individual BMP (both structural or non-structural) or source control measures and its corresponding measurable goal.

(vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report. The permittee must include in each annual report:

(a) A summary of the frequency of site reviews, inspections and enforcement activities that are conducted annually and cumulatively during the permit term.

(b) The number of plans that had the opportunity to implement GI/LID/Sustainable practices and how many incorporated the practices.

Program Flexibility Elements

(viii) The permittee may use storm water educational materials locally developed or provided by the EPA (refer to http://water.epa.gov/polwaste/npdes/swbmp/index.cfm, http://www.epa.gov/smartgrowth/parking.htm, http://www.epa.gov/smartgrowth/stormwater.htm), the NMED, environmental, public interest or trade organizations, and/or other MS4s.

(ix) The permittee may develop or update existing construction handbooks (e.g., the COA NPDES Stormwater Management Guidelines for Construction and Industrial Activities Handbook) to be consistent with promulgated construction and development effluent limitation guidelines.

(x) The construction site inspections required in Part I.D.5.a.(iii) may be carried out in conjunction with the permittee's building code inspections using a screening prioritization process.

Table 2. Construction Site Stormwater Runoff Control - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
Development of an ordinance or other regulatory mechanism as required in Part I.D.5.a.(ii)(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of the permit
Develop requirements and procedures as required in Part I.D.5.a.(ii)(b) through in Part I.D.5.a.(ii)(h)	Ten (10) months from effective date of permit	Thirteen (13) months from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit
Annually conduct site inspections of 100 percent of all construction projects cumulatively disturbing one (1) or more acres as required in Part I.D.5.a.(iii)	Ten (10) months from effective date of permit	Start Thirteen (13) months from effective date of permit and annually thereafter	Start Sixteen (16) months from effective date of permit and annually thereafter	Start eighteen (18) months from effective date of permit and thereafter	Start two (2) years from effective date of permit and thereafter
Coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area as required in Part I.D.5.a.(iv)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Evaluation of GI/LID/Sustainable practices in site plan reviews as required in Part I.D.5.a.(v)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.a.(vi) and in Part I.D.5.a.(vii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include program elements in Part I.D.5.a.(viii) through Part I.D.5.a.(x)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

b. Post-Construction Stormwater Management in New Development and Redevelopment

(i) The permittee must develop, revise, implement, and enforce a program to address stormwater runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the MS4. The program must ensure that controls are in place that would prevent or minimize water quality impacts. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs, updating as necessary, to comply with the requirements of this permit.** (Note: Highway Departments and Flood Control Authorities may only apply the post-construction stormwater management program to the permittee's own construction projects)

(ii) The program must include the development, implementation, and enforcement of, at a minimum:

(a) Strategies which include a combination of structural and/or non-structural best management practices (BMPs) to control pollutants in stormwater runoff.

(b) An ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law. The ordinance or policy must:

Incorporate a stormwater quality design standard that manages on-site the 90th percentile storm event discharge volume associated with new development sites and 80th percentile storm event discharge volume associated with redevelopment sites, through stormwater controls that infiltrate, evapotranspire the discharge volume, except in instances where full compliance cannot be achieved, as provided in Part I.D.5.b.(v). The stormwater from rooftop discharge may be harvested and used on-site for non-commercial use. Any controls utilizing impoundments that are also used for flood control that are located in areas where the New Mexico Office of the State Engineer requirements at NMAC 19.26.2.15 (see also Section 72-5-32 NMSA) apply must drain within 96 hours unless the state engineer has issued a waiver to the owner of the impoundment.

Options to implement the site design standard include, but not limited to: management of the discharge volume achieved by canopy interception, soil amendments, rainfall harvesting, rain tanks and cisterns, engineered infiltration, extended filtration, dry swales, bioretention, roof top disconnections, permeable pavement, porous concrete, permeable pavers, reforestation, grass channels, green roofs and other appropriate techniques, and any combination of these practices, including implementation of other stormwater controls used to reduce pollutants in stormwater (e.g., a water quality facility).

Estimation of the 90th or 80th percentile storm event discharge volume is included in EPA Technical Report entitled "*Estimating Predevelopment Hydrology in the Middle Rio Grande Watershed, New Mexico, EPA Publication Number 832-R-14-007*". Permittees can also estimate:

Option A: a site specific 90th or 80th percentile storm event discharge volume using methodology specified in the referenced EPA Technical Report.

Option B: a site specific pre-development hydrology and associated storm event discharge volume using methodology specified in the referenced EPA technical Report.

(c) The permittee must ensure the appropriate implementation of the structural BMPs by considering some or all of the following: pre-construction review of BMP designs; inspections during construction to verify BMPs are built as designed; post-construction inspection and maintenance of BMPs; and penalty provisions for the noncompliance with preconstruction BMP design; failure to construct BMPs

in accordance with the agreed upon pre-construction design; and ineffective post-construction operation and maintenance of BMPs;

(d) The permittee must ensure that the post-construction program requirements are constantly reviewed and revised as appropriate to incorporate improvements in control techniques;

(e) Procedure to develop and implement an educational program for project developers regarding designs to control water quality effects from stormwater, and a training program for plan review staff regarding stormwater standards, site design techniques and controls, including training regarding GI/LID/Sustainability practices. Training may be developed independently or obtained from outside resources, i.e. federal, state, or local experts;

(f) Procedures for site inspection and enforcement to ensure proper long-term operation, maintenance, and repair of stormwater management practices that are put into place as part of construction projects/activities. Procedure(s) shall include the requirement that as-built plans be submitted within ninety (90) days of completion of construction projects/activities that include controls designed to manage the stormwater associated with the completed site (post-construction stormwater management). Procedure(s) may include the use of dedicated funds or escrow accounts for development projects or the adoption by the permittee of all privately owned control measures. This may also include the development of maintenance contracts between the owner of the control measure and the permittee. The maintenance contract shall include verification of maintenance practices by the owner, allows the MS4 owner/operator to inspect the maintenance practices, and perform maintenance if inspections indicate neglect by the owner;

(g) Procedures to control the discharge of pollutants related to commercial application and distribution of pesticides, herbicides, and fertilizers where permittee(s) hold jurisdiction over lands not directly owned by that entity (e.g., incorporated city). The procedures must ensure that herbicides and pesticides applicators doing business within the permittee's jurisdiction have been properly trained and certified, are encouraged to use the least toxic products, and control use and application rates according to the applicable requirements; and

(h) Procedure or system to review and update, as necessary, the existing program to ensure that stormwater controls or management practices for new development and redevelopment projects/activities continue to meet the requirements and objectives of the permit.

(iii) The permittee must coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private new development and redevelopment projects/activities within the permit area to ensure the hydrology associated with new development and redevelopment sites mimic to the extent practicable the pre-development hydrology of the previously undeveloped site, except in instances where the pre-development hydrology requirement conflicts with applicable water rights appropriation requirements. For purposes of this permit, pre-development hydrology shall be met by capturing the 90th percentile storm event runoff (consistent with any limitations on that capture) which under undeveloped natural conditions would be expected to infiltrate or evapotranspirate on-site and result in little, if any, off-site runoff. (Note: This permit does not prevent permittees from requiring additional controls for flood control purposes.) Planning documents include, but are not limited to: comprehensive or master plans, subdivision ordinances, general land use plan, zoning code, transportation master plan, specific area plans, such as sector plan, site area plans, corridor plans, or unified development ordinances.

(iv) The permittee must assess all existing codes, ordinances, planning documents and other applicable regulations, for impediments to the use of GI/LID/Sustainable practices. The assessment shall include a list of the identified impediments, necessary regulation changes, and recommendations and proposed schedules to incorporate policies and standards to relevant documents and procedures to maximize infiltration, recharge, water harvesting, habitat improvement, and hydrological management of stormwater runoff as allowed under the applicable water rights appropriation requirements. The permittee must develop a report of the assessment findings, which is to be used to provide information to the permittee, of the regulation changes necessary to remove impediments and allow implementation of these practices.

(v) Alternative Compliance for Infeasibility due to Site Constrains:

(a) Infeasibility to manage the design standard volume specified in Part I(D)(5)(b)(ii)(b), or a portion of the design standard volume, onsite may result from site constraints including the following:

A. too small a lot outside of the building footprint to create the necessary infiltrative capacity even with amended soils;

B. soil instability as documented by a thorough geotechnical analysis;

C. a site use that is inconsistent with capture and reuse of storm water;

D. other physical conditions; or,

E. to comply with applicable requirements for on-site flood control structures leaves insufficient area to meet the standard.

(b) A determination that it is infeasible to manage the design standard volume specified in Part I.D.5.b.(ii)(b), or a portion of the design standard volume, on site may not be based solely on the difficulty or cost of implementing onsite control measures, but must include multiple criteria that rule out an adequate combination of the practices set forth in Part I.D,5.b.(v).

(c) This permit does not prevent imposition of more stringent requirements related to flood control. Where both the permittee's site design standard ordinance or policy and local flood control requirements on site cannot be met due to site conditions, the standard may be met through a combination of on-site and off-site controls.

(d) Where applicable New Mexico water law limits the ability to fully manage the design standard volume on site, measures to minimize increased discharge consistent with requirements under New Mexico water law must still be implemented.

(e) In instances where an alternative to compliance with the standard on site is chosen, technical justification as to the infeasibility of on-site management of the entire design standard volume, or a portion of the design standard volume, is required to be documented by submitting to the permittee a site-specific hydrologic and/or design analysis conducted and endorsed by a registered professional engineer, geologist, architect, and/or landscape architect.

(f) When a Permittee determines a project applicant has demonstrated infeasibility due to site constraints specified in Part I.D.5.b.(v) to manage the design standard volume specified in Part I.D.5.b.(ii).(b) or a portion of the design standard volume on-site, the Permittee shall require one of the following mitigation options:

A. Off-site mitigation. The off-site mitigation option only applies to redevelopment sites and cannot be applied to new development. Management of the standard volume, or a portion of the volume, may be implemented at another location within the MS4 area, approved by the permittee. The permittee shall identify priority areas within the MS4 in which mitigation projects can be completed. The permittee shall determine who will be responsible for long-term maintenance on off-site mitigation projects.

B. Ground Water Replenishment Project: Implementation of a project that has been determined to provide an opportunity to replenish regional ground water supplies at an offsite location.

C. Payment in lieu. Payment in lieu may be made to the permittee, who will apply the funds to a public stormwater project. MS4s shall maintain a publicly accessible database of approved projects for which these payments may be used.

D. Other. In a situation where alternative options A through C above are not feasible and the permittee wants to establish another alternative option for projects, the permitte may submit to the EPA for approval, the alternative option that meets the standard.

(vi) The permittee must estimate the number of acres of impervious area (IA) and directly connected impervious area (DCIA). For the purpose of his part, IA includes conventional pavements, sidewalks, driveways, roadways, parking lots, and rooftops. DCIA is the portion of IA with a direct hydraulic connection to the permittee's MS4 or a waterbody via continuous paved surfaces, gutters, pipes, and other impervious features. DCIA typically does not include isolated impervious areas with an indirect hydraulic connection to the MS4 (e.g., swale or detention basin) or that otherwise drain to a pervious area.

(vii) The permittee must develop an inventory and priority ranking of MS4-owned property and infrastructure (including public right-of-way) that may have the potential to be retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges to and from its MS4. In determining the potential for retrofitting, the permittee shall consider factors such as the complexity and cost of implementation, public safety, access for maintenance purposes, subsurface geology, depth to water table, proximity to aquifers and subsurface infrastructure including sanitary sewers and septic systems, and opportunities for public use and education under the applicable water right requirements and restrictions. In determining its priority ranking, the permittee shall consider factors such as schedules for planned capital improvements to storm and sanitary sewer infrastructure and paving projects; current storm sewer level of service and control of discharges to impaired waters, streams, and critical receiving water (drinking water supply sources);

(viii) The permittee must incorporate watershed protection elements into relevant policy and/or planning documents as they come up for regular review. If a relevant planning document is not scheduled for review during the term of this permit, the permittee must identify the elements that cannot be implemented until that document is revised, and provide to EPA and NMED a schedule for incorporation and implementation not to exceed five years from the effective date of this permit. As applicable to each permittee's MS4 jurisdiction, policy and/or planning documents must include the following:

(a) A description of master planning and project planning procedures to control the discharge of pollutants to and from the MS4.

(b) Minimize the amount of impervious surfaces (roads, parking lots, roofs, etc.) within each watershed, by controlling the unnecessary creation, extension and widening of impervious parking lots, roads and associated development. The permittee may evaluate the need to add impervious surface on a case-by-case basis and seek to identify alternatives that will meet the need without creating the impervious surface.

(c) Identify environmentally and ecologically sensitive areas that provide water quality benefits and serve critical watershed functions within the MS4 and ensure requirements to preserve, protect, create and/or restore these areas are developed and implemented during the plan and design phases of projects in these identified areas. These areas may include, but are not limited to critical watersheds, floodplains, and areas with endangered species concerns and historic properties. Stakeholders shall be consulted as appropriate.

(d) Implement stormwater management practices that minimize water quality impacts to streams, including disconnecting direct discharges to surface waters from impervious surfaces such as parking lots.

(e) Implement stormwater management practices that protect and enhance groundwater recharge as allowed under the applicable water rights laws.

(f) Seek to avoid or prevent hydromodification of streams and other water bodies caused by development, including roads, highways, and bridges.

(g) Develop and implement policies to protect native soils, prevent topsoil stripping, and prevent compaction of soils.

(h) The program must be specifically tailored to address local community needs (e.g. protection to drinking water sources, reduction of water quality impacts) and must be designed to attempt to maintain pre-development runoff conditions.

(ix) The permittee must update the SWMP as necessary to include a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.b.(i) throughout Part I.D.5.b.(viii) as well as the citations and descriptions of design standards for structural and non-structural controls to control pollutants in stormwater runoff, including discussion of the methodology used during design for estimating impacts to water quality and selecting structural and non-structural controls. Description of measurable goals for each BMP (structural or non-structural) or each stormwater control must be included in the SWMP.

(x) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report. The following information must be included in each annual report:

(a) Include a summary and analysis of all maintenance, inspections and enforcement, and the number and frequency of inspections performed annually.

(b) A cumulative listing of the annual modifications made to the Post-Construction Stormwater Management Program during the permit term, and a cumulative listing of annual revisions to administrative procedures made or ordinances enacted during the permit term.

(c) According to the schedule presented in the Program Development and Implementation Schedule in Table 3, the permittee must

A. Report the number of MS4-owned properties and infrastructure that have been retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges. The permittee may also include in its annual report non-MS4 owned property that has been retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges.

B. As required in Part I.D.5.b.(vi), report the tabulated results for IA and DCIA and its estimation methodology. In each subsequent annual report, the permittee shall estimate the number of acres of IA and DCIA that have been added or removed during the prior year. The permittee shall include in its estimates the additions and reductions resulting from development, redevelopment, or retrofit projects undertaken directly by the permittee; or by private developers and other parties in a voluntary manner on in compliance with the permittee's regulations.

Program Flexibility Elements:

(xi) The permittee may use storm water educational materials locally developed or provided by EPA (refer to http://water.epa.gov/polwaste/npdes/swbmp/index.cfm, http://www.epa.gov/smartgrowth/parking.htm, and http://www.epa.gov/smartgrowth/stormwater.htm); the NMED; environmental, public interest or trade organizations; and/or other MS4s.

(xii) When choosing appropriate BMPs, the permittee may participate in locally-based watershed planning efforts, which attempt to involve a diverse group of stakeholders including interested citizens. When developing a program that is consistent with this measure's intent, the permittee may adopt a planning process that identifies the municipality's program goals (e.g., minimize water quality impacts resulting from post-construction runoff from new development and redevelopment), implementation strategies (e.g., adopt a combination of structural and/or non-structural BMPs), operation and maintenance policies and procedures, and enforcement procedures.

(xiii) The permittee may incorporate the following elements in the Post-Construction Stormwater Management in New Development and Redevelopment program required in Part I.D.5.b.(ii)(b):

(a) Provide requirements and standards to direct growth to identified areas to protect environmentally and ecologically sensitive areas such as floodplains and/or other areas with endangered species and historic properties concerns;

(b) Include requirements to maintain and/or increase open space/buffers along sensitive water bodies, minimize impervious surfaces, and minimize disturbance of soils and vegetation; and

(c) Encourage infill development in higher density urban areas, and areas with existing storm sewer infrastructure.

Table 3. Post-Construction Stormwater Management in New Development and Redevelopment - Program Development and Implementation Schedules

Activity	Permittee Class				
	A **Phase I MS4s**	**B** **Phase II MS4s (2000 Census)**	**C** **New Phase II MS4s (2010 Census **)**	**D** **MS4s within Indian Lands**	**Cooperative (*)** **Any Permittee with cooperative programs**
Development of strategies as required in Part I.D.5.b.(ii).(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Development of an ordinance or other regulatory mechanism as required in Part I.D.5.b.(ii).(b)	Twenty (24) months from effective date of permit	Thirty (30) months from effective date of permit	Thirty six (36) months from effective date of permit	Thirty six (36) months from effective date of permit	Thirty six (36) months from effective date of permit
Implementation and enforcement, via the ordinance or other regulatory mechanism, of site design standards as required in Part I.D.5.b.(ii).(b)	Within thirsty six (36) months from effective date of the permit	Within forty two (42) months from the effective date of the permit	Within forty eight (48) months from effective date of the permit	Within forty eight (48) months from effective date of the permit	Within forty eight (48) months from effective date of the permit
Ensure appropriate implementation of structural controls as required in Part I.D.5.b.(ii).(c) and Part I.D.5.b.(ii).(d)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop procedures as required in Part I.D.5.b.(ii).(e), Part I.D.5.b.(ii).(f), Part I.D.5.b.(ii).(g), and Part I.D.5.b.(ii).(h)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit

Coordinate internally with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area as required in Part I.D.5.b.(iii)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	One (1) year from effective date of permit
As required in Part I.D.5.b.(iv), the permittee must assess all existing codes, ordinances, planning documents and other applicable regulations, for impediments to the use of GI/LID/Sustainable practices	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit
As required in Part I.D.5.b.(iv), develop and submit a report of the assessment findings on GI/LID/Sustainable practices.	Eleven (11) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Twenty seven (27) months from effective date of permit
Estimation of the number of acres of IA and DCIA as required in Part I.D.5.b.(vi)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Inventory and priority ranking as required in section in Part I.D.5.b.(vii)	Within fifteen (15) months from effective date of the permit	Within twenty four (24) months from effective date of the permit	Within thirty six (36) months from effective date of the permit	Within thirty six (36) months from effective date of the permit	Within forty two (42) months from effective date of the permit
Incorporate watershed protection elements as required in Part I.D.5.b.(viii)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.b.(ix) and Part I.D.5.b.(x).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include program elements in Part I.D.5.b.(xi) and Part I.D.5.b.(xii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

c. Pollution Prevention/Good Housekeeping for Municipal/Co-permittee Operations.

(i) The permittee must develop, revise and implement an operation and maintenance program that includes a training component and the ultimate goal of preventing or reducing pollutant runoff from municipal operations. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit**. The program must include:

(a) Development and implementation of an employee training program to incorporate pollution prevention and good housekeeping techniques into everyday operations and maintenance activities. The employee training program must be designed to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance. The permittee must also develop a tracking procedure and ensure that employee turnover is considered when determining frequency of training;

(b) Maintenance activities, maintenance schedules, and long term inspections procedures for structural and non-structural storm water controls to reduce floatable, trash, and other pollutants discharged from the MS4.

(c) Controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations, snow disposal areas operated by the permittee, and waste transfer stations;

(d) Procedures for properly disposing of waste removed from the separate storm sewers and areas listed in Part I.D.5.c.(i).(c) (such as dredge spoil, accumulated sediments, floatables, and other debris); and

(e) Procedures to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporating additional water quality protection devices or practices.

Note: The permittee may use training materials that are available from EPA, NMED, Tribe, or other organizations.

(ii) The Pollution Prevention/Good Housekeeping program must include the following elements:

(a) Develop or update the existing list of all stormwater quality facilities by drainage basin, including location and description;

(b) Develop or modify existing operational manual for de-icing activities addressing alternate materials and methods to control impacts to stormwater quality;

(c) Develop or modify existing program to control pollution in stormwater runoff from equipment and vehicle maintenance yards and maintenance center operations located within the MS4;

(d) Develop or modify existing street sweeping program. Assess possible benefits from changing frequency or timing of sweeping activities or utilizing different equipment for sweeping activities;

(e) A description of procedures used by permittees to target roadway areas most likely to contribute pollutants to and from the MS4 (i.e., runoff discharges directly to sensitive receiving water, roadway receives majority of de-icing material, roadway receives excess litter, roadway receives greater loads of oil and grease);

(f) Develop or revise existing standard operating procedures for collection of used motor vehicle fluids (at a minimum oil and antifreeze) and toxics (including paint, solvents, fertilizers, pesticides, herbicides,

and other hazardous materials) used in permittee operations or discarded in the MS4, for recycle, reuse, or proper disposal;

(g) Develop or revised existing standard operating procedures for the disposal of accumulated sediments, floatables, and other debris collected from the MS4 and during permittee operations to ensure proper disposal;

(h) Develop or revised existing litter source control programs to include public awareness campaigns targeting the permittee audience; and

(i) Develop or review and revise, as necessary, the criteria, procedures and schedule to evaluate existing flood control devices, structures and drainage ways to assess the potential of retrofitting to provide additional pollutant removal from stormwater. Implement routine review to ensure new and/or innovative practices are implemented where applicable.

(j) Enhance inspection and maintenance programs by coordinating with maintenance personnel to ensure that a target number of structures per basin are inspected and maintained per quarter;

(k) Enhance the existing program to control the discharge of floatables and trash from the MS4 by implementing source control of floatables in industrial and commercial areas;

(l) Include in each annual report, a cumulative summary of retrofit evaluations conducted during the permit term on existing flood control devices, structures and drainage ways to benefit water quality. Update the SWMP to include a schedule (with priorities) for identified retrofit projects;

(m) Flood management projects: review and revise, as necessary, technical criteria guidance documents and program for the assessment of water quality impacts and incorporation of water quality controls into future flood control projects. The criteria guidance document must include the following elements:

A. Describe how new flood control projects are assessed for water quality impacts.

B. Provide citations and descriptions of design standards that ensure water quality controls are incorporated in future flood control projects.

C. Include method for permittees to update standards with new and/or innovative practices.

D. Describe master planning and project planning procedures and design review procedures.

(n) Develop procedures to control the discharge of pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied, by the permittee's employees or contractors, to public right-of-ways, parks, and other municipal property. The permittee must provide an updated description of the data monitoring system for all permittee departments utilizing pesticides, herbicides and fertilizers.

(iii) Comply with the requirements included in the EPA Multi Sector General Permit (MSGP) to control runoff from industrial facilities (as defined in 40 CFR 122.26(b)(14)(i)-(ix) and (xi)) owned or operated by the permittees and ultimately discharge to the MS4. The permittees must develop or update:

(a) A list of municipal/permittee operations impacted by this program,

(b) A map showing the industrial facilities owned and operated by the MS4,

(c) A list of the industrial facilities (other than large construction activities defined as industrial activity) that will be included in the industrial runoff control program by category and by basin. The list must include the permit authorization number or a MSGP NOI ID for each facility as applicable.

(iv) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.c.(i) throughout Part I.D.5.c.(iii) and its corresponding measurable goal.

(v) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Table 4. Pollution Prevention/Good Housekeeping for Municipal/Co-permittee Operations - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
-Develop or update the Pollution Prevention/Good House Keeping program to include the elements in Part I.D.5.c.(i)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit	Fourteen (14) months from effective date of the permit	Eighteen (18) months from effective date of the permit
-Enhance the program to include the elements in Part I.D.5.c.(ii)	Ten (10) months from effective date of the permit	One (1) year from effective date of the permit	Two (2) years from effective date of the permit	Two (2) years from effective date of the permit	Thirty (30) months from effective date of the permit
-Develop or update a list and a map of industrial facilities owned or operated by the permittee as required in Part I.D.5.c.(iii)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit	One (1) year from effective date of the permit	Eighteen (18) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.c.(iv) and Part I.D.5.c.(v)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

d. Industrial and High Risk Runoff (Applicable only to Class A permittees)

(i) The permittee must control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity as defined in 40 CFR 122.26(b)(14)(i)-(ix) and (xi). If no such industrial activities are in a permittees jurisdiction, that permittee may certify that this program element does not apply.

(ii) The permittee must continue implementation and enforcement of the Industrial and High Risk Runoff program, assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the annual report. The program shall include:

(a) A description of a program to identify, monitor, and control pollutants in stormwater discharges to the MS4 from municipal landfills; other treatment, storage, or disposal facilities for municipal waste (e.g. transfer stations, incinerators, etc.); hazardous waste treatment, storage, disposal and recovery facilities; facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee(s) determines are contributing a substantial pollutant loading to the

MS4. (Note: If no such facilities are in a permittees jurisdiction, that permittee may certify that this program element does not apply.); and

(b) Priorities and procedures for inspections and establishing and implementing control measures for such discharges.

(iii) Permittees must comply with the monitoring requirements specified in Part III.A.4;

(iv) The permittee must modify the following as necessary:

(a) The list of the facilities included in the program, by category and basin;

(b) Schedules and frequency of inspection for listed facilities. Facility inspections may be carried out in conjunction with other municipal programs (e.g. pretreatment inspections of industrial users, health inspections, fire inspections, etc.), but must include random inspections for facilities not normally visited by the municipality;

(c) The priorities for inspections and procedures used during inspections (e.g. inspection checklist, review for NPDES permit coverage; review of stormwater pollution prevention plan; etc.); and

(d) Monitoring frequency, parameters and entity performing monitoring and analyses (MS4 permittees or subject facility). The monitoring program may include a waiver of monitoring for parameters at individual facilities based on a "no-exposure" certification;

(v) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.d.(i) throughout Part I.D.5.d.(iv) and its corresponding measurable goal.

(vi) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Program Flexibility Elements:

(vii) The permittee may:

(a) Use analytical monitoring data, on a parameter-by-parameter basis, that a facility has collected to comply with or apply for a State or NPDES discharge permit (other than this permit), so as to avoid unnecessary cost and duplication of effort;

(b) Allow the facility to test only one (1) outfall and to report that the quantitative data also apply to the substantially identical outfalls if:

A. A Type 1 or Type 2 industrial facility has two (2) or more outfalls with substantially identical effluents, and

B. Demonstration by the facility that the stormwater outfalls are substantially identical, using one (1) or all of the following methods for such demonstration. The NPDES Stormwater Sampling Guidance Document (EPA 833-B-92-001), available on EPA's website at provides detailed guidance on each of the three options: (1) submission of a narrative description and a site map; (2) submission of matrices; or (3) submission of model matrices.

(c) Accept a copy of a "no exposure" certification from a facility made to EPA under 40 CFR §122.26(g), in lieu of analytic monitoring.

Table 5: Industrial and High Risk Runoff - Program Development and Implementation Schedules:

Activity	Permittee Class	
	A **Phase I MS4s**	**Cooperative (*)** **Any Permittee with cooperative programs**
Ordinance (or other control method) as required in Part I.D.5.d.(i)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Continue implementation and enforcement of the Industrial and High Risk Runoff program, assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the annual report as required in Part I.D.5.d.(ii)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Meet the monitoring requirements in Part I.D.5.d.(iii)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Include requirements in Part I.D.5.d.(iv)	Ten (10) months from permit effective date of the permit	Twelve (12) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.d.(v) and Part I.D.5.d.(vi)	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.d.(vii)	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs. Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

e. Illicit Discharges and Improper Disposal

(i) The permittee shall develop, revise, implement, and enforce a program to detect and eliminate illicit discharges (as defined at 40 CFR 122.26(b)(2)) entering the MS4. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.** The permittee must:

(a) Develop, if not already completed, a storm sewer system map, showing the names and locations of all outfalls as well as the names and locations of all waters of the United States that receive discharges from those outfalls. Identify all discharges points into major drainage channels draining more than twenty (20) percent of the MS4 area;

(b) To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance or other regulatory mechanism, non-stormwater discharges into the MS4, and implement appropriate enforcement procedures and actions;

(c) Develop and implement a plan to detect and address non-stormwater discharges, including illegal dumpling, to the MS4. The permittee must include the following elements in the plan:

A. Procedures for locating priority areas likely to have illicit discharges including field test for selected pollutant indicators (ammonia, boron, chlorine, color, conductivity, detergents, *E. coli*, enterococci, total coliform, fluoride, hardness, pH, potassium, conductivity, surfactants), and visually screening outfalls during dry weather;

B. Procedures for enforcement, including enforcement escalation procedures for recalcitrant or repeat offenders;

C. Procedures for removing the source of the discharge;

D. Procedures for program evaluation and assessment; and

E. Procedures for coordination with adjacent municipalities and/or state, tribal, or federal regulatory agencies to address situations where investigations indicate the illicit discharge originates outside the MS4 jurisdiction.

(d) Develop an education program to promote, publicize, and facilitate public reporting of illicit connections or discharges, and distribution of outreach materials. The permittee shall inform public employees, businesses and the general public of hazards associated with illegal discharges and improper disposal of waste.

(e) Establish a hotline to address complaints from the public.

(f) Investigate suspected significant/severe illicit discharges within forty-eight (48) hours of detection and all other discharges as soon as practicable; elimination of such discharges as expeditiously as possible; and, requirement of immediate cessation of illicit discharges upon confirmation of responsible parties.

(g) Review complaint records for the last permit term and develop a targeted source reduction program for those illicit discharge/improper disposal incidents that have occurred more than twice in two (2) or more years from different locations. (Applicable only to class A and B permittees)

(h) If applicable, implement the program using the priority ranking develop during last permit term

(ii) The permittee shall address the following categories of non-stormwater discharges or flows (e.g., illicit discharges) only if they are identified as significant contributors of pollutants to the MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(90)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water.

Note: Discharges or flows from fire fighting activities are excluded from the effective prohibitions against non-stormwater and need only be addressed where they are identified a significant sources of pollutants to water of the United States).

(iii) The permittee must screen the entire jurisdiction at least once every five (5) years and high priority areas at least once every year. High priority areas include any area where there is ongoing evidence of illicit discharges or dumping, or where there are citizen complaints on more than five (5) separate events within twelve (12) months. The permittee must:

(a) Include in its SWMP document a description of the means, methods, quality assurance and controls protocols, and schedule for successfully implementing the required screening, field monitoring, laboratory analysis, investigations, and analysis evaluation of data collected.

(b) Comply with the dry weather screening program established in Table 6 and the monitoring requirements specified in Part III.A.2.

(c) If applicable, implement the priority ranking system develop in previous permit term.

(iv) Waste Collection Programs: The permittee must develop, update, and implement programs to collect used motor vehicle fluids (at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal, and to collect household hazardous waste materials (including paint, solvents, fertilizers, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. Where available, collection programs operated by third parties may be a component of the programs. Permittees shall enhance these programs by establishing the following elements as a goal in the SWMP:

A. Increasing the frequency of the collection days hosted;

B. Expanding the program to include commercial fats, oils and greases; and

C. Coordinating program efforts between applicable permittee departments.

(v) Spill Prevention and Response. The permittee must develop, update and implement a program to prevent, contain, and respond to spills that may discharge into the MS4. The permittees must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit. The Spill Prevention and Response program shall include:

(a) Where discharge of material resulting from a spill is necessary to prevent loss of life, personal injury, or severe property damage, the permittee(s) shall take, or insure the party responsible for the spill takes, all reasonable steps to control or prevent any adverse effects to human health or the environment: and

(b) The spill response program may include a combination of spill response actions by the permittee (and/or another public or private entity), and legal requirements for private entities within the permittee's municipal jurisdiction.

(vi) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.e.(i) throughout Part I.D.5.e.(v) and its corresponding measurable goal. A description of the means, methods, quality assurance and controls protocols, and schedule for successfully implementing the required screening, field monitoring, laboratory analysis, investigations, and analysis evaluation of data collected

(vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

(viii) The permittee must expeditiously revise as necessary, within nine (9) months from the effective date of the permit, the existing permitting/certification program to ensure that any entity applying for the use of Right of Way implements controls in their construction and maintenance procedures to control pollutants entering the MS4. (Only applicable to NMDOT)

Program Flexibility Elements

(ix) The permittee may:

(a) Divide the jurisdiction into assessment areas where monitoring at fewer locations would still provide sufficient information to determine the presence or absence of illicit discharges within the larger area;

(b) Downgrade high priority areas after the area has been screened at least once and there are citizen complaints on no more than five (5) separate events within a twelve (12) month period;

(c) Rely on a cooperative program with other MS4s for detection and elimination of illicit discharges and illegal dumping;

(d) If participating in a cooperative program with other MS4s, required detection program frequencies may be based on the combined jurisdictional area rather than individual jurisdictional areas and may use assessment areas crossing jurisdictional boundaries to reduce total number of screening locations (e.g., a shared single screening location that would provide information on more than one jurisdiction); and

(e) After screening a non-high priority area once, adopt an "in response to complaints only" IDDE for that area provided there are citizen complaints on no more than two (2) separate events within a twelve (12) month period.

(f) Enhance the program to utilize procedures and methodologies consistent with those described in "Illicit Discharge Detection and Elimination, A Guidance Manual for Program Development and Technical Assessments."

Table 6. Illicit Discharges and Improper Disposal - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census ***)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
Mapping as required in Part I.D.5.e.(i)(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Fourteen (14) months from effective date of permit
Ordinance (or other control method) as required in Part I.D.5.e.(i)(b)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop and implement a IDDE plan as required in Part I.D.5.e.(i)(c)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop an education program as required in Part I.D.5.e.(i)(d)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Establish a hotline as required in Part I.D.5.e.(i)(e)	Update as necessary	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Investigate suspected significant/severe illicit discharges as required in Part I.D.5.e.(i)(f)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Review complaint records and develop a targeted source reduction program as required in Part I.D.5.e.(i)(g)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	N/A	N/A	One (1) year from effective date of permit

Screening of system as required in Part I.D.5.e.(iii) as follows: a.) High priority areas**	1 / year	1 / year	1 / year	1 / year	1 / year
b.) Whole system	-Screen 20% of the MS4 per year	- Screen 20% of the MS4 per year	-Years 1 – 2: develop procedures as required in Part I.D.5.e.(i)(c) -Year 3: screen 30% of the MS4 -Year 4: screen 20% of the MS4 -Year 5: screen 50% of the MS4	-Years 1 – 2: develop procedures as required Part I.D.5.e.(i)(c) -Year 3: screen 30% of the MS4 -Year 4: screen 20% of the MS4 -Year 5: screen 50% of the MS4	-Years 1 – 3: develop procedures as require in Part I.D.5.e.(i)(c) -Year 4: screen 30% of the MS4 -Year 5: screen 70% of the MS4
Develop, update, and implement a Waste Collection Program as required in Part I.D.5.e.(iv)	Ten (10) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop, update and implement a Spill Prevention and Response program to prevent, contain, and respond to spills that may discharge into the MS4 as required in Part I.D.5.e.(v)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.e.(iii), Part I.D.5.e.(vi), and Part I.D.5.e.(vii).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.e.(ix)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) High priority areas include any area where there is ongoing evidence of illicit discharges or dumpling, or where there are citizen complaints on more than five (5) separate events within twelve (12) months
(***) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

f. Control of Floatables Discharges

(i) The permittee must develop, update, and implement a program to address and control floatables in discharges into the MS4. The floatables control program shall include source controls and, where necessary, structural controls. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.** The following elements must be included in the program:

(a) Develop a schedule for implementation of the program to control floatables in discharges into the MS4 (Note: AMAFCA and the City of Albuquerque should update the schedule according to the findings of the 2005 AMAFCA/COA Floatable and Gross Pollutant Study and other studies); and

(b) Estimate the annual volume of floatables and trash removed from each control facility and characterize the floatable type.

(ii) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.f.(i).

(iii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Table 7. Control of Floatables Discharges - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
- Develop a schedule to implement the program as required in Part I.D.5.f.(i)(a)	Ten (10) months from the effective date of the permit	Ten (10) months from the effective date of the permit	One (1) year from the effective date of the permit	One (1) year from the effective date of the permit	Eighteen (18) months from the effective date of the permit
-Estimate the annual volume of floatables and trash removed from each control facility and characterize the floatable type as required in Part I.D.5.f.(i)(b)	Ten (10) months from the effective date of the permit	One (1) year from the effective date of the permit	Two (2) years from the effective date of the permit	Two (2) years from the effective dae of the permit	Thirty (30) months from the effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.f.(ii) and Part I.D.5.f.(iii).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

g. Public Education and Outreach on Stormwater Impacts

(i) The permittee shall, individually or cooperatively, develop, revise, implement, and maintain a comprehensive stormwater program to educate the community, employees, businesses, and the general public of hazards associated with the illegal discharges and improper disposal of waste and about the impact that stormwater discharges on local waterways, as well as the steps that the public can take to reduce pollutants in stormwater. **Permittees previously covered under NMS000101 and NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.**

(ii) The permittee must implement a public education program to distribute educational knowledge to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff. The permittee must:

(a) Define the goals and objectives of the program based on high priority community-wide issues;

(b) Develop or utilize appropriate educational materials, such as printed materials, billboard and mass transit advertisements, signage at select locations, radio advertisements, television advertisements, and websites;

(c) Inform individuals and households about ensuring proper septic system maintenance, ensuring the proper use and disposal of landscape and garden chemicals including fertilizers and pesticides, protecting and restoring riparian vegetation, and properly disposing of used motor oil or household hazardous wastes;

(d) Inform individuals and groups how to become involved in local stream and beach restoration activities as well as activities that are coordinated by youth service and conservation corps or other citizen groups;

(e) Use tailored public education program, using a mix of locally appropriate strategies, to target specific audiences and communities. Examples of strategies include distributing brochures or fact sheets, sponsoring speaking engagements before community groups, providing public service announcements, implementing educational programs targeted at school age children, and conducting community-based projects such as storm drain stenciling, and watershed cleanups; and

(f) Use materials or outreach programs directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant stormwater impacts. For example, providing information to restaurants on the impact of grease clogging storm drains and to garages on the impact of oil discharges. The permittee may tailor the outreach program to address the viewpoints and concerns of all communities, particularly minority and disadvantaged communities, as well as any special concerns relating to children. The permittee must make information available for non-English speaking residents, where appropriate.

(iii) The permittee must include the following information in the Stormwater Management Program (SWMP) document:

(a) A description of a program to promote, publicize, facilitate public reporting of the presence of illicit discharges or water quality associated with discharges from municipal separate storm sewers;

(b) A description of the education activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(c) A description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.g.(i) and Part I.D.5.g.(ii) and its corresponding measurable goal.

(iv) The permittee must assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the Annual Report.

Program Flexibility Elements

(v) Where necessary to comply with the Minimum Control Measures established in Part I.D.5.g.(i) and Part I.D.5.g.(ii), the permittee should develop a program or modify/revise an existing education and outreach program to:

(a) Promote, publicize, and facilitate the use of Green Infrastructure (GI)/Low Impact Development (LID)/Sustainability practices; and

(b) Include an integrated public education program (including all permittee departments and programs within the MS4) regarding litter reduction, reduction in pesticide/herbicide use, recycling and proper

disposal (including yard waste, hazardous waste materials, and used motor vehicle fluids), and GI/LID/Sustainable practices (including xeriscaping, reduced water consumption, water harvesting practices allowed by the New Mexico State Engineer Office).

(vi) The permittee may collaborate or partner with other MS4 operators to maximize the program and cost effectiveness of the required outreach.

(vii) The education and outreach program may use citizen hotlines as a low-cost strategy to engage the public in illicit discharge surveillance.

(viii) The permittee may use stormwater educational materials provided by the State, Tribe, EPA, environmental, public interest or trade organizations, or other MS4s. The permittee may also integrate the education and outreach program with existing education and outreach programs in the Middle Rio Grande area. Example of existing programs include:

(a) Classroom education on stormwater;

A. Develop watershed map to help students visualize area impacted.

B. Develop pet-specific education

(b) Establish a water committee/advisor group;

(c) Contribute and participate in Stormwater Quality Team;

(d) Education/outreach for commercial activities;

(e) Hold regular employee trainings with industry groups

(f) Education of lawn and garden activities;

(g) Education on sustainable practices;

(h) Education/outreach of pet waste management;

(i) Education on the proper disposal of household hazardous waste;

(j) Education/outreach programs aimed at minority and disadvantaged communities and children;

(k) Education/outreach of trash management;

(l) Education/outreach in public events;

A. Participate in local events—brochures, posters, etc.

B. Participate in regional events (i.e., State Fair, Balloon Fiesta).

(m) Education/outreach using the media (e.g. publish local newsletters);

(n) Education/outreach on water conservation practices designed to reduce pollutants in storm water for home residences.

Table 8. Public Education and Outreach on Stormwater Impacts - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
Develop, revise, implement, and maintain an education and outreach program as required in Part I.D.5.g.(i) and Part I.D.5.g.(ii)	Ten (10) months from the effective date of the permit	Eleven (11) months from the effective date of the permit	Twelve (12) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.g.(iii) and Part I.D.5.g.(iv)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.g.(v) through Part I.D.5.g.(viii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

h. Public Involvement and Participation

(i) The permittee must provide local public notice of and make available for public review a copy of the complete NOI and attachments (see Part I.B.2). Local public notice may be made by newspaper notice, notice at a council meeting, posting on the internet, or other method consistent with state/tribal/local public notice requirements.

The permittee must consider all public comments received during the public notice period and modify the NOI, or include a schedule to modify the SWMP, as necessary, or as required by the Director modify the NOI or/and SWMP in response to such comments. The Permittees must include in the NOI any unresolved public comments and the MS4's response to these comments. Responses provided by the MS4 will be considered as part of EPA's decision-making process. See also Appendix E Providing Comments or Requesting a Public Hearing on an Operator's NOI.

(ii) The permittee shall develop, revise, implement and maintain a plan to encourage public involvement and provide opportunities for participation in the review, modification and implementation of the SWMP; develop and implement a process by which public comments to the plan are received and reviewed by the person(s) responsible for the SWMP; and, make the SWMP available to the public and to the operator of any MS4 or Tribal authority receiving discharges from the MS4. **Permittee previously covered under NMS000101 or NMR040000 must continue existing public involvement and participation programs while updating those programs, as necessary, to comply with the requirements of this permit.**

(iii) The plan required in Part I.D.5.h.(ii) 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 permittee must include the following elements in the plan:

(a) A detailed description of the general plan for informing the public of involvement and participation opportunities, including types of activities; target audiences; how interested parties may access the SWMP; and how the public was involved in development of the SWMP;

(b) The development and implementation of at least one (1) assessment of public behavioral change following a public education and/or participation event;

(c) A process to solicit involvement by environmental groups, environmental justice communities, civic organizations or other neighborhoods/organizations interested in water quality-related issues, including but not limited to the Middle Rio Grande Water Quality Work Group, the Middle Rio Grande Bosque Initiative, the Middle Rio Grande Endangered Species Act Collaborative Program, the Middle Rio Grande-Albuquerque Reach Watershed Group, the Pueblos of Santa Ana, Sandia and Isleta, Albuquerque Bernalillo County Water Utility Authority, UNM Colleges and Schools, and Chartered Student Organizations; and

(d) An evaluation of opportunities to utilize volunteers for stormwater pollution prevention activities and awareness throughout the area.

(iv) The permittee shall comply with State, Tribal and local public notice requirements when implementing a public involvement/ participation program.

(v) The public participation process must reach out to all economic and ethnic groups. Opportunities for members of the public to participate in program development and implementation include serving as citizen representatives on a local stormwater management panel, attending public hearings, working as citizen volunteers to educate other individuals about the program, assisting in program coordination with other pre-existing programs, or participating in volunteer monitoring efforts.

(vi) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Parts I.D.5.h.(i) throughout Part I.D.5.h.(iv) and its corresponding measurable goal.

(vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

(viii) The permittee must provide public accessibility of the Storm Water Management Program (SWMP) document and Annual Reports online via the Internet and during normal business hours at the MS4 operator's main office, a local library, posting on the internet and/or other readily accessible location for public inspection and copying consistent with any applicable federal, state, tribal, or local open records requirements. Upon a showing of significant public interest, the MS4 operator is encouraged to hold a public meeting (or include in the agenda of in a regularly scheduled city council meeting, etc.) on the NOI, SWMP, and Annual Reports. (See Part III B)

Program Flexibility Elements

(ix) The permittee may integrate the public Involvement and participation program with existing education and outreach programs in the Middle Rio Grande area. Example of existing programs include: Adopt-A-Stream Programs; Attitude Surveys; Community Hotlines (e.g. establishment of a "311"-type number and system established to handle storm-water-related concerns, setting up a public tracking/reporting

system, using phones and social media); Revegetation Programs; Storm Drain Stenciling Programs; Stream cleanup and Monitoring program/events.

Table 9. Public Involvement and Participation - *Program Development and Implementation Schedules*

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
Develop (or update), implement, and maintain a public involvement and participation plan as required in Part I.D.5.h.(ii) and Part I.D.5.h.(iii)	Ten (10) months from effective date of the permit	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit
Comply with State, Tribal, and local notice requirements when implementing a Public Involvement and Participation Program as required in Part I.D.5.h.(iv)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	Twelve (12) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit
Include elements as required in Part I.D.5.h.(v)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit	One (1) year from effective date of the permit	Eighteen (18) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.h.(vi), Part I.D.5.h.(vii), and Part I.D.5.h.(viii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.h.(ix)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

6. **Stormwater Management Program Review and Modification**.

a. Program Review. Permittee shall participate in an annual review of its SWMP in conjunction with preparation of the annual report required in Part III.B. Results of the review shall be discussed in the annual report and shall include an assessment of:

(i) SWMP implementation, progress in achieving measurable goals, and compliance with program elements and other permit conditions;

(ii) the effectiveness of its SWMP, and any necessary modifications, in complying with the permit, including requirements to control the discharge of pollutants, and comply with water quality standards and any applicable approved TMDLs; and the adequacy of staff, funding levels, equipment, and support capabilities to fully implement the SWMP and comply with permit conditions.

(a) Project staffing requirements, in man hours, for the implementation of the MS4 program during the upcoming year.

(b) Staff man hours used during the previous year for implementing the MS4 program. Man hours may be estimated based on staff assigned, assuming a forty (40) hour work week.

b. Program Modification. The permittee(s) may modify its SWMP with prior notification or request to the EPA and NMED in accordance with this section.

(i) Modifications adding, but not eliminating, replacing, or jeopardizing fulfillment of any components, controls, or requirements of its SWMP may be made by the permittee(s) at any time upon written notification to the EPA.

(ii) Modifications replacing or eliminating an ineffective or unfeasible component, control or requirement of its SWMP, including monitoring and analysis requirements described in Parts III.A and V, may be requested in writing at any time. If request is denied, the EPA will send a written explanation of the decision. Modification requests shall include the following:

(a) a description of why the SWMP component is ineffective, unfeasible (including cost prohibitions), or unnecessary to support compliance with the permit;

(b) expectations on the effectiveness of the proposed replacement component; and

(c) an analysis of how the proposed replacement component is expected to achieve the goals of the component to be replaced.

(iii) Modifications resulting from schedules contained in Part VI may be requested following completion of an interim task or final deadline.

(iv) Modification requests or notifications shall be made in writing, signed in accordance with Part IV.H.

c. Program Modifications Required by EPA. Modifications requested by EPA shall be made in writing, set forth the time schedule for the permittee(s) to develop the modifications, and offer the permittee(s) the opportunity to propose alternative program modifications to meet the objective of the requested modification. The EPA may require changes to the SWMP as needed to:

(i) Address impacts on receiving water quality caused, or contributed to, by discharges from the MS4;

(ii) Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements;

(iii) Include such other conditions deemed necessary by the EPA to comply with the goals and requirements of the Clean Water Act; or

(iv) If, at any time, EPA determines that the SWMP does not meet permit requirements.

d. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation: The permittee(s) shall implement the SWMP:

(i) On all new areas added to their portion of the MS4 (or for which they become responsible for implementation of stormwater quality controls) as expeditiously as possible, but not later than one (1) year from addition of the new areas. Implementation may be accomplished in a phased manner to allow additional time for controls that cannot be implemented immediately;

(ii) Within ninety (90) days of a transfer of ownership, operational authority, or responsibility for SWMP implementation, the permittee(s) shall have a plan for implementing the SWMP on all affected areas. The plan may include schedules for implementation; and information on all new annexed areas and any resulting updates required to the SWMP shall be submitted in the annual report.

7. **Retention of Program Records**. The permittee shall retain SWMP records developed in accordance with Part I.D, Part IV.P, and Part VI for at least five (5) years after coverage under this permit terminates.

8. **Qualifying State, Tribal or Local Program**. The permittee may substitute the BMPs and measurable goals of an existing storm water pollution control program to qualify for compliance with one or more of the minimum control measures if the existing measure meets the requirements of the minimum control measure as established in Part I.D.5

PART II. NUMERIC DISCHARGE LIMITATIONS

A. DISCHARGE LIMITATIONS. Reserved

PART III. MONITORING, ASSESSMENT, AND REPORTING REQUIREMENTS:

A. MONITORING AND ASSESSMENT

The permittee must develop, in consultation with NMED and EPA (and affected Tribes if monitoring locations would be located on Tribal lands), and implement a comprehensive monitoring and assessment program designed to meet the following objectives:

- Assess compliance with this permit;
- Assess the effectiveness of the permittee's stormwater management program;
- Assess the impacts to receiving waters resulting from stormwater discharges;
- Characterize stormwater discharges;
- Identify sources of elevated pollutant loads and specific pollutants;
- Detect and eliminate illicit discharges and illegal connections to the MS4; and
- Assess the overall health and evaluate long-term trends in receiving water quality.

The permittee shall be select specific monitoring locations sufficient to assess effects of storm water discharges on receiving waters. The monitoring program may take advantage of monitoring stations/efforts utilized by the permittees or others in previous stormwater monitoring programs or other water quality monitoring efforts. Data collected by others at such stations may be used to satisfy part, or all, of the permit monitoring requirements provided the data collection by that party meets the requirements established in Part III.A.1 throughout Part III.A.5. The comprehensive monitoring and assessment program shall be described in the SWMP document and the results must be provided in each annual report.

Implementation of the comprehensive monitoring and assessment program may be achieved through participation with other permittees to satisfy the requirements of Part III.A.1 throughout Part III.A.5 below in lieu of creating duplicate program elements for each individual permittee.

1. **Wet Weather Monitoring**: The permittees shall conduct wet weather monitoring to gather information on the response of receiving waters to wet weather discharges from the MS4 during both wet season (July 1 through October 31) and dry Season (November 1 through June 30). Wet Weather Monitoring shall be conducted at outfalls, internal sampling stations, and/or in-stream monitoring locations at each water of the US that runs in each entity or entities' jurisdiction(s). Permittees may choose either Option A or Option B below:

   a. *Option A*: Individual monitoring

      (i) Class A: Perform wet weather monitoring at a location coming into the MS4 jurisdictional area (upstream) and leaving the MS4 jurisdictional area (downstream), see Appendix D. Monitor for TSS, TDS, COD, BOD_5, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and gross alpha. Monitoring of temperature shall be also conducted at outfalls and/or Rio Grande monitoring locations. Phase I permittees must include additional parameters from monitoring conducted under permit NMS000101 (from last 10 years) whose mean values are at or above a WQS. Permittee must sample these pollutants a minimum of 10 events during the permit term with at least 5 events in wet season and 4 events in dry season.

      (ii) Class B, C, and D: Perform wet weather monitoring at a location coming into the MS4 jurisdictional area (upstream) and leaving the MS4 jurisdictional area (downstream), see Appendix D. Monitor for TSS, TDS, COD, BOD_5, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and gross alpha. Monitoring of temperature shall be also

conducted at outfalls and/or Rio Grande monitoring locations. If applicable, include additional parameters from monitoring conducted under permits NMR040000 or/and NMR04000I whose mean values are at or above a WQS; sample these pollutants a minimum of 8 events per location during the permit term with at least 4 events in wet season and 2 events in dry season.

b. *Option B*: Cooperative Monitoring Program

Develop a cooperative wet weather monitoring program with other permittees in the Middle Rio Grande watershed (see map in Appendix A). The program will monitor waters coming into the watershed (upstream) and leaving the watershed (downstream), see suggested sampling locations in Appendix D. The program must include sampling for TSS, TDS, COD, BOD5, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and Gross alpha. Monitoring of temperature shall be also conducted at outfalls and/or Rio Grande monitoring locations. Permittees must include additional parameters from monitoring conducted under permits NMS000101, NMR040000 or/and NMR04000I whose mean values are at or above a WQS. The monitoring program must sample the pollutants for a minimum of 7 storm events per location during the permit term with at least 3 events wet season and 2 events in dry season.

Note: Seasonal monitoring periods are: Wet Season: July 1 through October 31; Dry Season: November 1 through June 30.

c. Wet weather monitoring shall be performed only when the predicted (or actual) rainfall magnitude of a storm event is greater than 0.25 inches and an antecedent dry period of at least forty-eight (48) hours after a rain event greater than 0.1 inch in magnitude is satisfied. Monitoring methodology will consist of collecting a minimum of four (4) grab samples spaced at a minimum interval of fifteen (15) minutes each (or a flow weighted automatic composite, see Part III.A.5.a.(i)). Individual grab samples shall be preserved and delivered to the laboratory where samples will be combined into a single composite sample from each monitoring location.

d. Monitoring methodology at each MS4 monitoring location shall be collected during any portion of the monitoring location's discharge hydrograph (i.e. first flush, rising limb, peak, and falling limb) after a discernible increase in flow at the tributary inlet.

e. The permittee must comply with the schedules contained in Table 10. The results of the Wet Weather Monitoring must be provided in each annual report.

f. DO, pH, conductivity, and temperature shall be analyzed in the field within fifteen (15) minutes of sample collection.

g. Alternate wet weather monitoring locations established in Part III.A.1.a or Part III.A.1.b may be substituted for just cause during the term of the permit. Requests for approval of alternate monitoring locations shall be made to the EPA and NMED in writing and include the rationale for the requested monitoring station relocation. Unless disapproved by the EPA, use of an alternate monitoring location (except for those with numeric effluent limitations) may commence thirty (30) days from the date of the request. For monitoring locations where numeric effluent limitations have been established, the permit must be modified prior to substitution of alternate monitoring locations. At least six (6) samples shall be collected during the first year of monitoring at substitute monitoring locations. If there are less than six sampleable events, this should be document for reporting purposes.

h. Response to monitoring results: The monitoring program must include a contingency plan for collecting additional monitoring data within the MS4 or at additional appropriate instream locations should monitoring results indicate that MS4 discharges may be contributing to instream exceedances of WQS. The purpose of this additional monitoring effort would be to identify sources of elevated pollutant loadings so they could be addressed by the SWMP.

Table 10. Wet Weather Monitoring Program Implementation Schedules:

Activity	Permittee Class				
	A Phase I MS4s	**B Phase II MS4s (2000 Census)**	**C New Phase II MS4s (2010 Census **)**	**D MS4s within Indian Lands**	**Cooperative (*) Any Permittee with cooperative programs**
Submit wet weather monitoring preference to EPA (i.e., individual monitoring program vs. cooperative monitoring program) with NOI submittals	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)
Submit a detailed description of the monitoring scheme to EPA and NMED for approval. The monitoring scheme should include: a list of pollutants; a description of monitoring sites with an explanation of why those sites were selected; and a detailed map of all proposed monitoring sites	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Twelve (12) months from effective date of permit
Submit certification that all wet weather monitoring sites are operational and begin sampling	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Thirteen (13) months from effective date of permit	Thirteen (13) months from effective date of permit	Fourteen (14) months from effective date of permit
Update SWMP document and submit annual reports	Annually	Annually	Annually	Annually	Annually

(**) or MS4s designated by the Director

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

2. **Dry Weather Discharge Screening of MS4**: Each permittee shall identify, investigate, and address areas within its jurisdiction that may be contributing excessive levels of pollutants to the Municipal Separate Storm Sewer System as a result of dry weather discharges (i.e., discharges from separate storm sewers that occur without the direct influence of runoff from storm events, e.g. illicit discharges, allowable non-stormwater, groundwater infiltration, etc.). Due to the arid and semi-arid conditions of the area, the dry weather discharges screening program may be carried out during both wet season (July 1 through October 31) and dry Season (November 1 through June 30). Results of the assessment

shall be provided in each annual report. This program may be coordinated with the illicit discharge detection and elimination program required in Part I.D.5.e. The dry weather screening program shall be described in the SWMP and comply with the schedules contained in Part I.D.5.e.(iii). The permittee shall

a. Include sufficient screening points to adequately assess pollutant levels from all areas of the MS4.

b. Screen for, at a minimum, BOD_5, sediment or a parameter addressing sediment (e.g., TSS or turbidity), E. coli, Oil and Grease, nutrients, any pollutant that has been identified as cause of impairment of a waterbody receiving discharges from that portion of the MS4, including temperature.

c. Specify the sampling and non-sampling techniques to be issued for initial screening and follow-up purposes. Sample collection and analysis need not conform to the requirements of 40 CFR Part 136; and

d. Perform monitoring only when an antecedent dry period of at least seventy-two (72) hours after a rain event greater than 0.1 inch in magnitude is satisfied. Monitoring methodology shall consist of collecting a minimum of four (4) grab samples spaced at a minimum interval of fifteen (15) minutes each. Grab samples will be combined into a single composite sample from each station, preserved, and delivered to the laboratory for analysis. A flow weighted automatic composite sample may also be used.

3. **Floatable Monitoring:** The permittees shall establish locations for monitoring/assessing floatable material in discharges to and/or from their MS4. Floatable material shall be monitored at least twice per year at priority locations and at minimum of two (2) stations except as provided in Part III.A.3. below. The amount of collected material shall be estimated in cubic yards.

   a. One (1) station should be located in the North Diversion (only applicable to the COA and AMAFCA).

   b. Non-traditional MS4 as defined in Part VII shall sample/assess at one (1) station.

   c. Phase II MS4s shall sample/assess at one (1) station within their jurisdiction or participate in a cooperative floatable monitoring plan addressing impacts on perennial waters of the US on a larger watershed basis.

   A cooperative monitoring program may be established in partnership with other MS4s to monitor and assess floatable material in discharges to and/or from a joint jurisdictional area or watershed basis.

4. **Industrial and High Risk Runoff Monitoring** (Applicable only to Class A permittees): The permittees shall monitor stormwater discharges from Type 1 and 2 industrial facilities which discharge to the MS4 provided such facilities are located in their jurisdiction. (Note: if no such facilities are in the permittee's jurisdiction, the permittee must certify that this program element does not apply). The permittee shall:

   a. Conduct analytical monitoring of Type 1 facilities that discharge to the MS4. Type 1 facilities are municipal landfills; hazardous waste treatment, disposal and recovery facilities; facilities that are subject to EPCRA Title III, Section 313; and industrial facilities the permittee(s) determines are contributing a substantial pollutant loading to the MS4.

      (i) The following parameters shall be monitored:
      - any pollutants limited in an existing NPDES permit to a subject facility;

- oil and grease;
- chemical oxygen demand (COD);
- pH;
- biochemical oxygen demand, five-day (BOD_5);
- total suspended solids (TSS);
- total phosphorous;
- total Kjeldahl nitrogen (TKN);
- nitrate plus nitrite nitrogen;
- any discharge information required under 40 CFR §122.21(g)(7)(iii) and (iv);
- total cadmium;
- total chromium;
- total copper;
- total lead;
- total nickel;
- total silver;
- total zinc; and,
- PCBs.

(ii) Frequency of monitoring shall be established by the permittee(s), but may not be less than once per year;

(iii) In lieu of the above parameter list, the permittee(s) may alter the monitoring requirement for any individual Type 1 facility:

(a) To coincide with the corresponding industrial sector-specific monitoring requirements of the 2008 Multi-Sector General Stormwater Permit or any applicable general permit issued after September 2008. This exception is not contingent on whether a particular facility is actually covered by the general permit; or

(b) To coincide with the monitoring requirements of any individual permit for the stormwater discharges from that facility, and

(c) Any optional monitoring list must be supplemented by pollutants of concern identified by the permittee(s) for that facility.

b. Conduct appropriate monitoring (e.g. analytic, visual), as determined by the permittee(s), at Type 2 facilities that discharge to the MS4. Type 2 facilities are other municipal waste treatment, storage, or disposal facilities (e.g. POTWs, transfer stations, incinerators) and industrial or commercial facilities the permittee(s) believed contributing pollutants to the MS4. The permittee shall include in each annual report, a list of parameters of concern and monitoring frequencies required for each type of facility.

c. May use analytical monitoring data, on a parameter-by-parameter basis, that a facility has collected to comply with or apply for a State or NPDES discharge permit (other than this permit), so as to avoid unnecessary cost and duplication of effort;

d. May allow the facility to test only one (1) outfall and to report that the quantitative data also apply to the substantially identical outfalls if:

(i) A Type 1 or Type 2 industrial facility has two (2) or more outfalls with substantially identical effluents, and

(ii) Demonstration by the facility that the stormwater outfalls are substantially identical, using one (1) or all of the following methods for such demonstration. The NPDES Stormwater Sampling Guidance Document (EPA 833-B-92-001), available on EPA's website at provides detailed guidance on each of the three options: (1) submission of a narrative description and a site map; (2) submission of matrices; or (3) submission of model matrices.

b. May accept a copy of a "no exposure" certification from a facility made to EPA under 40 CFR §122.26(g), in lieu of analytic monitoring.

5. **Additional Sample Type, Collection and Analysis:**

a. Wet Weather (or Storm Event) Discharge Monitoring: If storm event discharges are collected to meet the objectives of the Comprehensive Monitoring and Assessment Program required in Part III.A (e.g., assess compliance with this permit; assess the effectiveness of the permittee's stormwater management program; assess the impacts to receiving waters resulting from stormwater discharges), the following requirements apply:

(i) Composite Samples: Flow-weighted composite samples shall be collected as follows:

(a) Composite Method – Flow-weighted composite samples may be collected manually or automatically. For both methods, equal volume aliquots may be collected at the time of sampling and then flow-proportioned and composited in the laboratory, or the aliquot volume may be collected based on the flow rate at the time of sample collection and composited in the field.

(b) Sampling Duration – Samples shall be collected for at least the first three (3) hours of discharge. Where the discharge lasts less than three (3) hours, the permittee should report the value. .

(c) Aliquot Collection – A minimum of three (3) aliquots per hour, separated by at least fifteen (15) minutes, shall be collected. Where more than three (3) aliquots per hour are collected, comparable intervals between aliquots shall be maintained (e.g. six aliquots per hour, at least seven (7) minute intervals).

(ii) Grab Samples: Grab samples shall be taken during the first two (2) hours of discharge.

b. Analytical Methods: Analysis and collection of samples shall be done in accordance with the methods specified at 40 CFR §136. Where an approved 40 CFR §136 method does not exist, any available method may be used unless a particular method or criteria for method selection (such as sensitivity) has been specified in the permit. The minimum quantification levels (MQLs) in Appendix F are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

Screening level tests may utilize less expensive "field test kits" using test methods not approved by EPA under 40 CFR 136, provided the manufacturers published detection ranges are adequate for the illicit discharge detection purposes.

EPA Method 1668 shall be utilized when PCB water column monitoring is conducted to determine compliance with permit requirements. For purposes of sediment sampling in dry weather as part of a screening program to identify area(s) where PCB control/clean-up efforts may need to be focused, either the Arochlor test (EPA Method 8082) or USGS test method (8093) may be utilized, but must use EPA Method 1668 (latest revision) for confirmation and determination of specific PCB levels at that location.

EPA Method 900.0 shall be utilized when gross alpha water column monitoring is conducted to determine compliance with permit requirements.

B. ANNUAL REPORT

The permittees shall submit an annual report to be submitted by no later than **December 1st**. See suggested form at http://epa.gov/region6/water/npdes/sw/ms4/index.htm. The report shall cover the previous year from **July 1st to June 30rd** and include the below separate sections. Additionally, the year one (1) and year four (4) annual report shall include submittal of a complete SWMP revision.

At least forty five (45) days prior to submission of each Annual Report, the permittee must provide public notice of and make available for public review and comment a draft copy of the Annual Report. All public input must be considered in preparation of the final Annual Reports and any changes to the SWMP.

Note: A complete copy of the signed Annual Report should be maintained on site.

1. **SWMP(s) status of implementation**: shall include the status of compliance with all schedules established under this permit and the status of actions required in Parts I, III, and VI.

2. **SWMP revisions**: shall include revisions, if necessary, to the assessments of controls or BMPs reported in the permit application (or NOI for coverage under this permit) under 40 CFR §122.26(d)(2)(v) and §122.34(d)(1)(i) are to be included, as well as a cumulative list of all SWMP revisions during the permit term.

   Class A permittees shall include revisions, if necessary, to the fiscal analysis reported in the permit application (or NOI for coverage under this permit) under §122.26(d)(2)(vi).

3. **Performance assessment**: shall include:

   a. an assessment of performance in terms of measurable goals, including, but not limited to, a description of the number and nature of enforcement actions and inspections, public education and public involvement efforts;

   b. a summary of the data, including monitoring data, that is accumulated throughout the monitoring year (July 1 to June 30); actual values of representative monitoring results shall be included, if results are above minimum quantification level (MQL); and

   c. an identification of water quality improvements or degradation.

4. **Annual expenditures**: for the reporting period, with a breakdown for the major elements of the stormwater management program and the budget for the year following each annual report. (Applicable only to Class A permittees)

5. **Annual Report Responsibilities for Cooperative Programs:** preparation of a system-wide report with cooperative programs may be coordinated among cooperating MS4s and then used as part of individual Annual Reports. The report of a cooperative program element shall indicate which, if any, permittee(s) have failed to provide the required information on the portions of the MS4 for which they are responsible to the cooperation permittees.

   a. Joint responsibility for reports covering cooperative programs elements shall be limited to participation in preparation of the overview for the entire system and inclusion of the identity of any permittee who failed to provide input to the annual report.

b. Individual permittees shall be individually responsible for content of the report relating to the portions of the MS4 for which they are responsible and for failure to provide information for the system-wide annual report no later than July 31st of each year.

6. **Public Review and Comment**: a brief summary of any issues raised by the public on the draft Annual Report, along with permittee's responses to the public comments.

7. **Signature on Certification of Annual Reports**: The annual report shall be signed and certified, in accordance with Part IV.H and include a statement or resolution that the permittee's governing body or agency (or delegated representative) has reviewed or been apprised of the content of the Annual Report. Annual report shall be due no later than December 1st of each year. A complete copy of the signed Annual Report should be maintained on site.

C. CERTIFICATION AND SIGNATURE OF RECORDS.

All reports required by the permit and other information requested by the EPA shall be signed and certified in accordance with Part IV.H.

D. REPORTING: WHERE AND WHEN TO SUBMIT

1. Monitoring results (Part III.A.1, Part III.A.3, Part III.A.5.a) obtained during the reporting period running from July 1st to June 30th shall be submitted on discharge monitoring report (DMR) forms along with the annual report required by Part III.B. A separate DMR form is required for each monitoring period (season) specified in Part III.A.1. If any individual analytical test result is less than the minimum quantification level (MQL) listed for that parameter, then a value of zero (0) may be used for that test result for the discharge monitoring report (DMR) calculations and reporting requirements. The annual report shall include the actual value obtained, if test result is less than the MQL (See Appendix F).

2. Signed copies of DMRs required under Part III, the Annual Report required by Part III.B, and all other reports required herein, shall be submitted in electronic form to R6_MS4Permits@epa.gov (note: there is an underscore between R6 and MS4).

   Copy of a suggested Annual Report Format is located in EPA R6 website: http://epa.gov/region6/water/npdes/sw/ms4/index.htm.

   Electronic submittal of the documents required in the permit using a compatible Integrated Compliance Information System (ICIS) format would be allowed if available.

3. Requests for SWMP updates, modifications in monitoring locations, or application for an individual permit shall, be submitted to,:

   U.S. EPA, Region 6
   Water Quality Protection Division
   Operations Support Office (6WQ-O)
   1445 Ross Avenue
   Dallas, Texas 75202-2733

4. Additional Notification. Permittee(s) shall also provide copies of NOIs, DMRs, annual reports, NOTs, requests for SWMP updates, items for compliance with permit requirements for Compliance with Water Quality Standards in Part I.C.1, TMDL's reports established in Part I.C.2, monitoring scheme, reports, and certifications required in Part III.A.1, programs or changes in monitoring locations, and all other reports required herein, to:

New Mexico Environment Department
Attn: Bruce Yurdin, Program Manager
Surface Water Quality Bureau
Point Source Regulation Section
P.O. Box 5469
Santa Fe, New Mexico 87502

Pueblo of Sandia Environment Department
Attn: Scott Bulgrin, Water Quality Manager
481 Sandia Loop
Bernalillo, NM 87004
(Note: Only those MS4s with discharges upstream of or to waters under the jurisdictional of the Pueblo of Sandia: AMAFCA, Sandoval County, Village of Corrales, City of Rio Rancho, Town of Bernalillo, SSCAFCA, and ESCAFCA)

Pueblo of Isleta
Attn: Ramona M. Montoya, Environment Division Manager
P.O. Box 1270
Isleta NM 87022

(Notes: Only the City of Albuquerque, Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA), New Mexico Department of Transportation (NMDOT) District 3, KAFB (Kirtland Air Force Base), Sandia Labs (DOE), and Bernalillo County). All parties submitting an NOI or NOT shall notify the Pueblo of Isleta in writing that a NOI or NOT has been submitted to EPA

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004
(Note: Only those MS4s with discharges upstream of or to waters under the jurisdictional of the Pueblo of Santa Ana)

PART IV. STANDARD PERMIT CONDITIONS

A. DUTY TO COMPLY.

The permittee(s) must comply with all conditions of this permit insofar as those conditions are applicable to each permittee, either individually or jointly. Any permit noncompliance constitutes a violation of the Clean Water Act (The Act) and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

B. PENALTIES FOR VIOLATIONS OF PERMIT CONDITIONS.

The EPA will adjust the Civil and administrative penalties listed below in accordance with the Civil Monetary Penalty Inflation Adjustment Rule (Federal Register: Dec. 31, 1996, Volume 61, No. 252, pages 69359-69366, as corrected, March 20, 1997, Volume 62, No. 54, pages 13514-13517) as mandated by the Debt Collection Improvement Act of 1996 for inflation on a periodic basis. This rule allows EPA's penalties to keep pace with inflation. The Agency is required to review its penalties at least once every four years thereafter and to adjust them as necessary for inflation according to a specified formula. The civil and administrative penalties listed below were adjusted for inflation starting in 1996.

1. **Criminal Penalties**.
   a. Negligent Violations: The Act provides that any person who negligently violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one (1) year, or both.

   b. Knowing Violations: The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than three (3) years, or both.

   c. Knowing Endangerment: The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act and who knows at that time that he is placing another person in imminent danger of death or serious bodily injury is subject to a fine of not more than $250,000, or by imprisonment for not more than fifteen (15) years, or both.

   d. False Statement: The Act provides that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act or who knowingly falsifies, tampers with, or renders inaccurate, any monitoring device or method required to be maintained under the Act, shall upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than two (2) years, or by both. If a conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four (4) years, or by both. (See Section 309(c)(4) of the Act).

2. **Civil Penalties**. The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a civil penalty not to exceed $27,500 per day for each violation.

3. **Administrative Penalties**. The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to an administrative penalty, as follows:

   a. Class I penalty: Not to exceed $11,000 per violation nor shall the maximum amount exceed $27,500.

b. Class II penalty: Not to exceed $11,000 per day for each day during which the violation continues nor shall the maximum amount exceed $137,500.

C. **DUTY TO REAPPLY**. If the permittee wishes to continue an activity regulated by this permit after the permit expiration date, the permittee must apply for and obtain a new permit. The application shall be submitted at least 180 days prior to expiration of this permit. The EPA may grant permission to submit an application less than 180 days in advance but no later than the permit expiration date. Continuation of expiring permits shall be governed by regulations promulgated at 40 CFR §122.6 and any subsequent amendments.

D. **NEED TO HALT OR REDUCE ACTIVITY NOT A DEFENSE**. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

E. **DUTY TO MITIGATE**. The permittee(s) shall take all reasonable steps to control or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

F. **DUTY TO PROVIDE INFORMATION**. The permittee(s) shall furnish to the EPA, within a time specified by the EPA, any information which the EPA may request to determine compliance with this permit. The permittee(s) shall also furnish to the EPA upon request copies of records required to be kept by this permit.

G. **OTHER INFORMATION**. When the permittee becomes aware that he or she failed to submit any relevant facts or submitted incorrect information in any report to the EPA, he or she shall promptly submit such facts or information.

H. **SIGNATORY REQUIREMENTS**. For a municipality, State, or other public agency, all DMRs, SWMPs, reports, certifications or information either submitted to the EPA or that this permit requires be maintained by the permittee(s), shall be signed by either a:

1. Principal executive officer or ranking elected official; or

2. Duly authorized representative of that person. A person is a duly authorized representative only if:

   a. The authorization is made in writing by a person described above and submitted to the EPA.

   b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either a named individual or any individual occupying a named position.

3. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new written authorization satisfying the requirements of this paragraph must be submitted to the EPA prior to or together with any reports, information, or applications to be signed by an authorized representative.

4. Certification: Any person signing documents under this section 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 who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

I. **PENALTIES FOR FALSIFICATION OF MONITORING SYSTEMS.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by fines and imprisonment described in Section 309 of the Act.

J. **OIL AND HAZARDOUS SUBSTANCE LIABILITY.** Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under section 311 of the Act or section 106 of CERCLA.

K. **PROPERTY RIGHTS.** The issuance of this permit does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property nor any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

L. **SEVERABILITY.** The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit shall not be affected thereby.

M. **REQUIRING A SEPARATE PERMIT.**

1. The EPA may require any permittee authorized by this permit to obtain a separate NPDES permit. Any interested person may petition the EPA to take action under this paragraph. The Director may require any permittee authorized to discharge under this permit to apply for a separate NPDES permit only if the permittee has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form (as necessary), a statement setting a deadline for the permittee to file the application, and a statement that on the effective date of the separate NPDES permit, coverage under this permit shall automatically terminate. Separate permit applications shall be submitted to the address shown in Part III.D. The EPA may grant additional time to submit the application upon request of the applicant. If an owner or operator fails to submit, prior to the deadline of the time extension, a separate NPDES permit application as required by the EPA, then the applicability of this permit to the permittee is automatically terminated at the end of the day specified for application submittal.

2. Any permittee authorized by this permit may request to be excluded from the coverage of this permit by applying for a separate permit. The permittee shall submit a separate application as specified by 40 CFR §122.26(d) for Class A permittees and by 40 CFR §122.33(b)(2) for Class B, C, and D permittees, with reasons supporting the request to the Director. Separate permit applications shall be submitted to the address shown in Part III.D.3. The request may be granted by the issuance of a separate permit if the reasons cited by the permittee are adequate to support the request.

3. When an individual NPDES permit is issued to a discharger otherwise subject to this permit, or the permittee is authorized to discharge under an alternative NPDES general permit, the applicability of this permit to the individual NPDES permittee is automatically terminated on the effective date of the individual permit or the date of authorization of coverage under the alternative general permit, whichever the case may be. When an individual NPDES permit is denied to an operator otherwise subject to this permit, or the operator is denied for coverage under an alternative NPDES general permit, the applicability of this permit to the individual NPDES permittee is automatically terminated on the date of such denial, unless otherwise specified by the permitting authority.

N. **STATE / ENVIRONMENTAL LAWS.**

1. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by section 510 of the Act.

2. No condition of this permit shall release the permittee from any responsibility or requirements under other environmental statutes or regulations.

O. PROPER OPERATION AND MAINTENANCE. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit and with the requirements of stormwater management programs. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance requires the operation of backup or auxiliary facilities or similar systems, installed by a permittee only when necessary to achieve compliance with the conditions of the permit.

P. MONITORING AND RECORDS.

1. The permittee must retain records of all monitoring information, including, all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, copies of Discharge Monitoring Reports (DMRs), a copy of the NPDES permit, and records of all data used to complete the NOI for this permit, for a period of at least three years from the date of the sample, measurement, report or application, or for the term of this permit, whichever is longer. This period may be extended by request of the permitting authority at any time.

2. The permittee must submit its records to the permitting authority only when specifically asked to do so. The permittee must retain a description of the SWMP required by this permit (including a copy of the permit language) at a location accessible to the permitting authority. The permittee must make its records, including the NOI and the description of the SWMP, available to the public if requested to do so in writing.

3. Records of monitoring information shall include:
   a. The date, exact place, and time of sampling or measurements;
   b. The initials or name(s) of the individual(s) who performed the sampling or measurements;
   c. The date(s) analyses were performed;
   d. The time(s) analyses were initiated;
   e. The initials or name(s) of the individual(s) who performed the analyses;
   f. References and written procedures, when available, for the analytical techniques or methods used; and
   g. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.

4. The permittee must maintain, for the term of the permit, copies of all information and determinations used to document permit eligibility under Parts I.A.5.f and Part I.A.3.b.

Q. MONITORING METHODS. Monitoring must be conducted according to test procedures approved under 40 CFR §136, unless other test procedures have been specified in this permit. The minimum quantification levels (MQLs) in Appendix F are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

R. INSPECTION AND ENTRY. The permittee shall allow the EPA or an authorized representative of EPA, or the State, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter the permittee's premises where a regulated facility or activity is located or conducted or where records must be kept under the conditions of this permit;

2. Have access to and copy at reasonable times, any records that must be kept under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substance or parameters at any location.

S. **PERMIT ACTIONS**. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

T. **ADDITIONAL MONITORING BY THE PERMITTEE(S)**. If the permittee monitors more frequently than required by this permit, using test procedures approved under 40 CFR §136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report (DMR). Such increased monitoring frequency shall also be indicated on the DMR.

U. **ARCHEOLOGICAL AND HISTORIC SITES** (Applicable to areas within the corporate boundary of the City of Albuquerque and Tribal lands). This permit does not authorize any stormwater discharges nor require any controls to control stormwater runoff which are not in compliance with any historic preservation laws.

1. In accordance with the Albuquerque Archaeological Ordinance (Section 2-12-2, 14-16-5, and 14-14-3-4), an applicant for either:

   a. A preliminary plan for any subdivision that is five acres or more in size; or

   b. A site development plan or master development plan for a project that is five acres or more in size on property that is zoned SU-1 Special Use, IP Industrial Park, an SU-2 zone that requires site plan review, PC Planned Community with a site, or meets the Zoning Code definition of a Shopping Center must first obtain either a Certificate of No Effect or a Certificate of Approval from the City Archaeologist. Details of the requirements for a Certificate of No Effect or a Certificate of Approval are described in the ordinance. Failure to obtain a certificate as required by ordinance shall subject the property owner to the penalties of §1-1-99 ROA 1994.

2. If municipal excavation and/or construction projects implementing requirements of this permit will result in the disturbance of previously undisturbed land, and the project is not required to have a separate NPDES permit (e.g. general permit for discharge of stormwater associated with construction activity), then the permittee may seek authorization for stormwater discharges from such sites of disturbance by:

   a. Submitting, thirty (30) days prior to commencing land disturbance, the following to the State Historic Preservation Officer (SHPO) and to appropriate Tribes and Tribal Historic Preservation Officers for evaluation of possible effects on properties listed or eligible for listing on the National Register of Historic Places:

      (i) A description of the construction or land disturbing activity and the potential impact that this activity may have upon the ground, and

      (ii) A copy of a USGS topographic map outlining the location of the project and other ancillary impact areas.

      (iii) The addresses of the SHPO. Sandia Pueblo, and Isleta Pueblo are:

      State Historic Preservation Officer
      New Mexico Historic Preservation Division

Bataan Memorial Building
407 Galisteo Street, Ste. 236
Santa Fe, New Mexico 87501

Pueblo of Sandia Environment Department
Attn: Frank Chaves, Environment Director
481 Sandia Loop
Bernalillo, New Mexico 87004

Pueblo of Isleta
Department of Cultural and Historic Preservation
Attn: Daniel Waseta, Director
P.O. Box 1270
Isleta NM 87022

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004

3. If the permittee receives a request for an archeological survey or notice of adverse effects from the SHPO, the permittee shall delay such activity until:

   a. A cultural resource survey report has been submitted to the SHPO for a review and a determination of no effect or no adverse effect has been made, and

   b. If an adverse effect is anticipated, measures to minimize harm to historic properties have been agreed upon between the permittee and the SHPO.

4. If the permittee does not receive notification of adverse effects or a request for an archeological survey from the SHPO within thirty (30) days, the permittee may proceed with the activity.

5. Alternately, the permittee may obtain authorization for stormwater discharges from such sites of disturbance by applying for a modification of this permit. The permittee may apply for a permit modification by submitting the following information to the Permitting Authority 180 days prior to commencing such discharges:

   a. A letter requesting a permit modification to include discharges from activities subject to this provision, in accordance with the signatory requirements in Part IV.H.

   b. A description of the construction or land disturbing activity and the potential impact that this activity may have upon the ground; County in which the facility will be constructed; type of facility to be constructed; size area (in acres) that the facility will encompass; expected date of construction; and whether the facility is located on land owned or controlled by any political subdivision of New Mexico; and

   c. A copy of a USGS topographic map outlining the location of the project and other ancillary impact areas.

V. **CONTINUATION OF THE EXPIRED GENERAL PERMIT.** If this permit is not reissued or replaced prior to the expiration date, it will be administratively continued in accordance with the Administrative Procedures Act and remain in force and effect. Any permittee who was granted permit coverage prior to the expiration date will automatically remain covered by the continued permit until the earlier of:

1. Reissuance or replacement of this permit, at which time the permittee must comply with the Notice of Intent conditions of the new permit to maintain authorization to discharge; or

2. Issuance of an individual permit for your discharges; or

3. A formal permit decision by the permitting authority not to reissue this general permit, at which time the permittee must seek coverage under an alternative general permit or an individual permit.

W. **PERMIT TRANSFERS**: This permit is not transferable to any person except after notice to the permitting authority. The permitting authority may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Act.

X. **ANTICIPATED NONCOMPLIANCE.** The permittee must give advance notice to the permitting authority of any planned changes in the permitted small MS4 or activity which may result in noncompliance with this permit. (see

Y. **PROCEDURES FOR MODIFICATION OR REVOCATION**: Permit modification or revocation will be conducted according to 40 CFR 122.62, 122.63, 122.64 and 124.5.

PART V. PERMIT MODIFICATION

A. **MODIFICATION OF THE PERMIT**. The permit may be reopened and modified, in accordance with 40 CFR §122.62, §122.63, and §124.5, during the life of the permit to address:

1. Changes in the State's Water Quality Management Plan, including Water Quality Standards;

2. Changes in applicable water quality standards, statutes or regulations;

3. A new permittee who is the owner or operator of a portion of the MS4;

4. Changes in portions of the SWMP that are considered permit conditions;

5. Construction activities implementing requirements of this permit that will result in the disturbance of previously undisturbed land and not required to have a separate NPDES permit; or

6. Other modifications deemed necessary by the EPA to meet the requirements of the Act.

B. **MODIFICATION OF THE SWMP(s).** Only those portions of the SWMPs specifically required as permit conditions shall be subject to the modification requirements of 40 CFR §124.5. Addition of components, controls, or requirements by the permittee(s); replacement of an ineffective or infeasible control implementing a required component of the SWMP with an alternate control expected to achieve the goals of the original control; and changes required as a result of schedules contained in Part VI shall be considered minor changes to the SWMP and not modifications to the permit. (See also Part I.D.6)

C. **CHANGES IN REPRESENTATIVE MONITORING SITES.** Changes in monitoring sites, other than those with specific numeric effluent limitations (as described in Part III.A.1.g), shall be considered minor modifications to the permit and shall be made in accordance with the procedures at 40 CFR §122.63.

PART VI. SCHEDULES FOR IMPLEMENTATION AND COMPLIANCE.

A. **IMPLEMENTATION AND AUGMENTATION OF THE SWMP(s).** The permittee(s) shall comply with all elements identified in Parts I and III for SWMP implementation and augmentation, and permit compliance. The EPA shall have sixty (60) days from receipt of a modification or augmentation made in compliance with Part VI to provide comments or request revisions. During the initial review period, EPA may extend the time period for review and comment. The permittee(s) shall have thirty (30) days from receipt of the EPA's comments or required revisions to submit a response. All changes to the SWMP or monitoring plans made to comply with schedules in Parts I and III must be approved by EPA prior to implementation.

B. **COMPLIANCE WITH EFFLUENT LIMITATIONS.** Reserved.

C. **REPORTING COMPLIANCE WITH SCHEDULES.** No later than fourteen (14) days following a date for a specific action (interim milestone or final deadline) identified in the Part VI schedule(s), the permittee(s) shall submit a written notice of compliance or noncompliance to the EPA in accordance with Part III.D.

D. **MODIFICATION OF THE SWMP(s).** The permittee(s) shall modify its SWMP, as appropriate, in response to modifications required in Part VI.A. Such modifications shall be made in accordance with Part V.B.

PART VII. DEFINITIONS

All definitions contained in Section 502 of the Act shall apply to this permit and are incorporated herein by reference. Unless otherwise specified, additional definitions of words or phrases used in this permit are as follows:

(1) **Baseline Load** means the load for the pollutant of concern which is present in the waterbody before BMPs or other water quality improvement efforts are implemented.

(2) **Best Management Practices (BMPs)** means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to 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.

(3) **Bioretention** means the water quality and water quantity stormwater management practice using the chemical, biological and physical properties of plants, microbes and soils for the removal of pollution from stormwater runoff.

(4) **Canopy Interception** means the interception of precipitation, by leaves and branches of trees and vegetation that does not reach the soil.

(5) **Contaminated Discharges:** The following discharges are considered contaminated:

- Has had a discharge resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at any time since November 16, 1987; or
- Has had a discharge resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or
- Contributes to a violation of an applicable water quality standard.

(6) **Controls** or **Control Measures** or **Measures** means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or control the pollution of waters of the United States. Controls 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.

(7) **Controllable Sources**: Sources, private or public, which fall under the jurisdiction of the MS4.

(8) **CWA** or **The Act** means Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et.seq.

(9) **Co-permittee** means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(10) **Composite Sample** means a sample composed of two or more discrete samples. The aggregate sample will reflect the average water quality covering the compositing or sample period.

(11) **Core Municipality** means, for the purpose of this permit, the municipality whose corporate boundary (unincorporated area for counties and parishes) defines the municipal separate storm sewer system. (ex. City of Dallas for the Dallas Municipal Separate Storm Sewer System, Harris County for unincorporated Harris County).

(12) **Direct Connected Impervious Area (DCIA)** means the portion of impervious area with a direct hydraulic connection to the permitee's municipal separate storm sewer system or a waterbody via continuous paved surfaces, gutters, pipes, and other impervious features. Direct connected impervious area typically does not include isolated impervious areas with an indirect hydraulic connection to the municipal separate storm sewer system (e.g., swale or detention basin) or that otherwise drain to a pervious area.

(13) **Director** means the Regional Administrator or an authorized representative.

(14) **Discharge** for the purpose of this permit, unless indicated otherwise, means discharges from the municipal separate storm sewer system.

(15) **Discharge-related activities"** include: activities which cause, contribute to, or result in storm water point source pollutant discharges; and measures to control storm water discharges, including the sitting, construction and operation of best management practices (BMPs) to control, reduce or prevent storm water pollution.

(16) **Engineered Infiltration** means an underground device or system designed to accept stormwater and slowly exfiltrates it into the underlying soil. This device or system is designed based on soil tests that define the exfiltration rate.

(17) **Evaporation** means rainfall that is changed or converted into a vapor.

(18) **Evapotranspiration** means the sum of evaporation and transpiration of water from the earth's surface to the atmosphere. It includes evaporation of liquid or solid water plus the transpiration of plants.

(19) **Extended Filtration** means a structural stormwater practice which filters stormwater runoff through vegetation and engineered soil media. A portion of the stormwater runoff drains into an underdrain system which slowly releases it after the storm is over.

(20) **Facility** means any NPDES "point source" or any other facility (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

(21) **Flood Control Projects** mean major drainage projects developed to control water quantity rather than quality, including channelization and detention.

(22) **Flow-weighted composite sample** means a composite sample consisting of a mixture of aliquots collected at a constant time interval, where the volume of each aliquot is proportional to the flow rate of the discharge.

(23) **Grab Sample** means a sample which is taken from a wastestream on a one-time basis without consideration of the flow rate of the wastestream and without consideration of time.

(24) **Green Infrastructure** means an array of products, technologies, and practices that use natural systems – or engineered systems that mimic natural processes – to enhance overall environmental quality and provide utility services. As a general principal, Green Infrastructure techniques use soils and vegetation to infiltrate, evapotranspirate, and/or recycle stormwater runoff. When used as components of a stormwater management system, Green Infrastructure practices such as green roofs, porous pavement, rain gardens, and vegetated swales can produce a variety of environmental benefits. In addition to effectively retaining and infiltrating rainfall, these technologies can simultaneously help filter air pollutants, reduce energy demands, mitigate urban heat islands, and sequester carbon while also providing communities with aesthetic and natural resource benefits.

(25) **Hydromodification** means the alteration of the natural flow of water through a landscape, and often takes the form of channel straightening, widening, deepening, or relocating existing, natural stream channels. It also can involve excavation of borrow pits or canals, building of levees, streambank erosion, or other conditions or practices that change the depth, width or location of waterways. Hydromodification usually results in water quality and habitat impacts.

(26) **Illicit connection** means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

(27) **Illicit discharge** means any discharge to a municipal separate storm sewer that is not composed entirely of stormwater except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(28) **Impervious Area (IA)** means conventional pavements, sidewalks, driveways, roadways, parking lots, and rooftops.

(29) **Indian Country** means:

a. All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
b. All dependent Indian communities within the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and
c. All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. This definition includes all land held in trust for an Indian tribe.

(30) **Individual Residence** means, for the purposes of this permit, single or multi-family residences. (e.g. single family homes and duplexes, town homes, apartments, etc.)

(31) **Infiltration** means the process by which stormwater penetrates the soil.

(32) **Land application unit** means an area where wastes are applied onto or incorporated into the soil surface (excluding manure spreading operations) for treatment or disposal.

(33) **Landfill** means an area of land or an excavation in which wastes are placed for permanent disposal, and which is not a land application unit, surface impoundment, injection well, or waste pile.

(34) **Land Use** means the way in which land is used, especially in farming and municipal planning.

(35) **Large or medium municipal separate storm sewer system** means all municipal separate storm sewers that are either: (i) located in an incorporated place (city) with a population of 100,000 or more as determined by the latest Decennial Census by the Bureau of Census (these cities are listed in Appendix F of 40 CFR §122); or (ii) located in the counties with unincorporated urbanized populations of 100,000 or more, except municipal separate storm sewers are located in the incorporated places, townships, or towns within such counties (these counties are listed in Appendices H and I of 40 CFR §122); or (iii) owned or operated by a municipality other than those described in Paragraph (i) or (ii) and that are designated by the Regional Administrator as part of the large or medium municipal separate storm sewer system.

(36) **MEP** means maximum extent practicable, the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges. A discussion of MEP as it applies to small MS4s is found at 40 CFR 122.34. CWA section 402(p)(3)(B)(iii) requires that a municipal permit "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 other provisions such as the Administrator or the State determines appropriate for the control of such pollutants.

(37) **Measurable Goal** means a quantitative measure of progress in implementing a component of storm water management program.

(38) **Municipal Separate Storm Sewer (MS4)** means all separate storm sewers that are defined as "large" or "medium" or "small" municipal separate storm sewer systems pursuant to paragraphs 40 CFR §122.26(b)(4), (b)(7), and (b)(16), or designated under paragraph 40 CFR §122.26(a)(1)(v).

(39) **Non-traditional MS4** means systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings. 40 CFR 122.26(a)(16)(iii).

(40) **NOI** means Notice of Intent to be covered by this permit (see Part I.B of this permit)

(41) **NOT** means Notice of Termination.

(42) **Outfall** means a *point source* as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(43) **Percent load reduction** means the difference between the baseline load and the target load divided by the baseline load.

(44) **Owner or operator** means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

(45) **Permittee** refers to any person (defined below) authorized by this NPDES permit to discharge to Waters of the United States.

(46) **Permitting Authority** means EPA, Region 6.

(47) **Person** means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

(48) **Point Source** means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.

(49) **Pollutant** is defined at 40 CFR 122.2. Pollutant means dredged spoil, solid waste, incinerator residue, filter back-wash, sewage, garbage, sewage sludge. Munitions, chemical waste, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011), heat, wrecked or discarded equipment, rock sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

(50) **Pre-development Hydrology**, Predevelopment hydrology is generally the rain volume at which runoff would be produced when a site or an area is in its natural condition, prior to development disturbances. For the Middle Rio Grande area, EPA considers predevelopment conditions to be a mix of woods and desert shrub.

(51) **Rainfall and Rainwater Harvesting** means the collection, conveyance, and storage of rainwater. The scope, method, technologies, system complexity, purpose, and end uses vary from rain barrels for garden irrigation in urban areas, to large-scale collection of rainwater for all domestic uses.

(52) **Soil amendment** means adding components to in-situ or native soils to increase the spacing between soil particles so that the soil can absorb and hold more moisture. The amendment of soils changes various other physical, chemical and biological characteristics so that the soils become more effective in maintaining water quality.

(53) **Storm drainage projects** include stormwater inlets, culverts, minor conveyances and a host of other structures or devices.

(54) **Storm sewer**, unless otherwise indicated, means a municipal separate storm sewer.

(55) **Stormwater** means stormwater runoff, snow melt runoff, and surface runoff and drainage.

(56) **Stormwater Discharge Associated with Industrial Activity** means the discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant (See 40 CFR §122.26(b)(14) for specifics of this definition).

(57) **Target load** means the load for the pollutant of concern which is necessary to attain water quality goals (e.g. applicable water quality standards).

(58) **Stormwater Management Program (SWMP)** means a comprehensive program to manage the quality of stormwater discharged from the municipal separate storm sewer system. For the purposes of this permit, the Stormwater Management Program is considered a single document, but may actually consist of separate programs (e.g. "chapters") for each permittee.

(59) **Targeted controls** means practices implemented to address particular pollutant of concern. For example litter program targets floatables.

(60) **Time-weighted composite** means a composite sample consisting of a mixture of equal volume aliquots collected at a constant time interval.

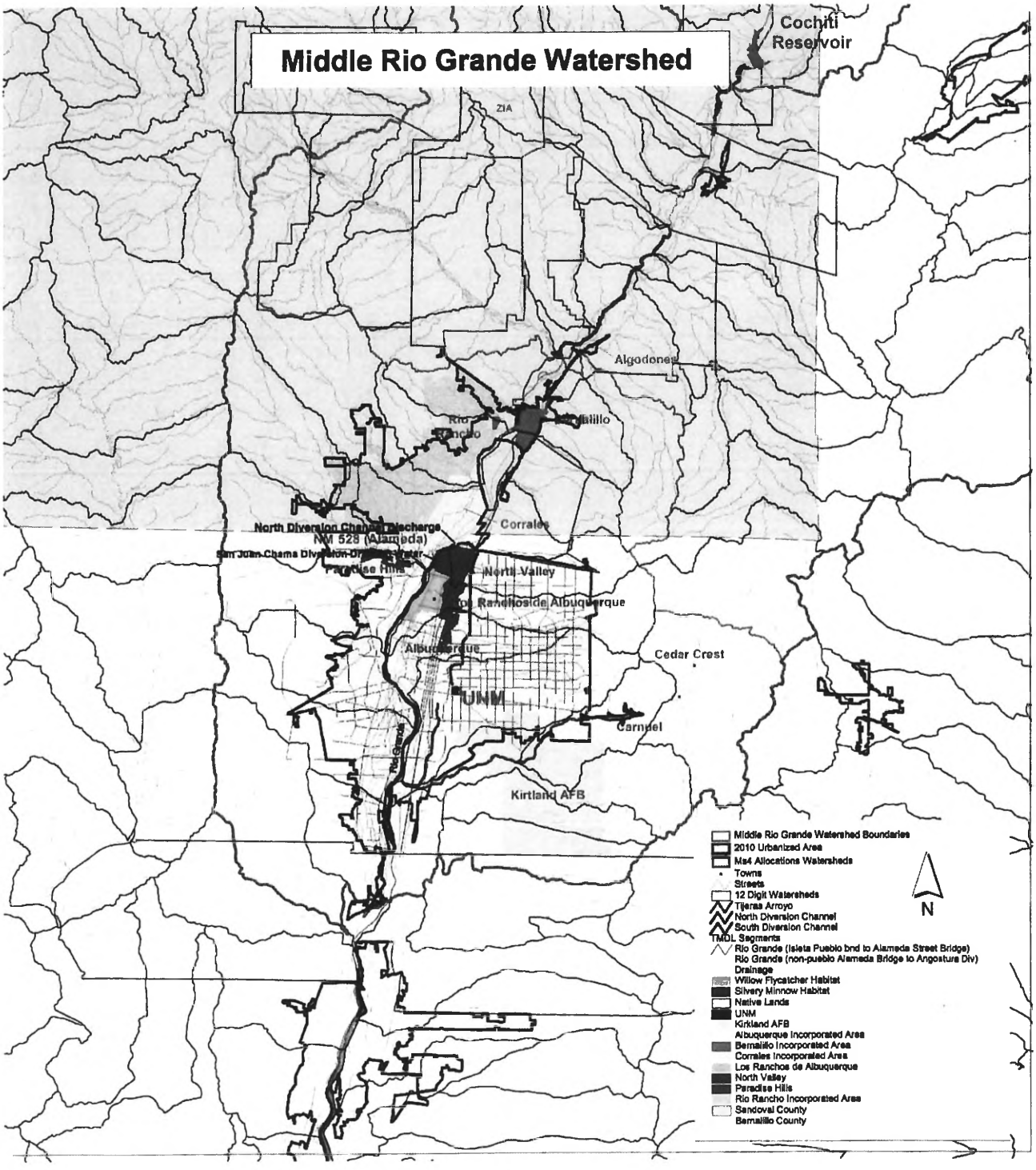
(61) **Total Maximum Daily Load (TMDL)** means a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards. A TMDL is the sum of individual wasteload allocations for point sources (WLA), load allocations for non-point sources and natural background (LA), and must consider seasonal variation and include a margin of safety. The TMDL comes in the form of a technical document or plan.

(62) **Toxicity** means an LC50 of <100% effluent.
(63) **Waste load allocation (WLA)** means the portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.
(64) **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
(65) **Whole Effluent Toxicity (WET)** means the aggregate toxic effect of an effluent measured directly by a toxicity test.

PART VIII PERMIT CONDITIONS APPLICABLE TO SPECIFIC AREAS OR INDIAN COUNTY LANDS

Reserved

Appendix A - Middle Rio Grande Watershed Jurisdictions and Potential Permittees



Middle Rio Grande Watershed Jurisdictions and Potential Permittees

Class A:
City of Albuquerque
AMAFCA (Albuquerque Metropolitan Arroyo Flood Control Authority)
UNM (University of New Mexico)
NMDOT (New Mexico Department of Transportation District 3)

Class B:
Bernalillo County
Sandoval County
Village of Corrales
City of Rio Rancho
Los Ranchos de Albuquerque
KAFB (Kirtland Air Force Base)
Town of Bernalillo
EXPO (State Fairgrounds/Expo NM)
SSCAFCA (Southern Sandoval County Arroyo Flood Control Authority)
NMDOT (New Mexico Department of Transportation District 3)

Class C:
ESCAFCA (Eastern Sandoval County Arroyo Flood Control Authority)
Sandia Labs (DOE)

Class D:
Pueblo of Sandia
Pueblo of Isleta
Pueblo of Santa Ana

Note: There could be additional potential permittees.
NMDOT Dist. 3 falls into the Class A type permittee, if an individual program is developed or/and implemented. The timelines for cooperative programs should be used, if NMDOT Dist. 3 cooperates with other permittees.

Appendix B - Total Maximum Daily Loads (TMDLs)

B.1. Approved Total Maximum Daily Loads (TMDLs) Tables

A bacteria TMDL for the Middle Rio Grande was approved by the New Mexico Water Quality Control Commission on April 13, 2010, and by EPA on June 30, 2010. The new TMDL modifies: 1) the indicator parameter for bacteria from fecal coliform to *E. coli*, and 2) the way the WLAs are assigned

Discharges to Impaired Waters – TMDL Waste Load Allocations (WLAs)[2] for *E. coli*: Rio Grande[1]

Stream Segment	Stream Name	Permittee Class	FLOW CONDITIONS & ASSOCIATED WLA (cfu/day)[3]				
			High	Moist	Mid-Range	Dray	Low
2105_50	Isleta Pueblo boundary to Alameda Street Bridge (based on flow at USGS Station NM08330000)	Class A [4]	3.36×10^{10}	8.41×10^{10}	5.66×10^{10}	2.09×10^{10}	4.67×10^{9}
		Class B[5] Class C[6]	3.73×10^{9}	9.35×10^{9}	6.29×10^{9}	2.32×10^{9}	5.19×10^{8}
2105.1_00	non-Pueblo Alameda Bridge to Angostura Diversion (based on flow at USGS Station NM08329928)	Class A	5.25×10^{10}	1.52×10^{10}	_	5.43×10^{9}	2.80×10^{9}
		Class B Class C	2.62×10^{11}	7.59×10^{10}	_	2.71×10^{10}	1.40×10^{10}

1 Total Maximum Daily Load for the Middle Rio Grande Watershed, NMED, 2010.
2 The WLAs for the stormwater MS4 permit was based on the percent jurisdiction area approach. Thus, the MS4 WLAs are a percentage of the available allocation for each hydrologic zone, where the available allocation = TMDL – WLA – MOS.
3 Flow conditions relate to percent of days the flow in the Rio Grande at a USGS Gauge exceeds a particular level: High 0-10%; Moist 10-40%; Mid-Range 40-60%; Dry 60-90%; and Low 90-100%. (Source: Figures 4.3 and 4.4 in 2010 Middle Rio Grande TMDL)
4 Phase I MS4s
5 Phase II MS4s (2000 Census)
6 New Phase II MS4s (2010 Census or MS4s designated by the Director)

Estimating Target Loadings for Particular Monitoring Location:

The Table in B.2 below provides a mechanism to calculate, based on acreage within a drainage area, a target loading value for a particular monitoring location.

B.2. Calculating Alternative Sub-measurable Goals

Individual permittees or a group of permittees seeking alternative sub-measureable goals under C.2.b.(i).(c).B should consult NMED. Preliminary proposals should be submitted with the Notice of Intent (NOI) under Part I.B.2.k according to the due dates specified in Part I.B.1.a of the permit. This proposal shall include, but is not limited to, the following items

B.2.1 Determine base loading for subwatershed areas consistent with TMDL

a. Using the table below, the permittee must develop a target load consistent with the TMDL for any sampling point in the watershed (even if it includes area outside the jurisdictional area of the permit).

E. coli loading on a per area basis (cfu/sq mi/day)

	high	moist	mid	dry	low
Alameda to Isleta	1.79E+09	4.48E+08	3.02E+08	1.11E+08	2.58E+07
Angostura to Alameda	3.25E+09	9.41E+08	5.19E+08	3.37E+08	1.74E+08

b. An estimation of the pertinent, subwatershed area that the permittee is responsible for and the basis for determining that area, including the means for excluding any tributary inholdings;

c. Using the total loading for the watershed (from part a) and the percentage of the watershed area that is part of the permitee(s) jurisdiction (part b) to calculate a base WLA for this subwatershed.

B.2.2 Set Alternative subwatershed targets

a. Permittee(s) may reallocate WLA within and between subwatershed based on factors including:

- Population density within the pertinent watershed area;
- Slope of the waterway;
- Percent impervious surface and how that value was determined;
- Stormwater treatment, installation of green infrastructure for the control or treatment of stormwater and stormwater pollution prevention and education programs within specific watersheds

b. A proposal for an alternative subwatershed target must include the rationale for the factor(s) used

B.2.3 Ensure overall compliance with TMDL WLA allocation

The permitee(s) will provide calculations demonstrating the total WLA under the alternative proposed in (Part II) is consistent with the baseline calculated in (Part I) based on their total jurisdictional area. Permittee(s) will not be allowed to allocate more area within the watershed than is accorded to them under their jurisdictional area. For permittees that work cooperatively, WLA calculations may be combined and used where needed within the sub-watershed amongst the cooperating parties.

WLA calculations must be sent as part of the Notice of Intent to EPA via e-mail at R6_MS4Permits@epa.gov. These calculations must also be sent to:

Sarah Holcomb
Industrial and Stormwater Team Leader
NMED Surface Water Quality Bureau
P.O. Box 5469,

Appendix C - Historic Properties Eligibility Procedures

MS4 operators must determine whether their MS4's storm water discharges, allowable non-storm water discharges, or construction of best management practices (BMPs) to control such discharges, have potential to affect a property that is either listed or eligible for listing on the National Register of Historic Places.

For existing dischargers who do not need to construct BMPs for permit coverage, a simple visual inspection may be sufficient to determine whether historic properties are affected. However, for MS4s which are new storm water dischargers and for existing MS4s which are planning to construct BMPs for permit eligibility, MS4 operators should conduct further inquiry to determine whether historic properties may be affected by the storm water discharge or BMPs to control the discharge. In such instances, MS4 operators should first determine whether there are any historic properties or places listed on the National Register or if any are eligible for listing on the register (e.g., they are "eligible for listing").

Due to the large number of entities seeking coverage under this permit and the limited number of personnel available to State and Tribal Historic Preservation Officers nationwide to respond to inquiries concerning the location of historic properties, EPA suggests that MS4 operators first access the "National Register of Historic Places" information listed on the National Park Service's web page (www.nps.gov/nr/). Addresses for State Historic Preservation Officers and Tribal Historic Preservation Officers are listed in Parts II and III of this appendix, respectively. In instances where a Tribe does not have a Tribal Historic Preservation Officer, MS4 operators should contact the appropriate Tribal government office when responding to this permit eligibility condition. MS4 operators may also contact city, county or other local historical societies for assistance, especially when determining if a place or property is eligible for listing on the register. Tribes that do not currently reside in an area may also have an interest in cultural properties in areas they formerly occupied. Tribal contact information is available at http://www.epa.gov/region06/6dra/oejta/tribalaffairs/index.html

The following three scenarios describe how MS4 operators can meet the permit eligibility criteria for protection of historic properties under this permit:

(1) If historic properties are not identified in the path of an MS4's storm water and allowable non-storm water discharges or where construction activities are planned to install BMPs to control such discharges (e.g., diversion channels or retention ponds), then the MS4 operator has met the permit eligibility criteria under Part I.A.3.b.(i).

(2) If historic properties are identified but it is determined that they will not be affected by the discharges or construction of BMPs to control the discharge, the MS4 operator has met the permit eligibility criteria under Part.I.A.3.b.(ii).

(3) If historic properties are identified in the path of an MS4's storm water and allowable non-storm water discharges or where construction activities are planned to install BMPs to control such discharges, and it is determined that there is the potential to adversely affect the property, the MS4 operator can still meet the permit eligibility criteria under Part I.A.3.b.(ii) if he/she obtains and complies with a written agreement with the appropriate State or Tribal Historic Preservation Officer which outlines measures the MS4 operator will follow to mitigate or prevent those adverse effects. The operator should notify EPA before exercising this option.

The contents of such a written agreement must be included in the MS4's Storm Water Management Program.

In situations where an agreement cannot be reached between an MS4 operator and the State or Tribal Historic Preservation Officer, MS4 operators should contact EPA for assistance.

The term "adverse effects" includes but is not limited to damage, deterioration, alteration or destruction of the historic property or place. EPA encourages MS4 operators to contact the appropriate State or Tribal Historic Preservation Officer as soon as possible in the event of a potential adverse effect to a historic property.

MS4 operators are reminded that they must comply with applicable State, Tribal and local laws concerning the protection of historic properties and places.

I. Internet Information on the National Register of Historic Places
An electronic listing of the ``National Register of Historic Places," as maintained by the National Park Service on its National Register Information System (NRIS), can be accessed on the Internet at www.nps.gov/nr/.

II. State Historic Preservation Officers (SHPO)
SHPO List for areas covered by the permit:

NEW MEXICO
Historic Preservation Div, Office of Cultural Affairs
Bataan Memorial Building, 407 Galisteo Street, Suite 236
Santa Fe, NM 87501
505-827-6320 FAX: 505-827-6338

III. Tribal Historic Preservation Officers
(THPO)
In instances where a Tribe does not have a Tribal Historic Preservation Officer, please contact the appropriate Tribal government office when responding to this permit eligibility condition.

Tribal Historic Preservation Officers:
Mescalero Apache Tribe
P.O. Box 227
Mescalero, New Mexico 88340

Pueblo of Sandia Environment Department
Attn: Frank Chaves, Environment Director
481 Sandia Loop
Bernalillo, New Mexico 87004

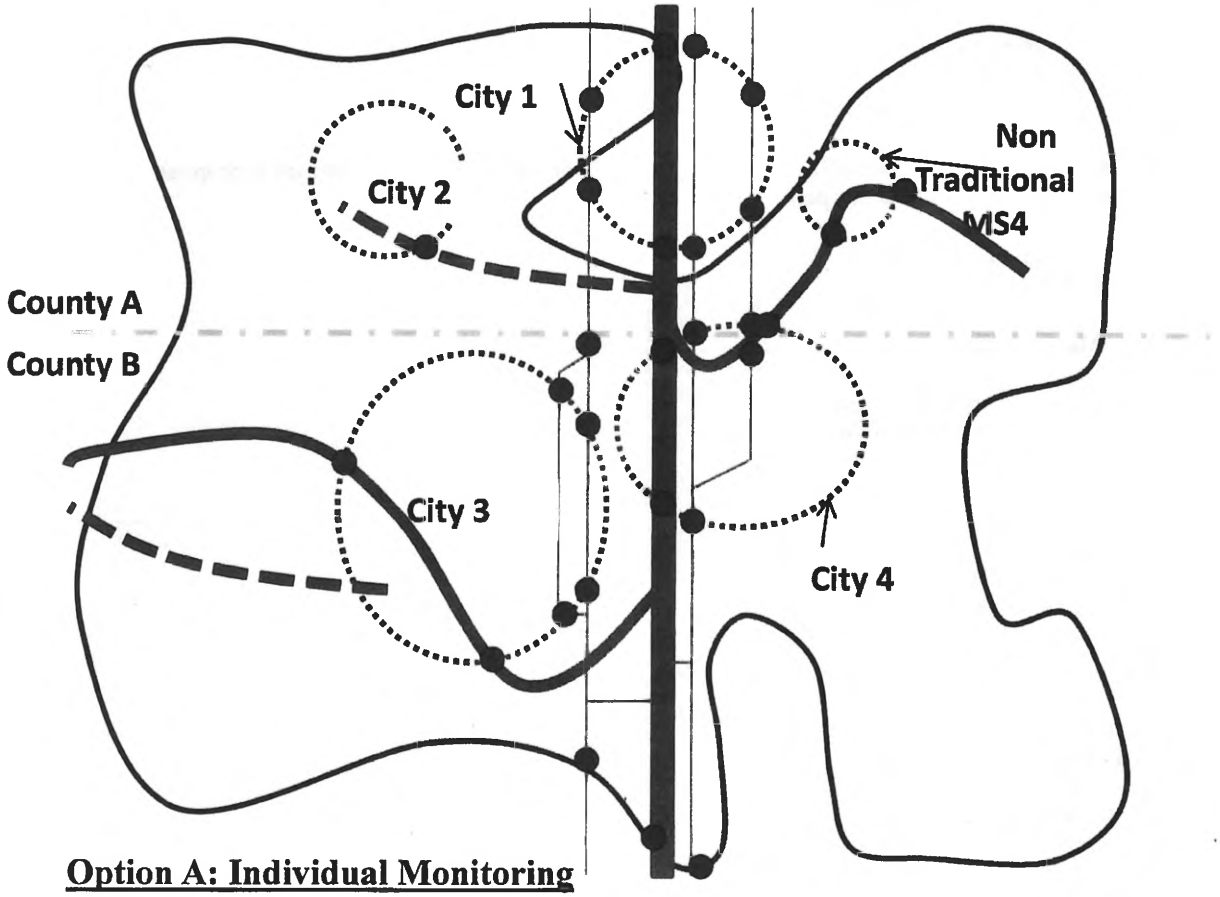
Pueblo of Isleta
Department of Cultural and Historic Preservation
Attn: Dr. Henry Walt, THPO
P.O. Box 1270
Isleta NM 87022

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004

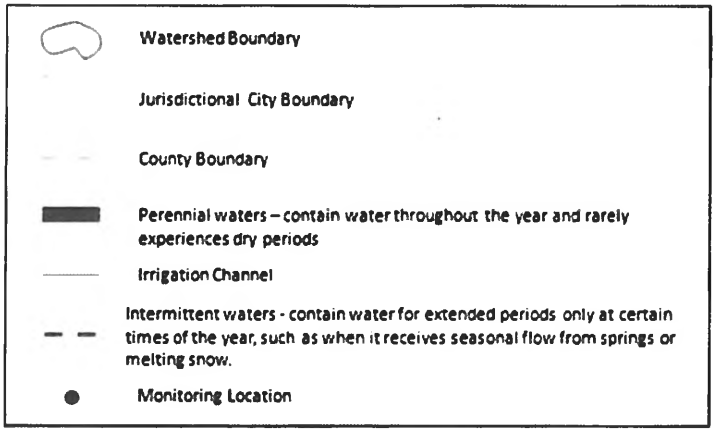
For more information:
National Association of Tribal Historic
Preservation Officers
P.O. Box 19189
Washington, DC 20036-9189
Phone: (202) 628-8476
Fax: (202) 628-2241

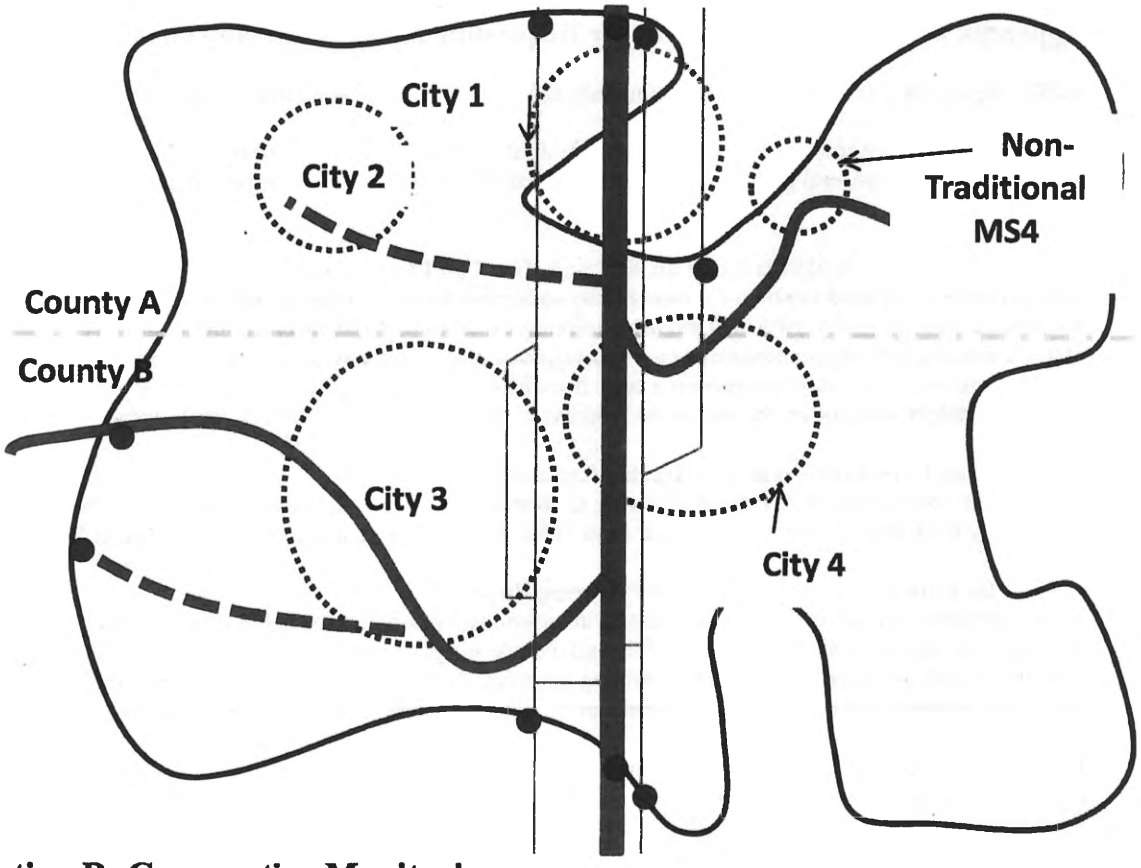
IV. Advisory Council on Historic Preservation
Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 803, Washington, DC 20004 Telephone: (202) 606-8503, Fax: (202) 606-8647/8672, E-mail: achp@achp.gov

Appendix D - Suggested Initial Phase Sampling Location Concepts – Wet Weather Monitoring



Option A: Individual Monitoring





Option B: Cooperative Monitoring

	Watershed Boundary
	Jurisdictional City Boundary
	County Boundary
	Perennial waters – contain water throughout the year and rarely experiences dry periods
	Irrigation Channel
	Intermittent waters - contain water for extended periods only at certain times of the year, such as when it receives seasonal flow from springs or melting snow.
	Monitoring Location

Appendix E - Providing Comments or Requesting a Public Hearing on an MS4 Operator's NOI

NOTE: Appendix E is for public information only and does not impose conditions on the permittee.

Any interested person may provide comments or request a public hearing on a Notice of Intent (NOI) submitted under this general permit. The general permit itself is not reopened for comment during the period an NOI is available for review and comment.

A. How Will I Know A MS4 is Filing an NOI and How Can I Get a Copy?
The permittee is required to provide a local public notice that they are filing an NOI and make a copy of the draft NOI submittal available locally. EPA will put basic information from all NOIs received on the Internet at: **http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm .** You may contact the listed MS4 representative for local access to the NOI. You may also request a copy from EPA by contacting Ms. Dorothy Brown at 214-665-8141 or **brown.dorothy@epa.gov** or via mail at the Address in Item D below, attention Dorothy Brown.

B. When Can I File Comments or a Hearing Request?
You can file comments and/or request a hearing as soon as a NOI is filed, but your request must be postmarked or physically received by EPA within thirty (30) calendar days of the date the NOI is posted on the web site in Section A.

C. How Do I File Comments or Make My Hearing Request?
Your comments and/or hearing request must be in writing and must state the nature of the issues proposed to be raised in the hearing. You should be as specific as possible and include suggested remedies where possible. You should include any data supporting your position(s). If you are submitting the request on behalf of a group or organization, you should describe the nature and membership of the group or organization. Electronic format comments in MS-WORD or PDF format are preferred.

D. Where Do I Send Copies of My Comments or Hearing Request?
Electronic Format: Submit one copy of your comments or hearing request via e-mail to Ms. Dorothy Brown at brown.dorothy@epa.gov and copy the Operator of the MS4 at the address on the NOI (send hard copy to MS4 Operator if no e-mail address provided). You may also submit via compact disk or diskette formatted for PCs to addresses for hard copy below. (Hard Copy: You must send an original and one copy of your comments or hearing request to EPA at the address below and a copy to the Operator of the MS4 at the address provided on the NOI)

U.S. EPA Region 6
Water Quality Protection Division (6WQ-NP)
Attn: Dorothy Brown
1445 Ross Ave., Suite 1200
Dallas, TX 75202

E. How Will EPA Determine Whether or Not To Hold a Public Hearing?
EPA will evaluate all hearing requests received on an NOI to determine if a significant degree of public interest exists and whether issues raised may warrant clarification of the MS4 Operator's NOI submittal. EPA will hold a public hearing if a significant amount of public interest is evident. EPA may also, at the Agency's discretion, hold either a public hearing or an informal public meeting to clarify issues related to the NOI submittal. EPA may hold a single public hearing or public meeting covering more than one MS4 (e.g., for all MS4s in an Urbanized Area, etc.).

F. How Will EPA Announce a Pubic Hearing or Public Meeting?
EPA will provide public notice of the time and place for any public hearing or public meeting in a major newspaper with local distribution and via the Internet at **http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm.**

G. What Will EPA Do With Comments on an NOI?
EPA will take all comments made directly or in the course of a public hearing or public meeting into consideration in determining whether or not the MS4 that submitted the NOI is appropriately covered under the general permit. The MS4 operator will have the opportunity to provide input on issues raised. The Director may require the MS4 operator to supplement or amend the NOI submittal in order to be authorized under the general permit or may direct the MS4 Operator to submit an individual permit application. A summary of issues raised and EPA's responses will be made available online at **http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm.** A hard copy may also be requested by contacting Ms. Dorothy Brown (see paragraph D)

Appendix F - Minimum Quantification Levels (MQL's)

The following Minimum Quantification Levels (MQL's) are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

POLLUTANTS	MQL µg/l	POLLUTANTS	MQL µg/l
METALS, RADIOACTIVITY, CYANIDE and CHLORINE			
Aluminum	2.5	Molybdenum	10
Antimony	60	Nickel	0.5
Arsenic	0.5	Selenium	5
Barium	100	Silver	0.5
Beryllium	0.5	Thalllium	0.5
Boron	100	Uranium	0.1
Cadmium	1	Vanadium	50
Chromium	10	Zinc	20
Cobalt	50	Cyanide	10
Copper	0.5	Cyanide, weak acid dissociable	10
Lead	0.5	Total Residual Chlorine	33
Mercury (*)	0.0005 0.005		
DIOXIN			
2,3,7,8-TCDD	0.00001		
VOLATILE COMPOUNDS			
Acrolein	50	1,3-Dichloropropylene	10
Acrylonitrile	20	Ethylbenzene	10
Benzene	10	Methyl Bromide	50
Bromoform	10	Methylene Chloride	20
Carbon Tetrachloride	2	1,1,2,2-Tetrachloroethane	10
Chlorobenzene	10	Tetrachloroethylene	10
Clorodibromomethane	10	Toluene	10
Chloroform	50	1,2-trans-Dichloroethylene	10
Dichlorobromomethane	10	1,1,2-Trichloroethane	10
1,2-Dichloroethane	10	Trichloroethylene	10
1,1-Dichloroethylene	10	Vinyl Chloride	10
1,2-Dichloropropane	10		
ACID COMPOUNDS			
2-Chlorophenol	10	2,4-Dinitrophenol	50
2,4-Dichlorophenol	10	Pentachlorophenol	5
2,4-Dimethylphenol	10	Phenol	10
4,6-Dinitro-o-Cresol	50	2,4,6-Trichlorophenol	10

POLLUTANTS	MQL µg/l	POLLUTANTS	MQL µg/l
		BASE/NEUTRAL	
Acenaphthene	10	Dimethyl Phthalate	10
Anthracene	10	Di-n-Butyl Phthalate	10
Benzidine	50	2,4-Dinitrotoluene	10
Benzo(a)anthracene	5	1,2-Diphenylhydrazine	20
Benzo(a)pyrene	5	Fluoranthene	10
3,4-Benzofluoranthene	10	Fluorene	10
Benzo(k)fluoranthene	5	Hexachlorobenzene	5
Bis(2-chloroethyl)Ether	10	Hexachlorobutadiene	10
Bis(2-chloroisopropyl)Ether	10	Hexachlorocyclopentadiene	10
Bis(2-ethylhexyl)Phthalate	10	Hexachloroethane	20
Butyl Benzyl Phthalate	10	Indeno(1,2,3-cd)Pyrene	5
2-Chloronapthalene	10	Isophorone	10
Chrysene	5	Nitrobenzene	10
Dibenzo(a,h)anthracene	5	n-Nitrosodimethylamine	50
1,2-Dichlorobenzene	10	n-Nitrosodi-n-Propylamine	20
1,3-Dichlorobenzene	10	n-Nitrosodiphenylamine	20
1,4-Dichlorobenzene	10	Pyrene	10
3,3'-Dichlorobenzidine	5	1,2,4-Trichlorobenzene	10
Diethyl Phthalate	10		
		PESTICIDES AND PCBS	
Aldrin	0.01	Beta-Endosulfan	0.02
Alpha-BHC	0.05	Endosulfan sulfate	0.02
Beta-BHC	0.05	Endrin	0.02
Gamma-BHC	0.05	Endrin Aldehyde	0.1
Chlordane	0.2	Heptachlor	0.01
4,4'-DDT and derivatives	0.02	Heptachlor Epoxide	0.01
Dieldrin	0.02	PCBs **	0.2
Alpha-Endosulfan	0.01	Toxaphene	0.3

(MQL's Revised November 1, 2007)

(*) Default MQL for Mercury is 0.005 unless Part I of your permit requires the more sensitive Method 1631 (Oxidation / Purge and Trap / Cold vapor Atomic Fluorescence Spectrometry), then the MQL shall be 0.0005.

(**) EPA Method 1668 should be utilized when PCB water column monitoring is conducted to determine compliance with permit requirements. Either the Arochlor test (EPA Method 8082) or USGS test method (8093) may be utilized for purposes of sediment sampling as part of a screening program, but must use EPA Method 1668 (latest revision) for confirmation and determination of specific PCB levels at that location.

Appendix G – Oxygen Saturation and Dissolved Oxygen Concentrations North Diversion Channel Area

Concentrations of dissolved oxygen in water at various atmospheric pressures and temperatures with 100 percent oxygen saturation, 54.3 percent oxygen saturation (associated with hypoxia and harassment of silvery minnows), and 8.7 percent oxygen saturation (associated with anoxia and lethality of silvery minnows) at the North Diversion Channel (NDC) (based on USGS DO website <http://water.usgs.gov/software/DOTABLES/> for pressures between 628 to 648 millimeters of mercury (Hg)). Source: Biological Consultation Cons. #22420-2011-F-0024-R001

Water temp.	100% Oxygen Saturation at NDC			54.3% saturation = Harassmen			8.7% saturation= 50%Lethality		
(°C)	628mmHg	638mmHg	648mmHg	628mmHg	638mmHg	648mmHg	628mmHg	638mmHg	64Bmm Hg
0	12.1	12.3	12.5	66	6.7	6.8	1.1	1.1	1.1
1	11.7	11.9	12.1	64	6.5	6.6	1.0	1.0	1 1
2	11.4	11.6	11.8	6.2	6.3	8.4	1.0	1.0	1.0
3	11.1	11.3	11.5	6.0	6.1	6.2	1.0	1.0	1.0
4	10.8	11	11.2	5.9	6.0	6.1	0.9	1.0	1.0
5	10.5	10.7	10.9	5.7	5.8	5 9	0.9	0.9	0.9
6	10.3	10.4	10.6	5.6	5.8	5.0	0.9	0.9	0.9
7	10	10.2	10.3	5.4	5.5	5.6	0.9	09	0.9
8	9.8	9.9	10.1	5.3	5.4	5.5	0.9	0.9	0.9
8	9.5	9.7	9.6	52	53	5.3	08	0.8	0.9
10	93	9.5	96	50	5.2	5.2	0.0	0.8	0.8
11	9.1	9.2	9.4	4.9	5.0	5.1	0.8	0.8	08
12	8.9	9	9.2	4.8	4.9	5.0	0.8	0.8	08
13	8.7	8.8	9	4.7	4.8	4.9	0.8	0.8	0.8
14	8.5	8.6	8.8	4.8	4.7	4.8	0.7	0.7	0.0
15	8.3	8.4	8.8	4.5	4.6	4.7	0.7	0.7	0.7
16	0.1	83	0.4	4.4	4.5	4.6	07	0.7	0.7
17	8	8.1	8.2	4.3	4.4	4.5	0.7	0.7	0.7
16	7.8	7.9	8	4.2	43	43	07	0.7	0.7
19	76	7.8	7.9	4.1	4.2	4.3	0.7	07	0.7
20	7.5	76	7.7	4.1	4.1	42	07	07	0.7
21	7.3	7.4	7.6	4.0	4.0	4.1	0.6	0.6	0.7
22	7.2	7.3	7.4	3.9	4.0	4.0	0.6	0.6	0.6
23	7	72	7.3	3.8	3.9	4.0	0.6	0.6	0.6
24	6.9	7	7.1	3.7	3.8	3.9	0.6	0.6	0.6
25	6.8	69	7	3.7	3.7	3.6	0.6	0.6	0.6
26	6.7	68	6.9	3.6	3.7	3.7	0.6	0.6	06
27	6.5	8.6	8.8	3.5	3.6	3.7	06	0.6	0.8
26	6.4	8.5	8.6	3.5	3.5	3.6	0.6	0.8	08
29	6.3	8.4	6.5	3.4	3.5	3.5	0.5	06	0.8
20	82	83	6.4	3.4	3.4	3.5	0.5	0.5	0.8
31	6.1	6.2	6.3	3.3	3.4	3.4	0.5	0.5	OS
32	6	6.1	6.2	3.3	3.3	34	0.5	0.5	0.5
33	5.0	6	6.1	3.2	3.3	3.3	0.5	0.5	0.5
34	5.8	5.9	6	3.1	3.2	3.3	0.5	0.5	0.5
	5.7	5.6	5.9	31	3.1	3.2	0.5	0.5	0.5

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EXHIBIT 3

Boise, ID – Boise/Garden City Area MS4 Permit

(Permit No. IDS-027561)

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United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

Authorization to Discharge Under the
National Pollutant Discharge Elimination System

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §1251 *et seq.*, as amended by the Water Quality Act of 1987, P.L. 100-4, the "Act",

Ada County Highway District,
Boise State University,
City of Boise,
City of Garden City.
Drainage District #3,
and the Idaho Transportation Department District #3,

(hereinafter "the Permittees")

are authorized to discharge from all municipal separate storm sewer system (MS4) outfalls existing as of the effective date of this Permit to waters of the United States, including the Boise River and its tributaries, in accordance with the conditions set forth herein.

This Permit will become effective February 1, 2013.

This Permit, and the authorization to discharge, expires at midnight, January 30, 2018.

Permittees must reapply for permit reissuance on or before August 3, 2017, 180 days before the expiration of this Permit, if the Permittees intend to continue operations and discharges from the MS4s beyond the term of this Permit.

Signed this 12th day of December, 2012.

Daniel D. Opalski, Director
Office of Water and Watersheds, Region 10
U.S. Environmental Protection Agency

Table of Contents

I. Applicability

A. Permit Area. This Permit covers all areas within the corporate boundary of the City of Boise and Garden City, Idaho, which are served by the municipal separate storm sewer systems (MS4s) owned or operated by the Ada County Highway District, Boise State University, City of Boise, City of Garden City, Drainage District #3, and/or the Idaho Transportation Department District #3 (the Permittees).

B. Discharges Authorized Under This Permit. Subject to the conditions set forth herein, the Permittees are authorized to discharge storm water to waters of the United States from the MS4s identified in Part I.A.

As provided in Part I.D, this Permit also authorizes the discharge of flows from the MS4s which are categorized as allowable non-storm water discharge, storm water discharge associated with industrial activity, and storm water discharge associated with construction activity.

C. Permittees' Responsibilities

1. **Individual Responsibility**. Each Permittee is individually responsible for Permit compliance related only to portions of the MS4 owned or operated solely by that Permittee, or where this Permit requires a specific Permittee to take an action.
2. **Joint Responsibility.** Each Permittee is jointly responsible for Permit compliance:
   a) related to portions of the MS4 where operational or storm water management program (SWMP) implementation authority has been transferred to all of the Permittees in accordance with an intergovernmental agreement or agreement between the Permittees;
   b) related to portions of the MS4 where Permittees jointly own or operate a portion of the MS4;
   c) related to the submission of reports or other documents required by Parts II and IV of this Permit; and
   d) Where this Permit requires the Permittees to take an action and a specific Permittee is not named.
3. **Intergovernmental Agreement.** The Permittees must maintain an intergovernmental agreement describing each organization's respective roles and responsibilities related to this Permit. Any previously signed agreement may be updated, as necessary, to comply with this requirement. An updated intergovernmental agreement must be completed no later than July 1, 2013. A copy of the updated intergovernmental agreement must be submitted to the Environmental Protection Agency (EPA) with the 1st Year Annual Report.

D. Limitations on Permit Coverage

1. **Non-Storm Water Discharges**. Permittees are not authorized to discharge non-storm water from the MS4, except where such discharges satisfy one of the following three conditions:

   a) The non-storm water discharges are in compliance with a separate NPDES permit;

   b) The non-storm water discharges result from a spill and:

      (i) are the result of an unusual and severe weather event where reasonable and prudent measures have been taken to prevent and minimize the impact of such discharge; or

      (ii) consist of emergency discharges required to prevent imminent threat to human health or severe property damage, provided that reasonable and prudent measures have been taken to prevent and minimize the impact of such discharges;

   or

   c) The non-storm water discharges satisfy each of the following two conditions:

      (i) The discharges consist of uncontaminated water line flushing; potable water sources; landscape irrigation (provided all pesticides, herbicides and fertilizer have been applied in accordance with manufacturer's instructions); lawn watering; irrigation water; flows from riparian habitats and wetlands; diverted stream flows; springs; rising ground waters; uncontaminated ground water infiltration (as defined at 40 CFR § 35.2005(20)) to separate storm sewers; uncontaminated pumped ground water or spring water; foundation and footing drains (where flows are not contaminated with process materials such as solvents); uncontaminated air conditioning or compressor condensate; water from crawlspace pumps; individual residential car washing; dechlorinated swimming pool discharges; routine external building wash down which does not use detergents; street and pavement wash waters, where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed); fire hydrant flushing; or flows from emergency firefighting activities; and

      (ii) The discharges are not sources of pollution to waters of the United States. A discharge is considered a source of pollution to waters of the United States if it:

         1) Contains hazardous materials in concentrations found to be of public health significance or to impair beneficial uses in receiving waters. (Hazardous materials are those

that are harmful to humans and animals from exposure, but not necessarily ingestion);

2) Contains toxic substances in concentrations that impair designated beneficial uses in receiving waters. (Toxic substances are those that can cause disease, malignancy, genetic mutation, death, or similar consequences);

3) Contains deleterious materials in concentrations that impair designated beneficial uses in receiving waters. (Deleterious materials are generally substances that taint edible species of fish, cause taste in drinking waters, or cause harm to fish or other aquatic life);

4) Contains radioactive materials or radioactivity at levels exceeding the values listed in 10 CFR Part 20 in receiving waters;

5) Contains floating, suspended, or submerged matter of any kind in concentrations causing nuisance or objectionable conditions or in concentrations that may impair designated beneficial uses in receiving waters;

6) Contains excessive nutrients that can cause visible slime growths or other nuisance aquatic growths that impair designated beneficial uses in receiving waters;

7) Contains oxygen-demanding materials in concentrations that would result in anaerobic water conditions in receiving waters; or

8) Contains sediment above quantities specified in IDAPA 58.01.02.250.02.e or in the absence of specific sediment criteria, above quantities that impair beneficial uses in receiving waters; or

9) Contains material in concentrations that exceed applicable natural background conditions in receiving waters (IDAPA 58.01.02.200. 09). Temperature levels may be increased above natural background conditions when allowed under IDAPA 58.01.02.401.

2. **Discharges Threatening Water Quality.** Permittees are not authorized to discharge storm water that will cause, or have the reasonable potential to cause or contribute to, an excursion above the Idaho water quality standards.

3. **Snow Disposal to Receiving Waters**. Permittees are not authorized to push or dispose of snow plowed within the Permit area directly into waters of the United States, or directly into the MS4(s). Discharges from any Permittee's snow disposal and snow management practices are authorized under this Permit only when such sites and practices are designed, conducted, operated, and maintained to prevent and reduce pollutants in the discharges to the maximum

extent practicable so as to avoid excursions above the Idaho water quality standards.

4. **Storm Water Discharge Associated with Industrial and Construction Activity.** Permittees are authorized to discharge storm water associated with industrial activity (as defined in 40 CFR 122.26(b)(14)), and storm water associated with construction activity (as defined in 40 CFR 122.26(b)(14)(x) and (b)(15)), from their MS4s, only when such discharges are otherwise authorized under an appropriate NPDES permit.

II. Storm Water Management Program (SWMP) Requirements

A. General Requirements

1. **Reduce pollutants to the maximum extent practicable.** The Permittees must implement and enforce a SWMP designed to reduce the discharge of pollutants from their MS4 to the maximum extent practicable (MEP), and to protect water quality in receiving waters. The SWMP as defined in this Permit must include best management practices (BMPs), controls, system design, engineering methods, and other provisions appropriate to control and minimize the discharge of pollutants from the MS4s.

   a) **SWMP Elements**. The required SWMP control measures are outlined in Part II.SWMP assessment/monitoring requirements are described in Part IV. Each Permittee must use practices that are selected, implemented, maintained, and updated to ensure that storm water discharges do not cause or contribute to an exceedance of an applicable Idaho water quality standard.

   b) **SWMP Documentation.** Each Permittee must prepare written documentation of the SWMP as implemented within their jurisdiction. The SWMP documentation must be organized according to the program components in Parts II and IV of this Permit, and must provide a current narrative physical description of the Permittee's MS4, illustrative maps or graphics, and all related ordinances, policies and activities as implemented within their jurisdiction. Each Permittee's SWMP documentation must be submitted to EPA with the 1st Year Annual Report.

      (i) Each Permittee must provide an opportunity for public review and comment on their SWMP documentation, consistent with applicable state or local requirements and Part II.B.6 of this Permit.

      (ii) Each Permittee's SWMP documentation must be updated at least annually and submitted as part of each subsequent Annual Report. (The document format used for Annual Report(s) submitted to EPA by the Permittees' prior to the effective date of this Permit may be modified to meet this requirement.)

   c) **SWMP Information.** The SWMP must include an ongoing program for gathering, tracking, maintaining, and using information to set priorities, evaluate SWMP implementation and Permit compliance.

d) **SWMP Statistics**. Permittees must track the number of inspections, official enforcement actions and types of public education activities and outcomes as stipulated by the respective program component. This information must be included in the Annual Report.

2. **Shared Implementation with outside entities.** Implementation of one or more of the SWMP minimum control measures may be shared with or delegated to another entity other than the Permittee(s). A Permittee may rely on another entity only if:

   a) The other entity, in fact, implements the minimum control measure;

   b) The action, or component thereof , is at least as stringent as the corresponding Permit requirement; and

   c) The other entity agrees to implement the minimum control measure on the Permittee's behalf. A binding written acceptance of this obligation is required. Each Permittee must maintain and record this obligation as part of the SWMP documentation. If the other entity agrees to report on the minimum control measure, the Permittees must supply the other entity with the reporting requirements in Part IV.C of this Permit. The Permittees remain responsible for compliance with the Permit obligation if the other entity fails to implement the required minimum control measure.

3. **Modification of the SWMP**. Minor modifications to the SWMP may be made in accordance with Part II.E of this Permit.

4. **Subwatershed Planning.** No later than September 30, 2016, the Permittees must jointly complete at least two individual sub-watershed plans for areas served by the MS4s within the Permit area. For the purposes of this Permit, the terms "subwatershed" and "storm sewershed" are defined as in Part VII. For each plan document, the subwatershed planning area must drain to at least one of the water bodies listed in Table II.C.

   Selected subwatersheds must be identified in the 1st Year Annual Report. Two completed subwatershed plan documents must be submitted to EPA as part of the 4th Year Annual Report.

   a) The Permittees must actively engage stakeholders in the development of each plan, and must provide opportunities for public input, consistent with Part II.B.6.

   b) The Permittees may modify and update any existing watershed planning document(s) to address the requirements of this Part.

   c) Each subwatershed plan must describe the extent and nature of the existing storm sewershed, and identify priority aquatic resources and beneficial uses to be protected or restored within the subwatershed planning area. Each subwatershed plan must contain a prioritized list of potential locations or opportunities for protecting or restoring such resources or beneficial uses through storm water infiltration, evapotranspiration or rainfall

harvesting/reuse, or other site-based low impact development (LID) practices. See Parts II.B.2.a, and II.B.2.c.

d) Each subwatershed plan must include consideration and discussion of how the Permittees will provide incentives, or enforce requirements, through their respective Stormwater Management Programs to address the following principles:

(i) Minimize the amount of impervious surfaces (roads, parking lots, roofs) within each watershed, by minimizing the creation, extension and widening of roads and associated development.

(ii) Preserve, protect, create and restore ecologically sensitive areas that provide water quality benefits and serve critical watershed functions. These areas may include, but are not limited to; riparian corridors, headwaters, floodplains and wetlands.

(iii) Prevent or reduce thermal impacts to water bodies, including requiring vegetated buffers along waterways, and disconnecting discharges to surface waters from impervious surfaces such as parking lots.

(iv) Seek to avoid or prevent hydromodification of streams and other water bodies caused by development, including roads, highways, and bridges.

(v) Preserve and protect trees, and other vegetation with important evapotranspirative qualities.

(vi) Preserve and protect native soils, prevent topsoil stripping, and prevent compaction of soils.

B. Minimum Control Measures. The following minimum control measures must be accomplished through each Permittee's Storm Water Management Program:

1. **Construction Site Runoff Control Program.** The Permittees must implement a construction site runoff control program to reduce discharges of pollutants from public and private construction activity within its jurisdiction.

The Permittees' construction site management program must include the requirements described below:

a) **Ordinance and/or other regulatory mechanism**. To the extent allowable under local or state law, Permittees must adopt, implement, and enforce requirements for erosion controls, sediment controls, and materials management techniques to be employed and maintained at each construction project from initial clearing through final stabilization. Each Permittee must require construction site operators to maintain adequate and effective controls to reduce pollutants in storm water discharges from construction sites. The Permittees must use enforcement actions (such as, written warnings, stop work orders or fines) to ensure compliance.

No later than September 30, 2015, each Permittee must update their ordinances or other regulatory mechanisms, as necessary, to be consistent with this Permit and with the current version of the *NPDES General Permit for Storm Water Discharges from Construction Activities*, Permit #IDR12-0000 (NPDES Construction General Permit or CGP).

b) **Manuals Describing Construction Storm Water Management Controls and Specifications.** The Permittees must require construction site operators within their jurisdiction to use construction site management controls and specifications as defined within manuals adopted by the Permittees.

No later than September 30, 2015, the Permittees must update their respective manuals, as necessary, to include requirements for the proper installation and maintenance of erosion controls, sediment controls, and material containment/pollution prevention controls during all phases of construction activity. The manual(s) must include all acceptable control practices, selection and sizing criteria, illustrations, and design examples, as well as recommended operation and maintenance of each practice. At a minimum, the manual(s) must include requirements for erosion control, sediment control, and pollution prevention which complement and do not conflict with the current version of the CGP. If the manuals previously adopted by the individual Permittee do not meet these requirements, the Permittee may create supplemental provisions to include as part of the adopted manual in order to comply with this Permit.

c) **Plan Review and Approval.** The Permittees must review and approve preconstruction site plans from construction site operators within their jurisdictions. Permittees must ensure that the construction site operator is prohibited from commencing construction activity prior to receipt of written approval.

(i) The Permittees must not approve any erosion and sediment control (ESC) plan or Storm Water Pollution Prevention Plan (SWPPP) unless it contains appropriate site-specific construction site control measures meeting the Permittee's requirements as outlined in Part II.B.1.b.

(ii) Prior to the start of a construction project disturbing one or more acres, or disturbing less than one acre but is part of a larger common plan of development, the Permittees must advise the construction site operator(s) to seek or obtain necessary coverage under the NPDES Construction General Permit.

(iii) Permittees must use qualified individuals, knowledgeable in the technical review of ESC plans/SWPPPs, to conduct such reviews.

(iv) Permittees must document the review of each ESC plan and/or SWPPP using a checklist or similar process.

d) **Construction Site Inspections**. The Permittees must inspect construction sites occurring within their jurisdictions to ensure compliance with their

applicable requirements. The Permittees may establish an inspection prioritization system to identify the frequency and type of inspection based upon such factors as project type, total area of disturbance, location, and potential threat to water quality. If a prioritization system is used, the Permittee must include a description of the current inspection prioritization in the SWMP document required in Part II.A, and summarize the nature and number of inspections conducted during the previous reporting period in each Annual Report.

(i) Inspections of construction sites must include, but not be limited to:

- As applicable, a check for coverage under the Construction General Permit by reviewing any authorization letter or Notice of Intent (NOI) during initial inspections;
- Review the applicable ESC plan/SWPPP to determine if control measures have been installed, implemented, and maintained as approved;
- Assessment of compliance with the Permittees' ordinances/requirements related to storm water runoff, including the implementation and maintenance of required control measures;
- Assessment of the appropriateness of planned control measures and their effectiveness;
- Visual observation of non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
- Education or instruction related to on storm water pollution prevention practices, as needed or appropriate; and
- A written or electronic inspection report.

(ii) The Permittees must track the number of construction site inspections conducted throughout the reporting period, and verify that the sites are inspected at the minimum frequencies required by the inspection prioritization system. Construction site inspections must be tracked and reported with each Annual Report.

(iii) Based on site inspection findings, each Permittee must take all necessary follow-up actions (i.e., re-inspection, enforcement) to ensure compliance. Follow-up and enforcement actions must be tracked and reported with each Annual Report.

e) **Enforcement Response Policy for Construction Site Management Program**. No later than September 30, 2016, each Permittee must develop and implement a written escalating enforcement response policy (ERP) appropriate to their organization. Upon implementation of the policy in its jurisdiction, each Permittee must submit its completed ERP to EPA with the 4th Year Annual Report. The ERP for City of Boise, City of Garden City, and Ada County Highway District must address enforcement of construction site runoff controls for all currently regulated construction projects within their jurisdictions. The ERP for Idaho Transportation Department District 3, Drainage District 3, and Boise State University must address contractual enforcement of construction site runoff controls at construction sites within their jurisdictions. Each ERP must describe the Permittee's potential responses to violations with an appropriate educational or enforcement response. The ERP must address repeat violations through progressively stricter responses as needed to achieve compliance. Each ERP must describe how the Permittee will use the following types of enforcement response, as available, based on the type of violation:

(i) Verbal Warnings: Verbal warnings are primarily consultative in nature. At a minimum, verbal warnings must specify the nature of violation and required corrective action.

(ii) Written Notices: Written notices must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.

(iii) Escalated Enforcement Measures: The Permittees must have the legal ability to employ any combination of the enforcement actions below (or their functional equivalent):

- The ERP must indicate when the Permittees will initiate a Stop Work Order. Stop work orders must require that construction activities be halted, except for those activities directed at cleaning up, abating discharge, and installing appropriate control measures.
- The Permittees must also use other escalating measures provided under local or state legal authorities, such as assessing monetary penalties. The Permittees may perform work necessary to improve erosion control measures and collect the funds from the responsible party in an appropriate manner, such as collecting against the project's bond, or directly billing the responsible party to pay for work and materials.

f) **Construction General Permit Violation Referrals.** For those construction projects which are subject to the NPDES Construction General Permit and do not respond to Permittee educational efforts, the Permittee may provide to EPA information regarding construction project operators which cannot demonstrate that they have appropriate NPDES Permit

coverage and/or site operators deemed by the Permittee as not complying with the NPDES Construction General Permit. Permittees may submit such information to the EPA NPDES Compliance Hotline in Seattle, Washington, by telephone, at (206) 553-1846, and include, at a minimum, the following information:

- Construction project location and description;
- Name and contact information of project owner/ operator;
- Estimated construction project disturbance size; and
- An account of information provided by the Permittee to the project owner/ operator regarding NPDES filing requirements.

(i) **Enforcement Tracking.** Permittees must track instances of non-compliance either in hard-copy files or electronically. The enforcement case documentation must include, at a minimum, the following:

- Name of owner/operator;
- Location of construction project;
- Description of violation;
- Required schedule for returning to compliance;
- Description of enforcement response used, including escalated responses if repeat violations occur;
- Accompanying documentation of enforcement response (e.g., notices of noncompliance, notices of violations, etc.); and
- Any referrals to different departments or agencies.

g) **Construction Program Education and Training.** Throughout the Permit term, the Permittees must ensure that all staff whose primary job duties are related to implementing the construction program (including permitting, plan review, construction site inspections, and enforcement) are trained to conduct such activities. The education program must also provide regular training opportunities for construction site operators. This training must include, at a minimum:

(i) *Erosion and Sediment Control/Storm Water Inspectors*:

- Initial training regarding proper control measure selection, installation and maintenance as well as administrative requirements such as inspection reporting/tracking and the implementation of the enforcement response policy; and

- Annual refresher training for existing inspection staff to update them on preferred BMPs, regulation changes, Permit updates, and policy or standards updates.

(ii) *Other Construction Inspectors*: Initial training on general storm water issues, basic control measure implementation information, and procedures for notifying the appropriate personnel of noncompliance.

(iii) *Plan Reviewers*:

- Initial training regarding control measure selection, design standards, review procedures;

- Annual training regarding new control measures, innovative approaches, Permit updates, regulation changes and policy or standard updates.

(iv) *Third-Party Inspectors and Plan Reviewers*. If the Permittee utilizes outside parties to either conduct inspections and or review plans, these outside staff must be trained per the requirements listed in Part II.B.1.f.i.-iii above.

(v) *Construction Operator Education*. At a minimum, the Permittees must educate construction site operators within the Permit area as follows:

- At least once per year, the Permittees must either provide information to all construction companies on existing training opportunities or develop new training for construction operators regarding appropriate selection, installation, and use of required construction site control measures at sites within the Permit area.

- The Permittees must require construction site operators to have at least one person on-site during construction that is appropriately trained in erosion and sediment control.

- The Permittees must require construction operators to attend training at least once every three years.

- The Permittees must provide appropriate information and outreach materials to all construction operators who may disturb land within their jurisdiction.

2. Storm Water Management for Areas of New Development and Redevelopment. At a minimum, the Permittees must implement and enforce a program to control storm water runoff from new development and redevelopment projects that result in land disturbance of 5,000 square feet or more, excluding individual one or two family dwelling development or redevelopment. This program must apply to private and public sector development, including roads and streets. The program implemented by the Permittees must ensure that permanent controls or practices are utilized at each new development and redevelopment site to protect water quality. The program must include, at a minimum, the elements described below:

a) **Ordinance or other regulatory mechanisms**. No later than the expiration date of this Permit, each Permittee must update its applicable ordinance or regulatory mechanism which requires the installation and long-term maintenance of permanent storm water management controls at new development and redevelopment projects. Each Permittee must update their ordinance/regulatory mechanism to the extent allowed by local and state law, consistent with the individual Permittee's respective legal authority. Permittees must submit their revised ordinance/regulatory mechanism as part of the 5th Year Annual Report.

(i) The ordinance/regulatory mechanism must include site design standards for all new and redevelopment that require, in combination or alone, storm water management measures that keep and manage onsite the runoff generated from the first 0.6 inches of rainfall from a 24-hour event preceded by 48 hours of no measureable precipitation. Runoff volume reduction can be achieved by canopy interception, soil amendments, bioretention, evapotranspiration, rainfall harvesting, engineered infiltration, extended filtration, and/or any combination of such practices that will capture the first 0.6 inches of rainfall. An Underground Injection Control permit may be required when certain conditions are met. The ordinance or regulatory mechanism must require that the first 0.6 inches of rainfall be 100% managed with no discharge to surface waters, except when the Permittee chooses to implement the conditions of II.B.2.a.ii below.

(ii) For projects that cannot meet 100% infiltration/evapotranspiration/reuse requirements onsite, the Permittees' program may allow offsite mitigation within the same subwatershed, subject to siting restrictions established by the Permittee. The Permittee allowing this option must develop and apply criteria for determining the circumstances under which offsite mitigation may be allowed. A determination that the onsite retention requirement cannot be met must be based on multiple factors, including but not limited to technical feasibility or logistic practicality (e.g. lack of available space, high groundwater, groundwater contamination, poorly infiltrating soils, shallow bedrock, and/or a land use that is inconsistent with

capture and reuse or infiltration of storm water). Determinations may not be based solely on the difficulty and/or cost of implementing such measures. The Permittee(s) allowing this option must create an inventory of appropriate mitigation projects and develop appropriate institutional standards and management systems to value, estimate and track these situations. Using completed subwatershed plans or other mechanisms, the Permittee(s) must identify priority areas within subwatersheds in which off-site mitigation may be conducted.

(iii) The ordinance or regulatory mechanism must include the following water quality requirements:

- Projects with potential for excessive pollutant loading(s) must provide water quality treatment for associated pollutants before infiltration.
- Projects with potential for excessive pollutant loading(s) that cannot implement adequate preventive or water quality treatment measures to ensure compliance with Idaho surface water standards must properly convey storm water to a NPDES permitted wastewater treatment facility or via a licensed waste hauler to a permitted treatment and disposal facility.

(iv) The ordinance or other regulatory mechanism must include procedures for the Permittee's review and approval of permanent storm water management plans for new development and redevelopment projects consistent with Part II.B.1.d.

(v) The ordinance or other regulatory mechanism must include sanctions (including fines) to ensure compliance, as allowed under state or local law.

b) **Storm Water Design Criteria Manual.** No later than September 30, 2015, each Permittee must update as necessary their existing Storm Water Design Criteria Manual specifying acceptable permanent storm water management and control practices. The manual must contain design criteria for each practice. In lieu of updating a manual, a Permittee may adopt a manual created by another entity which complies with this section. The manual must include:

(i) Specifications and incentives for the use of site-based practices appropriate to local soils and hydrologic conditions;

(ii) A list of acceptable practices, including sizing criteria, performance criteria, design examples, and guidance on selection and location of practices; and

(iii) Specifications for proper long term operation and maintenance, including appropriate inspection interval and self-inspection checklists for responsible parties.

c) **Green Infrastructure/Low Impact Development (LID) Incentive Strategy and Pilot Projects**. No later than September 30, 2015, the Permittees must develop a strategy to provide incentives for the increased use of LID techniques in private and public sector development projects within each Permittee's jurisdiction. Permittees must comply with applicable State and local public notice requirements when developing this Strategy. Pursuant to Part IV.A.2.a, the Strategy must reference methods of evaluating at least three (3) Green Infrastructure/LID pilot projects as described below. Permittees must implement the Green Infrastructure/LID Incentive Strategy, and complete an effectiveness evaluation of at least three pilot projects, prior to the expiration date of this Permit.

(i) As part of the 3rd Year Annual Report, the Permittees must submit the written Green Infrastructure /LID Incentive Strategy; the Strategy must include a description of at least three selected pilot projects, and a narrative report on the progress to evaluate the effectiveness of each selected LID technique or practice included in the pilot project. Each pilot project must include an evaluation of the effectiveness of LID technique(s) or practice(s) used for on-site control of water quality and/or quantity. Each Pilot Project must involve at least one or more of the following characteristics:

- The project manages runoff from at least 3,000 square feet of impervious surface;
- The project involves transportation related location(s) (including parking lots);
- The drainage area of the project is greater than five acres in size; and/or
- The project involves mitigation of existing storm water discharges to one or more of the water bodies listed in Table II.C.

(ii) Consistent with Part IV.A.10, the Permittees must evaluate the performance of LID technique(s) or practice(s) in each pilot project, and include a progress report on overall strategy implementation in the 4th Annual Report. Final pilot project evaluations must be submitted in the 5th Year Annual Report. The Permittees must monitor, calculate or model changes in runoff quantities for each of the pilot project sites in the following manner:

- For retrofit projects, changes in runoff quantities shall be calculated as a percentage of 100% pervious surface before and after implementation of the LID technique(s) or practice(s).
- For new construction projects, changes in runoff quantities shall be calculated for development scenarios both with LID technique(s) or practice(s) and without LID technique(s) or practice(s).

- The Permittees must measure runoff flow rate and subsequently prepare runoff hydrographs to characterize peak runoff rates and volumes, discharge rates and volumes, and duration of discharge volumes. The evaluation must include quantification and description of each type of land cover contributing to surface runoff for each pilot project, including area, slope, vegetation type and condition for pervious surfaces, and the nature of impervious surfaces.
- The Permittees must use these runoff values to evaluate the overall effectiveness of various LID technique(s) or practice(s) and to develop recommendations for future adoption of LID technique(s) or practice(s) that address appropriate use, design, type, size, soil type and operation and maintenance practices.

(iii) **Riparian Zone Management and Outfall Disconnection.** No later than September 30, 2015, the Permittees must identify and prioritize riparian areas appropriate for Permittee acquisition and protection. Prior to the expiration date of this Permit, the Permittees must undertake and complete at least one project designed to reduce the flow of untreated urban storm water discharging through the MS4 system through the use of vegetated swales, storm water treatment wetlands and/or other appropriate techniques. The Permittees must submit the list of prioritized riparian protection areas, and a status report on the planning and implementation of the outfall disconnection project, as part of the 3rd Year Annual Report. Documentation of the completed outfall disconnection project must be included in the 5th Year Annual Report.

(iv) **Repair of Public Streets, Roads and Parking Lots.** When public streets, roads or parking lots are repaired (as defined in Part VII), the Permittees performing these repairs must evaluate the feasibility of incorporating runoff reduction techniques into the repair by using canopy interception, bioretention, soil amendments, evaporation, rainfall harvesting, engineered infiltration, rain gardens, infiltration trenches, extended filtration and/or evapotranspiration and/or any combination of the aforementioned practices. Where such practices are found to be technically feasible, the Permittee performing the repair must use such practices in the design and repair. These requirements apply only to projects whose design process is started after the effective date of this Permit. As part of the 5th Year Annual Report, the Permittees must list the locations of street, road and parking lot repair work completed since the effective date of the Permit that have incorporated such runoff reduction practices, and the receiving water body(s) benefitting from such practices. This documentation must include a general description of the project design, estimated total cost, and estimates of total flow

volume and pollutant reduction achieved compared to traditional design practices.

d) **Plan Review and Approval.** The Permittees must review and approve pre-construction plans for permanent storm water management. The Permittees must review plans for consistency with the ordinance/regulatory mechanism and Storm Water Design Criteria Manual required by this Part. The Permittees must ensure that the project operator is prohibited from commencing construction activity prior to receipt of written approval from the Permittee.

(i) The Permittees must not approve or recommend for approval any plans for permanent storm water controls that do not contain appropriate permanent storm water management practices that meet the minimum requirements specified in this Part.

(ii) Permittees must use qualified individuals, knowledgeable in the technical review of plans for permanent storm water controls to conduct such reviews.

(iii) Permittees must document the review of each plan using a checklist or similar process.

e) **Operation and Maintenance (O&M) of Permanent Storm Water Management Controls.**

(i) **Inventory and Tracking.** The Permittees must maintain a database tracking all new public and private sector permanent storm water controls. No later than January 30, 2018, all of the available data on existing permanent storm water controls known to the Permittees must be included in the inventory database. For the purposes of this Part, new permanent controls are those installed after February 1, 2013; existing permanent controls are those installed prior to February 1, 2013. The tracking must begin in the plan review stage with a database that incorporates geographic information system (GIS) information. The tracking system must also include, at a minimum: type and number of practices; O&M requirements, activity and schedule; responsible party; and self-inspection schedule.

(ii) **O&M Agreements.** Where parties other than the Permittees are responsible for operation and maintenance of permanent storm water controls, the Permittees must require a legally enforceable and transferable O&M agreement with the responsible party, or other mechanism, that assigns permanent responsibility for maintenance of structural or treatment control storm water management practices.

f) **Inspection and Enforcement of Permanent Storm Water Management Controls.** The Permittees must ensure proper long term operation and

maintenance of all permanent storm water management practices within the Permittees' respective jurisdiction. The Permittees must implement an inspection program, and define and prioritize new development and redevelopment sites for inspections of permanent storm water management controls. Factors used to prioritize sites must include, but not be limited to: size of new development or redevelopment area; sensitivity and/or impaired status of receiving water(s); and, history of non-compliance at the site during the construction phase.

(i) No later than September 30, 2017, all high priority locations must be inventoried and associated inspections must be scheduled to occur at least once annually. The inspections must determine whether storm water management or treatment practices have been properly installed (i.e., an "as built" verification). The inspections must evaluate the operation and maintenance of such practices, identify deficiencies and potential solutions, and assess potential impacts to receiving waters.

(ii) No later than September 30, 2017, the Permittees must develop checklists to be used by inspectors during these inspections, and must maintain records of all inspections conducted on new development and redevelopment sites.

(iii) No later than September 30, 2017, the Permittees must develop and implement an enforcement strategy similar to that required in Section II.B.1.e to maintain the integrity of permanent storm water management and treatment practices.

g) **Education and Training on Permanent Storm Water Controls**. No later than September 30, 2015, the Permittees must begin a training program for appropriate audiences regarding the selection, design, installation, operation and maintenance of permanent storm water controls. The training program and materials must be updated as necessary to include information on updated or revised storm water treatment standards, design manual specifications, Low Impact Development techniques or practices, and proper operation and maintenance requirements.

(i) No later than September 30, 2016, and annually thereafter, all persons responsible for reviewing plans for new development and redevelopment and/or inspecting storm water management practices and treatment controls must receive training sufficient to determine the adequacy of storm water management and treatment controls at proposed new development and redevelopment sites.

(ii) No later than September 30, 2016, and at least annually thereafter, Permittees must provide training to local audiences on the storm water management requirements described in this Part.

3. **Industrial and Commercial Storm Water Discharge Management**. The Permittees must implement a program to reduce to the MEP the discharge of pollutants from industrial and commercial operations within their jurisdiction. Throughout the Permit term, the Permittees must conduct educational and/or enforcement efforts to reduce the discharge of pollutants from those industrial and commercial locations which are considered to be significant contributors of phosphorus, bacteria, temperature, and/or sediment to receiving waters. At a minimum, the program must include the following elements:

a) **Inventory of Industrial and Commercial Facilities/Activities**. No later than September 30, 2016, the Permittees must update the inventory and map of facilities and activities discharging directly to their MS4s.

(i) At a minimum, the inventory must include information listing the watershed/receiving water body, facility name, address, nature of business or activity, and North American or Standard Industrial Classification code(s) that best reflect the facility's product or service;

(ii) The inventory must include the following types of facilities: municipal landfills (open and closed); Permittee-owned maintenance yards and facilities; hazardous waste recovery, treatment, storage and disposal facilities; facilities subject to Section 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11023; all industrial sectors listed in 40 CFR §122.26(b)(14); vehicle or equipment wash systems; commercial animal facilities, including kennels, race tracks, show facilities, stables, or other similar commercial locations where improper management of domestic animal waste may contribute pollutants to receiving waters or to the MS4; urban agricultural activities; and other industrial or commercial facility that the Permittees determine is contributing a substantial pollutant loading to the MS4 and associated receiving waters.

(iii) The Permittees must collectively identify at least two specific industrial/commercial activities or sectors operating within the Permit area for which storm water discharges are not being adequately addressed through existing programs. No later than September 30, 2016, the Permittees must develop best management practices for each activity, and educate the selected industrial/commercial audiences regarding these performance expectations. Example activities for consideration include, but are not limited to: landscaping businesses; wholesale or retail agricultural and construction supply businesses; urban agricultural activities; power washers; commercial animal facilities; commercial car/truck washing operations; and automobile repair shops.

b) **Inspection of Industrial and Commercial Facilities/Activities**. The Permittees must work cooperatively throughout the Permit term to prioritize

and inspect selected industrial and commercial facilities/activities which discharge to receiving waters or to the MS4. No later than September 30, 2016, any existing agreements between the Permittees to accomplish such inspections must be updated as necessary to comply with this permit. At a minimum, the industrial and commercial facility inspection program must include:

(i) Priorities and procedures for inspections, including inspector training, and compliance assistance or education materials to inform targeted facility/activity operators of applicable requirements;

(ii) Provisions to record observations of a facility or activity;

(iii) Procedures to report findings to the inspected facility or activity, and to follow-up with the facility/activity operator as necessary;

(iv) A monitoring (or self monitoring) program for facilities that assesses the type and quantity of pollutants discharging to the MS4s;

(v) Procedures to exercise legal authorities to ensure compliance with applicable local storm water ordinances.

c) **Maintain Industrial and Commercial Facility/Activity Inventory**. The industrial and commercial facility/activity inventory must be updated at least annually. The updated inventory and a summary of the compliance assistance and inspection activities conducted, as well as any follow-up actions, must be submitted to EPA with each Annual Report.

4. Storm Water Infrastructure and Street Management. The Permittees must maintain their MS4 and related facilities to reduce the discharge of pollutants from the MS4 to the MEP. All Permittee-owned and operated facilities must be properly operated and maintained. This maintenance requirement includes, but is not limited to, structural storm water treatment controls, storm sewer systems, streets, roads, parking lots, snow disposal sites, waste facilities, and street maintenance and material storage facilities. The program must include the following:

a) **Storm Sewer System Inventory and Mapping**. No later than January 30, 2018, the Permittees must update current records to develop a comprehensive inventory and map of the MS4s and associated outfall locations. The inventory must identify all areas over which each Permittee has responsibility. The inventory must include:

(i) the location of all inlets, catch basins and outfalls owned/operated by the Permittee;

(ii) the location of all MS4 collection system pipes (laterals, mains, etc.) owned/operated by the Permittee, including locations where the MS4 is physically interconnected to the MS4 of another operator ;

(iii) the location of all structural flood control devices, if different from the characteristics listed above;

(iv) the names and locations of receiving waters of the U.S. that receive discharges from the outfalls;

(v) the location of all existing structural storm water treatment controls;

(vi) identification of subwatersheds, associated land uses, and approximate acreage draining into each MS4 outfall; and

(vii) the location of Permittee-owned vehicle maintenance facilities, material storage facilities, maintenance yards, and snow disposal sites; Permittee-owned or operated parking lots and roadways.

A summary description of the Permittees' storm sewer system inventory and a map must be submitted to EPA as part of the reapplication package required by Part VI.B

b) **Catch Basin and Inlet Cleaning.** No later than September 30, 2016, the Permittees must initiate an inspection program to inspect all Permittee-owned or operated catch basins and inlets at least every two years and take appropriate maintenance action based on those inspections. Inspection records must be maintained and summarized in each Annual Report.

c) **Street and Road Maintenance.** No later than September 30, 2015, the Permittees responsible for road and street maintenance must update any standard operating procedures for storm water controls to ensure the use of BMPs that, when applied to the Permittee's activity or facility, will protect water quality, and reduce the discharge of pollutants to the MEP. The operating procedures must contain, for each activity or facility, inspection and maintenance schedules specific to the activity, and appropriate pollution prevention/good housekeeping procedures for all of the following types of facilities and/or activities listed below. Water conservation measures should be considered for all landscaped areas.

(i) **Streets, roads, and parking lots**. The procedures must address, but are not limited to: road deicing, anti-icing, and snow removal practices; snow disposal areas; street/road material (e.g. salt, sand, or other chemical) storage areas; maintenance of green infrastructure/low impact development practices; and BMPs to reduce road and parking lot debris and other pollutants from entering the MS4. Within four years of the effective date of this permit, the Permittees must implement all of the pollution prevention/good housekeeping practices established in the SOPs for all streets, roads, highways, and parking lots with more than 3,000 square feet of impervious surface that are owned, operated, or maintained by the Permittees.

(ii) **Inventory of Street Maintenance Materials.** Throughout the Permit term, all Permittees with street maintenance

responsibilities must maintain an inventory of street /road maintenance materials, including use of sand and salt, and document the inventory in the corresponding Annual Reports.

(iii) **Manage Sand with Salt and Salt Storage Areas.** No later than September 30, 2017, the Permittees must address any sand, salt, or sand with salt material stockpiles at each of their materials storage locations to prevent pollutants in stormwater runoff from discharging to the MS4 or into any receiving waterbody. Examples how the Permittee may choose to address runoff from their material storage areas include, but are not limited to: building covered storage areas; fully containing the material stockpile area in a manner that prevents runoff from discharging to the MS4 or a receiving waterbody; relocating and/or otherwise consolidating material storage piles to alternative locations which prevents discharges to the MS4 or a receiving waterbody. The Permittees must identify their material storage locations in the SWMP documentation submitted to EPA with the 1st year Annual Report and reference the average quantity of material stored at each location in the inventory required in Part II.B.4.c.ii. Permittees must document in the 5th Year Annual Report how their material stockpiles have been addressed to prevent runoff from discharging to the MS4 or a receiving waterbody.

d) **Street, Road and Parking Lot Sweeping**. Each Permittee with street, road, and/or public parking lot maintenance responsibilities must update their respective sweepings management plans no later than September 30, 2015. Each updated plan must designate all streets, roads, and/or public parking lots which are owned, operated or maintained by that Permittee to fit within one of the following categories for sweeping frequency based on land use, traffic volumes or other factors:

- Residential – Streets and road segments that include, but are not limited to, light traffic zones and residential zones.
- Arterial and all other – Streets and road segments with high traffic volumes serving commercial or industrial districts.
- Public Parking Lots – large lots serving schools and cultural facilities, plazas, sports and event venues or similar facilities.

(i) No later than September 30, 2014, each Permittee with street, road, and/or public parking lot maintenance responsibilities must inventory and map all of their designated streets, roads, and public parking lots for sweeping frequency. The resulting inventory and map must be submitted as part of the 2nd Year Annual Report.

(ii) No later than September 30, 2015, Permittees with street, road, and/or public parking lot maintenance responsibilities must

sweep all streets, roads, and public parking lots that are owned, operated or maintained by that Permittee according to the following schedule:

Table II.B-2

Roadway Type	Sweeping Schedule			
	Two Times Per Month	**Every Six Weeks**	**Four Times Per Year**	**One Time Per Year**
Downtown Areas of Boise and Garden City	**X**			
Arterial and Collector Roadways (non-downtown)		**X**		
Residential Roadways			**X**	
Paved Alleys and Public Parking Lots				**X**

(iii) If a Permittee's existing overall street/road/parking lot sweeping program provides equivalent or greater street sweeping frequency to the requirements above, the Permittee must continue to implement its existing street/road/parking lot sweeping program.

(iv) For areas where sweeping is technically infeasible, the Permittees with street, road, and/or public parking lot maintenance responsibilities must document in the 1st Year Annual Report each area and indicate why sweeping is infeasible. The Permittee must document what alternative sweeping schedule will be used, or how the Permittee will increase implementation of other trash/litter control procedures to minimize pollutant discharges to the MS4 and to receiving waters.

(v) The Permittees with street, road, and/or public parking lot maintenance responsibilities must estimate the effectiveness of their street sweeping activities to minimize pollutant discharges to the MS4 and receiving waters, and document the following in each Annual Report:

- Identify any significant changes to the designated road/street/parking lot inventory and map, and the basis for those changes;
- Report annually on types of sweepers used, swept curb and/or lane miles, dates of sweeping by general location and frequency category, volume or weight of materials removed and a representative sample of the particle size distribution of swept material;
- Report annually on any public outreach efforts or other means to address excess leaves and other material as well as areas that are infeasible to sweep.

e) **Implement appropriate requirements for pesticide, herbicide, and fertilizer applications**. Permittees must continue to implement practices to reduce the discharge of pollutants to the MS4 associated with the application, storage and disposal of pesticides, herbicides and fertilizers from municipal areas and activities. Municipal areas and activities include, at a minimum, municipal facilities, public right-of-ways, parks, recreational facilities, golf courses, and landscaped areas. All employees or contractors of the Permittees applying restricted use pesticides must be registered as certified applicators.

f) **Develop and implement Storm Water Pollution Prevention Plans.** No later than September 30, 2015, the Permittees must develop and implement SWPPPs for all Permittee-owned material storage facilities, and maintenance yards located within the Permit area and identified in the inventory required in Parts II.B.3.a and II.B.4.a.viii. Permittee-owned facilities discharging storm water associated with industrial activity as defined in 40 CFR 122.26(b)(14) must obtain separate NPDES permit coverage as required in Part I.D.4 of this permit.

g) **Storm Water Management.** Each Permittee must ensure that any storm water management projects it undertakes after the effective date of this Permit are designed and implemented to prevent adverse impacts on water quality.

(i) Permittees must evaluate the feasibility of retrofitting existing storm water control devices to provide additional pollutant removal from collected storm water.

(ii) No later than the expiration date of this Permit, Permittees must identify and define all locations where such retrofit project opportunities are feasible, identify appropriate funding sources, and outline project timelines or schedule(s) for retrofit projects designed to better control the discharge of pollutants of concern to the Boise River and its tributaries.

h) **Litter Control.** Throughout the Permit term, each Permittee must continue to implement effective methods to reduce litter within their jurisdiction. Permittees must work with others as appropriate to control litter on a

regular basis and after major public events to reduce the discharge of pollutants to receiving waters.

i) **Training.** The Permittees must provide regular training to appropriate Permittee staff on all operations and maintenance procedures designed to prevent pollutants from entering the MS4 and receiving waters. Appropriate Permittee staff must receive training no later than September 30, 2015, and annually thereafter.

5. Illicit Discharge Management. An illicit discharge is any discharge to an MS4 that is not composed entirely of storm water. Exceptions are described in Part I.D. of this permit. The Permittees must continue to implement their illicit discharge management program to reduce to the MEP the unauthorized and illegal discharge of pollutants to the MS4. The program must include:

a) **Ordinance or other regulatory mechanisms.** Upon the effective date of this Permit, the Permittees must effectively prohibit non-storm water discharges to the MS4 (except those identified in Part 1.D of this permit) through enforcement of relevant ordinances or other regulatory mechanisms. Such ordinances/regulatory mechanisms must be updated prior to the expiration date of this Permit as necessary to provide adequate controls. To be considered adequate, an ordinance or regulatory mechanism must:

(i) Authorize the Permittee to prohibit, at a minimum, the following discharges to the MS4, unless otherwise authorized in Part 1.D:

- Sewage;
- Discharges of wash water resulting from the hosing or cleaning of gas stations, auto repair garages, or other types of automotive services facilities;
- Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility, including motor vehicles, cement-related equipment, and port-a-potty servicing, etc.;
- Discharges of wash water from mobile operations, such as mobile automobile or truck washing, steam cleaning, power washing, and carpet cleaning, etc.;
- Discharges of wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas - including parking lots, streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas, etc. - where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed);
- Discharges of runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials;

- Discharges of pool or fountain water containing chlorine, biocides, or other chemicals; discharges of pool or fountain filter backwash water;
- Discharges of sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and
- Discharges of food-related wastes (grease, fish processing, and restaurant kitchen mat and trash bin wash water, etc.).

(ii) Prohibit and eliminate illicit connections to the MS4;

(iii) Control the discharge of spills, and prohibit dumping or disposal of materials other than storm water into the MS4.

b) **Illicit Discharge Complaint Reporting and Response Program.** At a minimum, Permittees must respond to reports of illicit discharges from the public in the following manner:

(i) **Complaint/ReportingHotline.** The Permittees must maintain the dedicated telephone number and email address, or other publicly available and accessible means in addition to the website required in Part II.B.6, for use by the public to report illicit discharges. This complaint hotline must be answered by trained staff during normal business hours. During non-business hours, a system must be in place to record incoming calls to the hotline and a system must be in place to guarantee timely response. The telephone number must be printed on appropriate education, training, and public participation materials produced under Part II.B.6, and clearly listed in the local telephone book as appropriate.

(ii) **Response to Complaints/Reports.** The Permittees must respond to all complaints or reports of illicit discharges as soon as possible, but no later than within two working days.

(iii) **Maintain log of complaints/reports received and actions taken.** The Permittees must maintain a record documenting all complaints or reports of illicit discharges and responses taken by the Permittees.

c) **Illicit Discharge Mapping.** No later than September 30, 2014, the Permittees must develop a map of reported and documented illicit discharges or illicit connections to identify priority areas. The map must identify, at a minimum, the location, type and relative quantity or severity of the known, recurrent or ongoing non-storm water discharges to the MS4. This map must be updated annually and used to target the specific outfall locations for that field screening season.

d) **Dry Weather Outfall Screening Program.** Permittees must implement, and update as necessary, a dry weather analytical and field screening monitoring program. This dry weather outfall screening program must emphasize frequent, geographically widespread monitoring to detect illicit discharges and illegal connections, and to reinvestigate potentially

problematic outfalls. At a minimum, the procedures must be based on the following guidelines and criteria:

(i) **Outfall Identification.** The Permittees must update as necessary the storm water outfall identification and screening plan, describing the reconnaissance activities that must be performed and information used to prioritize targeted outfalls and associated land uses.. The plan must discuss how chemical and microbiological analysis will be conducted on any flows identified during dry weather screening, including field screening methodologies and associated trigger thresholds to be used for determining follow-up action.

(ii) **Monitoring Illicit Discharges.** No later than September 30, 2015, dry weather analytical and field screening monitoring must be conducted at least once annually (or more often if the Permittees deem necessary). One third of the outfalls to be screened annually must be conducted within the June 1 and September 30th timeframe.

- Upon the effective date of the Permit, the Permittees must conduct visual dry weather screening of at least 20% of their total outfalls per year.
- The outfalls must be geographically dispersed across the MS4 and must represent all major land uses in the Permit area. In addition, the Permittees must ensure that dry weather screening includes, but is not limited to, screening of 20% outfalls discharging to impaired waters listed in Table II.C.
- When flows during dry weather are identified the Permittees must collect grab samples of the discharge for in-field analysis of the following indicator constituents: pH; total chlorine; detergents as surfactants; total copper; total phenols; *E. coli*; total phosphorus; turbidity; temperature; and suspended solids concentrations (to be measured in mg/L).
- Photos may be used to document conditions.
- Results of field sampling must be compared to established trigger threshold levels and/or existing state water quality standards. If the outfall is dry (no flowing or ponded runoff), the Permittees must make and record all applicable visual observations.
- All dry weather flows previously identified or documented by the Permittees to be associated with irrigation flows or ground water seepage must be sampled to assess pollutant loading associated with such flows. The results must be evaluated to identify feasible actions necessary to eliminate such flows and ensure compliance with Part I.D of this Permit. If field sample

results of such irrigation or groundwater seepage comply with Part I.D of this permit, annual sampling of that dry weather flow at that outfall is no longer required. Permittees must document in the SWMP document the specific location(s) of outfalls associated with these results as well as the Permittee's rationale for the conclusion to discontinue future dry weather screening at that location..

(iii) **Maintain Records of Dry Weather Screening.** The Permittees must keep detailed records of the dry weather screening with the following information at a minimum: time since last rain event; quantity of last rain event; site description (e.g., conveyance type, dominant watershed land uses); flow estimation (e.g., width of water surface, approximate depth of water, approximate flow velocity, flow rate); visual observations (e.g., odor, color, clarity, floatables, deposits/stains, vegetation condition, structural condition, and biology); results of any in field sampling; and recommendations for follow-up actions to address identified problems, and documentation of completed follow-up actions.

e) **Follow-up.** The Permittees must investigate recurring illicit discharges identified as a result of complaints or as a result of dry weather screening inspections and sampling within fifteen (15) days of its detection to determine the source. Permittees must take appropriate action to address the source of the ongoing illicit discharge within 45 days of its detection.

f) **Prevent and Respond to Spills to the MS4.** Throughout the Permit term, the Permittees must coordinate appropriate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies to ensure maximum water quality protection at all times. The Permittees must respond to, contain and clean up all sewage and other spills that may discharge into the MS4 from any source (including private laterals and failing septic systems).

g) **Facilitate Disposal of Used Oil and Toxic Materials.** The Permittees must continue to coordinate with appropriate agencies to ensure the proper management and disposal or recycling of used oil, vehicle fluids, toxic materials, and other household hazardous wastes by their employees and the public. Such a program must include educational activities, public information activities, and establishment of collection sites operated by the Permittees or other entity. The program must be implemented throughout the Permit term.

h) **Training.** No later than September 30, 2014, and annually thereafter, the Permittees must develop and provide training to staff on identifying and eliminating illicit discharges, spill, and illicit connections to the MS4. At a minimum, the Permittee's construction inspectors, maintenance field staff, and code compliance officers must be sufficiently trained to respond to illicit discharges and spills to the MS4.

6. **Education, Outreach and Public Involvement.**

a) **Comply with Applicable Requirements.** The Permittees must comply with applicable State and local public notice requirements when implementing their SWMP public involvement activities.

b) **Implement an Ongoing Education Outreach and Involvement Program.** The Permittees must conduct, or contract with other entities to conduct, an ongoing joint education, outreach and public involvement program aimed at residents, businesses, industries, elected officials, policy makers, and Permittee planning staff /other employees.

The goal of the education and outreach program is to reduce or eliminate behaviors and practices that cause or contribute to adverse storm water impacts. The goal of the public involvement program is to engage interested stakeholders in the development and implementation of the Permittees' SWMP activities to the extent allowable pursuant to the respective authority granted individual Permittees under Idaho law.

The Permittees' joint education and public involvement program must be designed to improve each target audience's understanding of the selected storm water issues, engage stakeholders, and help target audiences understand what they can do to positively impact water quality by preventing pollutants from entering the MS4.

(i) No later than September 30, 2014, the Permittees must implement or participate in an education, outreach and public involvement program using a variety of methods to target each of the audiences and at least one or more of the topics listed below:

1) General Public

- Watershed characteristics and subwatershed planning efforts as required in Part II.A.4;
- General impacts of storm water flows into surface water;
- Impacts from impervious surfaces;
- Source control best management practices and environmental stewardship, actions and opportunities for pet waste control/disposal, vehicle maintenance, landscaping and vegetative buffers;
- Water wise landscaping, water conservation, water efficiency.

2) General public and businesses, including home based and mobile businesses

- Best management practices for use and storage of automotive chemicals, hazardous cleaning supplies, vehicle wash soaps and other hazardous materials;

- Proper use and application of pesticides, herbicides and fertilizers;
- Impacts of illicit discharges and how to report them;
- Water wise landscaping, water conservation, water efficiency.

3) Homeowners, homeowner's associations, landscapers, and property managers
   - Yard care techniques protective of water quality, such as composting;
   - Best management practices for use and storage of pesticides, herbicides, and fertilizers;
   - Litter and trash control and recycling programs;
   - Best management practices for power washing, carpet cleaning and auto repair and maintenance;
   - Low Impact Development techniques, including site design, pervious paving, retention of mature trees and other vegetation;
   - Storm water treatment and flow/volume control practices;
   - Water wise landscaping, water conservation, water efficiency.
4) Engineers, contractors, developers, review staff, and land use planners
   - Technical standards for storm water site plans;
   - Low Impact Development techniques, including site design, pervious paving, retention of mature trees and other vegetation;
   - Storm water treatment and flow/volume control practices;
   - Water wise landscaping, water conservation, water efficiency.
5) Urban farmers and managers of public and private community gardens
   - Water wise landscaping, water conservation, and water efficiency.

(ii) The Permittees must assess, or participate in an effort to assess understanding and adoption of behaviors by the target audiences.

The resulting assessments must be used to direct storm water education and outreach resources most effectively.

(iii) The Permittees must track and maintain records of public education, outreach and public involvement activities.

c) **Targeted Education and Training.** For the specific topics identified in the Permit sections listed below, the Permittees must develop and implement, or contract with other entities to implement, targeted training programs to educate appropriate Permittee staff or other audiences within their jurisdiction. Where joint, cooperative education efforts to address these topics are not feasible, the individual Permitttee must ensure that the necessary education and training occurs for the following topics:

(i) II.B.1.f - Construction Storm Water Management Training for construction site operators and Permittee staff;

(ii) II.B.2.g – Permanent Storm Water Control Training for project operators and Permittee staff;

(iii) II.B.4.i– Storm Water Infrastructure and Street Management/ Maintenance training for the Permittee staff; and

(iv) II.B.5.h – Illicit Discharge Management Training for Permittee staff.

d) **Storm Water Website.** The Permittees must maintain and promote at least one publicly-accessible website that identifies each Permittee's SWMP activities and seeks to educate the audiences listed in Part II.B.6.b.i. The website(s) must describe and provide relevant information regarding the activities of all Permittees. The website must be updated no later than February 1, 2014, and updated at least quarterly thereafter as new material is available. The website must incorporate the following features:

(i) All reports, plans, or documents generated by each Permittee in compliance with this Permit must be posted on the website in draft form when input from the public is being solicited, and in final form when the document is completed.

(ii) Information and/or links to key sites that provide education, training, licensing, and permitting related to construction and post-construction storm water management controls and requirements for each jurisdiction. The website must include links to all applicable ordinances, policies and/or guidance documents related to the Permittees' construction and post-construction stormwater management control programs.

(iii) Information and/or links to appropriate controls for industrial and commercial activities,

(iv) Information and/or links to assist the public to report illicit connections and illegal dumping activity;

(v) Appropriate Permittee contact information, including phone numbers for relevant staff and telephone hotline, mailing addresses, and electronic mail addresses.

C. Discharges to Water Quality Impaired Receiving Waters.

1. The Permittees must conduct a storm water discharge monitoring program as required in Part IV.
2. For the purposes of this Permit and as listed in Table II.C, the Clean Water Act §303 (d) listed water bodies are those cited in the IDEQ 2010 Integrated Report including, but not limited to the Lower Boise River, and its associated tributaries. "Pollutant(s) of concern" refer to the pollutant(s) identified as causing or contributing to the water quality impairment. Pollutants of concern for the purposes of this Permit are: total phosphorus, sediment, temperature, and *E. coli*.
3. Each Permittees' SWMP documentation must include a description of how the activities of each minimum control measure in Part II.B are implemented by the Permittee to control the discharge of pollutants of concern and ensure that the MS4 discharges will not cause or contribute to an excursion above the applicable Idaho water quality standards. This discussion must specifically identify how the Permittee evaluates and measures the effectiveness of the SWMP to control the pollutants of concern. For those activities identified in Part II.B requiring multiple years to develop and implement, the Permittee must provide interim updates on progress to date. Consistent with Part II.A.1.b, each Permittee must submit this description of the SWMP implementation to EPA and IDEQ as part of the 1st Year Annual Report required in Part IV.C, and must update its description annually in subsequent Annual Reports.

Table II.C

Clean Water Act §303 (d) listed Water Bodies and Pollutants of Concern

Receiving Water Body Assessment Unit/ Description	Pollutants of Concern Causing Impairment
ID17050114SW011a_06 ***Boise River – Diversion Dam to River Mile 50***	Temperature
ID17050114SW005_06 ***Boise River – River Mile 50 to Star Bridge***	Temperature, Sediment, *E. coli.*
ID17050114SW005_06a ***Boise River – Star to Middleton***	Temperature, Sediment, *E. coli.*
ID17050114SW005_06b ***Boise River- Middleton to Indian Creek***	Temperature, Total phosphorus, Sediment, *E. coli.*
ID17050114SW001_06 ***Boise River- Indian Creek to the mouth***	Temperature, Total phosphorus, Sediment, *E. coli.*
ID17050114SW008_03 ***Tenmile Creek - 3rd order below Blacks Creek Reservoir***	Sediment, *E. coli.*
ID17050114SW010_02 ***Fivemile Creek - 1st & 2nd order tributaries***	*E. coli.*
ID17050114SW010_03 ***Fivemile Creek - 3rd order-tributaries***	Sediment, *E. coli.*

D. Reviewing and Updating the SWMP.

1. Permittees must annually review their SWMP actions and activities for compliance with this Permit as part of the preparation of the Annual Report required under Part IV.C.2.

2. Permittees may request changes to any SWMP action or activity specified in this Permit in accordance with the following procedures:
   a) Changes to delete or replace an action or activity specifically identified in this Permit with an alternate action or activity may be requested by the Permittees at any time. Modification requests to EPA must include:
      (i) An analysis of why the original action or activity is ineffective, infeasible, or cost prohibitive;
      (ii) Expectations on the effectiveness of the replacement action or activity; and
      (iii) An analysis of why the replacement action or activity is expected to better achieve the Permit requirements.
   b) Change requests must be made in writing and signed by the Permittees in accordance with Part VI.E.
   c) Documentation of any of the actions or activities required by this Permit must be submitted to EPA upon request.
   d) EPA may review Annual Reports or other such documentation and subsequently notify the Permittees that changes to the SWMP actions and activities are necessary to:
      (i) Address discharges from the MS4 that are causing or contributing to water quality impacts;
      (ii) Include more stringent requirements necessary to comply with new federal or state statutory or regulatory requirements; or
      (iii) Include other conditions deemed necessary by EPA to comply with water quality standards, and/or other goals and requirements of the CWA.
   e) If EPA notifies the Permittees that changes are necessary pursuant to Parts II.D.2.a or II.D.2.d, the notification will offer the Permittees an opportunity to propose alternative program changes to meet the objectives of the requested modification. Following this opportunity, the Permittees must implement any required changes according to the schedule set by EPA.

4. Any modifications to this Permit will be accomplished according to Part VI.A of this Permit.

E. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation. The Permittees must implement the actions and activities of the SWMP in all new areas added or transferred to the Permittee's MS4 (or for which a Permittee becomes responsible for implementation of storm water quality controls) as expeditiously as practicable, but not later than one year from the date upon which the new areas were added. Such additions and schedules for implementation must be documented in the next Annual Report following the transfer.

F. SWMP Resources. The Permittees must continue to provide adequate finances, staff, equipment and other support capabilities to implement their SWMP actions and activities outlined in this permit. The Permittees must report on total costs associated with SWMP implementation over the prior 12 month reporting period in each Annual Report. Permittees are encouraged to consider establishing consistent funding sources for continued program implementation.

G. Legal Authority. To the extent allowable pursuant to the respective authority granted individual Permittees under Idaho law, each Permittee must operate to, at a minimum:

- Prohibit and eliminate, through statute, ordinance, policy, permit, contract, court or administrative order or other similar means, the contribution of pollutants to the MS4 by illicit connections and discharges to the MS4. Illicit connections include pipes, drains, open channels, or other conveyances that have the potential to allow an illicit discharge to enter the MS4. Illicit discharges include all non-storm water discharges not otherwise authorized under Part I.D. of this Permit;
- Control through statute, ordinance, policy, permit, contract, court or administrative order, or other similar means, the discharge to the MS4 of spills, dumping or disposal of materials other than storm water;
- Control through interagency agreements among the Permittees the contribution of pollutants from one portion of the MS4 to another portion of the MS4;
- Require compliance with conditions in statutes, ordinances, policy, permits, contracts, or court or administrative orders; and
- Carry out all inspection, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with Permit conditions including the prohibition on illicit discharges to the MS4.

No later than January 30, 2014, each Permittee must review and revise its relevant ordinances or other regulatory mechanisms, (or adopt new ordinances or regulatory mechanisms that provide it with adequate legal authority as allowed and authorized pursuant to applicable Idaho law), to control pollutant discharges into and from its MS4 and to meet the requirements of this permit. As part of the SWMP documentation that accompanies the 1st Year Annual Report, each Permittee must summarize all of its unique legal authorities which satisfy the five criteria listed above.

III. Schedule for Implementation and Required Submissions

The Permittees must complete SWMP actions, and/or submit documentation, to EPA and IDEQ as summarized below. Unless otherwise noted, Annual Reports must include the interim or completed status of required SWMP activities occurring during the corresponding reporting period as specified in Part IV.C.3, and include program summary statistics, copies of interim or final documents, and/or other supporting information.

Table III. Schedule for Implementation and Required Submissions

Permit Part	Item/Action	Due Date
I.C.3	Update intergovernmental agreement no later than July 1, 2013.	Submit updated intergovernmental agreement with the 1st Year Annual Report.
II.A.1.b, II.C.3	SWMP documentation	Submit SWMP documentation with the 1st Year Annual Report. Include updated documentation in each subsequent Annual Report.
II.A.4	Complete two subwatershed planning documents	Identify subwatersheds in 1st Year Annual Report; Submit two completed planning documents with the 4rd Year Annual Report.
II.B.1.a	Update construction runoff control ordinances/ regulatory mechanisms, if necessary	September 30, 2015; submit any updated ordinances etc w/ 3rd Year Annual Report.
II.B.1.b	Update Construction Stormwater Management Manual(s)	September 30, 2015; submit any updated documents with 3rd Year Annual Report.
II.B.1.e	Develop & Implement Enforcement Response Policy (ERP)	September 30, 2016; submit final ERPs w/ 4th Year Annual Report
II.B.2.a	Update ordinance or regulatory mechanism requiring long term onsite stormwater management controls	January 30, 2018; submit ordinance or regulatory mechanism with 5th Year Annual Report.
II.B.2.b	Update Stormwater Design Criteria Manual(s)	September 30, 2015; submit any updated ordinances etc w/ 3rd Year Annual Report
II.B.2.c	Develop & Implement Green Infrastructure/Low Impact Development (LID) Incentive Strategy;	September 30, 2015;
II.B.2.c.i	Evaluate Effectiveness of LID Practices via three Pilot Projects;	Submit strategy document, identify 3 pilot projects in the 3rd Year Annual Report.
II.B.2.c.ii, IV.A.10	Identify recommendations for specific LID practices to be adopted within the Permit area	Progress report on strategy implementation/ Pilot Project evaluations w/4rd Year Annual Report. Submit final evaluations & recommendations with the 5th Year Annual Report.
II.B.2.c.iii	Develop Priority Riparian Area List	September 30, 2015; Submit priority area list with the 3rd Year Annual Report.
II.B.2.c.iii	Complete Outfall Disconnection Project	Document progress on outfall disconnection project w/3rd Year Annual Report. Complete outfall disconnection project by January 30, 2018; document completed project in 5th Year Annual Report.

Table III. Schedule for Implementation and Required Submissions, continued

Permit Part	Item/Action	Due Date
II.B.2.c.iv	Consider/install stormwater runoff reduction techniques for streets, roads & parking lot repair work entering design phase after February 1, 2013 where feasible	Document all locations of street/road/parking lot repair projects where runoff reduction techniques were installed w/5th Year Annual Report.
II.B.2.e.i	O&M Database of new permanent stormwater controls; Incorporate all existing controls into database	Include new controls beginning February 1, 2013; Existing controls, no later than January 30, 2018.
II.B.2.f.i	Identify high priority locations; annual inspections	September 30, 2017
II.B.2.f.ii	Develop inspection checklists	September 30, 2017
II.B.2.f.iii	Enforcement Response Policy for SW controls	September 30, 2017
II.B.2.g	Conduct Education/Training on Permanent SW Controls	September 30, 2015; staff training & training for local audiences, September 30, 2016.
II.B.3.a	Inventory Industrial & Commercial facilities/activities	September 30, 2016
II.B.3.a.iii	Identify two specific activities, develop BMPs, and begin compliance assistance education program	September 30, 2016
II.B.3.b	Update Permittee agreements; inspect selected industrial & commercial facilities/activities	September 30, 2016
II.B.3.c	Document industrial & commercial inspection and compliance assistance activities	Annually
II.B.4.a	Update MS4 system inventory & map	No later than January 30, 2018; include w/5th Year Annual Report
II.B.4.b	Inspect of catch basins at least every two years	September 30, 2016
II.B.4.c	Update SOPs for Street & Road Maintenance	September 30, 2015
II.B.4.c.iii	Cover storage facilities for sand/salt storage areas	September 30, 2017; Identify locations in SWMP w/1st year Annual Report; Final documentation w/5th Year Annual Report
II.B.4.d	Update Street/Road/Parking Lot Sweeping Plans	September 30, 2015
II.B.4.d.i	Inventory/map designated areas	September 30, 2014; submit w/2st Year Annual Report
II.B.4.d.ii	Sweep according to schedule	September 30, 2015
II.B.4.d.iv,	Identify infeasible sweeping areas, alternative schedule or other program	Document in 1st Year Annual Report
II.B.4.d.v	Estimate sweeping effectiveness	Document in each Annual Report
II.B.4.f	Develop facility& maintenance yards SWPPPs	September 30, 2015
II.B.4.i	Train Permittee staff	September 30, 2016; annually thereafter
II.B.4.g	Evaluate the feasibility of retrofitting existing control devices	January 30, 2018; submit evaluation with 5th Year Annual Report

Table III. Schedule for Implementation and Required Submissions, continued

Permit Part	Item/Action	Due Date
II.B.5.c	Inventory/Map Illicit Discharge Reports	September 30, 2014, update annually
II.B.5.d.ii, IV.A.11	Conduct dry weather outfall screening; update screening plan; inspect 20% of outfalls per year	September 30, 2015; inspect 20% annual ly
II.B.6.b	Conduct public education & assess understanding to specific audiences	September 30, 2014; ongoing
II.B.6.d	Maintain, Promote, and Update Storm water Website	September 30, 2014, quarterly thereafter
II.C.3, II.A.1.b	Identify how Permittee controls are implemented to reduce discharge of pollutants of concern, measure SWMP effectiveness	Include discussion in SWMP documentation submitted with 1st Year Annual Report
II.E	Implement SWMP in all geographic areas newly added or annexed by Permittee	No later than one year from date new areas are added to Permittee's jurisdiction
II.F	Report SWMP implementation costs for the corresponding 12 month reporting period	Within each Annual Report
II.G	Review & Summarize legal authorities or regulatory mechanisms used by Permittee to implement & enforce SWMP & Permit requirements	No later than January 30, 2014, summarize legal authorities within the required SWMP documentation submitted with 1st Annual Report
IV.A.1	Assess & Document Permit Compliance	Annually; submit with Annual Reports
IV.A.2	Develop & Complete Stormwater Monitoring & Evaluation Plan	September 30, 2014; Submit Completed Plan with 2nd Year Annual Report
IV.A.7.a	Update *Boise NPDES Municipal SW Monitoring Plan*	September 30, 2015
IV.A.7.b	Monitor Five Representative Outfalls During Wet Weather; sample three times per year thereafter	No later than September 30, 2014
IV.A.8	If Applicable: update SW Monitoring & Evaluation Plan to include WQ Monitoring and/or Fish Tissue Sampling	If applicable: Update SW Monitoring & Evaluation Plan by September 30, 2014 to include WQ Monitoring and/or Fish Tissue Sampling; submit with 2nd Year Annual Report
IV.A.9	Evaluate Effectiveness of 2 Structural Control Techniques Currently Required by the Permittees	Begin evaluations no later than September 30, 2015; document in Annual Report(s)
IV.C.1	Submit Stormwater Outfall Discharge Data	2nd Year Annual Report, annually thereafter
IV.C.2	Submit WQ Monitoring or Fish Tissue Sampling Data Report (if applicable)	2nd Year Annual Report, annually thereafter
IV.C.3	Submit Annual Reports	1st Year Annual Report due January 30, 2014; all subsequent Annual Reports are due annually no later than January 30th; See Table IV.C.
VI.B	Submit Permit Renewal Application	No later than 180 days prior to Permit Expiration Date; see cover page. Alternatively, Renewal Application may be submitted as part of the 4th Year Annual Report.

IV. Monitoring, Recordkeeping and Reporting Requirements.

A. Monitoring

1. **Assess Permit Compliance.** At least once per year, each Permittee must individually evaluate their respective organization's compliance with these Permit conditions, and progress toward implementing each of the control measures defined in Part II. The compliance evaluation must be documented in each Annual Report required in Part IV.C.2.

2. **Stormwater Monitoring and Evaluation Program Plan and Objectives.** The Permittees must conduct a wet weather monitoring and evaluation program, or contract with another entity to implement such a program. This stormwater monitoring and evaluation program must be designed to characterize the quality of storm water discharges from the MS4, and to evaluate overall effectiveness of selected storm water management practices.

   a) No later than September 30, 2014, the Permittees must develop a stormwater monitoring and evaluation plan that includes the quality assurance requirements, outfall monitoring, in-stream and/or fish tissue monitoring (as appropriate), evaluation of permanent storm water controls and evaluation of LID pilot project effectiveness as described later in this Part. In general, the Permittees must develop and conduct a stormwater monitoring and evaluation program to:

      (i) Broadly estimate reductions in annual pollutant loads of sediment, bacteria, phosphorus and temperature discharged to impaired receiving waters from the MS4s, occurring as a result of the implementation of SWMP activities;

      (ii) Assess the effectiveness and adequacy of the permanent storm water controls and LID techniques or controls selected for evaluation by the Permittees and which are intended to reduce the total volume of storm water discharging from impervious surfaces and/or improve overall pollutant reduction in stormwater discharges; and

      (iii) Identify and prioritize those portions of each Permittee's MS4 where additional controls can be accomplished to further reduce total volume of storm water discharged and/or reduce pollutants in storm water discharges to waters of the U.S.

   b) The final, updated stormwater monitoring and evaluation plan must be submitted to EPA with the 2nd Year Annual Report.

3. **Representative Sampling.** Samples and measurements must be representative of the nature of the monitored discharge or activity.

4. **Analytical Methods.** Sample collection, preservation, and analysis must be conducted according to sufficiently sensitive methods/test procedures approved under 40 CFR Part 136, unless otherwise approved by EPA. Where an approved 40 CFR Part 136 method does not exist, and other test procedures

have not been specified, any available method may be used after approval from EPA.

5. **Quality Assurance Requirements.** The Permittees must develop or update a quality assurance plan (QAP) for all analytical monitoring conducted in accordance with this Part. The QAP must be developed concurrently as part of the stormwater monitoring and evaluation plan. The Permittees must submit the QAP as part of the stormwater monitoring and evaluation plan to EPA and IDEQ in the 2nd Year Annual Report. Any existing QAP may be modified for the requirements under this section.

   a) The QAP must be designed to assist in the collection and analysis of storm water discharges in support of this Permit and in explaining data anomalies when they occur.

   b) Throughout all sample collection, analysis and evaluation activities, Permittees must use the EPA-approved QA/QC and chain-of-custody procedures described in the most current version of the following documents:

      (i) *EPA Requirements for Quality Assurance Project Plans EPA-QA/R-5* (EPA/240/B-01/003, March 2001). A copy of this document can be found electronically at: http://www.epa.gov/quality/qs-docs/r5-final.pdf;

      (ii) *Guidance for Quality Assurance Project Plans EPA-QA/G-5*, (EPA/600/R-98/018, February, 1998). A copy of this document can be found electronically at: http://www.epa.gov/r10earth/offices/oea/epaqag5.pdf ;

      (iii) *Urban Storm BMP Performance Monitoring*, (EPA-821-B-02-001, April 2002). A copy of this document can be found electronically at: http://www.epa.gov/npdes/pubs/montcomplete.pdf

   The QAP should be prepared in the format specified in these documents.

   c) At a minimum, the QAP must include the following:

      (i) Organization chart reflecting responsibilities of key Permittee staff;

      (ii) Details on the number of samples, type of sample containers, preservation of samples, holding times, analytical methods, analytical detection and quantitation limits for each target compound, type and number of quality assurance field samples, precision and accuracy requirements, sample representativeness and completeness, sample preparation requirements, sample shipping methods, and laboratory data delivery requirements;

      (iii) Data quality objectives;

(iv) Map(s) and associated documentation reflecting the location of each sampling point and physical description including street address or latitude/longitude;

(v) Qualification and training of personnel;

(vi) Name(s), address(es) and telephone number(s) of the laboratories, used by or proposed to be used by the Permittees;

(vii) Data management;

(viii) Data review, validation and verification; and

(ix) Data reconciliation.

d) The Permittees must amend the QAP whenever there is a modification in sample collection, sample analysis, or other procedure addressed by the QAP. The amended QAP must be submitted to EPA as part of the next Annual Report.

e) Copies of any current QAP must be maintained by the Permittees and made available to EPA and/or IDEQ upon request.

6. **Additional Monitoring by Permittees.** If the Permittees monitor more frequently, or in more locations, than required by this Permit, the results of any such additional monitoring must be included and summarized with other data submitted to EPA and IDEQ as required in Part IV.C.

7. **Storm Water Outfall Monitoring**

a) No later than September 30, 2015, the Permittees must update the existing *Boise NPDES Municipal Storm Water Permit Monitoring Plan* to be consistent with the monitoring and evaluation program objectives and plan as described in Part IV.A.2. At a minimum, the plan must describe five outfall sample locations, and any additional or alternative locations, as defined by the Permittees. The outfalls selected by the Permittees to be monitored must be identified as representative of all major land uses occurring within the Permit area.

b) No later than September 30, 2014, the Permittees must begin monitoring discharges from the identified five storm water outfalls during wet weather events at least three times per year. The specific minimum monitoring requirements are outlined in Table IV.A, but may be augmented based on the Permittees' updated stormwater monitoring and evaluation plan required by Part IV.A.2. The Permittees must include any additional parameters to be sampled in an updated Table IV.A within the final updated stormwater monitoring and evaluation plan submitted to EPA with the 2nd Annual Report.

Table IV.A – Outfall Monitoring Requirements[1, 2]
PARAMETER SAMPLING
Ammonia
Total Kjeldahl Nitrogen (TKN) (mg/l)
Nitrate + Nitrite
Total Phosphorus (mg/l)
Dissolved Orthophosphate (mg/l)
E. coli
Biological Oxygen Demand (BOD5) (mg/l)
Chemical Oxygen Demand (COD) (mg/l)
Total Suspended Solids (TSS) (mg/l)
Total Dissolved Solids (TDS) (mg/l)
Dissolved Oxygen
Turbidity (NTU)
Temperature
pH (S.U)
Flow/Discharge, Volume, in cubic feet
Arsenic – Total
Cadmium- Total and Dissolved
Copper – Dissolved
Lead – Total and Dissolved
Mercury – Total
Zinc – Dissolved
Hardness (as CaCO3) (mg/l)

[1] Five or more outfall locations will be identified in the Permittees' updated stormwater monitoring and evaluation plan

[2] A minimum of ***three (3) samples*** must be collected during wet weather storm events in each reporting year, assuming the presence of storm events sufficient to produce a discharge.

8. **Water Quality Monitoring and/or Fish Tissue Sampling**. At the Permittees' option and to augment the storm water discharge data collection required in Part IV.A.7 above, one or more of the Permittees may conduct, or contract with others to conduct, water quality monitoring and/or fish tissue sampling within the Lower Boise River Watershed.

   a) If the Permittees elect to conduct in-stream water quality monitoring and/or fish tissue sampling within the Lower Boise River Watershed, the Permittees must revise the stormwater monitoring and evaluation plan and QAP to describe the monitoring and/or sampling effort(s) per Part IV.A.2 and IV.A.5, no later September 30, 2014.

   b) The documentation of the Permittees' intended in-stream water quality monitoring and/or fish tissue sampling activities must be included in the final updated stormwater monitoring and evaluation plan submitted with the 2nd Year Annual Report as required in Part IV.A.2.b.

   c) The Permittees are encouraged to engage in cooperative efforts with other organizations to collect reliable methylmercury fish tissue data within a specific geographic area of the Lower Boise River Watershed. The objective of the cooperative effort is to determine if fish tissue concentrations of methylmercury in the Lower Boise River are compliant with Idaho's methylmercury fish tissue criterion of 0.3 mg/kg.

      (i) In particular, the Permittees are encouraged to cooperate with other organizations to collect data through implementation of the Methylmercury Fish Tissue Sampling requirements specified in NPDES Permits # ID-002044-3 and ID-002398-1 as issued to the City of Boise. Beginning with the 2nd Year Annual Report, the Permittees' may (individually or collectively) submit documentation in each Annual Report which describes their specific involvement over the prior reporting period, and may reference fish tissue sampling plans and data reports as developed or published by others through the cooperative watershed effort.

9. **Evaluate the Effectiveness of Required Structural Controls**. Within two years of the effective date of this Permit, the Permittees must select and begin to evaluate at least two different types of permanent structural storm water management controls currently mandated by the Permittees at new development or redevelopment sites. For each selected control, this evaluation must determine whether the control is effectively treating or preventing the discharge of one or more of the pollutants of concern into waterbodies listed in Table II.C. The results of this evaluation, and any recommendations for improved treatment performance, must be submitted to EPA in subsequent Annual Reports as the evaluation projects are implemented and completed.

10. **Evaluate the Effectiveness of Green Infrastructure/Low Impact Development Pilot Projects**. The Permittees must evaluate the performance and effectiveness of the three pilot projects required in Part II.B.2.c of this Permit, or contract with another entity to conduct such evaluations. An evaluation summary of the LID technique or control and any recommendations

of improved treatment performance must be submitted in subsequent Annual Reports as the evaluation projects are implemented and completed.

11. **Dry Weather Discharge Screening.** The Permittees must implement a dry weather screening program, or contract with another entity to implement such a program, as required in Part II.B.5.d.

B. Recordkeeping

1. **Retention of Records.** The Permittees must retain records and copies of all information (e.g., all monitoring, calibration, and maintenance records; all original strip chart recordings for any continuous monitoring instrumentation; copies of all reports required by this Permit; storm water discharge monitoring reports; a copy of the NPDES permit; and records of all data or information used in the development and implementation of the SWMP and to complete the application for this Permit;) for a period of at least five years from the date of the sample, measurement, report or application, or for the term of this Permit, whichever is longer. This period may be extended at the request of the EPA at any time.
2. **Availability of Records.** The Permittees must submit the records referred to in Part IV.B.1 to EPA and IDEQ only when such information is requested. At a minimum, the Permittees must retain all records comprising the SWMP required by this Permit (including a copy of the Permit language and all Annual Reports) in a location and format that are accessible to EPA and IDEQ. The Permittees must make all records described above available to the public if requested to do so in writing. The public must be able to view the records during normal business hours. The Permittees may charge the public a reasonable fee for copying requests.

C. Reporting Requirements

1. **Storm Water Discharge Monitoring Report.** Beginning with the 2nd Year Annual Report, and in subsequent Annual Reports, all storm water discharge monitoring data collected to date must be submitted as part of the Annual Report. At a minimum, this Storm Water Discharge Monitoring Report must include:
   a) Dates of sample collection and analyses;
   b) Results of sample analyses;
   c) Location of sample collection. and
   d) Summary discussion and interpretation of the data collected, including a discussion of quality assurance issues and comparison to previously collected information, as appropriate.
2. **Water Quality Monitoring and/or Fish Tissue Sampling Report(s).** If the Permittees elect to conduct water quality monitoring and/or fish tissue sampling as specified in Part IV.A.8, all relevant monitoring data collected to date must

be submitted as part of each Annual Report beginning with the 2nd Year Annual Report. Summary data reports as prepared by other organizations with whom the Permittee(s) cooperate may be submitted to fulfill this requirement. At a minimum, this Water Quality Monitoring and/or Fish Tissue Sampling Report must include:

a) Dates of sample collection and analyses;

b) Results of sample analyses;

c) Locations of sample collection; and

d) Summary discussion and interpretation of the data collected, including discussion of quality assurance issues and comparison to previously collected information, as appropriate.

3. **Annual Report.**

a) No later than January 30th of each year beginning in 2014, and annually thereafter, each Permittee must submit an Annual Report to EPA and IDEQ. The reporting period for the 1st Year Annual Report will be from February 1, 2013, through September 30, 2013. Reporting periods for subsequent Annual Reports are specified in Table IV.C. Copies of all Annual Reports, including each Permittee's SWMP documentation, must be available to the public, through a Permittee-maintained website, and/or through other easily accessible means.

Table IV.C - Annual Report Deadlines

Annual Report	Reporting Period	Due Date
1st Year Annual Report	February 1, 2013–September 30, 2013	January 30, 2014
2nd Year Annual Report	October 1, 2013-September 30, 2014	January 30, 2015
3rd Year Annual Report	October 1, 2014-September 30, 2015	January 30, 2016
4th Year Annual Report	October 1, 2015-September 30, 2016	January 30, 2017
5th Year Annual Report	October 1, 2016-December 31, 2017	January 30, 2018

b) Preparation and submittal of the Annual Reports must be coordinated by Ada County Highway District. Each Permittee is responsible for content of their organization's SWMP documentation and Annual Report(s) relating to SWMP implementation for portions of the MS4s for which they are responsible.

c) The following information must be submitted in each Annual Report:

(i) A updated and current document describing the SWMP as implemented by the specific Permittee, in accordance with Part II.A.1.b;

(ii) A narrative assessment of the Permittee's compliance with this Permit, describing the status of implementing the control measures in Parts II and IV. The status of each control measure must be addressed, even if activity has previously been completed, has not yet been implemented, does not apply to the Permittee's jurisdiction or operation, or is conducted on the Permittee's behalf by another entity;

(iii) Discussion of any information collected and analyzed during the reporting period, including but not limited to storm water monitoring data not included with the Storm Water Discharge Monitoring Report; dry weather monitoring results; Green Infrastructure/LID pilot project evaluation results, structural control evaluation results, and any other information collected or used by the Permittee(s) to assess the success of the SWMP controls at improving receiving water quality to the maximum extent practicable;

(iv) A summary of the number and nature of public education programs; the number and nature of complaints received by the Permittee(s), and follow-up actions taken; and the number and nature of inspections, formal enforcement actions, or other similar activities as performed by the Permittee(s) during the reporting period;

(v) Electronic copies of new or updated education materials, ordinances (or other regulatory mechanisms), inventories, guidance materials, or other products produced as required by this Permit during the reporting period;

(vi) A description and schedule of the Permittee's implementation of additional controls or practices deemed necessary by the Permittee, based on monitoring or other information, to ensure compliance with applicable water quality standards;

(vii) Notice if the Permittee is relying on another entity to satisfy any of the Permit obligations, if applicable; and

(viii) Annual expenditures for the reporting period, and estimated budget for the reporting period following each Annual Report.

d) If, after the effective date of this Permit, EPA provides the Permittees with an alternative Annual Report format, the Permittees may use the alternative format in lieu of the required elements of Part IV.C.3.c.

D. Addresses

Reports and other documents required by this Permit must be signed in accordance with Part VI.E and submitted to each of the following addresses:

IDEQ: Idaho Department of Environmental Quality
Boise Regional Office
Attn: Water Program Manager
1410 North Hilton
Boise, ID 83854

EPA: United States Environmental Protection Agency
Attention: Storm Water MS4 Compliance Program
NPDES Compliance Unit
1200 6th Avenue, Suite 900 (OCE-133)
Seattle, WA 98101

Any documents and/or submittals requiring formal EPA approval must also be submitted to the following address:

United States Environmental Protection Agency
Attention: Storm Water MS4 Permit Program
NPDES Permits Unit
1200 6th Avenue, Suite 900 (OWW-130)
Seattle, WA 98101

V. Compliance Responsibilities.

A. Duty to Comply. The Permittees must comply with all conditions of this Permit. Any Permit noncompliance constitutes a violation of the Act and is grounds for enforcement action, for Permit termination, revocation and reissuance, or modification, or for denial of a Permit renewal application.

B. Penalties for Violations of Permit Conditions

1. Civil and Administrative Penalties. Pursuant to 40 CFR Part 19 and the Act, any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed the maximum amounts authorized by Section 309(d) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $37,500 per day for each violation).

2. Administrative Penalties. Any person may be assessed an administrative penalty by the Administrator for violating Section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of this Act. Pursuant to 40 CFR Part 19

and the Act, administrative penalties for Class I violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(A) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $16,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed $37,500). Pursuant to 40 CFR Part 19 and the Act, penalties for Class II violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(B) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $16,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed $177,500).

3. Criminal Penalties

a) **Negligent Violations**. The Act provides that any person who negligently violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment of not more than one year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than $50,000 per day of violation, or by imprisonment of not more than two years, or both.

b) **Knowing Violations**. Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of $5,000 to $50,000 per day of violation, or imprisonment for not more than three years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than $100,000 per day of violation, or imprisonment of not more than six years, or both.

c) **Knowing Endangerment**. Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than $500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in Section 309(c)(3)(B)(iii) of the Act, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than $1,000,000 and can be fined up to $2,000,000 for second or subsequent convictions.

d) **False Statements.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Permit shall, upon conviction, be

punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four years, or both. The Act further provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this Permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

C. Need to Halt or Reduce Activity not a Defense. It shall not be a defense for the Permittees in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with this Permit.

D. Duty to Mitigate. The Permittees must take all reasonable steps to minimize or prevent any discharge or disposal in violation of this Permit that has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance. The Permittees must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Permittees to achieve compliance with the conditions of this Permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by the Permittees only when the operation is necessary to achieve compliance with the conditions of the Permit.

F. Toxic Pollutants. The Permittees must comply with effluent standards or prohibitions established under Section 307(a) of the Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the Permit has not yet been modified to incorporate the requirement.

G. Planned Changes. The Permittee(s) must give notice to the Director and IDEQ as soon as possible of any planned physical alterations or additions to the permitted facility whenever:

1. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source as determined in 40 CFR §122.29(b); or

2. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are not subject to effluent limitations in the Permit.

H. Anticipated Noncompliance. The Permittee(s) must give advance notice to the Director and IDEQ of any planned changes in the permitted facility or activity that may result in noncompliance with this Permit.

I. Twenty-four Hour Notice of Noncompliance Reporting

1. The Permittee(s) must report the following occurrences of noncompliance by telephone within 24 hours from the time the Permittee(s) becomes aware of the circumstances:

a) any noncompliance that may endanger health or the environment;

b) any unanticipated bypass that exceeds any effluent limitation in the permit (See Part IV.F., "Bypass of Treatment Facilities");

c) any upset that exceeds any effluent limitation in the permit (See Part IV.G., "Upset Conditions"); or

d) any overflow prior to the stormwater treatment facility over which the Permittee(s) has ownership or has operational control. An overflow is any spill, release or diversion of municipal sewage including:

(1) an overflow that results in a discharge to waters of the United States; and

(2) an overflow of wastewater, including a wastewater backup into a building (other than a backup caused solely by a blockage or other malfunction in a privately owned sewer or building lateral) that does not reach waters of the United States.

2. The Permittee(s) must also provide a written submission within five days of the time that the Permittee(s) becomes aware of any event required to be reported under subpart 1 above. The written submission must contain:

a) a description of the noncompliance and its cause;

b) the period of noncompliance, including exact dates and times;

c) the estimated time noncompliance is expected to continue if it has not been corrected; and

d) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

e) if the noncompliance involves an overflow, the written submission must contain:

(1) The location of the overflow;

(2) The receiving water (if there is one);

(3) An estimate of the volume of the overflow;

(4) A description of the sewer system component from which the release occurred (e.g., manhole, constructed overflow pipe, crack in pipe);

(5) The estimated date and time when the overflow began and stopped or will be stopped;

(6) The cause or suspected cause of the overflow;

(7) Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the overflow and a schedule of major milestones for those steps;

(8) An estimate of the number of persons who came into contact with wastewater from the overflow; and

(9) Steps taken or planned to mitigate the impact(s) of the overflow and a schedule of major milestones for those steps.

3. The Director of the Office of Compliance and Enforcement may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the NPDES Compliance Hotline in Seattle, Washington, by telephone, (206) 553-1846.

4. Reports must be submitted to the addresses in Part IV.D ("Addresses").

J. Bypass of Treatment Facilities

1. Bypass not exceeding limitations. The Permittee(s) may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs 2 and 3 of this Part.

2. Notice.

a) **Anticipated bypass**. If the Permittee(s) knows in advance of the need for a bypass, it must submit prior written notice, if possible at least 10 days before the date of the bypass.

b) **Unanticipated bypass.** The Permittee(s) must submit notice of an unanticipated bypass as required under Part III.G ("Twenty-four Hour Notice of Noncompliance Reporting").

3. Prohibition of bypass.

a) Bypass is prohibited, and the Director of the Office of Compliance and Enforcement may take enforcement action against the Permittee(s) for a bypass, unless:

(1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of equipment downtime or preventive maintenance; and

(3) The Permittee(s) submitted notices as required under paragraph 2 of this Part.

b) The Director of the Office of Compliance and Enforcement may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph 3.a. of this Part.

K. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the Permittee(s) meets the requirements of paragraph 2 of this Part. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

2. Conditions necessary for a demonstration of upset. To establish the affirmative defense of upset, the Permittee(s) must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

a) An upset occurred and that the Permittee(s) can identify the cause(s) of the upset;

b) The permitted facility was at the time being properly operated;

c) The Permittee(s) submitted notice of the upset as required under Part V.I, "*Twenty-four Hour Notice of Noncompliance Reporting*;" and

d) The Permittee(s) complied with any remedial measures required under Part V.D, "*Duty to Mitigate.*"

3. Burden of proof. In any enforcement proceeding, the Permittee(s) seeking to establish the occurrence of an upset has the burden of proof.

VI. General Provisions

A. Permit Actions.

1. This Permit may be modified, revoked and reissued, or terminated for cause as specified in 40 CFR **§§** 122.62, 122.64, or 124.5. The filing of a request by the Permittee(s) for a Permit modification, revocation and reissuance, termination, or a notification of planned changes or anticipated noncompliance, does not stay any Permit condition.

2. Permit coverage may be terminated, in accordance with the provisions of 40 CFR §§122.64 and 124.5, for a single Permittee without terminating coverage for the other Permittees subject to this Permit.

B. Duty to Reapply. If the Permittees intend to continue an activity regulated by this Permit after the expiration date of this Permit, the Permittees must apply for and obtain a

new permit. In accordance with 40 CFR §122.21(d), and unless permission for the application to be submitted at a later date has been granted by the Director, the Permittees must submit a new application at least 180 days before the expiration date of this Permit, or alternatively in conjunction with the 4th Year Annual Report. The reapplication package must contain the information required by 40 CFR §122.21(f), which includes: name and mailing address(es) of the Permittees(s) that operate the MS4(s), and names and titles of the primary administrative and technical contacts for the municipal Permittees(s). In addition, the Permittees must identify any previously unidentified water bodies that receive discharges from the MS4(s); a summary of any known water quality impacts on the newly identified receiving waters; a description of any changes to the number of applicants; and any changes or modifications to the Storm Water Management Program as implemented by the Permittees. The re-application package may incorporate by reference the 4th Year Annual Report when the reapplication requirements have been addressed within that report.

C. Duty to Provide Information. The Permittees must furnish to the Director and IDEQ, within the time specified in the request, any information that the Director or IDEQ may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Permit, or to determine compliance with this Permit. The Permittees must also furnish to the Director or IDEQ, upon request, copies of records required to be kept by this Permit.

D. Other Information. When the Permittees become aware that it failed to submit any relevant facts in a Permit application, or that it submitted incorrect information in a Permit application or any report to the Director or IDEQ, the Permittees must promptly submit the omitted facts or corrected information.

E. Signatory Requirements. All applications, reports or information submitted to the Director and IDEQ must be signed and certified as follows.

1. All Permit applications must be signed as follows:
   a) For a corporation: by a responsible corporate officer.
   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.

2. All reports required by the Permit and other information requested by the Director or the IDEQ must be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
   a) The authorization is made in writing by a person described above;
   b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or

position having overall responsibility for environmental matters for the organization; and

c) The written authorization is submitted to the Director and IDEQ.

3. **Changes to Authorization.** If an authorization under Part VI.E.2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part VI.E.2 must be submitted to the Director and IDEQ prior to or together with any reports, information, or applications to be signed by an authorized representative.

4. **Certification.** Any person signing a document under this Part must 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 who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

F. Availability of Reports. In accordance with 40 CFR Part 2, information submitted to EPA pursuant to this Permit may be claimed as confidential by the Permittees. In accordance with the Act, permit applications, permits and effluent data are not considered confidential. Any confidentiality claim must be asserted at the time of submission by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice to the Permittees. If a claim is asserted, the information will be treated in accordance with the procedures in 40 CFR Part 2, Subpart B (Public Information) and 41 Fed. Reg. 36902 through 36924 (September 1, 1976), as amended.

G. Inspection and Entry. The Permittees must allow the Director, IDEQ, or an authorized representative (including an authorized contractor acting as a representative of the Director), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the Permittees' premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purpose of assuring Permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

H. Property Rights. The issuance of this Permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons or property or invasion of other private rights, nor any infringement of state or local laws or regulations.

I. Transfers. This Permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the Permit to change the name of the Permittees and incorporate such other requirements as may be necessary under the Act. (See 40 CFR 122.61; in some cases, modification or revocation and reissuance is mandatory.)

J. State/Tribal Environmental Laws

1. Nothing in this Permit shall be construed to preclude the institution of any legal action or relieve the Permittees from any responsibilities, liabilities, or penalties established pursuant to any applicable State/Tribal law or regulation under authority preserved by Section 510 of the Act.
2. No condition of this Permit releases the Permittees from any responsibility or requirements under other environmental statutes or regulations.

K. Oil and Hazardous Substance Liability Nothing in this Permit shall be constructed to preclude the institution of any legal action or relieve the Permittees from any responsibilities, liabilities, or penalties to which the Permittees is or may be subject under Section 311 of the CWA or Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

L. Severability The provisions of this Permit are severable, and if any provision of this permit, or the application of any provision of this Permit to any circumstance, is held invalid, the application of such provision to the circumstances, and the remainder of this Permit shall not be affected thereby.

VII. Definitions and Acronyms

All definitions contained in Section 502 of the Act and 40 CFR Part 122 apply to this Permit and are incorporated herein by reference. For convenience, simplified explanations of some regulatory/statutory definitions have been provided but, in the event of a conflict, the definition found in the statute or regulation takes precedence.

"Administrator" means the Administrator of the EPA, or an authorized representative.

"Animal facility" see "commercial animal facility."

"Annual Report" means the periodic self –assessment submitted by the Permittee(s) to document incremental progress towards meeting the storm water management requirements and implementation schedules as required by this Permit. See Part IV.C.

"Best Management Practices (BMPs)" means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. See 40 CFR § 122.2. BMP refers to operational activities, physical controls or educational measures that are applied to reduce the discharge of pollutants and minimize potential impacts upon receiving waters, and accordingly, refers to both structural and nonstructural practices that have direct impacts on the release, transport, or discharge of pollutants. See also "storm water control measure (SCM)."

"Bioretention" is the water quality and water quantity storm water management practice using the chemical, biological and physical properties of plants, microbes and soils for the removal of pollution from storm water runoff.

"Canopy Interception**"** is the interception of precipitation, by leaves and branches of trees and vegetation that does not reach the soil.

"CGP" and "Construction General Permit" means the current available version of EPA's *NPDES General Permit for Storm Water Discharges for Construction Activities in Idaho*, Permit No. IDR12-0000. EPA's CGP is posted on EPA's website at *www.epa.gov/npdes/stormwater/cgp*.

"Commercial Animal Facility" as used in this Permit, means a business that boards, breeds, or grooms animals including but not limited to dogs, cats, rabbits or horses.

"Common Plan of Development**"** is a contiguous construction project or projects where multiple separate and distinct construction activities may be taking place at different times on different schedules but under one plan. The "plan" is broadly defined as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot; included in this definition are most subdivisions and industrial parks.

"Construction activity" includes, but is not limited to, clearing, grading, excavation, and other site preparation work related to the construction of residential buildings and non-residential buildings, and heavy construction (e.g., highways, streets, bridges, tunnels, pipelines, transmission lines and industrial non-building structures).

"Control Measure" as used in this Permit, refers to any action, activity, Best Management Practice or other method used to prevent or reduce the discharge of pollutants in stormwater to waters of the United States.

"CWA" or "The Act" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended by Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et seq.

"Director" means the Environmental Protection Agency Regional Administrator, the EPA Director of the Office of Water and Watersheds, or an authorized representative.

"Discharge" when used without a qualifier, refers to "discharge of a pollutant" as defined at 40 CFR §122.2.

"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 channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

"Discharge of Storm Water Associated with Construction Activity" as used in this Permit, refers to a discharge of pollutants in storm water runoff from areas where soil disturbing activities (*e.g.*, clearing, grading, or excavation), construction materials or equipment storage or maintenance (*e.g.*, fill piles, borrow areas, concrete truck washout, fueling) or other industrial storm water directly related to the construction process are located, and which are required to be managed under an NPDES permit. See the regulatory definitions of storm water discharge associated with large and small construction activity at 40 CFR §122.26(b)(14)(x) and 40 CFR §122.26(b)(15), respectively

"Discharge of Storm Water Associated with Industrial Activity" as used in this Permit, refers to 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 included in the regulatory definition of storm water discharge associated with industrial activity at 40 CFR §122.26(b)(14).

"Discharge-related Activities" include: activities which cause, contribute to, or result in storm water point source pollutant discharges and measures to control storm water discharges, including the siting, construction, and operation of best management practices to control, reduce or prevent storm water pollution.

"Disconnect" for the purposes of this permit, means the change from a direct discharge into receiving waters to one in which the discharged water flows across a vegetated surface, through a constructed water or wetlands feature, through a vegetated swale, or other attenuation or infiltration device before reaching the receiving water.

"Engineered Infiltration" is an underground device or system designed to accept storm water and slowly exfiltrates it into the underlying soil. This device or system is designed based on soil tests that define the infiltration rate.

"Erosion" means the process of carrying away soil particles by the action of water.

"Evaporation" means rainfall that is changed or converted into a vapor.

"Evapotranspiration" means the sum of evaporation and transpiration of water from the earth's surface to the atmosphere. It includes evaporation of liquid or solid water plus the transpiration from plants.

"Extended Filtration" is a structural storm water device which filters storm water runoff through a soil media and collects it in an underdrain which slowly releases it after the storm is over.

"EPA" means the Environmental Protection Agency Regional Administrator, the EPA Director of the Office of Water and Watersheds, or an authorized representative.

"Entity" means a governmental body, or a public or private organization.

"Existing Permanent Controls," in the context of this Permit, means post- construction or permanent storm water management controls designed to treat or control runoff on a permanent basis and that were installed prior to the effective date of this Permit.

"Facility or Activity" generally means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

"Fish Tissue Sampling" see "Methylmercury Fish Tissue Sampling"

"Green infrastructure" means runoff management approaches and technologies that utilize, enhance and/or mimic the natural hydrologic cycle processes of infiltration, evapotranspiration and reuse.

"Hydromodification" means changes to the storm water runoff characteristics of a watershed caused by changes in land use.

"IDEQ" means the Idaho Department of Environmental Quality or its authorized representative.

"Illicit Connection" means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

"Illicit Discharge" is defined at 40 CFR §122.26(b)(2) and means any discharge to a municipal separate storm sewer that is not entirely composed of storm water, except discharges authorized under an NPDES permit (other than the NPDES Permit for discharges from the MS4) and discharges resulting from fire fighting activities.

"Impaired Water" (or "Water Quality Impaired Water") for purposes of this Permit means any water body identified by the State of Idaho or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards. Impaired waters include both waters with approved or established Total Maximum Daily Loads (TMDLs), and those for which a TMDL has not yet been approved or established.

"Industrial Activity" as used in this Permit refers to the eleven categories of industrial activities included in the definition of discharges of "storm water associated with industrial activity" at 40 CFR §122.26(b)(14).

"Industrial Storm Water" as used in this Permit refers to storm water runoff associated with the definition of "discharges of storm water associated with industrial activity".

"Infiltration" is the process by which storm water penetrates into soil.

"Low Impact Development" or "LID" means storm water management and land development techniques, controls and strategies applied at the parcel and subdivision scale that emphasize conservation and use of on-site natural features integrated with engineered, small scale hydrologic controls to more closely mimic pre-development hydrologic functions.

"Major outfall" is defined in 40 CFR §122.26(b)(5) and in general, means a municipal storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more.

"MEP" or "maximum extent practicable," means the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges that was established by Section 402(p) of the Clean Water Act, 33 U.S.C §1342(p).

"Measurable Goal" means a quantitative measure of progress in implementing a component of a storm water management program.

"Methylmercury Fish Tissue Sampling" and "Methylmercury Fish Tissue Sampling Requirements" means the IDEQ-recommended cooperative data collection effort for the Lower Boise River Watershed. In particular, Methylmercury Fish Tissue Sampling requirements are otherwise specified in NPDES Permits # ID-002044-3 and ID-002398-1, as issued by EPA to the City of Boise and available online at http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/Current+ID1319

"Minimize" means to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry or municipal practices.

"MS4" means "municipal separate storm sewer system," and is used to refer to either a Large, Medium, or Small Municipal Separate Storm Sewer System as defined in 40 CFR 122.26(b). The term, as used within the context of this Permit, refers to those portions of the municipal separate storm sewer systems within the corporate limits of the City of Boise and City of Garden City that are owned and/or operated by the Permittees, namely: Ada County Highway District, Boise State University, City of Boise, City of Garden City, Drainage District #3 and/or the Idaho Transportation Department District #3.

"Municipality" means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA.

"Municipal Separate Storm Sewer" is defined in 40 CFR §122.26(b) and 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.

"National Pollutant Discharge Elimination System" or "NPDES" means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 402, 318 and 405 of the CWA. The term includes an 'approved program.'

"New Permanent Controls," in the context of this Permit, means post- construction or permanent storm water management controls designed to treat or control runoff on a permanent basis that are installed after the effective date of this permit.

"Outfall" is defined at 40 CFR §122.26(b)(9) means a point source (see definition below) at the point where a municipal separate storm sewer discharges to waters of the United States, and does not include open conveyances connecting two municipal separate storm sewers or pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

"Owner or operator" means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

"Permanent storm water management controls" see "post-construction storm water management controls."

"Permitting Authority" means the U.S. Environmental Protection Agency (EPA)

"Point Source" is defined at 40 CFR §122.2 and means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

"Pollutant" is defined at 40 CFR §122.2. A partial listing from this definition includes: dredged spoil, solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial or municipal waste.

"Pollutant(s) of concern" includes any pollutant identified by IDEQ as a cause of impairment of any water body that will receive a discharge from a MS4 authorized under this Permit. See Table II.C.

"Post- construction storm water management controls" or "permanent storm water management controls" means those controls designed to treat or control runoff on a permanent basis once construction is complete. See also "new permanent controls" and "existing permanent controls."

"QA/QC" means quality assurance/quality control.

"QAP" means Quality Assurance Plan.

"Rainfall and Rainwater Harvesting" is the collection, conveyance, and storage of rainwater. The scope, method, technologies, system complexity, purpose, and end uses vary from rain barrels for garden irrigation in urban areas, to large-scale collection of rainwater for all domestic uses.

"Redevelopment" for the purposes of this Permit, means the alteration, renewal or restoration of any developed land or property that results in land disturbance of 5,000 square feet or more, and that has one of the following characteristics: land that currently has an existing structure, such as buildings or houses; or land that is currently covered with an impervious surface, such as a parking lot or roof; or land that is currently degraded and is covered with sand, gravel, stones, or other non-vegetative covering.

"Regional Administrator" means the Regional Administrator of Region 10 of the EPA, or the authorized representative of the Regional Administrator.

"Repair of Public Streets, Roads and Parking Lots" means repair work on Permittee-owned or Permittee-managed streets and parking lots that involves land disturbance, including asphalt removal or regrading of 5,000 square feet or more. This definition excludes the following activities: pot hole and square cut patching; overlaying existing asphalt or concrete pacing with asphalt or concrete without expanding the area of coverage; shoulder grading; reshaping or regrading drainage ditches; crack or chip sealing; and vegetative maintenance.

"Runoff Reduction Techniques" means the collective assortment of storm water practices that reduce the volume of storm water from discharging off site.

"Storm Sewershed" means, for the purposes of this Permit, all the land area that is drained by a network of municipal separate storm sewer system conveyances to a single point of discharge into a water of the United States.

"Significant contributors of pollutants" means any discharge that causes or could cause or contribute to a violation of surface water quality standards.

"Small Construction Activity" – is defined at 40 CFR §122.26(b)(15) and incorporated here by reference. A small construction activity includes clearing, grading, and excavating resulting in a land disturbance that will disturb equal to or greater than one (1) acre and less than five (5) acres of land or will disturb less than one (1) acre of total land area but is part of a larger common plan of development or sale that will ultimately disturb equal to or greater than one (1) acre and less than five (5) 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 site.
"Snow management" means the plowing, relocation and collection of snow.

"Soil amendments" are components added to in situ or native soils to increase the spacing between soil particles so that the soil can absorb and hold more moisture. The amendment of soils changes

various other physical, chemical and biological characteristics so that the soils become more effective in maintaining water quality.

"Source control" storm water management means practices that control storm water *before* pollutants have been introduced into storm water

"Storm event" or "measurable storm event" for the purposes of this Permit means a precipitation event that results in an actual discharge from the outfall and which follows the preceding measurable storm event by at least 48 hours (2 days).

"Storm water" and "storm water runoff" as used in this Permit means storm water runoff, snow melt runoff, and surface runoff and drainage, and is defined at 40 CFR §122.26(b)(13). "Storm water" means that portion of precipitation that does not naturally percolate into the ground or evaporate, but flows via overland flow, interflow, channels, or pipes into a defined surface water channel or a constructed infiltration facility.

"Storm Water Control Measure" (SCM) or "storm water control device," means physical, structural, and/or managerial measures that, when used singly or in combination, reduce the downstream quality and quantity impacts of storm water. Also, SCM means a permit condition used in place of or in conjunction with effluent limitations to prevent or control the discharge of pollutants. This may include a schedule of activities, prohibition of practices, maintenance procedures, or other management practices. SCMs may include, but are not limited to, treatment requirements; operating procedures; practices to control plant site runoff, spillage, leaks, sludge, or waste disposal; or drainage from raw material storage. See "best management practices (BMPs)."

"Storm Water Facility" means a constructed component of a storm water drainage system, designed or constructed to perform a particular function or multiple functions. Storm water facilities include, but are not limited to, pipes, swales, ditches, culverts, street gutters, detention basins, retention basins, constructed wetlands, infiltration devices, catch basins, oil/water separators, sediment basins, and modular pavement.

"Storm Water Management Practice" or "Storm Water Management Control" means practices that manage storm water, including structural and vegetative components of a storm water system.

"Storm Water Management Project" means a project that takes into account the effects on the water quality of the receiving waters and whether a structural storm water control device can be retrofitted to control water quality.

"Storm Water Management Program (SWMP)" refers to a comprehensive program to manage the quality of storm water discharged from the municipal separate storm sewer system. For the purposes of this Permit, the SWMP consists of the actions and activities conducted by the Permittees as required by this Permit and described in the Permittees' SWMP documentation. A "SWMP document" is the written summary describing the unique and/or cooperative means by which an individual Permittee or entity implements the specific storm water management controls Permittee within their jurisdiction.

"Storm Water Pollution Prevention Plan (SWPPP)" means a site specific plan designed to describe the control of soil, raw materials, or other substances to prevent pollutants in storm water runoff; a SWPPP is generally developed for a construction site, or an industrial facility. For the purposes of this permit, a SWPPP means a written document that identifies potential sources of pollution, describes practices to reduce pollutants in storm water discharges from the site, and identifies procedures or controls that the operator will implement to reduce impacts to water quality and comply with applicable Permit requirements.

"Structural flood control device" means a device designed and installed for the purpose of storm drainage during storm events.

"Subwatershed" for the purposes of this Permit means a smaller geographic section of a larger watershed unit with a drainage area between 2 to 15 square miles and whose boundaries include all the land area draining to a point where two second order streams combine to form a third order stream. A subwatershed may be located entirely within the same political jurisdiction.

"TMDL" means Total Maximum Daily Load, an analysis of pollutant loading to a body of water detailing the sum of the individual waste load allocations for point sources and load allocations for non-point sources and natural background. See 40 CFR §130.2.

"Treatment control" storm water management means practices that 'treat' storm water after pollutants have been incorporated into the storm water.

"Urban Agriculture" and "Urban Agricultural Activities" means the growing, processing, and distribution of food and other products through intensive plant cultivation and animal husbandry in and around cities. For the purposes of this Permit, the term includes activities allowed and/or acknowledged by the Permittees through a local comprehensive plan ordinance, or other regulatory mechanism. For example, see: *Blueprint Boise* online at *http://www.cityofboise.org/BluePrintBoise/pdf/Blueprint%20Boise/0_Blueprint_All.pdf,* and/or *City of Boise Urban Agriculture ordinance amendment, ZOA11-00006.*

"Waters of the United States," as defined in 40 CFR 122.2, means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

2. All interstate waters, including interstate "wetlands";

3. All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

   a. Which are or could be used by interstate or foreign travelers for recreational or other purposes;
   b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

c. Which are used or could be used for industrial purposes by industries in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under this definition;

5. Tributaries of waters identified in paragraphs 1 through 4 of this definition;

6. The territorial sea; and

7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs 1 through 6 of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds for steam electric generation stations per 40 CFR Part 423) which also meet the criteria of this definition are not waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

"Watershed" is defined as all the land area that is drained by a waterbody and its tributaries.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

EXHIBIT 4

Washington, D.C. – District of Columbia MS4 Permit

(Permit No. DC0000221)

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NPDES Permit No. DC0000221

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*

Government of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

is authorized to discharge from all portions of the municipal separate storm sewer system owned and operated by the District of Columbia to receiving waters named:

Potomac River, Anacostia River, Rock Creek and stream segments tributary to each such water body

in accordance with the Stormwater Management Program(s) dated February 19, 2009, subsequent updates, and related reports, strategies, effluent limitations, monitoring requirements and other conditions set forth in Parts I through IX herein.

The effective issuance date of this permit is: October 7, 2011.

This permit and the authorization to discharge shall expire at midnight, on: October 7, 2016.

Signed this 30th day of September, 2011.

Jon M. Capacasa, Director
Water Protection Division
U.S. Environmental Protection Agency
Region III

PERMIT FOR THE DISTRICT OF COLUMBIA
MUNICIPAL SEPARATE STORM SEWER SYSTEM

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1. DISCHARGES AUTHORIZED UNDER THIS PERMIT

1.1 Permit Area

This permit covers all areas within the jurisdictional boundary of the District of Columbia served by, or otherwise contributing to discharges from, the Municipal Separate Storm Sewer System (MS4) owned or operated by the District of Columbia. This permit also covers all areas served by or contributing to discharges from MS4s owned or operated by other entities within the jurisdictional boundaries of the District of Columbia unless those areas have separate NPDES MS4 permit coverage or are specifically excluded herein from authorization under the District's stormwater program. Hereinafter these areas collectively are referred to as "MS4 Permit Area".

1.2 Authorized Discharges

This permit authorizes all stormwater point source discharges to waters of the United States from the District of Columbia's MS4 that comply with the requirements of this permit. This permit also authorizes the discharge of stormwater commingled with flows contributed by process wastewater, non-process wastewater, or stormwater associated with industrial activity provided such discharges are authorized under separate NPDES permits.

This permit authorizes the following non-stormwater discharges to the MS4 when appropriate stormwater activities and controls required through this permit have been applied and which are: (1) discharges resulting from clear water flows, roof drainage, dechlorinated water line flushing, landscape irrigation, ornamental fountains, diverted stream flows, rising ground waters, uncontaminated ground water infiltration to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation waters, springs, footing drains, lawn watering, individual resident car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, wash water, fire fighting activities, and similar types of activities; and (2) which are managed so that water quality is not further impaired and that the requirements of the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and EPA regulations are met.

1.3 Limitations to Coverage

1.3.1 Non-stormwater Discharges

The permittee, as defined herein, shall effectively prohibit non-stormwater discharges into the MS4, except to the extent such discharges are regulated with an NPDES permit.

1.3.2 Waivers and Exemptions

This permit does not authorize the discharge of any pollutant from the MS4 which arises from or is based on any existing waivers and exemptions that may otherwise apply and are not consistent with the Federal Clean Water Act and other pertinent guidance, policies, and regulations. This narrative prohibition on the applicability of such waivers and exemptions extends to any activity that would otherwise be authorized under District law, regulations or

ordinance but which impedes the reduction or control of pollutants through the use of stormwater control measures and/or prevents compliance with the narrative /numeric effluent limits of this permit. Any such discharge not otherwise authorized may constitute a violation of this permit.

1.4 Discharge Limitations

The permittee must manage, implement and enforce a stormwater management program (SWMP) in accordance with the Clean Water Act and corresponding stormwater NPDES regulations, 40 C.F.R. Part 122, to meet the following requirements:

1.4.1. Effectively prohibit pollutants in stormwater discharges or other unauthorized discharges into the MS4 as necessary to comply with existing District of Columbia Water Quality Standards (DCWQS);

1.4.2. Attain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL) for each receiving water body, consistent with 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. § 122.44(k)(2) and (3); and

1.4.3. Comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit.

Compliance with the performance standards and provisions contained in Parts 2 through 8 of this permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term.

2. LEGAL AUTHORITY, RESOURCES AND STORMWATER PROGRAM ADMINSTRATION

2.1 Legal Authority

2.1.1 The permittee shall use its existing legal authority to control discharges to and from the Municipal Separate Storm Sewer System in order to prevent or reduce the discharge of pollutants to achieve water quality objectives, including but not limited to applicable water quality standards. To the extent deficiencies can be addressed through regulation or other Executive Branch action, the permittee shall remedy such deficiencies within 120 days. Deficiencies that can only be addressed through legislative action shall be remedied within 2 years of the effective date of this permit, except where otherwise stipulated, in accordance with the District's legislative process. Any changes to or deficiencies in the legal authority shall be explained in each Annual Report.

2.1.2 No later than 18 months following the effective date of this permit, the District shall update and implement Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution) ("updated DC Stormwater Regulations"), to address the control of stormwater throughout the MS4 Permit Area. Such regulations shall be consistent with this

permit, and shall be at least as protective of water quality as the federal Clean Water Act and its implementing regulations require.

2.1.3 The permittee shall ensure that the above legal authority in no way restricts its ability to enter into inter-jurisdictional agreements with other District agencies and/or other jurisdictions affected through this permit.

2.1.4 Review and revise, where applicable, building, health, road and transportation, and other codes and regulations to remove barriers to, and facilitate the implementation of the following standards: (1) standards resulting from issuance of District stormwater regulations required by Section 2.1, paragraph 1 herein; and (2) performance standards required by this permit.

2.2 Fiscal Resources

The permittee, including all agencies and departments of the District as specified in section 2.3 below, shall provide adequate finances, staff, equipment and support capabilities to implement the existing Stormwater Management Program (SWMP) and the provisions of this permit. For the core program the District shall provide a dedicated funding source. Each annual report under Part 6 of this permit shall include a demonstration of adequate fiscal capacity to meet the requirements of this permit.

2.3 Stormwater Management Program Administration/Permittee Responsibilities

2.3.1 The Government of the District of Columbia is the permittee, and all activities of all agencies, departments, offices and authorities of the District must comply with the requirements of this permit. The permittee has designated the District Department of the Environment (DDOE) as the agency responsible for managing the MS4 Stormwater Management Program and all activities necessary to comply with the requirements of this permit and the Comprehensive Stormwater Management Enhancement Amendment Act of 2008 by coordinating and facilitating a collaborative effort among other city agencies and departments including but not limited to departments designated as "Stormwater Agencies" by the Comprehensive Stormwater Management Enhancement Amendment Act of 2008:

District Department of Transportation (DDOT);
Department of Public Works (DPW);
Office of Planning (OP);
Office of Public Education Facilities Modernization (OPEFM);
Department of Real Estate Services (DRES);
Department of Parks and Recreation; and
DC Water and Sewer Authority (also known as and hereinafter referred to as DC Water).

Each named entity is responsible for complying with those elements of the permit within its jurisdictional scope and authorities.

2.3.2 DDOE shall coordinate, and all agencies, offices, departments and authorities shall implement provisions of the existing MS4 Task Force Memorandum of Understanding (MOU) dated 2000, updated matrix of responsibilities (January 2008), any subsequent updates, and other institutional agreements to coordinate compliance activities among agency partners to implement the provisions of this permit. DDOE's major responsibilities under these MOUs and institutional agreements shall include:

1. Convening regular meetings and communication with MS4 Task Force agencies and other committees established to implement this permit to budget, assign and implement projects, and monitor, inspect and enforce all activities required by the MS4 permit.

2. Providing technical and administrative support for the MS4 Task Force and other committees established to implement this permit

3. Evaluating, assessing, and synthesizing results of the monitoring and assessment programs and the effectiveness of the implementation of management practices and coordinating necessary adjustments to the stormwater management program in order to ensure compliance.

4. Coordinating the completion and submission of all deliverables required by the MS4 Permit.

5. Projecting revenue needs to meet MS4 Permit requirements, overseeing the District's stormwater fees to fulfill revenue needs, and coordinating with DC Water to ensure the District's stormwater fee is collected.

6. Making available to the public and other interested and affected parties, the opportunity to comment on the MS4 stormwater management program.

2.3.3 Within 180 days of permit issuance, the permittee shall complete an assessment of additional governmental agencies and departments, non-governmental organizations, watershed groups or other community organizations in the District and adjacent states to partner with to administer required elements of the permit. Intra- and inter-agency agreements between relevant governmental and nongovernmental organizations shall be established to ensure successful coordination and implementation of stormwater management activities in accordance with the requirements of this permit. Additional government and nongovernmental organizations and programs to consider include; land use planning, brownfields redevelopment, fire department, building and safety, public health, parks and recreation, and federal departments and agencies, including but not limited to, the National Park Service, Department of Agriculture, Department of Defense, and General Services Administration, responsible for facilities in the District.

3. STORMWATER MANAGEMENT PROGRAM (SWMP) PLAN

The permittee shall continue to implement, assess and upgrade all of the controls, procedures and management practices, described in this permit, and in the SWMP dated

February 19, 2009, and any subsequent updates. This Program has been determined to reduce the discharge of pollutants to the maximum extent practicable. The Stormwater Management Program is comprised of all requirements in this permit. All existing and new strategies, elements, initiatives, schedules or programs required by this permit must be documented in the SWMP Plan, which shall be the consolidated document of all stormwater program elements. Updates to the plan shall be consistent with all compliance deadlines in this permit. A current plan shall be posted on the District's website at an easily accessible location at all times.

New Stormwater Management Program strategies, elements, initiatives and plans required to be submitted to EPA for review and approval are included in Table 1.

TABLE 1
Elements Requiring EPA Review and/or Approval

Element	**Submittal Date (from effective date of this permit)**
Anacostia River Watershed Trash Reduction Calculation Methodology (4.10)	1 year
Catch Basin Operation and Maintenance Plan (4.3.5.1)	18 months
Outfall Repair Schedule (4.3.5.3)	18 months
Off-site Mitigation/Payment-in-Lieu Program (4.1.3)	18 months
Retrofit Program (4.1.6)	2 years
Consolidated TMDL Implementation Plan (4.10.3)	2 years
Revised Monitoring Program (5.1)	2 years
Revised Stormwater Management Program Plan (3)	4 years

No later than 3 years from the issuance date of this permit the permittee shall public notice a fully updated Plan including all of the elements required in this permit. No later than 4 years from the issuance date of this permit the permittee shall submit to EPA the fully updated plan for review and approval, as part of the application for permit renewal.

The measures required herein are terms of this permit. These permit requirements do not prohibit the use of 319(h) funds for other related activities that go beyond the requirements of this permit, nor do they prohibit other sources of funding and/or other programs where legal or contractual requirements preclude direct use for stormwater permitting activities.

TABLE 2
Legal Authority for Selected Required Program Stormwater Elements

Required Program Application Element	**Regulatory References**
Adequate Legal Authority	40 C.F.R. § 122.26(d)(2)(I)(C)-(F)

Green technology stormwater management practices, which incorporate technologies and practices across District activities.	Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution)
Existing Structural and Source Controls	40 C.F.R. § 122.26(d)(2)(iv)(A)(1)
Roadways	40 C.F.R. § 122.26(d)(2)(iv)(A)(3)
Pesticides, Herbicides, and Fertilizers Application	40 C.F.R. § 122.26(d)(2)(iv)(A)(6)
Municipal Waste Sites	40 C.F.R. § 122.26(d)(2)(iv)(A)(5)
Spill Prevention and Response	40 C.F.R. § 122.26(d)(2)(iv)(B)(4)
Infiltration of Seepage	40 C.F.R. § 122.26(d)(2)(iv)(B)(7)
Stormwater Management Program for Commercial and Residential Areas	40 C.F.R. § 122.26(d)(2)(iv)(A)
Manage Critical Source Areas	40 C.F.R. § 122.26(d)(iii)(B)(6)
Stormwater Management for Industrial Facilities	40 C.F.R. § 122.26(d)(2)(iv)(C)
Industrial and High Risk Runoff	40 C.F.R. § 122.26(d)(2)(iv)(C), (iv)(A)(5)
Identify Priority Industrial Facilities	40 C.F.R. § 122.26(d)(2)(iv)(C)(1)
Illicit Discharges and Improper Disposal	40 C.F.R. § 122.26(d)(2)(iv)(B)(1)-(5), (iv)(B)(7)
Flood Control Projects	40 C.F.R. § 122.26(d)(2)(iv)(A)(4)
Public Education and Participation	40 C.F.R. § 122.26(d)(2)(iv)(A)(6), (iv)(B)(5), (iv)(B)(6)

Monitoring and Assessment and Reporting	40 C.F.R. § 122.26(d)(2)(iv)(D)(v)
Monitoring Program	40 C.F.R. § 122.26(d)(2)(iv)(B)(2), (iii), iv(A), (iv)(C)(2)
Characterization Data	40 C.F.R. § 122.26(d)(2)(iii)(B)-(D), 40 C.F.R. § 122.21(g)(7)
Reporting	40 C.F.R. § 122.41(l)

4. IMPLEMENTATION OF STORMWATER CONTROL MEASURES

4.1 Standard for Long-Term Stormwater Management

The permittee shall continue to develop, implement, and enforce a program in accordance with this permit and the permittee's updated SWMP Plan that integrates stormwater management practices at the site, neighborhood and watershed levels that shall be designed to mimic pre-development site hydrology through the use of on-site stormwater retention measures (e.g., harvest and use, infiltration and evapotranspiration), through policies, regulations, ordinances and incentive programs

4.1.1 Standard for Stormwater Discharges from Development

No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement one or more enforceable mechanism(s) that will adopt and implement the following performance standard for all projects undertaking development that disturbs land greater than or equal to 5,000 square feet:

Require the design, construction and maintenance of stormwater controls to achieve on-site retention of 1.2" of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting and use for all development greater than or equal to 5,000 square feet.

The District may allow a portion of the 1.2" volume to be compensated for in a program consistent with the terms and requirements of Part 4.1.3.

4.1.2 Code and Policy Consistency, Site Plan Review, Verification and Tracking

By the end of this permit term the District must review and revise, as applicable, stormwater, building, health, road and transportation, and other codes and regulations to remove barriers to, and facilitate the implementation of the retention performance standard required in

Section 4.1.1. The District must also establish/update and maintain a formal process for site plan reviews and a post-construction verification process (e.g., inspections, submittal of as-builts) to ensure that standards are appropriately implemented. The District must also track the on-site retention performance of each project subject to this regulatory requirement.

4.1.3 Off-Site Mitigation and/or Fee-in Lieu for all Facilities

Within 18 months of the effective date of this permit the District shall develop, public notice, and submit to EPA for review and comment an off-site mitigation and/or fee-in-lieu program to be utilized when projects will not meet stormwater management performance standard as defined in Section 4.1.1. The District has the option of implementing an off-site mitigation program, a fee-in-lieu program, or both. Any allowance for adjustments to the retention standard shall be defined in the permittee's regulations. The program shall include at a minimum:

1. Establishment of baseline requirements for on-site retention and for mitigation projects. On-site volume plus off-site volume (or fee-in-lieu equivalent or other relevant credits) must equal no less than the relevant volume in Section 4.1.1;
2. Specific criteria for determining when compliance with the performance standard requirement for on-site retention cannot technically be met based on physical site constraints, or a rationale for why this is not necessary;
3. For a fee-in-lieu program, establishment of a system or process to assign monetary values at least equivalent to the cost of implementation of controls to account for the difference in the performance standard, and the alternative reduced value calculated; and
4. The necessary tracking and accounting systems to implement this section, including policies and mechanisms to ensure and verify that the required stormwater practices on the original site and appropriate required off-site practices stay in place and are adequately maintained.

The program may also include incentives for achieving other important environmental objectives such as ongoing measurable carbon sequestration, energy savings, air quality reductions in green house gases, or other environmental benefits for which the program can develop methods for quantifying and documenting those outcomes. Controls implemented to achieve those outcomes are subject to the same level of site plan review, inspection, and operation and maintenance requirements as stormwater controls.

District-owned transportation right-of-way projects are subject to a similarly stringent process for determining an alternate performance volume, but for the duration of this permit term need not conduct off-site mitigation or pay into a fee-in-lieu program to compensate for the difference.

4.1.4 Green Landscaping Incentives Program

No later than one year following permit issuance, the permittee shall develop an incentive program to increase the quantity and quality of planted areas in the District while allowing flexibility for developers and designers to meet development standards. The Incentive Program

shall use such methods as a scoring system to encourage green technology practices such as larger plants, permeable paving, green roofs, vegetated walls, preservation of existing trees, and layering of vegetation along streets and other areas visible to the public.

4.1.5 Retrofit Program for Existing Discharges

4.1.5.1 Within two years of the effective date of this permit the District shall develop, public notice, and submit to EPA for review and approval a program that establishes performance metrics for retrofit projects. The District shall fully implement the program upon EPA approval. The starting point for the performance metrics shall be the standard in Section 4.1.1. Performance metrics may be established generally for all retrofit projects, or for categories of projects, e.g., roads, sidewalks, parking lots, campuses. Specific site conditions may constitute justifications for setting a performance standard at something less than the standard in Section 4.1.1, and a similar calculator or algorithm process may be used in conjunction with a specific site analysis.

4.1.5.2 The District, with facilitation assistance from EPA Region III, will also work with major Federal landholders, such as the General Services Administration and the Department of Defense, with the objective of identifying retrofit opportunities, documenting federal commitments, and tracking pollutant reductions from relevant federal actions.

4.1.5.3 For each retrofit project estimate the potential pollutant load and volume reductions achieved through the DC Retrofit program by major waterbody (Rock Creek, Potomac, Anacostia) for the following pollutants: Bacteria (E. coli), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash. These estimates shall be included in the annual report following implementation of the project.

4.1.5.4 The DC Retrofit Program shall implement retrofits for stormwater discharges from a minimum of 18,000,000 square feet of impervious surfaces during the permit term. A minimum of 1,500,000 square feet of this objective must be in transportation rights-of-way.

4.1.5.5 No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement an enforceable mechanism that will adopt and implement stormwater retention requirements for properties where less than 5,000 square feet of soil is being disturbed but where the buildings or structures have a footprint that is greater than or equal to 5,000 square feet and are undergoing substantial improvement. Substantial improvement, as consistent with District regulations at 12J DCMR § 202, is any repair, alteration, addition, or improvement of a building or structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the improvement or repair is started. The characteristics of these types of projects may constitute justifications for setting a performance standard at something less than the standard in Section 4.1.1.

4.1.5.6 The permittee shall ensure that every major renovation/rehabilitation project for District-owned properties within the inventory of DRES and OPEFM (e.g., schools and school administration buildings) includes on-site stormwater retention measures, including but not

limited to green roofs, stormwater harvest/reuse, and/or other practices that can achieve the retention performance standard.

4.1.6 Tree Canopy

4.1.6.1 No later than one year following issuance of this permit, the District shall develop and public notice a strategy to reduce the discharge of stormwater pollutants by expanding tree canopy throughout the city. The strategy shall identify locations throughout the District where tree plantings and expanded tree boxes are technically feasible and commit to specific schedules for implementation at locations throughout the District, with highest priority given to projects that offer the greatest stormwater retention potential. The strategy shall also include the necessary elements to achieve the requirements of Section 4.1.6.2.

4.1.6.2 The District shall achieve a minimum net annual tree planting rate of 4,150 plantings annually within the District MS4 area, with the objective of a District-wide urban tree canopy coverage of 40% by 2035. The annual total tree planting shall be calculated as a net increase, such that annual mortality is also included in the estimate. The District shall ensure that trees are planted and maintained, including requirements for adequately designed and sized tree boxes, to achieve optimal stormwater retention and tree survival rate. Trees shall be planted in accordance with the Planting Specifications issued by the International Society of Arboriculture as appropriate to the site conditions.

4.1.6.3 The District shall annually document the total trees planted and make an annual estimate of the volume of stormwater that is being removed from the MS4 (and combined system, as relevant) in a typical year of rainfall as a result of the maturing tree canopy over the life of the MS4 permit. Also report annually on the status of achieving 40% canopy District-wide.

4.1.7 Green Roof Projects

4.1.7.1 Complete a structural assessment of all District properties maintained by DRES and slated for redevelopment to determine current roof conditions and the feasibility for green roof installation. These assessments shall be performed on an ongoing basis for all properties as they are considered for redevelopment. Based on the structural assessment and other factors, identify all District-owned properties where green roof projects are technically feasible and commit to specific schedules for implementing these projects. Highest priority shall be given to projects that offer the greatest stormwater capture potential.

4.1.7.2 The permittee shall install at a minimum 350,000 square feet of green roofs on District properties during the term of the permit (including schools and school administration buildings).

4.1.7.3 Document the square footage of green roof coverage in the District, whether publicly or privately owned, report any incentive programs implemented during the permit term, and estimate the volume of stormwater that is being removed from the MS4 (and combined

system, as relevant) in a typical year of rainfall as a result of the combined total green roof facilities in the District.

4.2 Operation and Maintenance of Stormwater Capture Practices

4.2.1 District Owned and Operated Practices.

Within two years of the effective date of this permit, develop and implement operation and maintenance protocols and guidance for District-owned and operated on-site retention practices (development and retrofits) to include maintenance needs, inspection frequencies, estimated maintenance frequencies, and a tracking system to document relevant information. Provide training to all relevant municipal employees and contractors, with regular refreshers, as necessary.

4.2.2 Non-District Owned and Operated Practices.

In conjunction with updating of relevant ordinances and policies, develop accountability mechanisms to ensure maintenance of stormwater control measures on non-District property. Those mechanisms may include combinations of deed restrictions, ordinances, maintenance agreements, or other policies deemed appropriate by the District. The District must also include a long-term verification process of O&M, which may include municipal inspections, 3rd party inspections, owner/operator certification on a frequency deemed appropriate by the District, and/or other mechanisms. The District must continue to maintain an electronic inventory of practices on private property to include this information.

4.2.3 Stormwater Management Guidebook and Training

4.2.3.1 No later than 18 months from the permit issuance date, the permittee shall finalize a Stormwater Management Guidebook to be available for wide-spread use by land use planners and developers. The Stormwater Management Guidebook shall provide regular updates, as applicable, in a format that facilitates such regular updates, and shall include objectives and specifications for integration of stormwater management technologies, including on site retention practices, in the areas of:

a. Site Assessment.
b. Site Planning and Layout.
c. Vegetative Protection, Revegetation, and Maintenance.
d. Techniques to Minimize Land Disturbance.
e. Techniques to Implement Measures at Various Scales.
f. Integrated Water Resources Management Practices.
g. Designing to meet the required performance standard(s).
h. Flow Modeling Guidance.
i. Hydrologic Analysis.
j. Construction Considerations.
k. Operation and Maintenance

4.2.3.2 The permittee shall continue to provide key industry, regulatory, and other stakeholders with information regarding objectives and specifications of green infrastructure practices contained in the Stormwater Management Guidebook through a training program. The Stormwater Management training program will include at a minimum the following:

a. Stormwater management/green technology practices targeted sessions and materials for builders, design professionals, regulators, resource agencies, and stakeholders.
b. Materials and data from stormwater management/green technology practices pilot projects and demonstration projects including case studies.
c. Design and construction methods for integration of stormwater management/green technology practices measures at various project scales.
d. Guidance on performance and cost of various types of stormwater management/green technology practices measures in the District.

4.3 Management of for District Government Areas

Procedures to reduce the discharge of pollutants in stormwater runoff shall include, but not be limited to:

4.3.1 Sanitary Sewage System Maintenance Overflow and Spill Prevention Response

The permittee shall coordinate with DC Water to implement an effective response protocol for overflows of the sanitary sewer system into the MS4. The response protocol shall clearly identify agencies responsible and telephone numbers and e-mail for any contact and shall contain at a minimum, procedures for:

1. Investigating any complaints received within 24 hours of the incident report.
2. Responding within two hours to overflows for containment.
3. Notifying appropriate sewer, public health agencies and the public within 24 hours when the sanitary sewer overflows to the MS4.

This provision in no way authorizes sanitary sewer overflow discharges either directly or via the MS4.

4.3.2 Public Construction Activities Management

The permittee shall implement and comply with the Development and Redevelopment and the Construction requirements in Part 4.6 of this permit at all permittee-owned or operated public construction projects.

The permittee shall obtain discharge authorization under the applicable EPA Construction General permit for construction activities and comply with provisions therein.

4.3.3 Vehicle Maintenance/Material Storage Facilities/ Municipal Operations.

The permittee shall implement stormwater pollution prevention measures at all permittee-owned, leased facilities and job sites including but not limited to vehicle/ equipment maintenance facilities, and material storage facilities.

For vehicle and equipment wash areas and municipal facilities constructed, redeveloped, or replaced, the permittee shall eliminate discharges of wash waters from vehicle and equipment washing into the MS4 by implementing any of the following measures at existing facilities with vehicle or equipment wash areas:

1. Self-contain, and haul off-site for disposal;
2. Equip with a clarifier; or
3. Equip with an alternative pre-treatment device.

4.3.4 Landscape and Recreational Facilities Management, Pesticide, Herbicide, Fertilizer and Landscape Irrigation

4.3.4.1 The permittee shall further reduce pollutants and pollutant discharges associated with the storage and application of pesticides, fertilizers, herbicides, the use of other toxic substances and landscape irrigation according to an integrated pest management program (IPM). The IPM shall be an ecosystem based strategy that focuses on long-term prevention of pests or their damage through a combination of techniques such as biological control, habitat manipulation, modification of cultural practices, use of resistant varieties, and use of low or no chemical and irrigation input landscapes, in accordance with the provisions of this permit, procedures and practices described in the SWMP and regulations.

The permittee shall further utilize IPM controls to reduce pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied by employees or contractors, to public rights-of-way, parks, and other District property to ensure that:

a. Pesticides are used only if monitoring indicates they are needed according to established guidelines;

b. Fertilizers are used only when soil tests indicate that they are necessary, and only in minimum amounts and for needed purposes (e.g., seed germination).

c. Treatments are made with the purpose of removing only the target organism;

d. Pest controls are selected and applied in a manner that minimizes risks to human health, beneficial, non-target organisms, and the environment;

e. No pesticides or fertilizers are applied to an area immediately prior to an expected rain event, or during or immediately following a rain event, or when water is flowing off the area;

f. No banned or unregistered pesticides are stored or applied;

g. All staff applying pesticides are certified or are under the direct supervision of a pesticide applicator certified in the appropriate category;

h. Procedures are implemented to encourage the retention and planting of native and/or non-invasive, naturalized vegetation to reduce water, pesticide and fertilizer needs;

i. Pesticides and fertilizers are stored indoors or under cover on paved surfaces or enclosed in secondary containment and storage areas inspected regularly to reduce the potential for spills; and

j. Landscapes that maximize on-site retention of stormwater, while minimizing mowing, chemical inputs and irrigation are given preference for all new landscape installation.

4.3.4.2 The District shall coordinate internally among departments for the purpose of ensuring that pesticide and fertilizer use within its jurisdiction does not threaten water quality.

4.3.4.3 The District shall partner with other organizations to ensure that pesticide and fertilizer use within their jurisdiction does not threaten water quality.

4.3.4.4 The District shall continue to conduct education and outreach, as well as provide incentives, to curtail the use of turf-grass fertilizers for the purpose of reducing nitrogen and phosphorous discharges to surface waters. The program shall incentivize the use of vegetative landscapes other than turf grass and other measures to restrict the use of turf grass fertilizers.

4.3.4.5 The District shall use GIS layers of public land and sewersheds, as well as background data, to identify priority areas for a targeted strategy to reduce the sources of pesticides, herbicides, and fertilizers that contaminate the stormwater runoff, and report progress toward completing the screening characterization in the next Updated SWMP.

4.3.4.6 The District shall include in each Annual Report a report on the implementation of the above application procedures, a history of the improvements in the control of these materials, and an explanation on how these procedures will meet the requirements of this permit.

4.3.5 Storm Drain System Operation and Management and Solids and Floatables Reduction

4.3.5.1 Within 18 months of the effective date of this permit, the District shall complete, public notice and submit to EPA for review and approval a plan for optimal catch basin inspections, cleaning and repairs. The District shall fully implement the plan upon EPA approval.

4.3.5.2 Until such time as the catch basin maintenance study has been completed and approved, the permittee shall ensure that each catch basin within the DC MS4 Permit Area is cleaned at least once annually during the life of the permit. The permittee shall continue to use strategies for coordinated catch basin cleaning and street-sweeping that will optimize reduction of stormwater pollutants.

4.3.5.3 Within 18 months of the effective date of this permit, and consistent with the 2006 Outfall Survey, the District shall complete, public notice and submit to EPA for review and approval an outfall repair schedule to ensure that approximately 10% of all outfalls needing repair are repaired annually, with the overall objective of having all outfalls in good repair by 2022. This schedule may be combined with the catch basin maintenance study outlined in 4.3.5.1. The repair schedule shall be fully implemented upon EPA approval.

4.3.5.4 The permittee shall comply with the Anacostia River Trash TMDL implementation provisions in Part 4.10 of this permit and apply the technologies and other activities developed in the Anacostia River Watershed Trash TMDL throughout the entire MS4 Permit Area. The permittee shall continue to report the progress of trash reduction in the Consolidated Annual Report.

4.3.6 Streets, Alleys and Roadways

4.3.6.1 Street sweeping shall be conducted on no less than 641 acres of roadway in the MS4 area annually in accordance with the following schedule:

TABLE 3
Street Sweeping

Area/Street Classification	Frequency
Arterials-heavily developed commercial and central business districts with considerable vehicular and pedestrian traffic	At least nine (9) times per year
Industrial areas	At least six (6) times per year
Residential-residential areas with limited throughway and pedestrian traffic AND neighborhood streets which are used for local purposes only	At least four (4) times per year
Central Business District/Commercial-neighborhood business districts and main streets with moderate vehicular and pedestrian traffic	At least one (1) time every two weeks
Environmental hot spots in the	At least two (2) times per month

Anacostia River Watershed	March through October

4.3.6.2 Standard road repair practices shall include limiting the amount of soil disturbance to the immediate area under repair. Stormwater conveyances which are denuded shall be resodded, reseeded and mulched, or otherwise stabilized for rapid revegetation, and these areas should have effective erosion control until stabilized.

4.3.6.3 The permittee shall continue to evaluate and update the use, application and removal of anti-icers, chemical deicers, salt, sand, and/or sand/deicer mixtures in an effort to minimize the impact of these materials on water quality. The permittee shall investigate and implement techniques available for reducing pollution from deicing salts in snowmelt runoff and runoff from salt storage facilities. The permittee shall evaluate and implement the use of porous/permeable surfaces that require less use of deicing materials and activities. This evaluation shall be made a part of an overall investigation of ways to meet the requirements of the Clean Water Act and reported in each Annual Report.

4.3.6.4 The permittee shall continue to implement and update a program to ensure that excessive quantities of snow and ice control materials do not enter the District's water bodies. The permittee shall report its progress in implementing the program in each Annual Report. Except during a declared Snow Emergency when the permittee determines that the foremost concern of snow removal activities is public health and safety, it shall avoid snow dumping or storage in areas adjacent to water bodies, wetlands, and areas near public or private drinking water wells which would ultimately reenter the MS4.

4.3.7 Infrastructure Maintenance/Pollution Source Control Maintenance

The permittee shall continue to implement an operation and maintenance program that incorporates good housekeeping components at all municipal facilities located in the DC MS4 Permit Area, including but not limited to; municipal waste water treatment facility, potable drinking water facility, municipal fleet operations, maintenance garages, parks and recreation, street and infrastructure maintenance, and grounds maintenance operations, libraries and schools. The permittee shall document the program in the Annual Report, as required at Section 6.2 herein. The permittee shall, at a minimum:

1. Continue to implement maintenance standards at all municipal facilities that will protect the physical, chemical and biological integrity of receiving waters.

2. Continue to implement an inspection schedule in which to perform inspections to determine if maintenance standards are being met. Inspections shall be performed no less than once per calendar year and shall provide guidance in Stormwater Pollution Prevention Plan development and implementation, where needed.

3. Continue to implement procedures for record keeping and tracking inspections and maintenance at all municipal facilities.

4. Continue to implement an inspection and maintenance program for all permittee-owned management practices, including post-construction measures.

5. Continue to ensure proper operation of all treatment management practices and maintain them as necessary for proper operation, including all post-construction measures.

6. Ensure that any residual water following infrastructure maintenance shall be self-contained and disposed of legally in accordance with the Clean Water Act.

4.3.8 Public Industrial Activities Management/Municipal and Hazardous Facilities

For any municipal activity associated with industrial activity, as defined by 40 C.F.R. § 122.26, which discharges stormwater to, from and through the DC MS4, the permittee shall obtain separate coverage under either: (1) the EPA Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) (As modified May 27, 2009); or (2) an individual permit.

4.3.9 Emergency Procedures

The permittee may conduct repairs of essential public service systems and infrastructure in emergency situations. An emergency includes only those situations included as conditions necessary for demonstration of an upset at 40 C.F.R. 122.41(n). For each claimed emergency, the permittee shall submit to the Permitting Authority a statement of the occurrence of the emergency, an explanation of the circumstances, and the measures that were implemented to reduce the threat to water quality, no later than required by applicable Clean Water Act regulations.

4.3.10 Municipal Official Training

The permittee shall continue to implement an on-going training program for those employees specified below, and any other employees whose job functions may impact stormwater program implementation. The training program shall address the importance of protecting water quality, the requirements of this permit, design, performance, operation and maintenance standards, inspection procedures, selecting appropriate management practices, ways to perform their job activities to prevent or minimize impacts to receiving waters, and procedures for tracking, inspecting and reporting, including potential illicit discharges. The permittee shall provide follow-up and refresher training at a minimum of once every twelve months, and shall include any changes in procedures, techniques or requirements.

The training program shall include, but is not limited to, those employees who work in the following areas:

1. Municipal Planning
2. Site plan review

3. Design
4. Construction
5. Transportation planning and engineering
6. Street/sewer and right-of-way construction and maintenance
7. Water and sewer departments
8. Parks and recreation department
9. Municipal water treatment and waste water treatment
10. Fleet maintenance
11. Fire and police departments
12. Building maintenance and janitorial
13. Garage and mechanic crew
14. Contractors and subcontractors who may be contracted to work in the above described
15. areas
16. Personnel responsible for answering questions about the permittee's stormwater program,
17. including persons who may take phone calls about the program
18. Any other department of the permittee that may impact stormwater runoff

4.4 Management of Commercial and Institutional Areas

The District shall establish and implement policies and procedures to reduce the discharge of pollutants in stormwater runoff from all commercial and institutional (including federal) areas covered by this permit.

The permittee shall ensure maintenance of all stormwater management controls in commercial and institutional land areas in accordance with the following provisions:

1. Tracking all controls;
2. Inspecting all controls on a regular basis, according to an inspection schedule;
3. Ensure compliance with the MS4 permit and municipal ordinances at commercial and institutional facilities.

4.4.1 Inventory of Critical Sources and Source Controls

4.4.1.1 The permittee shall continue to maintain a watershed-based inventory or database of all facilities within its jurisdiction that are critical sources of stormwater pollution. Critical sources to be tracked shall include the following:

a. Automotive service facilities, *e.g.*, service, fueling and salvage facilities;
b. Industrial activities, as defined at 40 C.F.R. §§ 122.26(b)(14); and
c. Construction sites exceeding one acre, or sites under one acre that are part of a larger common plan of development.
d. Dry cleaners
e. Any other facility the District has identified as a Critical Source

4.4.1.2 The permittee shall include the following minimum fields of information for each industrial and commercial facility identified as a critical source:

a. Name of facility and name of owner/ operator;
b. Address of facility;
c. Size of facility; and
d. Activities conducted at the facility that could impact stormwater.
e. Practices and/or measures to control pollutants.
f. Inspection and maintenance schedules, dates and findings.

4.4.1.3 The permittee shall update its inventory of critical sources at least annually. The update may be accomplished through collection of new information obtained through field activities or through other readily available inter and intra-agency informational databases (*e.g.*, business licenses, pretreatment permits, sanitary sewer hook-up permits, and similar information).

4.4.2 Inspection of Critical Sources

The permittee shall continue to inspect all commercial facilities identified in Part 4.4.1. herein and any others found to be critical sources twice during the five-year term of the permit. A minimum interval of six months between the first and the second mandatory compliance inspection is required, unless a follow-up inspection to ensure compliance must occur sooner.

4.4.3 Compliance Assurance.

At each facility identified as a critical source, the permittee's inspector(s) shall verify that the operator is implementing a control strategy necessary to protect water quality. Where the permittee determines that existing measures are not adequate to protect water quality, the permittee shall require additional site-specific controls sufficient to protect water quality.

4.5 Management of Industrial Facilities and Spill Prevention

4.5.1 The District shall continue to implement a program to monitor and control pollutants in stormwater discharged from Industrial Facilities located within the MS4 Permit Area, as defined herein, pursuant to the requirements in 40 C.F.R. § 122.26(d)(2)(iv)(C). These facilities shall include, but are not limited to:

a. Private Solid Waste Transfer Stations
b. Hazardous Waste Treatment, Disposal, and/or Recovery Plants
c. Industrial Facilities subject to SARA or EPCRA Title III
d. Industrial Facilities with NPDES Permits
e. Industrial facilities with a discharge to the MS4

4.5.2 The District shall continue to maintain and update the industrial facilities database.

4.5.3 The District shall continue to perform or provide on-site assistance/inspections and outreach focused on the development of stormwater pollution prevention plans and NPDES permit compliance.

4.5.4 The District shall continue to refine and implement procedures to govern the investigation of facilities suspected of contributing pollutants to the MS4, including at a minimum: (i) a review, if applicable, of monitoring data collected by the facility pursuant to its NPDES permit; and (ii) wet weather screening as required by Part 5.2.1 herein (including collecting data on discharges from industrial sites). These procedures shall be submitted as part of each Annual Report required by Part 6.2 herein.

4.5.5 The District shall continue to implement the prohibition against illicit discharges, control spills, and prohibit dumping. Continue to implement a program to prevent, contain, and respond to spills that may discharge to the MS4, and report on such implementation submitted in each Annual Report. The spill response program may include a combination of spill response actions by the permittee and/or another public or private entity.

4.5.6 The District shall report progress in developing and carrying out industrial-related programs in each Annual Report required by Section 6 herein. Provide an explanation as to how the implementation of these procedures will meet the requirements of the Clean Water Act.

4.6 Stormwater Management for Construction Sites

4.6.1 Continue implementation of the Program that reduces the discharge of pollutants from construction sites. In each Annual Report, the permittee shall evaluate and report to determine if the existing practices meet the requirements of 40 C.F.R. § 122.26(d)(2)(iv)(A) and (D).

4.6.2 Continue the review and approval process of the sediment and erosion control plans under this program. Also, the permittee shall ensure that all construction projects impacting one acre or greater, or less than one acre when part of a larger common plan of development or sale equal to or larger than one acre, are not authorized until documentation is provided that they have received EPA NPDES Construction General Permit Coverage.

4.6.3 Continue to implement inspection and enforcement procedures, including but not limited to inspection of permitted construction sites that disturb more than 5,000 square feet of soil as follows:

1. First inspection prior to ground disturbing activities to review planned sediment and erosion control measures;
2. Second inspection to verify proper installation and maintenance of sediment and erosion control measures;
3. Third inspection to review planned installation and maintenance of stormwater BMPs;

4. Fourth inspection to verify proper installation of stormwater management practices following final stabilization of the project site; and
5. Other inspections as necessary to ensure compliance with relevant standards and requirements.

4.6.4 When a violation of local erosion and sediment control ordinances occurs, the permittee shall follow existing enforcement procedures and practices using standardized reports as part of the inspection process to provide accurate record keeping of inspections of construction sites. The permittee shall use a listing of all violations and enforcement actions to assess the effectiveness of the Enforcement Program in each Annual Report.

4.6.5 Continue with educational measures for construction site operators (Section 4.9 of this permit) that consist, at a minimum, of providing guidance manuals and technical publications.

4.6.6 Report progress in developing and carrying out the above construction-related programs in each Annual Report required by Parts 6.2 herein, including: (i) an explanation as to how the implementation of these procedures will meet the requirements of the Clean Water Act; (ii) an explanation as to how the implementation of these procedures, particularly with regard to District "waivers and exemptions", will meet the requirements of the Clean Water Act; and (iii) discussion of progress toward meeting TMDL and the District Watershed Implementation Plan deadlines.

4.7 Illicit Discharges and Improper Disposal.

4.7.1 The District shall continue to implement an ongoing program to detect illicit discharges, pursuant to the SWMP, and Part 4 of this permit, and to prevent improper disposal into the storm sewer system, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). Such program shall include, at a minimum the following:

a. An updated schedule of procedures and practices to prevent illicit discharges, as defined at 40 C.F.R. § 122.26(b)(2), and, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1), to detect and remove illicit discharges as defined herein;

b. An updated inventory (organized by watershed) of all outfalls that discharge through the MS4 including any changes to the identification and mapping of existing permitted outfalls. Such inventory shall include, but not be limited to, the name and address, and a description (such as SIC code) which best reflects the principal products or services provided by each facility which may discharge to the MS4;

c. Continue to implement an illicit connection detection and enforcement program to perform dry weather flow inspections in target areas;

d. Visual inspections of targeted areas;

e. Issuance of fines, tracking and reporting illicit discharges, and reporting progress on stopping targeted illicit discharges, and in appropriate cases, chemical testing immediately after discovery of an illicit discharge;

f. Enforcement procedures for illicit discharges set forth in Part 4 herein;

g. All necessary inspection, surveillance, and monitoring procedures to remedy and prevent illicit discharges. The permittee shall submit an inspection schedule, inspection criteria, documentation regarding protocols and parameters of field screening, and allocation of resources as a part of each Annual Report.

h. The permittee shall continue to implement procedures to prevent, contain, and respond to spills that may discharge into the MS4. The permittee shall provide for the training of appropriate personnel in spill prevention and response procedures.

i. The permittee shall report the accomplishments of this program in each Annual Report.

4.7.2 The District shall continue to ensure the implementation of a program to further reduce the discharge of floatables (e.g. litter and other human-generated solid refuse). The floatables program shall include source controls and, where necessary, structural controls.

4.7.3 The District shall continue to implement the prohibition against the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal waste into separate storm sewers. The permittee shall ensure the implementation of programs to collect used motor vehicle fluids (at a minimum oil and anti-freeze) for recycle, reuse, and proper disposal and to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. The permittee shall ensure that such programs are readily available within the District, and that they are publicized and promoted on a regular basis, pursuant to Public Education provisions in this permit at Part 4.9 herein.

4.7.4 The District shall continue to work with members of the Metropolitan Police Department to enhance illegal dumping enforcement.

4.7.5 The District shall implement the District's ban on coal tar pavement products, including conducting outreach and enforcement activities.

4.7.6 The District shall implement the Anacostia Clean Up and Protection Act of 2009, to ban the use of disposable non-recyclable plastic carryout bags and restrict the use on disposable carryout bags in certain food establishments.

4.8 Flood Control Projects

4.8.1 The District shall update the impervious surface analysis of floodplains six months after the approval of the revised Flood Insurance Rate Maps by the Federal Emergency Management Agency.

4.8.2 The District shall assess potential impacts on the water quality and the ability of the receiving water to support beneficial uses for all flood management projects. Evaluate the feasibility of retrofitting existing flood control devices to provide additional pollutant and volume removal from stormwater. Report results of such assessment, mapping program, and feasibility studies in the Annual Report (Part 6.2 herein).

4.8.3 The District shall review all development proposed in flood plain areas to ensure that the impacts on the water quality of receiving water bodies have been properly addressed. Information regarding impervious surface area located in the flood plains shall be used (in conjunction with other environmental indicators) as a planning tool. The permittee shall collect data on the percentage of impervious surface area located in flood plain boundaries for all proposed development beginning six months after the effective date of this permit. The permittee shall collect similar data for existing development in flood plain areas, in accordance with the mapping program and other activities designed to improve water quality. Critical unmapped areas shall be prioritized by the permittee with an emphasis on developed and developing acreage. Reports of this work shall be summarized in the Annual Report.

4.9 Public Education and Public Participation

The District shall continue to implement a public education program including but not limited to an education program aimed at residents, businesses, industries, elected officials, policy makers, planning staff and other employees of the permittee. The purpose of education is to reduce or eliminate behaviors and practices that cause or contribute to adverse stormwater impacts. Education initiatives may be developed locally or regionally.

4.9.1 Education and Outreach.

4.9.1.1 The District shall continue to implement its education and outreach program for the area served by the MS4 that was established during the previous permit cycle. The outreach program shall be designed to achieve measurable improvements in the target audience's understanding of stormwater pollution and steps they can take to reduce their impacts.

4.9.1.2 The permittee shall assess current education and outreach efforts and identify areas where additional outreach and education are needed. Audiences and subject areas to be considered include:

a. General public

1) General impacts of stormwater flows into surface waters
2) Impacts from impervious surfaces
3) Source control practices and environmental stewardship actions and opportunities in the areas of pet waste, vehicle maintenance, landscaping, and rain water reuse.

4) A household hazardous waste educational and outreach program to control illicit discharges to the MS4 as required herein
5) Information and education on proper management and disposal of used oil, other automotive fluids, and household chemicals
6) Businesses, including home-based and mobile businesses
7) Management practices for use and storage of automotive chemicals, hazardous cleaning supplies, carwash soaps and other hazardous materials
8) Impacts of illicit discharges and how to report them including information for industries about stormwater permitting and pollution prevention plans and the requirement that they develop structural and non-structural control systems

b. Homeowners, landscapers and property managers

1) Use of low or no phosphorus fertilizers, alternatives to fertilizers, alternative landscaping requiring no fertilizers
2) Landscape designs to reduce runoff and pollutant loadings
3) Car washing alternatives with the objective of eliminating phosphorus detergent discharges
4) Yard care techniques that protect water quality
5) Management practices for use and storage of pesticides and fertilizers
6) Management practices for carpet cleaning and auto repair and maintenance
7) Runoff Reduction techniques, including site design, on-site retention, pervious paving, retention of forests and mature trees
8) Stormwater pond maintenance

c. Engineers, contractors, developers, review staff and land use planners

1) Technical standards for construction site sediment and erosion control
2) Runoff Reduction techniques, including site design, on-site reduction, pervious pavement, alternative parking lot design, retention of forests and mature trees
3) Stormwater treatment and flow control controls
4) Impacts of increased stormwater flows into receiving water bodies

4.9.2 Measurement of Impacts.

The permittee shall continue to measure the understanding and adoption of selected targeted behaviors among the targeted audiences. The resulting measurements shall be used to direct education and outreach resources most effectively, as well as to evaluate changes in adoption of the targeted behaviors.

4.9.3 Recordkeeping.

The permittee shall track and maintain records of public education and outreach activities.

4.9.4 Public Involvement and Participation.

The permittee shall continue to include ongoing opportunities for public involvement through advisory councils, watershed associations and/or committees, participation in developing updates to the stormwater fee system, stewardship programs, environmental activities or other similar activities. The permittee shall facilitate opportunities for direct action, educational, and volunteer programs such as riparian planting, volunteer monitoring programs, storm drain marking or stream clean up programs.

4.9.4.1 The permittee shall continue to create opportunities for the public to participate in the decision making processes involving the implementation and update of the permittee's SWMP. The permittee shall continue to implement its process for consideration of public comments on their SWMP.

4.9.4.2 The permittee shall continue to establish a method of routine communication to groups such as watershed associations and environmental organizations that are located in the same watershed(s) as the permittee, or organizations that conduct environmental stewardship projects located in the same watershed(s) or in close proximity to the permittee. This is to make these groups aware of opportunities for their direct involvement and assistance in stormwater activities that are in their watershed.

4.9.4.3 The permittee shall make all draft and approved MS4 documents required under this permit available to the public for comment. The current draft and approved SWMP and the MS4 annual reports deliverable documents required under this permit shall be posted on the permittee's website.

4.9.4.4 The permittee shall continue to develop public educational and participation materials in cooperation and coordination with other agencies and organizations in the District with similar responsibilities and objectives. Progress reports on public education shall be included in the Annual Report. An explanation shall be provided as to how this effort will reduce pollution loadings to meet the requirements of this permit.

4.9.4.5 The permittee shall periodically, and at least annually, update its website.

4.10 Total Maximum Daily Load (TMDL) Wasteload Allocation (WLA) Planning and Implementation

4.10.1 Anacostia River Watershed Trash TMDL Implementation

The permittee shall attain removal of 103,188 pounds of trash annually, as determined in the Anacostia River Watershed Trash TMDL, as a specific single-year measure by the fifth year of this permit term.

Reductions must be made through a combination of the following approaches:

1. Direct removal from waterbodies, e.g., stream clean-ups, skimmers
2. Direct removal from the MS4, e.g., catch basin clean-out, trash racks

3. Direct removal prior to entry to the MS4, e.g., street sweeping
4. Prevention through additional disposal alternatives, e.g., public trash/recycling collection
5. Prevention through waste reduction practices, regulations and/or incentives, e.g., bag fees

At the end of the first year the permittee must submit the trash reduction calculation methodology with Annual Report to EPA for review and approval. The methodology should accurately account for trash prevention/removal methods beyond those already established when the TMDL was approved, which may mean crediting a percentage of certain approaches. The calculation methodology must be consistent with assumptions for weights and other characteristics of trash, as described in the 2010 Anacostia River Watershed Trash TMDL.

Annual reports must include the trash prevention/removal approaches utilized, as well as the overall total weight (in pounds) of trash captured for each type of approach.

The requirements of this Section, and related elements as appropriate, shall be included in the Consolidated TMDL Implementation Plan (Section 4.10.3).

4.10.2 Hickey Run TMDL Implementation

The permittee shall implement and complete the proposed replacement/rehabilitation, inspection and enforcement, and public education aspects of the strategy for Hickey Run as described in the updated Plan to satisfy the requirements of the oil and grease wasteload allocations for Hickey Run. If monitoring or other assessment determine it to be necessary, the permittee shall install or implement appropriate controls to address oil & grease in Hickey Run no later than the end of this permit term. As appropriate, any requirement of this Section not completed prior to finalization of the Consolidated TMDL Implementation Plan (Section 4.10.3) shall be included in that Plan.

4.10.3 Consolidated TMDL Implementation Plan

For all TMDL wasteload allocations assigned to District MS4 discharges, the District shall develop, public notice and submit to EPA for review and approval a consolidated TMDL Implementation Plan within 2 years of the effective date of this permit. This Plan shall include, at a minimum, the following TMDLs and any subsequent updates:

1. TMDL for Biochemical Oxygen Demand (BOD) in the Upper and Lower Anacostia River (2001)
2. TMDL for Total Suspended Solids (TSS) in the Upper and Lower Anacostia River (2002)
3. TMDL for Fecal Coliform Bacteria in the Upper and Lower Anacostia River (2003)
4. TMDL for Organics and Metals in the Anacostia River and Tributaries (2003)
5. TMDL for Fecal Coliform Bacteria in Kingman Lake (2003)
6. TMDL for Total Suspended Solids, Oil and Grease and Biochemical Oxygen Demand in Kingman Lake (2003)

7. TMDL for Fecal Coliform Bacteria in Rock Creek (2004)
8. TMDL for Organics and Metals in the Tributaries to Rock Creek (2004)
9. TMDL for Fecal Coliform Bacteria in the Upper, Middle and Lower Potomac River and Tributaries (2004)
10. TMDL for Organics, Metals and Bacteria in Oxon Run (2004)
11. TMDL for Organics in the Tidal Basin and Washington Ship Channel (2004)
12. TMDL for Sediment/Total Suspended Solids for the Anacostia River Basin in Maryland and the District (2007) [pending resolution of court vacature, Anacostia Riverkeeper, Inc. v. Jackson, No. 09-cv-97 (RCL)]
13. TMDL for PCBs for Tidal Portions of the Potomac and Anacostia Rivers in the District of Columbia, Maryland and Virginia (2007)
14. TMDL for Nutrients/Biochemical Oxygen Demand for the Anacostia River Basin in Maryland and the District (2008)
15. TMDL for Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia (2010)
16. TMDL for Nitrogen, Phosphorus and Sediment for the Chesapeake Bay Watershed (2010)

This Plan shall place particular emphasis on the pollutants in Table 4, but shall also evaluate other pollutants of concern for which relevant WLAs exist. The District shall fully implement the Plan upon EPA approval. This Plan shall preempt any existing TMDL implementation plans for the relevant WLAs. For any new or revised TMDL approved during the permit term with wasteload allocations assigned to District MS4 discharges, the District shall update this Plan within six months and include a description of revisions in the next regularly scheduled annual report. The Plan shall include:

1. A specified schedule for compliance with each TMDL that includes numeric benchmarks that specify annual pollutant load reductions and the extent of control actions to achieve these numeric benchmarks.
2. Interim numeric milestones for TMDLs where final attainment of applicable waste load allocations requires more than one permit cycle. These milestones shall originate with the third year of this permit term and every five years thereafter.
3. Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment.
4. The Consolidated TMDL Implementation Plan elements required in this section will become enforceable permit terms upon approval of such Plans, including the interim and final dates in this section for attainment of applicable WLAs.
5. Where data demonstrate that existing TMDLs are no longer appropriate or accurate, the Plan shall include recommended solutions, including, if appropriate, revising or withdrawing TMDLs.

4.10.4 Adjustments to TMDL Implementation Strategies

If evaluation data, as outlined in the monitoring strategy being developed per Part 5.1, indicate insufficient progress towards attaining any WLA covered in 4.10.1, 4.10.2 or 4.10.3, the

permittee shall adjust its management programs within 6 months to address the deficiencies, and document the modifications in the Consolidated TMDL Implementation Plan. The Plan modification shall include a reasonable assurance demonstration of the additional controls to achieve the necessary reductions. Annual reports must include a description of progress as evaluated against all implementation objectives, milestones and benchmarks, as relevant, outlined in Part 4.10.

4.11 Additional Pollutant Sources

For any additional pollutant sources not addressed in sections 4.1 through 4.9, the permittee shall continue to compile pertinent information on known or potential pollution sources, including significant changes in:

1. land use activities,
2. population estimates,
3. runoff characteristics,
4. major structural controls,
5. landfills,
6. publicly owned lands, and
7. industries impacting the MS4.

For purposes of this section, "significant changes" are changes that have the potential to revise, enhance, modify or otherwise affect the physical, legal, institutional, or administrative characteristics of the above-listed potential pollution sources. This information shall be submitted in each of the Annual Reports submitted to EPA pursuant to the procedures in Part 6.2 herein. For the Stormwater Model, analysis of data for these pollution sources shall be reported according to Part 7 herein.

The permittee shall implement controls to minimize and prevent discharges of pollutants from additional pollutant sources, including but not limited to Bacteria (*E. coli*), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash, to receiving waters. Controls shall be designed to prevent and restrict priority pollutants from coming into contact with stormwater, *e.g.*, restricting the use of lawn fertilizers rather than end-of-pipe treatment. These strategies shall include program priorities and a schedule of activities to address those priorities and an outline of which agencies will be responsible for implementing those strategies. The strategies used to reduce or eliminate these pollutants shall be documented in updates to the Stormwater Management Program Plan.

5. MONITORING AND ASSESSMENT OF CONTROLS

5.1 Revised monitoring program

5.1.1 Design of the Revised Monitoring Program

Within two years of the effective date of this permit the District shall develop, public notice and submit to EPA for review and approval a revised monitoring program. The District shall fully implement the program upon EPA approval. The revised monitoring program shall meet the following objectives:

1. Make wet weather loading estimates of the parameters in Table 4 from the MS4 to receiving waters. Number of samples, sampling frequencies and number and locations of sampling stations must be adequate to ensure data are statistically significant and interpretable.

2. Evaluate the health of the receiving waters, to include biological and physical indicators such as macroinvertebrates and geomorphologic factors. Number of samples, frequencies and locations must be adequate to ensure data are statistically significant and interpretable for long-term trend purposes (not variation among individual years or seasons).

3. Include any additional necessary monitoring for purposes of source identification and wasteload allocation tracking. This strategy must align with the Consolidated TMDL Implementation Plan required in Part 4.10.3 For all pollutants in Table 4 monitoring must be adequate to determine if relevant WLAs are being attained within specified timeframes in order to make modifications to relevant management programs, as necessary.

Table 4
Monitoring Parameters

Parameter
E. coli
Total nitrogen
Total phosphorus
Total Suspended Solids
Cadmium
Copper
Lead
Zinc
Trash

4. All chemical analyses shall be performed in accordance with analytical methods approved under 40 C.F.R. Part 136. When there is not an approved analytical method, the applicant may use any suitable method as described in Section 5.7 herein, but must provide a description of the method.

5.1.2 Utilization of the Revised Monitoring Program

The permittee must use the information to evaluate the quality of the stormwater program and the health of the receiving waters at a minimum to include:

1. The permittee shall estimate annual cumulative pollutant loadings for pollutants listed in Table 4. Pollutant loadings and, as appropriate, event mean concentrations, will be reported in DMRs and annual reports on TMDL implementation for pollutants listed in Table 4 in discharges from the monitoring stations in Table 5.

2. The permittee shall perform the following activities at least once during the permit term, but no later than the fourth year of this permit:

    a. Identify and prioritize additional efforts needed to address water quality exceedances, and receiving stream impairments and threats;

    b. Identify water quality improvements or degradation

Upon approval of the Revised Monitoring Program by EPA Region III, or 2 years from the effective date of this permit, whichever comes first, the permittee shall begin implementation of the Revised Monitoring Program.

5.2 Interim Monitoring

Until such time as EPA has approved the Revised Monitoring Program, the permittee shall implement the following monitoring program:

5.2.1 Wet Weather Discharge Monitoring

The permittee shall monitor for the parameters identified in Table 4 herein, at the locations listed in Table 5 herein. Monitoring frequency for chemical/physical parameters shall be taken by at least three times per year at a minimum. This does not include a geomorphologic assessment and/or physical habitat assessment. The permittee shall conduct sampling as provided in 40 C.F.R. § 122.21(g)(7).

The permittee shall monitor and provide an annual Discharge Monitoring Report for the period of interim monitoring.

TABLE 5
Monitoring Stations

A. Anacostia River Sub Watershed Monitoring Sites
1. Gallatin Street & 14th Street N.E. across from the intersection of 14th St. and Gallatin St. in

an outfall (MS-2)
2. Anacostia High School/Anacostia Recreation Center – Corner of 17th St and Minnesota Ave SE
B. Rock Creek Subwatershed Monitoring Sites
1. Walter Reed -- Fort Stevens Drive -- 16th Street and Fort Stevens Road, N.W. at an outfall (MS-6)
2. Soapstone Creek -- Connecticut Avenue and Ablemarle Street N.W. at an outfall (MS-5)
C. Potomac River Subwatershed Monitoring Sites
1. Battery Kemble Creek-49th and Hawthorne Streets, N.W. at an outfall (MS-4)
2. Oxon Run-Mississippi Avenue and 15th Street, S.E. into Oxon Run via an outfall (MS-1)

The District may revise this list of sites in accordance with its revised monitoring program in Section 5.1 herein. Otherwise, changes to the above MS4 monitoring stations and/or sites for any reason shall be considered a major modification to the permit subject to the reopener clause.

During the interim monitoring period for the pollutants listed in Table 4, demonstration of compliance will be calculated using the procedures identified in the SWMP, the approved Anacostia River TMDL Implementation Plan, and/or other appropriate modeling tools and data on management practices efficiencies. The annual report will provide all monitoring data, and a brief synthesis of whether the data indicate that relevant wasteload allocations and other relevant targets are being achieved.

5.2.2 Storm Event Data

In addition to the parameters listed above, the permittee shall continue to maintain records of the date and duration (in hours) of the storm events sampled; rainfall measurements or estimates (in inches) of the storm event which generated the sampled runoff; the duration (in hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and a calculated flow estimate of the total volume (in gallons) and nature of the discharge sampled.

5.2.3 Sample Type, Collection, and Analysis

The following requirements apply only to samples collected for Part 5.2.1, Representative Monitoring.

1. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one sample shall be taken for pollutants listed in Table 4 including temperature, DO, pH and specific conductivity. For all parameters, data shall be reported for the entire event of the discharge pursuant to 40 C.F.R. § 122.26(d)(2)(iii).

2. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge, with each aliquot being separated by a minimum period of fifteen minutes.

3. Analysis and collection of samples shall be done in accordance with the most recent EPA approved laboratory methods and procedures specified at 40 C.F.R. Part 136 and its subsequent amendments.

5.2.4 Sampling Waiver

When a discharger is unable to collect samples due to adverse climatic conditions, the discharger must submit in lieu of sampling data a description of why samples could not be collected, including available documentation of the event.

Adverse climatic conditions which may prohibit the collection of samples includes weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.).

5.3 Dry Weather Monitoring

5.3.1 Dry Weather Screening Program

The permittee shall continue with ongoing efforts to detect the presence of illicit connections and improper discharges to the MS4 pursuant to the District SWMP. The permittee shall perform the following: (1) continue to screen known problem sewersheds within the District based on past screening activities; (2) continue to inventory all MS4 outfalls in the District and inspect all outfalls by the end of the permit term; and (3) ensure that the dry weather screening program has addressed all watersheds within the permit term. The screening shall be sufficient to estimate the frequency and volume of dry weather discharges and their environmental impact.

5.3.2 Screening Procedures

Screening may be developed and/or modified based on experience gained during actual field screening activities. The permittee shall establish a protocol which requires screening to ensure that such procedures are occurring, but such protocol need not conform to the procedures published at 40 C.F.R. § 122.26(d)(1)(iv)(D). The permittee shall describe the protocol actually used in each Annual Report with a justification for its use. The procedures described in the SWMP shall be used as guidance.

5.3.3 Follow-up on Dry Weather Screening Results

The permittee shall continue to implement its enforcement program for locating and ensuring elimination of all suspected sources of illicit connections and improper disposal identified during dry weather screening activities. The permittee shall report the results of such implementation in each Annual Report.

5.4. Area and/or Source Identification Program

The permittee shall continue to implement a program to identify, investigate, and address areas and/or sources within its jurisdiction that may be contributing excessive levels of pollutants to the MS4 and receiving waters, including but not limited to those pollutants identified in Table 4 herein.

5.5 Flow Measurements

The permittee shall continue to select and use appropriate flow measurement devices and methods consistent with accepted scientific practices to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated, and maintained to insure that the accuracy of the measurements is consistent with the accepted capability of that type of device.

5.6 Monitoring and Analysis Procedures

5.6.1 Monitoring must be conducted according to laboratory and test procedures approved under 40 C.F.R. Part 136 and subsequent amendments, unless other test procedures have been specified in the permit.

5.6.2 The permittee is authorized to use a more current or sensitive (i.e., lower) detection method than the one identified in 40 C.F.R. Part 136 exists for a particular parameter, including but not limited to PCBs (Method 1668B) and mercury (Method 1631E). If used, the permittee shall report using the more current and/or more sensitive method for compliance reporting and monitoring purposes.

5.6.3 EPA reserves the right to modify the permit in order to require a more sensitive method for measuring compliance with any pollutant contamination levels, consistent with 40 CFR, Part 136, should it become necessary.

5.7 Reporting of Monitoring Results

The permittee shall continue to report monitoring results annually in a Discharge Monitoring Report. If NetDMR (http://www.epa.gov/netdmr/) is unavailable to any of the following then the original and one copy of the Report are to be submitted at the following addresses:

NPDES Permits Branch

U.S. EPA Region III

(3WP41)

Water Protection Division
1650 Arch Street
Philadelphia, PA 19103-2029

National Marine Fisheries Service/Northeast Region
Protected Resource Division
55 Great Republic Drive

Gloucester, Massachusetts

01930-2276

Monitoring results obtained during the previous year shall be summarized and reported in the Annual Report.

5.8 Additional Monitoring by the Permittee

If the permittee monitors (for the purposes of this permit) any pollutant more frequently than required by this permit, using laboratory and test procedures approved under 40 C.F.R. Part 136 and subsequent amendments or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the annual Discharge Monitoring Report. Such frequency shall also be indicated.

5.9 Retention of Monitoring Information

The permittee shall continue to retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation for a period of at least five(5) years from the date of the sample, measurement or report. This period may be extended by request of EPA at any time.

5.10 Record Content

Records of monitoring information shall include:

1. The date, exact location, time and methods of sampling or measurements;
2. The individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The individual(s) who performed the analyses;
5. The analytical techniques or methods used; and

6. The results of such analyses.

6. REPORTING REQUIREMENTS

The permittee shall comply with the reporting requirements identified in this section, including but not limited to the deliverables identified in Table 6 below.

TABLE 6
Reporting Requirements

Submittal	Deadline
Discharge Monitoring Report	Each year on the anniversary of the effective date of the permit (AEDOP)
Annual Report	Each year on the AEDOP.
MS4 Permit Application	Six months prior to the permit expiration date.

6.1 Discharge Monitoring Reports

The permittee shall provide discharge monitoring reports per Part 5.7 of this permit on the quality of stormwater discharges from the MS4 for all analytical chemical monitoring stipulated in Part 5 of this permit.

6.2 Annual Reporting

The permittee shall submit an Annual Report to EPA on or by the effective yearly date of the permit for the duration of the permitting cycle. At the same time the Annual Report it submitted to EPA it shall also be posted on the District's website at an easily accessible location. If the annual report is subsequently modified per EPA approval (part 6.2.3 of this permit) the updated report shall be posted on the District's website.

6.2.1 Annual Report.

The Annual Report shall follow the format of the permit as written, address each permit requirement, and also include the following elements:

a. A review of the status of program implementation and compliance (or non-compliance) with all provisions and schedules of compliance contained in this permit, including documentation as to compliance with performance standards and other provisions and deliverables contained in Section 4 herein;
b. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings, including TMDL WLAs and TMDL implementation activities;

c. An assessment of the effectiveness of controls established by the SWMP;

d. An assessment of the projected cost of SWMP implementation for the upcoming year (or longer) and a description of the permittee's budget for existing stormwater programs, including: (i) an overview of the permittee's financial resources and budget, (ii) overall indebtedness and assets, (iii) sources for funds for stormwater programs; and (iv) a demonstration of adequate fiscal capacity to meet the requirements of this permit, subject to the (a) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351, (b) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08 (2001), (c) D.C. Official Code § 47-105 (2001), and (d) D.C. Official Code § 1-204.46 (2006 Supp.), as the foregoing statutes may be amended from time to time;

e. A summary describing the number and nature of enforcement actions, inspections, and public education programs and installation of control systems;

f. Identification of water quality improvements or degradation through application of a measurable performance standard as stated throughout this permit;

g. Results of storm and water quality modeling and its use in planning installation of control systems and maintenance and other activities;

h. An assessment of any SWMP modifications needed to meet the requirements of this permit;

i. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 C.F.R. § 122.26(d)(2)(iv) and (v);

j. Methodology to assess the effects of the Stormwater Management Program (SWMP);

k. Annual expenditures and budget for the year following each annual report;

l. A summary of commitments for the next year and evaluation of the commitments from the previous year;

m. A summary of the monitoring data for stormwater and ambient sampling that is collected in the previous year and the plan, including identification of monitoring locations, to collect additional data for the next year;

n. The amount of impervious cover within the District, and within the three major watersheds in the District (Anacostia, Potomac and Rock Creek);

o. The percentage of effective impervious cover reduced annually, including but not limited to the number and square footage of green roofs installed in the District, including the square footage of drainage managed by practices that meet the performance standard in 4.1.1; and

p. An analysis of the work to be performed in the next successive year, including performance measures for those tasks. In the following year, progress with those performance measures shall be part of the Annual Report. The basis for each of the performance standards, which will be used as tools for evaluating environmental results and determining the success of each MS4 activity, shall be described incorporating an integrated program approach that considers all programs and projects which have a direct as well as an indirect affect on stormwater management quantity and quality within the District. The report shall also provide an update of the fiscal analysis for each year of the permit as required by 40 C.F.R. § 122.26(d)(2)(vi).

6.2.2 Annual Report Meeting

Within 12 months of the effective date of this permit the District shall convene an annual report meeting with EPA to present annual progress and plans for the following year. In conjunction with this meeting the annual written report may consist of presentation materials summarizing all required elements of the annual report rather than a lengthy written report, as long as all required elements are included. Following this first annual reporting meeting EPA and the District shall determine if the meeting and associated presentation materials constitute an effective reporting mechanism. With the agreement of both EPA and the District the annual reporting meeting and the use of summarized presentation materials in lieu of a lengthy written report may be extended for the remainder of the permit term.

6.2.3 Annual Report Revisions

Each Annual Report may be revised with written approval by EPA. The revised Report will become effective after its approval.

6.2.4 Signature and Certification

The permittee shall sign and certify the Annual Report in accordance with 40 C.F.R §122.22(b), and include a statement or resolution that the permittee's governing body or agency (or delegated representative) has reviewed or been appraised of the content of such submissions. The permittee shall provide a description of the procedure used to meet the above requirement.

6.2.5 EPA Approval

In reviewing any submittal identified in Table 1 or 6, EPA may approve or disapprove each submittal. If EPA disapproves any submittal, EPA shall provide comments to the permittee. The permittee shall address such comments in writing within thirty (30) days of receipt of the disapproval from EPA. If EPA determines that the permittee has not adequately addressed the disapproval/comments, EPA may revise that submittal or portions of that submittal. Such revision by EPA is effective thirty (30) days from receipt by the permittee. Once approved by EPA, or in the event of EPA disapproval, as revised by EPA, each submission shall be an enforceable element of this permit.

6.3 MS4 Permit Application

The permittee develop a permit Application based on the findings presented in each of the Annual SWMP Reports submitted during the permitting cycle to be submitted six months prior to the expiration date of the permit. The permit application shall define the next iterative set of objectives for the program and provide an analysis to demonstrate that these objectives will be achieved in the subsequent permit term.

7. STORMWATER MODEL

The permittee shall continue to update and report all progress made in developing a Stormwater Model and Geographical Information System (GIS) to EPA on an annual basis as an attachment to each Annual Report required herein.

On an annual basis, the permittee shall report on pollutant load reductions throughout the area covered by this permit using the statistical model developed by DDOE or other appropriate model. In the annual update, the permittee shall include, at a minimum, other applicable components which are not only limited to those activities identified in Section 6 herein, but which are necessary to demonstrate the effectiveness of the permittee's Stormwater Management Program toward implementing a sustainable strategy for reducing stormwater pollution runoff to the impaired waters of the District of Columbia.

Assess performance of stormwater on-site retention projects through monitoring, modeling and/or estimating storm retention capacity to determine the volume of stormwater removed from the MS4 in a typical year of rainfall as a result of implementing stormwater controls. This provision does not require all practices to be individually monitored, only that a reasonable evaluation strategy must provide estimates of overall volume reductions by sewershed.

8. STANDARD PERMIT CONDITIONS FOR NPDES PERMITS

8.1 Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and may result in an enforcement action; permit termination, revocation and reissuance, or modification; and denial of a permit renewal application.

8.2 Inspection and Entry

The permittee shall allow EPA, or an authorized representative, and/or the District's contractor(s)/subcontractor(s), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises at reasonable times where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, any records that must be maintained under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), processes, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

8.3 Civil and Criminal Penalties for Violations of Permit Conditions

Nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

The Clean Water Act provides that any person who violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act, or any permit condition or limitation implementing such section, or any requirement imposed in an approved pretreatment program and any person who violates any Order issued by EPA under Section 301(a) of the Act, shall be subject to a civil penalty not to exceed $25,000 per day for each violation, Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, EPA has raised the statutory maximum penalty for such violations to $37,500 per day for each such violation. 74 Fed. Reg. 626 (Jan. 7, 2009). The Clean Water Act also provides for an action for appropriate relief including a permanent or temporary injunction.

Any person who negligently violates Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, any permit condition or limitation implementation any such section, shall be punished by a criminal fine of not less than $5,000 nor more than $50,000 per day of such violation, or by imprisonment for not more than 3 years, or by both. Any person who knowingly violates any permit condition or limitation implementing Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000, or by imprisonment of not more than 15 years, or by both.

8.4 Duty to Mitigate

The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit.

In the event that the permittee or permitting authority determines that discharges are causing or contributing to a violation of applicable WQS, the permittee shall take corrective action to eliminate the WQS exceedance or correct the issues and/or problems by requiring the party or parties responsible for the alleged violation(s) comply with Part I.C.1 (Limitations to Coverage) of this permit. The methods used to correct the WQS exceedances shall be documented in subsequent annual reports and in revisions to the Stormwater Management Program Plan.

8.5 Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause including, but not limited to, the following:

1. Violation of any terms or conditions of this permit;

2. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;

3. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge;

4. Information newly acquired by the Agency, including but not limited to the results of the studies, planning, or monitoring described and/or required by this permit;

5. Material and substantial facility modifications, additions, and/or expansions;

6. Any anticipated change in the facility discharge, including any new significant industrial discharge or changes in the quantity or quality of existing industrial discharges that will result in new or increased discharges of pollutants; or

7. A determination that the permitted activity endangers human health or the environment and that it can only be regulated to acceptable levels by permit modification or termination.

The effluent limitations expressed in this permit are based on compliance with the District of Columbia's water quality standards in accordance with the Clean Water Act. In the event of a revision of the District of Columbia's water quality standards, this document may be modified by EPA to reflect this revision.

The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition. When a permit is modified, only conditions subject to modification are reopened.

8.6 Retention of Records

The permittee shall continue to retain records of all documents pertinent to this permit not otherwise required herein, including but not limited copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least five (5) years from the expiration date of this permit. This period may be extended by request of EPA at any time.

8.7 Signatory Requirements

All Discharge Monitoring Reports, plans, annual reports, certifications or information either submitted to EPA or that this permit requires be maintained by the permittee shall be signed by either a principal executive officer or ranking elected official, or a duly authorized representative of that person. A person is a duly authorized representative only if: (i) the

authorization is made in writing by a person described above and submitted to EPA; and (ii) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for an agency. (A duly authorized representative may thus be either a named individual or any individual occupying a named position).

If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new notice satisfying the requirements of this paragraph must be submitted to EPA prior or together with any reports, information, or applications to be signed by an authorized representative.

8.8 Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act, 33 U.S.C. § 1321.

8.9 District Laws, Regulations and Ordinances

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable District law, regulation or ordinance identified in the SWMP. In the case of "exemptions and waivers" under District law, regulation or ordinance, Federal law and regulation shall be controlling.

8.10 Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

8.11 Severability

The provisions of this permit are severable, and if any provisions of this permit, or the application of any provision of this permit to any circumstances is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

8.12 Transfer of Permit

In the event of any change in ownership or control of facilities from which the authorized discharge emanates, the permit may be transferred to another person if:

1. The current permittee notifies the EPA, in writing of the proposed transfer at least 30 days in advance of the proposed transfer date;

2. The notice includes a written agreement between the existing and new permittee containing a specific date for transfer of permit responsibility, coverage, and liability between them; and

3. The EPA does not notify the current permittee and the new permittee of intent to modify, revoke and reissue, or terminate the permit and require that a new application be submitted.

8.13 Construction Authorization

This permit does not authorize or approve the construction of any onshore or offshore physical structures or facilities or the undertaking of any work in any navigable waters.

8.14 Historic Preservation

During the design stage of any project by the Government of the District of Columbia within the scope of this permit that may include ground disturbance, new and existing or retrofit construction, or demolition of a structure, the Government of the District of Columbia shall notify the Historic Preservation liaison and provide the liaison planning documents for the proposed undertaking. The documents shall include project location; scope of work or conditions; photograph of the area/areas to be impacted and the methods and techniques for accomplishing the undertaking. Depending on the complexity of the undertaking, sketches, plans and specifications shall also be submitted for review. The documentation will enable the liaison to assess the applicability of compliance procedures associated with Section 106 of the National Historic Preservation Act. Among the steps in the process are included:

1. The determination of the presence or absence of significant historic properties (architectural, historic or prehistoric). This can include the evaluation of standing structures and the determination of the need for an archaeological survey of the project area.

2. The evaluation of these properties in terms of their eligibility for nomination to the National Register of Historic Places.

3. The determination of the effect that the proposed undertaking will have on these properties.

4. The development of mitigating measures in conjunction with any anticipated effects.

All such evaluations and determinations will be presented to the Government of the District of Columbia for its concurrence.

If an alternate Historic Preservation procedure is approved by EPA in writing during the term of this permit, the alternate procedure will become effective after its approval.

8.15 Endangered Species

The U.S. Fish and Wildlife Service (FWS) has indicated that Hay's Spring Amphipod, a Federally listed endangered species, occurs at several locations in the District of Columbia. The National Oceanic and Atmospheric Administration National Marine Fisheries Service (NOAA Fisheries) has indicated that the endangered shortnose sturgeon occurs in the Potomac River drainage and may occur within the District of Columbia. The FWS and NOAA Fisheries indicate that at the present time there is no evidence that the ongoing stormwater discharges covered by this permit are adversely affecting these Federally-listed species. Stormwater discharges, construction, or any other activity that adversely affects a Federally-listed endangered or threatened species are not authorized under the terms and conditions of this permit.

The monitoring required by this permit will allow further evaluation of potential effects on these threatened and endangered species once monitoring data has been collected and analyzed. EPA requires that the permittee submit to NOAA Fisheries, at the same time it submits to EPA, the Annual Outfall Discharge Monitoring Report of the monitoring data which will be used by EPA and NOAA Fisheries to further assess effects on endangered or threatened species. If this data indicates that it is appropriate, requirements of this NPDES permit may be modified to prevent adverse impacts on habitats of endangered and threatened species.

The above-referenced Report of monitoring data is required under this permit to be sent on an annual basis to:

The United States Environmental Protection Agency
Region III (3WP41)
Water Protection Division
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

National Marine Fisheries Service/Northeast Region
Protected Resource Division
55 Great Republic Drive
Gloucester, Massachusetts 01930-2276

8.16 Toxic Pollutants

If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under section 307(a) of the Act, 33 U.S.C. § 1317(a), for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, the permittee shall comply with such standard or prohibition even if the permit has not yet been modified to comply with the requirement.

8.17 Bypass

8.17.1 Bypass not exceeding limitations. In accordance with 40 C.F.R. § 122.41(m), the permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation.

8.17.2 Notice

1. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it must submit prior notice at least ten days before the date of the bypass. See 40 C.F.R. § 122.41(m)(3)(i).

2. Unanticipated bypass. The permittee must submit notice of an unanticipated bypass as required by 40 C.F.R. § 122.41(l)6) (24-hour notice). See 40 C.F.R. § 122.41(m)(3)(ii).

8.17.3 Prohibition of bypass. See 40 C.F.R. § 122.41(m)(4).

1. Bypass is prohibited, and EPA may take enforcement action against the permittee for bypass, unless:

    a. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage as defined herein;

    b. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

    c. The permittee submitted notices as required herein.

2. EPA may approve an anticipated bypass, after considering its adverse effects, if EPA determines that it will meet the three conditions listed above.

8.18 Upset

Effect of an upset: An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of 40 C.F.R. § 122.41(n) are met.

8.19 Reopener Clause for Permits

The permit may be modified or revoked and reissued, including but not limited to, any of the following reasons:

1. To incorporate any applicable effluent standard or limitation issued or approved under Sections 301, 304, or 307 of the Clean Water Act, and any other applicable provision, such as provided for in the Chesapeake Bay Agreements based on water quality considerations, and if the effluent standard or limitation so issued or approved:

   a. Contains different conditions or is otherwise more stringent than any effluent limitation in the permit; or

   b. Controls any pollutant not limited in the permit. The permit, as modified or reissued under this paragraph, shall also contain any other requirements of the Act then applicable; or

2. To incorporate additional controls that are necessary to ensure that the permit effluent limits are consistent with any applicable TMDL WLA allocated to the discharge of pollutants from the MS4; or

3. As specified in 40 C.F.R. §§ 122.44(c), 122.62, 122.63, 122.64, and 124.5.

8.20 Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, it must apply for and obtain a new permit. The application shall be submitted at least 180 days before the expiration date of this permit. EPA may grant permission to submit an application less than 180 days in advance but no longer than the permit expiration date. In the event that a timely and complete reapplication has been submitted and EPA is unable through no fault of he permittee, to issue a new permit before the expiration date of this permit, the terms and conditions of this permit are automatically continued and remain fully effective and enforceable.

9. PERMIT DEFINITIONS

Terms that are not defined herein shall have the meaning accorded them under section 502 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, or its implementing regulations, 40 C.F.R. Part 122.

"Annual Report" refers to the consolidated Annual Report that the permittee is required to submit annually.

"Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. See 40 C.F.R. § 122.41(m)(1)(i).

"CWA" means Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended Pub. L. 95-217, Pub. L. 95-576, Pub. L. (6-483 and Pub. L. 97-117, 33 U.S.C. §§ 1251 *et seq.*

"Development" is the undertaking of any activity that disturbs a surface area greater than or equal to 5,000 square feet, including new development projects and redevelopment projects. For purposes of Parts 4.1.1 through 4.1.4 of the permit the requirements apply to discharges from sites for which design or construction commenced after 18 months from the effective date of this permit or as required by District of Columbia law, whichever is sooner. The District may exempt development projects receiving site plan approval prior to this date from these requirements.

"Director" means the Regional Administrator of USEPA Region 3 or an authorized representative.

"Discharge" for the purpose of this permit, unless indicated otherwise, refers to discharges from the Municipal Separate Storm Sewer System (MS4).

"Discharge Monitoring Report", "DMR" or "Outfall Discharge Monitoring Report" includes the monitoring and assessment of controls identified in Section 5 herein.

"EPA" means USEPA Region 3.

"Green Roof" is a low-maintenance roof system that stores rainwater where the water is taken up by plants and/or transpired into the air.

"Green Technology Practices" means stormwater management practices that are used to mimic pre-development site hydrology by using site design techniques that retain stormwater on-site through infiltration, evapotranspiration, harvest and use.

"Guidance" means assistance in achieving a particular outcome or objective.

"Illicit connection" means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

"Illicit discharge" means any discharge to a municipal separate storm sewer that is not composed entirely of stormwater except discharges pursuant to an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities, pursuant to 40 C.F.R. § 122.26(b)(2).

"Impaired Water" (or "Water Quality Impaired Water" or "Water Quality Limited Segment"): A water is impaired for purposes of this permit if it has been identified by the District or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards (these waters are called "water quality limited segments" under 40 C.F.R. 30.2(j)). Impaired waters include both waters with approved or established TMDLs, and those for which a TMDL has not yet been approved or established.

"Landfill" means an area of land or an excavation in which wastes are placed for permanent disposal, and which is not a land application unit (i.e., an area where wastes are applied onto or incorporated into the soil surface [excluding manure spreading operations] for treatment or disposal), surface impoundment, injection well, or waste pile.

"Large or Medium municipal separate storm sewer system" means all municipal separate storm sewers that are either: (1) located in an incorporated place (city) with a population of 100,000 or more as determined by the latest Decennial Census by the Bureau of Census (these cities are listed in Appendices F and G of 40 C.F.R. Part 122); or (2) located in the counties with unincorporated urbanized populations of 100,000 or more, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties (these counties are listed in Appendices H and I of 40 C.F.R. Part 122); or (3) owned or operated by a municipality other than those described in paragraph (i) or (ii) and that are designated by the Director as part of the large or medium municipal separate storm sewer system.

"MS4" refers to either a Large or Medium Municipal Separate Storm Sewer System.

"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): (1) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State Law) having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes; (2) Designed or used to collect or convey stormwater (including storm drains, pipes, ditches, etc.); (3) not a combined sewer; and (4) not part of a Publicly-Owned Treatment Works as defined at 40 C.F.R. § 122.2.

"Offset" means a unit of measurement, either used as monetary or non-monetary compensation, as a substitute or replacement for mitigation of a stormwater control practice that has been determined to be impracticable to implement.

"Performance measure" means for purposes of this permit, a minimum set of criteria for evaluating progress toward meeting a standard of performance.

"Performance standard" means for purposes of this permit, a cumulative measure or provision for attainment of an outcome or objective.

"Permittee" refers to the Government of the District of Columbia and all subordinate District and independent agencies, such as the District of Columbia Water and Sewer Authority, directly accountable and responsible to the City Council and Mayor as authorized under the Stormwater Permit Compliance Amendment Act of 2000 and any subsequent amendments for administrating, coordinating, implementing, and managing stormwater for MS4 activities within the boundaries of the District of Columbia.

"Point Source" means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other

floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.

"Pollutant of concern" means a pollutant in an MS4 discharge that may cause or contribute to the violation of a water quality criterion for that pollutant downstream from the discharge.

"Pre-Development Condition" means the combination of runoff, infiltration and evapotranspiration rates, volumes, durations and temperatures that typically existed on the site with natural soils and vegetation before human-induced land disturbance occurred. In the context of requirements in this permit the environmental objective is a stable, natural hydrologic site condition that protects or restores to the degree relevant for that site, stable hydrology in the receiving water, which will not necessarily be the hydrologic regime of that receiving water prior to any human disturbance in the watershed.

"Retention" means the use of soils, vegetation, water harvesting and other mechanisms and practices to retain a target volume of stormwater on a given site through the functions of: pore space and surface ponding storage; infiltration; reuse, and/or evapotranspiration.

"Retrofit" means improvement in a previously developed area that results in reduced stormwater discharge volumes and pollutant loads and/or improvement in water quality over current conditions.

"Stormwater" means the flow of surface water which results from, and which occurs immediately following, a rainfall event, snow melt runoff, and surface runoff and drainage.

"Stormwater management" means (1) for quantitative control, a system of vegetative or structural measures, or both, which reduces the increased volume and rate of surface runoff caused by man-made changes to the land; and (2) for qualitative control, a system of vegetative, structural, and other measures which reduce or eliminate pollutants which might otherwise be carried by surface runoff.

"SWMP" is an acronym for Stormwater Management Program. For purposes of this permit, the term includes all stormwater activities described in the District's SWMP Plan updated February 19, 2009, or any subsequent update, and all other strategies, plans, documents, reports, studies, agreements and related correspondences developed and used pursuant to the requirements of this permit.

"Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production. See 40 C.F.R. § 122.41(m)(1)(ii).

"Total Maximum Daily Load (TMDL) Units" means for purposes of this permit, the sum of individual waste load allocations (WLAs) and natural background. Unless specifically permitted otherwise in an EPA-approved TMDL report covered under the permit, TMDLs are expressed in

terms of mass per time, toxicity or other appropriate measure such as pollutant pounds of a total average annual load.

"TMDL Implementation Plan" means for purposes of this permit, a plan and subsequent revisions/updates to that plan that are designed to demonstrate how to achieve compliance with applicable waste load allocations as set forth in the permit requirements described in Section 8.1.4.

"Stormwater Management Program (SWMP)" is a modified and improved SWMP based on the existing SWMP and on information in each of the Annual Reports/Discharge Monitoring Reports. The purpose of the SWMP is to describe the list of activities that need to be done to meet the requirements of the Clean Water Act, an explanation as to why these activities will meet the Clean Water Act requirements, and a schedule for those activities.

"Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond reasonable control. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. See 40 C.F.R. § 122.41(n)(1).

"Waste pile" means any non-containerized accumulation of solid, nonflowing waste.

"Water quality standards" refers to the District of Columbia's Surface and Ground Water Quality Standards codified at Code of District of Columbia Regulations §§ 21-1100 *et seq.*, which are effective on the date of issuance of the permit and any subsequent amendments which may be adopted during the life of this permit.

"Waters of the United States" is defined at 40 C.F.R. § 122.2.

FACT SHEET

National Pollutant Discharge Elimination System (NPDES)
Municipal Separate Storm Sewer System (MS4)
Permit No. DC0000221 (Government of the District of Columbia)

NPDES PERMIT NUMBER: DC0000221 (Reissuance)

FACILITY NAME AND MAILING ADDRESS:

Government of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

MS4 ADMINISTRATOR NAME AND MAILING ADDRESS:

Director, District Department of the Environment
1200 First Street, N.E., 6th Floor
Washington, D.C. 20002

FACILITY LOCATION:

District of Columbia's Municipal Separate Storm Sewer System (MS4)

RECEIVING WATERS:

Potomac River, Anacostia River, Rock Creek, and Stream Segments Tributary
To Each Such Water Body

INTRODUCTION:

Today's action finalizes reissuance of the District of Columbia Municipal Separate Storm Sewer System (MS4) Permit. In the Final Permit EPA has continued to integrate the adaptive management approach with enhanced control measures to address the complex issues associated with urban stormwater runoff within the corporate boundaries of the District of Columbia, where stormwater discharges via the Municipal Separate Storm Sewer System (MS4).

Since the United States Environmental Protection Agency, Region III (EPA) issued the District of Columbia (the District) its first MS4 Permit in 2000, the Agency has responded to a number of legal challenges involving both that Permit (as well as amendments thereto) and the second-round MS4 Permit issued in 2004. For the better part of ten years, the Agency has worked with various parties in the litigation, including the District and two non-governmental organizations, Defenders of Wildlife and Friends of the Earth, to address the concerns of the various parties. The Agency has engaged in both litigation and negotiation, including formal

mediation.[1] These activities ultimately led to an enhanced stormwater management strategy in the District, consisting of measurable outputs for addressing the issues raised during the litigation and mediation process.

FACILITY BACKGROUND AND DESCRIPTION:

The Government of the District of Columbia owns and operates its own MS4, which discharges stormwater from various outfall locations throughout the District into its waterways.[2]

On April 21, 2010 EPA public noticed the Draft Permit. The Draft Fact Sheet published with that Draft Permit contains more extensive permit background information, and the reader is referred to that document for the history of the District of Columbia MS4 permit.

The public comment period closed on June 4, 2010. EPA received comments from 21 individual commenters and an additional 53 form letters. The Draft Permit, Draft Fact Sheet, and comments received on those documents are all available at: http://www.epa.gov/reg3wapd/npdes/draft_permits.html. The Final Permit reflects many of the comments received. EPA is simultaneously releasing a responsiveness summary responding to these comments.

ACTION TO BE TAKEN:

EPA is today reissuing the District of Columbia NPDES MS4 Permit. The Final Permit replaces the 2004 Permit, which expired on August 18, 2009 and has been administratively extended since that time. The Final Permit incorporates concepts and approaches developed from studies and pilot projects that were planned and implemented by the District under the 2000 and 2004 MS4 permits and modifying Letters of Agreement, and implements Total Maximum Daily Loads (TMDLs) that have been finalized since the prior permit was issued, including the Chesapeake Bay TMDL. A number of applicable measurable performance standards have been incorporated into the Final Permit. These and other changes between the 2004 Permit and today's Final Permit are reflected in a Comparison Document that is part of today's Permit issuance.

WATER QUALITY IN DISTRICT RECEIVING WATERS:

The District's *2008 Integrated Report to the Environmental Protection Agency and U.S. Congress Pursuant to Sections 305(b) and 303(d) Clean Water Act*[3] documents the serious water

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1 A procedural history of Permit appeals can be viewed at the EPA Environmental Appeals Board web: http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/77355bee1a56a5aa8525711400542d23/b5e5b68e89edabe98525714f00731c6f!OpenDocument&Highlight=2,municipal.

2 Portions of the District are served by a combined sanitary and storm sewer system. The discharges from the combined sewer system are not subject to the MS4 permit, but are covered under NPDES Permit No. xxxx issued to the District of Columbia Water and Sewer Authority.

3 District Department of the Environment, *The District of Columbia Water Quality Assessment, 2008 Integrated Report to the Environmental Protection Agency and U.S. Congress Pursuant to Sections 305(b) and 303(d) Clean Water Act* (hereinafter "2008 Integrated Report").

quality impairments in the surface waters in and around the District. A number of the relevant designated uses are not being met, *e.g.*, aquatic life, fish consumption, and full body contact, and there are a number of specific pollutants of concern that have been identified (for additional discussion on relevant TMDLs *see* Section 4.10 of this Final Fact Sheet).

Commenters on the Draft Permit expressed some frustration over very slow progress or even lack of progress after a decade of implementation of the MS4 program and even longer for other water quality programs. EPA appreciates this concern. Although the District's receiving waters are affected by a range of discharge sources, discharges from the MS4 are a significant contributor of pollutants and cause of stream degradation. EPA also recognizes, however, that stormwater management efforts that achieve a reversal of the ongoing degradation of water quality caused by urban stormwater discharges entail a long term, multi-faceted approach.

Consistent with the federal stormwater regulations for characterizing discharges from the MS4 (40 C.F.R. §122.26(d)(2)(iii)), the first two permit terms for the District's MS4 program required end-of-pipe monitoring to determine the type and severity of pollutants discharging via the system. The monitoring program was not designed to evaluate receiving water quality *per se*, therefore detection of trends or patterns was not reasonably possible. Today's Final Permit includes requirements for a Revised Monitoring Program, and one of the objectives for the program is to use a suite of approaches and indicators to evaluate and track water quality over the long-term (*see* discussion of Section 5.1 in this Final Fact Sheet).
There have been identified improvements in some areas. For example the *2008 Integrated Report* noted improvements in the diversity of submerged aquatic vegetation in the Potomac River, as well as improvements in fish species richness in Rock Creek. Biota metrics are often the best indicators of the integrity of any aquatic system.

EPA also notes that there are a variety of indirect measures indicative of improvement. The federal stormwater regulations foresaw the difficulty, especially in the near-term, of detecting measurable improvement in receiving waters, and relied instead on indirect measures, such as estimates of pollutant load reductions (40 C.F.R. §122.26(d)(2)(v)). The District documents these types of indirect measures in its annual reports, *e.g.*, tons of solids collected from catch basin clean-outs, amount of household hazardous waste collected, number of trees planted, square footage of green roofs installed, and many other measures of success.[4]

EPA believes that documenting trends in water quality, whether improvements, no change, or even further degradation, is an important element of a municipal water quality program. Today's Final Permit recognizes this principle, both in the types of robust measures required as well as the transition to new monitoring paradigms. EPA encourages all interested parties to provide the District with input during the development of these program elements.

THIS FACT SHEET:

(http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/information2/water.reg.leg/DC_IR_2008_Revised_9-9-2008.pdf

4 District MS4 Annual Reports can be found at: http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,495855.asp

This Final Fact Sheet is organized to correspond with the chronological organization and numbering in today's Final Permit. Where descriptions or discussions may be relevant to more than one element of the Final Permit the reader will be referred to the relevant section(s).

To keep today's Final Fact Sheet of readable length, many of the elements included in the fact sheet published with the Draft Permit (Draft Fact Sheet) on April 21, 2010 have not been repeated, but are referenced. Readers are referred to the Draft Fact Sheet published with the Draft Permit for additional discussion on provisions that have been finalized as proposed.[5] The Final Fact Sheet does discuss significant changes since the 2004 Permit (even if discussed in the Draft Fact Sheet). The Final Fact Sheet also contains additional explanation of the Final Permit where commenters requested additional clarification. In addition, this Final Fact Sheet explains modifications to the Final Permit where provisions were changed in response to comments.

In many cases EPA made a number of very simple modifications to the Final Permit, *e.g.*, a word, phrase, or minor reorganization, simply for purposes of clarification. These modifications were not intended to change the substance of the permit provisions, only to clarify them. Most of those types of edits are not discussed in this Final Fact Sheet, but EPA has provided a Comparison Document of the Draft and Final Permits for readers who would like that level of detail.

Many commenters noted that the Draft Permit was not logically organized. EPA agrees. The major reorganization principles include:

1) There is a new Section 3, Stormwater Management Program (SWMP) Plan consolidating the various plans, strategies and other documents developed in fulfillment of permit requirements.
2) All implementation measures, *i.e.*, those stipulating management measures and implementation policies, are included in Section 4 of today's Final Permit. This includes "Source Identification" elements (Section 3 in the Draft Permit) and "Other Applicable Provisions" elements (Section 8 in the Draft Permit), which included TMDL requirements.
3) All monitoring requirements are consolidated in Section 5 of the Final Permit.
4) All reporting requirements are consolidated in Section 6 of the Final Permit.

EPA also refers readers to the Responsiveness Summary released today along with the Final Permit and Final Fact Sheet, for responses to comments and questions received on the Draft Permit. That document contains additional detailed explanations of the rationale for changes made to the Draft Permit in the Final Permit.

Finally, EPA made significant effort to avoid appending or incorporating by reference other documents containing permit requirements into the Final Permit. In the interest of clarity

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5 The Permit and Fact Sheet proposed on April 21, 2010 can be viewed at: http://www.epa.gov/reg3wapd/npdes/draft_permits.html

and transparency EPA, to the extent possible, has included all requirements directly in the permit. Thus, EPA reviewed a variety of documents with relevant implementation measures, *e.g.*, TMDL Implementation Plans and the 2008 Modified Letter of Agreement to the 2004 permit[6], and translated elements of those plans and strategies into specific permit requirements that are now contained in the Final Permit. This Fact Sheet provides an explanation of the sources of provisions that are significant and are a direct result of one of those strategies.

1. DISCHARGES AUTHORIZED UNDER THIS PERMIT

(1.2 Authorized Discharges): The Final Permit authorizes certain non-stormwater discharges, including discharges from water line flushing. One commenter noted that many of these discharges, especially from potable water systems, contain concentrations of chlorine that may exceed water quality standards. EPA agrees, and has therefore clarified that dechlorinated water line flushing is authorized to be discharged under the Final Permit.

(1.4 Discharge Limitations): Comments on the language in Part 1.4 varied widely. Some commenters did not believe it was reasonable to require discharges to meet water quality standards. Other commenters believed this to be an unambiguous requirement of the Clean Water Act.

Today's Final Permit is premised upon EPA's longstanding view that the MS4 NPDES permit program is both an iterative and an adaptive management process for pollutant reduction and for achieving applicable water quality standard and/or total maximum daily load (TMDL) compliance. *See generally,* "National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges," 55 F.R. 47990 (Nov. 16, 1990).

EPA is aware that many permittees, especially those in highly urbanized areas such as the District, likely will be unable to attain all applicable water quality standards within one or more MS4 permit cycles. Rather the attainment of applicable water quality standards as an incremental process is authorized under section 402(p)(3)(B)(iii) of the Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii), which requires an MS4 permit "to reduce the discharge of pollutants to the maximum extent practicable" (MEP) "and such other provisions" deemed appropriate to control pollutants in municipal stormwater discharges. To be clear, the goal of EPA's stormwater program is attainment of applicable water quality standards, but Congress expected that many municipal stormwater dischargers would need several permit cycles to achieve that goal.

Specifically, the Agency expects that attainment of applicable water quality standards in waters to which the District's MS4 discharges, requires staged implementation and increasingly more stringent requirements over several permitting cycles. During each cycle, EPA will continue to review deliverables from the District to ensure that its activities constitute sufficient progress toward standards attainment. With each permit reissuance EPA will continue to increase

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6 District Department of the Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

stringency until such time as standards are met in all receiving waters. Therefore today's Final Permit is clear that attainment of applicable water quality standards and consistency with the assumptions and requirements of any applicable WLA are requirements of the Permit, but, given the iterative nature of this requirement under CWA Section 402(p)(3)(B)(iii), the Final Permit is also clear that "compliance with all performance standards and provisions contained in the Final Permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term" (Section 1.4).

EPA believes that permitting authorities have the obligation to write permits with clear and enforceable provisions and thus the determination of what is the "maximum extent practicable" under a permit is one that must be made by the permitting authority and translated into provisions that are understandable and measurable. In this Final Permit EPA has carefully evaluated the maturity of the District stormwater program and the water quality status of the receiving waters, including TMDL wasteload allocations. In determining whether certain measures, actions and performance standards are practicable, EPA has also looked at other programs and measures around the country for feasibility of implementation. Therefore today's Final Permit does not qualify any provision with MEP thus leaving this determination to the discretion of the District. Instead each provision has already been determined to be the maximum extent practicable for this permit term for this discharger.

EPA modified the language in the Final Permit to provide clarity on the expectations consistent with the preceding explanation. Specifically Section 1.4.2 of the Final Permit requires that discharges 'attain' applicable wasteload allocations rather than just 'be consistent' with them, since the latter term is somewhat ambiguous.

In addition, the general discharge limitation 'no increase in pollutant loadings from discharges from the MS4 may occur to receiving waters' was removed because of the difficulty in measuring, demonstrating and enforcing this provision. Instead, consistent with EPA's belief that the Final Permit must include all of the enforceable requirements that would achieve this principle, the following discharge limitation is substituted: "comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit."

In addition, EPA made the following modifications: "Compliance with <u>the</u> performance standards and provisions contained in <u>Parts 2 through 8 of</u> this permit shall constitute adequate progress towards compliance with DCWQS <u>and WLAs for this permit term</u>" (*<u>underlined text added</u>*) (Section 1.4 of the Final Permit). EPA eliminated circularity with the addition of "Parts 2 through 8", clarifying that this requirement does not circle back to include the statements in 1.4.1 and 1.4.2, but rather interprets them. Also, although WLAs are a mechanism for attainment of water quality standards, EPA added the specific language "and WLAs" to make this concept explicit rather than just implicit. In addition this revised language emphasizes that the specific measures contained in the Final Permit, while appropriate for this permit term, will not necessarily constitute full compliance in subsequent permit terms. It is the expectation that with each permit reissuance, additional or enhanced requirements will be included with the objective

of ensuring that MS4 discharges do not cause or contribute to an exceedance of applicable water quality standards, including attainment of relevant WLAs.

2. LEGAL AUTHORITY, RESOURCES, AND STORMWATER PROGRAM ADMINISTRATION

(2.1 Legal Authority): Several commenters pointed out that there were a number of requirements in the Draft Permit without clear compliance schedules or deadlines, or with deadlines that did not correspond well to others in the permit. In the Final Permit, EPA has made several revisions to address these comments. For example, EPA changed a requirement that deficiencies in legal authority must be remedied "as soon as possible" to a 120-day requirement for deficiencies that can be addressed through regulation, and two years for deficiencies that require legislative action (Section 2.1.1). Also, EPA increased the compliance schedule for updating the District's stormwater regulation from twelve months to eighteen months, *id.,* so that this action could be adequately coordinated with the development of the District's new offsite mitigation/payment-in-lieu program (for more discussion see Section 4.1.3 below).

(2.2 Fiscal Resources): One commenter suggested eliminating the reference to the District's Enterprise Fund since funding was likely to come from a number of different budgets within the District. EPA agrees with this comment and has removed this reference.

On the other hand, many commenters noted that the implementation costs of the District's stormwater program will be significant. EPA agrees. The federal stormwater regulations identify the importance of adequate financial resources [40 C.F.R. §122.26(d)(1)(vi) and (d)(2)(vi)]. In addition, after seeing notable differences in the caliber of stormwater programs across the country, EPA recognizes that dedicated funding is critical for implementation of effective MS4 programs.[7,8,9] In 2009 the District established, and in 2010 revised, an impervious-based surface area fee for service to provide core funding to the stormwater program[10] (understanding that stormwater-related financing may still come from other sources as they fulfill multiple purposes, *e.g.,* street and public right-of-way retrofits). In conjunction with the 2010 rule-making to revise the fee the District issued a Frequently Asked Questions document[11] that indicates the intent to restrict this fee to its original purpose, *i.e.*, dedicated funding to implement the stormwater program and comply with MS4 permit requirements. EPA believes this action is essential, and he expects that the District will maintain a dedicated source of funding for the stormwater program.

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7 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

8 National Association of Flood and Stormwater Agencies, Funded by EPA, *Guidance for Municipal Stormwater Funding* (2006) http://www.nafsma.org/Guidance%20Manual%20Version%202X.pdf

9 EPA, *Funding Stormwater Programs* (2008) http://www.epa.gov/npdes/pubs/region3_factsheet_funding.pdf

10 District of Columbia, Rule 21-566 Stormwater Fees, http://www.dcregs.dc.gov/Gateway/RuleHome.aspx?RuleID=474056

11 District of Columbia, FAQ Document *Changes to the District's Stormwater Fee* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/information2/water.reg.leg/Stormwater_Fee_FAQ_10-5-10_-final.pdf

3. STORMWATER MANAGEMENT PROGRAM (SWMP) PLAN

A number of commenters were confused by the wide variety of plans, strategies and other written documents required by the Draft Permit. A number of commenters were also concerned about public access to several of these documents.

In today's Final Permit EPA is clarifying that any written study, strategy, plan, schedule or other element, existing or new, is part of the District Stormwater Management Program Plan. It is EPA's intent that all elements of the program be described in this central 'Plan'. This does not mean that the Plan cannot consist of separate documents. EPA understands that stand-alone elements may aid in implementation in certain situations. However, EPA is clarifying that all such documents are inherent components of the Plan.

To address the accessibility issue EPA is also requiring that the most current version of the Plan be posted on the District website. As such, all elements that may be documented in separate documents and deliverables must be posted at this location (a hyperlink to any element of the program in a different document is sufficient).

Moreover, today's Final Permit requires the District to public notice a fully updated Plan (to include all existing and new elements required by the Final Permit) within three years of the effective date of this Final Permit, and to then submit that Plan to EPA within four years of the effective date of the Final Permit. This schedule will enable this evaluation of the Plan to be part of EPA's evaluation of the Districts stormwater management program in preparation for the next reissuance of the permit.

The Final Permit requires the District to develop a number of new initiatives. Many commenters raised concerns about the rigor and suitability of these new elements in the absence of a requirement for public input, and in the absence of EPA review and approval. In light of those concerns EPA reviewed all elements of the Draft Permit, and where appropriate has added requirements to the Final Permit both for public notice and opportunity to comment and for submittal to EPA for review and approval. Not every new element has been subjected to this requirement. However, EPA agrees that the opportunity for the public and EPA to review new program elements that will become major components of the stormwater management program is reasonable. Thus, for provisions that EPA believes will be important foundations of the program in years to come, EPA has added a requirement for public notice and EPA review and approval. A new Table 1 in the Final Permit summarizes the elements that must now be submitted to EPA for review and approval.

TABLE 1
Elements Requiring EPA Review and Approval

Element	Submittal Date (from effective date of this permit)
Anacostia River Watershed Trash Reduction Calculation Methodology (4.10)	1 year
Catch Basin Operation and Maintenance Plan (4.3.5.1)	18 months
Outfall Repair Schedule (4.3.5.3)	18 months
Off-site Mitigation/Payment-in-Lieu Program (4.1.3)	18 months
Retrofit Program (4.1.6)	2 years
Consolidated TMDL Implementation Plan (4.10.3)	2 years
Revised Monitoring Program (5.1)	2 years
Revised Stormwater Management Program Plan (3)	4 years

4. IMPLEMENTATION OF STORMWATER CONTROL MEASURES

(4.1 Standard for Long-Term Stormwater Management): One of the fundamental differences between today's Final Permit and earlier permits is the inclusion of measurable requirements for green technology practices, sometimes referred to as "low-impact development" or "green infrastructure." These requirements, which include green roofs, enhanced tree plantings, permeable pavements, and a performance standard to promote practices such as bioretention and water harvesting, are designed to increase the effectiveness of stormwater controls by reducing runoff volumes and associated pollutant loads.[12,13] In past years, stormwater management requirements in permits did not include clear performance goals, numeric requirements or environmental objectives. Today's Final Permit stipulates a specific standard for newly developed and redeveloped sites, and also emphasizes the use of "green infrastructure" controls to be used to meet the performance standard. These permit requirements are intended to improve the permit by providing clarity regarding program performance and promoting the use of technologies and strategies that do not rely solely on end-of-pipe detention measures to manage runoff. EPA notes that much of this emphasis is based on changing paradigms in stormwater science, technology and policy (see discussion below), but also points out that the groundwork for this framework was laid during the prior permit term, and all of the green infrastructure elements agreed to in the 2008 Modified Letter of Agreement to the 2004 Permit.[14]

In the natural, undisturbed environment precipitation is quickly intercepted by trees and other vegetation, or absorbed by soils and humic matter on the surface of the ground where it is

12 The performance of green infrastructure control measures is well-established through numerous studies and reports, many of which are available at http://cfpub2.epa.gov/npdes/greeninfrastructure/research.cfm#research

13 Jay Landers, *Stormwater Test Results Permit Side-by-Side Comparisons of BMPs* (2006) Civil Engineering News http://www.unh.edu/erg/civil_eng_4_06.pdf

14 District Department of the Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222*, (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

used by plants, becomes baseflow (shallow groundwater feeding waterways) or infiltrates more deeply to aquifers. During most storms very little rainfall becomes stormwater runoff where the landscape is naturally vegetated or in cases where there are permeable soils. Runoff generally only occurs with larger precipitation events, which constitute a very small proportion of the storms that occur in Washington, DC. In contrast to natural settings, traditional development practices cover large areas of the ground with impervious surfaces such as roads, driveways, sidewalks, and buildings. In addition, the remaining soils are often heavily compacted and are effectively impervious. Under developed conditions, stormwater runs off or is channeled away even during small precipitation events. The collective force of the increased stormwater flows entering the MS4 and discharging through outfalls into receiving streams scours streambeds, erodes stream banks, and causes large quantities of sediment and other entrained pollutants, such as metals, nutrients and trash, to enter the water body each time it rains[15,16,17]. Stormwater research generally shows a high correlation between the level of imperviousness in a watershed and the degree of overall degradation of water quality and habitat. This principle is so well-settled that EPA has not included individual study results here, but refers interested readers to an excellent compendium of relevant studies compiled by the Maryland Department of Natural Resources at http://www.dnr.state.md.us/irc/bibs/effectsdevelopment.html.

To date stormwater management approaches generally have been focused primarily on flood management, in particular extended detention controls, such as wet ponds or dry detention basins, or on in-pipe or end-of-pipe treatment systems. Extended detention approaches are intended to reduce downstream flooding to the extent necessary to protect the public safety and private and public property. End-of-pipe systems are intended to filter or settle specific pollutants, but typically do not reduce the large suite of pollutants in storm water, nor do anything to address degradation attributable to increased discharge volumes. These approaches occurred largely by default since stormwater permits and regulations, including those with water quality objectives, did not stipulate specific, measurable standards or environmental objectives. In addition, water quality was not the primary concern during the early evolution of stormwater management practices.

There are multiple potential problems with extended detention as a water quality management practice, including the fact that receiving stream dynamics are generally based on balances of much more than just discharge rates.[18] Stream stability, habitat protection and water quality are not necessarily protected by the use of extended detention practices and systems. In fact the use of practices such as wet detention basins often results in continued stream bank

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15 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

16 Schueler, Thomas R., *The Importance of Imperviousness* (2000) Center for Watershed Protection, http://yosemite.epa.gov/R10/WATER.NSF/840a5de5d0a8d1418825650f00715a27/159859e0c556f1c988256b7f007525b9/$FILE/The%20Importance%20of%20Imperviousness.pdf

17 E. Shaver, R. Horner, J. Skupien, C. May, and G. Ridley. *Fundamentals of Urban Runoff Management: Technical and Institutional Issues – 2nd Edition*, (2007) North American Lake Management Society, Madison, WI. http://www.deq.state.ms.us/mdeq.nsf/0/A8E8B82B89DCDDCE862573530049EEE0/$file/Fundamentals_full_manual_lowres.pdf?OpenElement

18 Low Impact Development Center, *A Review of Low Impact Development Policies: Removing Institutional Barriers to Adoption* (2007) http://pepi.ucdavis.edu/mapinfo/pdf/CA_LID_Policy_Review_Final.pdf

destabilization and increased pollutant loadings of sediment, phosphorus and other pollutants due to bank and channel erosion. Numerous studies have documented the physical, chemical and biological impairments of receiving waters caused by increased volumes, rates, frequencies, and durations of stormwater discharges, and the critical importance of managing stormwater flows and volumes to protecting and restoring our nation's waters[19,20].

Traditional stormwater management is very heavily focused on extended detention approaches, *i.e.,* collecting water short-term (usually in a large basin), and discharging it to the receiving water over the period of one to several days, depending on the size of the storm. Extended detention practices are first and foremost designed to prevent downstream flooding and not to protect downstream channel stability and water quality. For decades, water quality protection has been a secondary goal, or one omitted entirely during the design of these facilities. Over time it has become apparent through research and monitoring that these traditional practices do not effectively protect the physical, chemical or biological integrity of receiving waters[21]. Furthermore, operation and maintenance of these systems to ensure they perform as designed requires a level of managerial and financial commitment that is often not provided, further diminishing the effectiveness of these practices from a water quality performance perspective. A number of researchers have documented that extended detention practices fail to maintain water quality, downstream habitat and biotic integrity of the receiving waters.[22,23,24,25] As a result, today's Final Permit shifts the District's practices from extended detention approaches to water quality protection approaches based on retention of discharge volumes and reduced pollutant loadings.

(4.1.1 Standard for Stormwater Discharges from Development): The 2008 National Research Council Report (NRC Report) on urban stormwater confirmed that current stormwater control efforts are not fully adequate. Three of the NRC Report's findings on stormwater management approaches are particularly relevant:

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19 Daren M Carlisle, David M Wolock, and Michael R Meador , *Alteration of streamflow magnitudes and potential ecological consequences: a multiregional assessment*, , Front Ecol Environ, (2010)

20 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

21 EPA, *Protecting Water Quality from Urban Runoff* (2003) http://www.epa.gov/npdes/pubs/nps_urban-facts_final.pdf

22 C.R. MacRae, *Experience from Morphological Research on Canadian Streams: Is Control of the Two Year Frequency Runoff Event the Best Basis for Stream Channel Protection?* (1997) in Effects of Watershed Development and Management on Aquatic Ecosystems, ASCE

23 R. Horner, C. May, E. Livingston, D. Blaha, M. Scoggins, J. Tims & J. Maxted, *Structural and Nonstructural BMPs for Protecting Streams* (2002) Seventh Biennial Stormwater Research & Watershed Management Conference http://www.p2pays.org/ref/41/40364.pdf

24 D.B. Booth & C.R. Jackson, *Urbanization of Aquatic Systems – Degradation Thresholds, Stormwater Detention and the Limits of Mitigation* (1997) Journal of the American Water Resources Association 22(5) http://clear.uconn.edu/projects/TMDL/library/papers/BoothJackson_1997.pdf

25 E. Shaver, R. Horner, J. Skupien, C. May, and G. Ridley. *Fundamentals of Urban Runoff Management: Technical and Institutional Issues – 2nd Edition*, (2007) North American Lake Management Society, Madison, WI. http://www.deq.state.ms.us/mdeq.nsf/0/A8E8B82B89DCDDCE862573530049EEE0/$file/Fundamentals_full_manual_lowres.pdf?OpenElement

1) Individual controls on stormwater discharges are inadequate as the sole solution to stormwater impacts in urban watersheds;
2) Stormwater control measures such as product substitution, better site design, downspout disconnection, conservation of natural areas, and watershed and land-use planning can dramatically reduce the volume of runoff and pollutant loadings from new development; and
3) Stormwater control measures that harvest, infiltrate, and evapotranspire stormwater are critical to reducing the volume and pollutant loading of storms.

The NRC Report points out the wisdom of managing stormwater flow not just for the hydrologic benefits as described above, but because it serves as an excellent proxy for pollutants, *i.e.,* by reducing the volume of stormwater discharged, the amount of pollutants typically entrained in stormwater will also be reduced. Reductions in the number of concentrated and erosive flow events will result in decreased mobilization and transport of sediments and other pollutants into receiving waters. The NRC Report also noted that it is generally easier and less expensive to measure flow than the concentration or load of individual pollutant constituents. For all of these reasons EPA has chosen to use flow volume as the management parameter to implement policies, strategies and approaches.

The objective of effective stormwater management is to replicate the pre-development hydrology to protect and preserve both the water resources onsite and those downstream by eliminating or reducing the amount of both water and pollutants that run off a site, enter the MS4, and ultimately are discharged into adjacent water bodies. The fundamental principle is to employ systems and practices that use or mimic natural processes to: 1) infiltrate and recharge, 2) evapotranspire, and/or 3) harvest and use precipitation near to where it falls to earth.

Retaining the volume of all storms up to and including the 95th percentile storm event is approximately analogous to maintaining or restoring the pre-development hydrology with respect to the volume, rate, and duration of the runoff for most sites. In the mid-Atlantic region the 95th percentile approach represents a volume that appears to reasonably represent the volume that is fully infiltrated in a natural condition and thus should be managed onsite to restore and maintain this pre-development hydrology for the duration, rate and volume of stormwater flows. This approach also employs and/or mimics natural treatment and flow attenuation methods, *i.e.*, soil and vegetation, that existed on the site before the construction of infrastructure (*e.g.,* building, roads, parking lots, driveways). The 95th percentile volume is not a "magic" number; there will be variation among sites based on site-specific factors when replicating predevelopment hydrologic conditions. However, this metric represents a good approximation of what is protective of water quality on a watershed scale, it can be easily and fairly incorporated into standards, and can be equitably applied on a jurisdictional basis.

In the Draft Permit EPA proposed two sets of performance standards to be implemented by the District: on-site retention of the 90th percentile volume, or 1.2" for all non-federal projects, and on-site retention of the 95th percentile volume, or 1.7" for all federal projects.

In determining 'maximum extent practicable' for discharges from development involving

federal facilities EPA considered several factors in the Draft Permit:

1) Energy Independence and Security Act (EISA) Section 438 and EPA Guidance[26]: Entitled "Storm water runoff requirements for federal development projects," EISA section 438 provides: "The sponsor of any development or redevelopment project involving a Federal facility with a footprint that exceeds 5,000 share feet shall use site planning, design, construction, and maintenance strategies for the property to maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow."

   Guidance for federal agencies to implement EISA section 438 has been in place since December 2009, and sets forth two optional approaches to meeting the statutory requirements: a performance objective to retain the volume from the 95th percentile storm on site for any federally sponsored new development or redevelopment project and a site-specific hydrologic analysis to determine the pre-development runoff conditions and to develop the site such that the post-development hydrology replicates those conditions "to the maximum extent technically feasible."

2) Executive Orders:
   a. Executive Order 13508 - Chesapeake Bay Protection and Restoration: Calling the Chesapeake Bay a national treasure, E,O. 13508, issued May 12, 2009, establishes a mandate for federal leadership, action and accountability in restoring the Bay. Among the provisions of the Executive Order, section 202(c) directs the strengthening of stormwater management practices at Federal facilities and on Federal lands within the Chesapeake Bay watershed. In addition, section 501 directs federal agencies to implement controls as expeditiously as practicable on their own properties. As required by section 502, EPA issued guidance for federal land management practices to protect and restore the Bay, which includes guidance for managing existing development, as well as redevelopment, new development Thus federal agencies have an executive directive to be leaders in stormwater management in the District and throughout the Chesapeake Bay watershed.[27]

   b. Executive Order 13514 - Federal Leadership in Environmental, Energy, and Economic Performance E.O 13514, issued Oct. 5, 2009, directs the federal government to "lead by example" and includes a requirement for federal agencies to implement EPA's EISA Section 438 guidance (see Sections 2(d)(iv)[28] and 14).

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26 EPA, *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act* (2009) http://www.epa.gov/owow_keep/nps/lid/section438/

27 EPA, *Guidance for Federal Land Management in the Chesapeake Bay Watershed*, Chapter 3. Urban and Suburban, (2010) 841-R-10-002 (http://www.epa.gov/owow_keep/NPS/chesbay502/pdf/chesbay_chap03.pdf)

28 Sec. 2. Goals for Agencies. In implementing the policy set forth in Section 1 of this order, and preparing and implementing the Strategic Sustainability Performance Plan called for in Section 8 of this order, the head of each agency shall: . . . (d) improve water use efficiency and management by: . . . (iv) implementing and

3) Water Quality: These performance standards are aappropriate as water quality-based effluent limitations in the Final Permit. In order to meet the necessary water quality requirements of the Clean Water Act, and to be consistent with the assumptions and requirements of the wasteload allocations for the Chesapeake Bay TMDL, EPA has determined that this performance standard is necessary. In fact, the District's final Phase I WIP acknowledges reasonable assurance demonstration for meeting its obligations to implement the Chesapeake Bay TMDL on an expectation that federal new development and redevelopment projects will achieve a 1.7" stormwater retention objective[29].

EPA concluded in the Draft Permit, and maintains in the Final Permit, that in this first permit in which a performance standard is being required, a retention standard of 1.2" represents the "maximum extent practicable" (MEP) for the District to implement at this time. In the District of Columbia area the 90th percentile event volume is estimated at 1.2 inches. This volume was calculated from 59 years (1948-2006) of rainfall data collected at Reagan National Airport using the methodology detailed in the Energy Independence and Security Act (EISA) Section 438 Guidance[30]. EPA expects that the performance objective shall be accomplished largely by the use of practices that infiltrate, evapotranspire and/or harvest and use rainwater.

EPA's MEP determination included evaluating what has been demonstrated to be feasible in the mid-Atlantic region as well as in other parts of the country. Because on-site retention of the 90th percentile rainfall event volume and analogous approaches have been successfully implemented in other locations across the nation as requirements of stormwater permits, state regulations and local standards [31,32,33,34,35,36,37,38,39] and under a wide variety of climates and

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achieving the objectives identified in the stormwater management guidance referenced in Section 14 of this order. Sec. 14. Stormwater Guidance for Federal Facilities. Within 60 days of the date of this order, the Environmental Protection Agency, in coordination with other Federal agencies as appropriate, shall issue guidance on the implementation of Section 438 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17094).

29 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

30 EPA, *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act* (2009) http://www.epa.gov/owow_keep/nps/lid/section438/

31 EPA, *The Municipality of Anchorage and the Alaska Department of Transportation and Public Facilities Municipal Separate Storm Sewer System Permit*, NPDES No. AKS052558 (2010) http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/MS4+requirements+-+Region+10/$FILE/ATTCZX11/AKS052558%20FP.pdf

32 California Regional Water Quality Control Board Los Angeles Region, *Ventura County Municipal Separate Storm Sewer System Permit*, NPDES No. CAS004002 (2009) http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057__01-13-2010.pdf

33 Montana Department of Environmental Quality, *General Permit for Stormwater Discharge Associated with Small Municipal Separate Storm Sewer System*, NPDES No. MTR040000 (2010) http://www.deq.mt.gov/wqinfo/mpdes/StormWater/ms4.mcpx

34 Tennessee Department of Environment and Conservation, *General Permit for Discharges from Small Municipal Separate Storm Sewer Systems*, NPDES No. TNS000000, (2010) http://state.tn.us/environment/wpc/stormh2o/finals/tns000000_ms4_phase_ii_2010.pdf

conditions, EPA considers this performance standard to be proven and therefore 'practicable' at this point in time. EPA believes that application of this performance standard will result in a significant improvement to the *status quo* and that it will provide notable water quality benefits. This approach will also provide a sound foundation and framework for future management approaches, strategies, measures and practices as the program evolves over subsequent permit cycles. In this context, EPA notes that there may be a need to improve upon this standard in the future, and expects to evaluate implementation success, performance of practices and the overall program, and water quality in the receiving waters when determining whether or not to modify this requirement in a future permit cycle.

EPA received a number of comments on these proposed development performance standards. Many commenters supported this approach. A few were opposed, largely to the numbers rather than the retention framework. Only one federal agency, the Department of Defense, to whom the 95th percentile standard would apply, opposed this provision, on the basis that they should not be subject to the higher standard.

In response to comments EPA revised the Final Permit to require the District to implement a performance standard of on-site retention of 1.2" for all development projects, regardless of who owns or operates the development. EPA's rationale for including a single performance standard for all development projects is based on the fact that this permit is issued to the District of Columbia and the MEP determination must be based on what is practicable for that permittee even though certain property owners discharging to the District's MS4 may have the ability as well as the mandate to achieve more. EPA concludes that it would be not be inappropriate to include the 1.7" performance standard in a permit to a federal permittee. This permit, however, is being issued to a non-federal permittee.

Therefore today's Final Permit includes a performance standard for stormwater discharges from development that disturbs an area of land greater than or equal to 5,000 square feet. The requirement must be in effect 18 months from today. The Permit requires the design, construction, and maintenance of stormwater management practices to retain rainfall onsite, and

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35 West Virginia Department of Environmental Protection, General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems, NPDES WV0116025 (2009) http://www.dep.wv.gov/WWE/Programs/stormwater/MS4/permits/Documents/WV%20MS4%202009%20General%20Permit.pdf

36 North Carolina Department of Environment and Natural Resources, *General Permit to Construct Operate and Maintain Impervious Areas and BMPs Associated with a Residential Development Disturbing Less than 1 Acre*, State Permit No. SWG050000 (2008) http://portal.ncdenr.org/c/document_library/get_file?uuid=724171cc-c208-4f39-a68c-b4cd84022cd9&groupId=38364

37 State of Maryland, *Stormwater Management Act of 2007*, Environment Article 4 §201.1 and §203 http://www.mde.state.md.us/programs/Water/StormwaterManagementProgram/Pages/Programs/WaterPrograms/SedimentandStormwater/swm2007.aspx

38 City of Philadelphia, *Stormwater Regulations*, §600.0 Stormwater Management (2006) http://www.phillyriverinfo.org/WICLibrary/StormwaterRegulations.pdf

39 EPA, See Chapter 3, *Green Infrastructure Case Studies: Municipal Policies for Managing Stormwater with Green Infrastructure* (2010) http://www.epa.gov/owow/NPS/lid/gi_case_studies_2010.pdf

prevent the off-site discharge of the rainfall volume from all events less than or equal to the 90th percentile rainfall event.

The District's Phase I Watershed Implementation Plan (WIP) for the Chesapeake Bay TMDL[40] based its proposed nutrient and sediment reductions, and the associated reasonable assurance demonstration, on these performance standards, i.e., 1.2" for non-federal projects and 1.7" for federal projects. In establishing the Chesapeake Bay TMDL, EPA used the information in the Bay jurisdictions' final Phase I WIPs, including that of the District, where possible. Thus the wasteload allocations (WLAs) in the TMDL[41] are based, in part, on the expectation that all development in the District will be subject to these standards.

EPA notes that all federal facilities still must comply with the EISA requirements. The District will track the performance of federal development projects subject to the District's stormwater regulations, and therefore document those achieving better than 1.2" onsite retention. However, the District cannot, nor should they be expected to, enforce the EISA requirements.

EPA dropped the option for determination of the predevelopment runoff conditions based on a full hydrologic and hydraulic analysis of the site. EISA guidance had provided this option to federal facilities and EPA did not want to provide an *a priori* limitation to federal projects in the Draft Permit, but rather provide the District with the flexibility to include it if they determined it to be administratively feasible. However, since the Final Permit no longer includes an additional requirement for federal facilities, this provision is no longer necessary to provide federal facilities options consistent with EISA. With respect to non-federal facilities, in the seventeen months since the Draft Permit was proposed the District has continued with the process of finalizing their stormwater regulations, and has determined that inclusion of this option is not necessary or reasonable, and EPA concurs.

Several commenters raised the issue of costs associated with implementation of the performance standard. EPA has responded by noting that there are many locations where this stormwater management framework has already been implemented (*see* footnote 22), and also where costs have been well documented to be competitive or instances where infrastructure costs were less expensive because of avoided costs, *e.g.,* reduced infrastructure, narrower roads and otherwise fewer impervious surfaces, reduced or eliminated curbs and gutters, no or fewer buried storm sewers. In addition, where cost-benefit analyses have been conducted, green infrastructure practices are even more cost effective because of the wide array of additional benefits[42] that do not accrue when traditional stormwater management practices are used.[43,44,45,46,47,48,49,50,51,52,53,54]

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40 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

41 EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* (2010) http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html

42 EPA, Managing Wet Weather with Green Infrastructure website, Benefits: (http://cfpub2.epa.gov/npdes/home.cfm?program_id=298)

43 LimnoTech, *Analysis of the Pollution Reduction Potential of DC Stormwater Standards* (2009)

44 EPA, *Reducing Stormwater Costs through Low Impact Development Strategies and Practices* (2007)

Several commenters took issue with the inclusion of any numeric performance standard for discharges from development. As discussed above EPA believes that stormwater discharge permits should include clear and enforceable standards, and where feasible, numeric limits are preferred. As discussed above, for the purpose of requiring the permittee to ensure adequate management of discharges from development, a numeric performance standard is a proven means of establishing a clear and enforceable requirement. EPA recognizes that there will be development projects that may not be able to meet the performance standard on site because of site conditions or site activities that preclude the use of extensive green infrastructure practices. Thus as proposed in the Draft Permit, the Final Permit requires the District to develop an alternative means of compliance for development projects under these circumstances (*see* discussion of Section 4.1.3 Off-Site Mitigation and/or Fee-in-Lieu for all Facilities).

In July 2010 EPA Region III issued *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed.*[55] This document provides direction to all NPDES permitting authorities in the Region and establishes expectations for the next generation of MS4 permits. Based on many of the reasons already articulated in this Final Fact Sheet, EPA directed states to incorporate performance-based standards into permits and regulations with the objective of maintaining or restoring a pre-development hydrologic site condition for newly developed and redeveloped sites. In fact most states with authorized NPDES permit programs in the Chesapeake

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http://www.epa.gov/owow/NPS/lid/costs07/

45 Report to Natural Resources Defense Council and Waterkeeper Alliance, *Economic Costs, Benefits and Achievability of Stormwater Regulations for Construction and Development Activities* (2008)

46 Meliora Environmental Design LLC, *Comparison of Environmental Site Design for Stormwater Management for Three Redevelopment Sites in Maryland* (2008)

47 City of Portland Environmental Services, *Cost-Benefit Evaluation of Ecoroofs* (2008) http://www.portlandonline.com/bes/index.cfm?a=261053&c=50818

48 Natural Resources Defense Council, *Rooftops to Rivers, Green Strategies for Controlling Stormwater and Combined Sewer Overflows* (2006) http://www.nrdc.org/water/pollution/rooftops/rooftops.pdf

49 Riverkeeper, *Sustainable Raindrops* (2006) http://www.riverkeeper.org/wp-content/uploads/2009/06/Sustainable-Raindrops-Report-1-8-08.pdf

50 City of Philadelphia Water Department, *A Triple Bottom Line Assessment of Traditional and Green Infrastructure Options for Controlling CSO Events in Philadelphia's Watersheds* (2009) http://www.epa.gov/npdes/pubs/gi_phil_bottomline.pdf

51 Richard R. Horner, *Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices for Ventura County,* and *Initial Investigation of the Feasibility and Benefits of Low-Impact Site Development Practices for the San Francisco Bay Area,* and *Supplementary Investigation of the Feasibility and Benefits of Low-Impact Site Development Practices for the San Francisco Bay Area,* (2007) http://docs.nrdc.org/water/files/wat_09081001b.pdf

52 J. Hathaway and W.F. Hunt. *Stormwater BMP Costs*. (2007) www.bae.ncsu.edu/stormwater/PublicationFiles/DSWC.BMPcosts.2007.pdf.

53 Center for Neighborhood Technology and American Rivers, *The Value of Green Infrastructure: A Guide to Recognizing Its Economic, Environmental and Social Benefits* (2010) http://www.cnt.org/repository/gi-values-guide.pdf

54 J. Gunderson, R. Roseen, T. Janeski, J. Houle, M. Simpson. *Cost-Effective LID in Commercial and Residential Development* (2011) Stormwater http://www.stormh2o.com/march-april-2011/costeffective-lid-development-1.aspx

55 EPA, *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed* (2010) http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3final07_29_10.pdf

Bay Watershed have incorporated numeric on-site retention standards into final or draft regulations or permits.

In addition, this provision is consistent with the 2008 Modified Letter of Agreement to the 2004 Permit[56] in which the District committed to promulgate stormwater regulations that implement "Low Impact Development", *i.e.,* measures that infiltrate, evapotranspire and harvest stormwater.

(4.1.2 Code and Policy Consistency, Site Plan Review, Verification and Tracking): In Region III's *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed*, EPA emphasized the importance of establishing accountability measures around performance measures. The best standards will not provide the necessary environmental outcomes if they are not properly implemented, and the only way to ensure proper implementation is to ensure that stormwater control measures are properly designed and installed.

Today's Final Permit requires the District to ensure that all codes and policies are consistent with the standards in the Final Permit, and to establish and maintain adequate site plan review procedures, and a post-construction verification process (such as inspections or submittal of as-builts) to ensure that controls are properly installed.

Ensuring that local codes, ordinances and other policies are consistent with the requirements of the permit is critical element of success. A number local governments attempting to implement green infrastructure measures have found their own local policies to be one of the most significant barriers[57], *e.g.*, parking codes that require over-sized parking lots, plumbing codes that don't allow rainwater harvesting for indoor uses, or street design standards that prohibit the use of porous/pervious surfaces. EPA has published a document, the *Water Quality Scorecard*, to assist local governments in understanding and identifying these local policy barriers and also provides options for eliminating them.[58] EPA is not requiring the District to use the *Scorecard* or any other specific method, but recommends a systematic assessment of local policies in the context of the requirements of the Final Permit in order to comply with the provisions of this Section.

EPA and others have long recognized the importance of site plan review in ensuring that development projects are designed according to standards and regulations, and a verification process following construction that projects were constructed as designed and approved.[59,60,61,62]

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56 District Department of Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

57 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

58 EPA, *Water Quality Scorecard, Incorporating Green Infrastructure Practices and the Municipal, Neighborhood and Site Scales* (2009) http://www.epa.gov/smartgrowth/pdf/2009_1208_wq_scorecard.pdf

59 EPA, *Post-Construction Plan Review*, Menu of BMPs http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=factsheet_results&view=specific&bmp=123

Most local governments, including the District, already have some form of site plan review and post-construction verification process for development projects. Today's Final Permit includes them as critical accountability elements of the District stormwater program.

In addition, today's Final Permit requires the District to track volume reductions from all projects. This is a critical element of determining whether wasteload allocations are being achieved.

One commenter noted that EPA had not imposed a clear compliance schedule for this requirement. The Final Permit includes a deadline of the end of the permit term for full compliance with this requirement, acknowledging that updating codes, ordinances and other policies may be a time-consuming process that typically requires consultation and support from elected officials, coordination amongst multiple departments and agencies, e.g., the Office of Planning, the Department of Transportation and the Department of the Environment, as well as public involvement.

(4.1.3 Off-Site Mitigation and/or Fee-in Lieu for all Facilities): Today's Final Permit requires the District to establish a program for Off-site Mitigation and/or Fee-In-Lieu within 18 months of the effective date of the Final Permit. The Final Permit provides the District flexibility to develop a program with either one of those elements or both. Specifically the Permit states:

The program shall include at a minimum:

1) Establishment of baseline requirements for on-site retention and for mitigation projects. On-site volume plus off-site volume (or fee-in-lieu equivalent or other relevant credits) must equal no less than the relevant volume in Section 4.1.1;
2) Specific criteria for determining when compliance with the baseline requirement for on-site retention cannot technically be met based on physical site constraints, or a rationale for why this is not necessary;
3) For a fee-in-lieu program, establishment of a system or process to assign monetary values at least equivalent to the cost of implementation of controls to account for the difference in the performance standard, and the alternative reduced value calculated; and
4) The necessary tracking and accounting systems to implement this section, including policies and mechanisms to ensure and verify that the required stormwater practices on the original site and appropriate required off-site practices stay in place and are adequately maintained.

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60 Center for Watershed Protection, *Managing Stormwater in Your Community, A Guide for Building an Effective Post-Construction Program* (2008) http://www.cwp.org/documents/cat_view/76-stormwater-management-publications/90-managing-stormwater-in-your-community-a-guide-for-building-an-effective-post-construction-program.html

61 EPA, *MS4 Permit Improvement Guide* (2010) http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf

62 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

This provision is included in today's Final Permit in acknowledgement that meeting the performance standard in 4.1.1 may be challenging in some situations. The NRC Report noted that an offset system is critical to situations when on-site stormwater control measures are not feasible.[63] In cases where a full complement of onsite controls is not feasible, offsite practices should be employed that result in net improvements to watershed function and water quality at the watershed scale. The *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed* contemplates offsets in MS4 programs.[64] EPA has also articulated expectations in the Chesapeake Bay TMDL that it expects the Bay jurisdictions to account for growth via offset programs that are consistent with Section 10 and Appendix S of the Chesapeake Bay TMDL.[65]

EPA received numerous comments on this provision. No commenter was opposed to an offset program *per se*, but there were various opinions on how it should function. Because there was so much general interest in how this program would be shaped, EPA is responding to these comments by requiring the program be subject to public notice followed by submittal to and review by EPA. EPA believes this provides all of those with an interest in this program the opportunity to provide meaningful input. EPA will also review the program to ensure that it has adequate tracking and enforceability components, and meets the water quality objectives of the Final Permit. It is EPA's expectation that these mechanisms will be described by the permittee in the proposed implementation scheme. EPA emphasizes that accountability measures (*e.g.,* inspections, maintenance, tracking) will be critical to ensure the success of the program, and therefore the District's plan will be closely scrutinized for those measures prior to implementation.

The Final Permit includes an option for the District to include incentives for other environmental objectives, e.g., carbon sequestration, in the offset program. As noted, because of the wide array of opinions EPA feels that consideration of some of these other environmental objectives deserve a full vetting by the community. The District is not required to include any incentives or credits along these lines in the program. If it chooses to do so, anything implemented to achieve those other environmental objectives must be subject to the same level of site plan review, inspection, and operation and maintenance requirements as stormwater controls implemented in fulfillment of other permit requirements.

Finally, for the duration of this permit term, the Final Permit exempts District owned and operated transportation rights-of-way projects from the requirement to mitigate stormwater off-site or pay into a fee-in-lieu program for development projects where the on-site performance standard cannot be met. This decision was based on the District request for short-term relief while the District Department of Transportation develops new stormwater management design, construction, and operation and maintenance processes, protocols, requirements and

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63 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

64 EPA, *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed* (2010) http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3final07_29_10.pdf

65 EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* (2010) http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html

specifications for transportation systems and public rights of way. EPA notes that this exemption does not apply to other District owned projects.

(4.1.4 Green Landscaping Incentives Program): Green infrastructure regulatory and incentive programs are becoming common across the country.[66,67] Landscaping requirements that provide flexibility and a suite of options from which to select appropriate green infrastructure practices and systems, e.g. Seattle's Green Factor[68], have proven to be quite popular with developers, land owners and municipal officials.

The green landscaping provision is consistent with the 2008 Modified Letter of Agreement to the 2004 Permit[69] that articulated a long list of specific green infrastructure measures to be implemented, coupled with the commitment by the District to develop green infrastructure policies and incentives. Because these green landscaping provisions fill an important gap in the District's suite of green infrastructure-related policies, EPA specifically identified landscaping as an important area for development of incentives.

Other than general support EPA received little comment on this provision, thus the Final Permit has not been modified from the Draft Permit.

(4.1.5 Retrofit Program for Existing Discharges): Changes in land cover that occurred when urban and urbanizing areas were developed have changed both the hydrology and pollutant loadings to receiving waters and have led to water quality problems and stream degradation. In order to protect and restore receiving waters in and around the District stormwater volume and pollutant loadings from sites with existing development must be reduced. Due to historical development practices, most of these areas were developed without adequate stormwater pollutant reduction or water quality-related controls. To compensate for the lack of adequate stormwater discharge controls in these areas, EPA is requiring the District to include retrofit elements in the stormwater management program.[70,71,72]

EPA has acknowledged the importance of including retrofit requirements in MS4 permits.[73,74] The Chesapeake Bay TMDL allocations are founded on the expectation of

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66 EPA, *Green Infrastructure Incentive Mechanisms*, Green Infrastructure Municipal Handbook Series, (2009) http://www.epa.gov/npdes/pubs/gi_munichandbook_incentives.pdf

67 EPA, *Green Infrastructure Case Studies: Municipal Policies for Managing Stormwater with Green Infrastructure* (2010) http://www.epa.gov/owow/NPS/lid/gi_case_studies_2010.pdf

68 City of Seattle, *Seattle Green Factor*, http://www.seattle.gov/dpd/Permits/GreenFactor/Overview/

69 District Department of Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

70 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

71 Schueler, Thomas. *Urban Subwatershed Restoration Manual No. 1: An Integrated Framework to Restore Small Urban Watersheds* (2005)

72 EPA, *Green Infrastructure Retrofit Policies*, Managing Wet Weather with Green Infrastructure Municipal Handbook Series (2008) http://www.epa.gov/npdes/pubs/gi_munichandbook_retrofits.pdf

73 EPA, *MS4 Permit Improvement Guide* (2010) EPA 833-R-10-001,

stormwater retrofits in the District (*see* Section 8 of the TMDL[75]), based on actions outlined in the District's final Phase I WIP developed for the Chesapeake Bay TMDL.[76]

EPA received quite a few comments on this set of requirements. Some commenters strongly approved of the retrofit provisions in the Draft Permit, while others expressed concerns.

Today's Final Permit requires the District to develop performance metrics for retrofits, using the performance standard in Section 4.1.1 as the starting point, *i.e.*, if projects can meet the environmental objectives specified in Part 4.1.1 they should. However, understanding the challenges associated with retrofitting some sites, the Final Permit allows that the performance metrics for retrofit projects may vary from the performance standard in 4.1.1, *e.g.*, different requirements may apply to differing sets of circumstances, site conditions or types of projects. EPA believes the most important first step in a robust retrofit program is to set stringent environmental objectives, thus the requirement to develop clear and specific performance standards. EPA fully expects the District to utilize this permit term to develop design, construction and operation and maintenance protocols to meet the requisite performance standards.

Several modifications were made to this provision:

1) Because there was so much interest in this provision EPA added a requirement for public notice.
2) Because there were so many opinions on how this program should function, EPA removed some of the criteria in the Final Permit to allow the community to shape the program. In exchange EPA included a requirement that the relevant performance metrics be submitted to EPA for review and approval.
3) The compliance schedule for development, public notice and submittal to EPA of performance metrics for a retrofit program has been extended from one year to 18 months at the request of the District. EPA believes the additional time will allow better coordination of the offset program with the District's stormwater regulations (also with an 18 month compliance schedule), and allow adequate time for a public notice process and an EPA review.

Also included in the permit is a requirement that the District must work with federal agencies to document federal commitments to retrofitting their properties. Consistent with Executive Order 13508 on the Chesapeake Bay, the federal strategies developed pursuant thereto, and in fulfillment of the Chesapeake Bay TMDL, federal agencies have obligations to

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http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf

74 EPA, *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed* (2010) http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3fmal07_29_10.pdf

75 EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* (2010) http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html

76 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

implement substantive stormwater controls. In order to accurately account for loads from federal lands that discharge through the District MS4 system, the District needs to be able to track the pollutant reductions resulting from federal actions. To do so the District will need to identify federal facilities and properties and work with federal agencies to identify retrofit opportunities on federal lands and properties and track progress in retrofitting these lands and properties.

In addition, the Final Permit requires the District to make pollutant load and volume reduction estimates for all retrofit projects for the nine pollutants in Table 4, and by each of the major District watersheds (Anacostia River, Rock Creek, Potomac River).

The Final Permit requires the District to implement retrofits to manage runoff from 18,000,000 square feet of impervious surfaces during the permit term. Of that total, 1,500,000 square feet must be in transportation rights-of-way. Although these initial drainage area objectives are not especially aggressive, EPA believes that a strong foundation for the retrofitting program must first be established. EPA can then set more aggressive drainage area objectives in subsequent permits. In its comments on the Draft Permit the District contended that the requirement in the Draft Permit for the retrofitting of 3,600,000 square feet of impervious surfaces in transportation rights-of-way was more than it could accomplish in a single permit term. The District suggested 1,500,000 square feet, almost 60% less than what was required in the Draft Permit would be achievable. In consideration of these comments, the total square footage of retrofitted impervious surfaces that must be in transportation rights-of-way is 1,500,000 square feet. EPA notes that the total square footage retrofit requirement is unchanged. EPA believes that this requirement will establish a strong foundation for the implementing a retrofitting program overall and in transportation rights-of-way, which can be followed in subsequent permits with more aggressive drainage area objectives. In addition, the Final Permit includes an additional provision that is intended to enhance the District's retrofit opportunities (*see* next paragraph).

The Final Permit establishes a requirement for the District to adopt and implement stormwater retention requirements for properties where less than 5,000 square feet of soil is being disturbed but where the buildings or structures have a footprint that is greater than or equal to 5,000 square feet and are undergoing substantial improvement. Substantial improvement, as consistent with District regulations at 12J DCMR § 202, is any repair, alteration, addition, or improvement of a building or structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the improvement or repair is started. Although this specific element was not included in the Draft Permit, it reflects the fact that the District has already considered this provision in their proposed stormwater regulations, and is consistent with the overall retrofit approach in the Draft Permit. Both the District and EPA believe this will promote retrofitting on smaller sites that would not otherwise be subject to the performance standard in the stormwater regulations.

This section of the Final Permit also requires the District to ensure that every major renovation/ rehabilitation project for District-owned properties within the inventory of Department of Real Estate Services (DRES) and Office of Public Education Facilities Modernization (OPEFM) includes on-site retention measures to manage stormwater. This

requirement is based in part on EPA's understanding that these two agencies have control over most District buildings and renovation projects in the District. This provision was in Section 4.2 Operation and Maintenance of Stormwater Capture Practices of the Draft Permit, and was moved to Section 4.1.5 of the Final Permit since it is a retrofit requirement rather than a maintenance requirement.

(4.1.6 Tree Canopy): Several studies have documented the capacity for planting additional trees in the District and quantified the benefits.[77,78,79,80] The District commitments to the tree planting requirements of the Final Permit are documented in the 2008 Modified Letter of Agreement to the 2004 Permit,[81] and the District's Chesapeake Bay TMDL WIP.[82] The number was derived from the District Urban Tree Canopy Goal[83] of planting 216,300 trees over the next 25 years, an average of 8,600 trees per year District-wide. Adjusting this number for the MS4 area of the District, the Final Permit requires the District to develop a strategy to plant new trees at a rate of at least 4,150 annually.

There was some interest from commenters in providing input to the tree canopy strategy, thus the Final Permit includes a requirement for the District to public notice this strategy. Also, in response to several comments, EPA has clarified the annual number as a net increase in order to account for mortality.

(4.1.7 Green Roof Projects): Quite a few studies have documented the water quality benefits of green roofs.[84,85,86] The Green Build-out Model, a project specifically carried out to

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77 Casey Trees, *The Green Build-out Model: Quantifying the Stormwater Management Benefits of Trees and Green Roofs in Washington, DC* (2007) (http://www.caseytrees.org/planning/greener-development/gbo/index.php).

78 University of Vermont and the U.S. Forest Service, A Report on Washington D.C.'s Existing and Potential Tree Canopy (2009) http://www.caseytrees.org/geographic/key-findings-data-resources/urban-tree-canopy-goals/documents/UnivofVermontUTCReport4-17-09.pdf

79 Casey Trees, et al. *See* several District tree inventories: http://www.caseytrees.org/geographic/tree-inventory/community/index.php

80 Casey Trees, *The Green Build-out Model: Quantifying the Stormwater Management Benefits of Trees and Green Roofs in Washington, D.C.* (2007) http://www.caseytrees.org/planning/greener-development/gbo/documents/GBO_Model_Full_Report_20051607.pdf

81 District Department of Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

82 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

83 Casey Trees, Urban Tree Canopy Goal website: http://www.caseytrees.org/geographic/key-findings-data-resources/urban-tree-canopy-goals/index.php

84 EPA, *Green Roofs for Stormwater Runoff Control* (2009) http://www.epa.gov/nrmrl/pubs/600r09026/600r09026.pdf

85 E. Oberndorfer et al, *Green Roofs as Urban Ecosystems: Ecological Structures, Functions, and Services* (2007) BioScience 57(10):823-833 http://www.bioone.org/doi/full/10.1641/B571005

86 M. Hathaway, W.F. Hunt, G.D. Jennings, *A Field Study of Green Roof Hydrologic and Water Quality Performance* (2008) Transactions of American Society of Agricultural and Biological Engineers, Vol. 51(1): 37-44 http://www.bae.ncsu.edu/people/faculty/jennings/Publications/ASABE%20Hathaway%20Hunt%20Jennings.pdf

evaluate the potential in the District for using green roofs and other green infrastructure measures to reduce flows and pollutants from the District's wet weather systems, documented significant opportunities for green roof implementation.[87]

The District commitments to green roof implementation are documented in the 2008 Modified Letter of Agreement to the 2004 Permit,[88] and the District Chesapeake Bay TMDL Watershed Implementation Plan.[89] The District is required to evaluate the feasibility of installing green roofs on District-owned buildings, and to install at least 350,000 square feet of green roof during the permit term.

(4.2 Operation and Maintenance of Retention Practices): Operation and maintenance, required pursuant to 40 C.F.R. 122.26(d)(2)(iv)(A)(*1*) and (*3*), is critical for the continued performance of stormwater control measures.[90,91] EPA has consistently noted the importance of operation and maintenance in regulatory guidance.[92,93,94] Today's Final Permit requires the District to ensure adequate maintenance of all stormwater control measures, both publicly and privately owned and operated.

The District has two years from the effective date of the Final Permit to develop and implement operation and maintenance protocols for all District owned and operated stormwater management practices. The District is also required to provide regular and ongoing training to all relevant contractors and employees.

The District is required to develop operation and maintenance mechanisms to ensure that stormwater practices are maintained and operated to meet the objectives of the program and that they continue to function over multiple permit cycles to provide the water quality benefits intended by design. Such mechanisms may include deed restrictions, ordinances and/or maintenance agreements to ensure that all non-District owned and operated stormwater control measures are adequately maintained. In addition the District must develop and/or refine

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87 Casey Trees, *The Green Build-out Model: Quantifying the Stormwater Management Benefits of Trees and Green Roofs in Washington, D.C.* (2007) http://www.caseytrees.org/planning/greener-development/gbo/documents/GBO_Model_Full_Report_20051607.pdf

88 District Department of Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

89 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

90 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

91 EPA Website: Stormwater Control Operation and Maintenance. http://www.epa.gov/owow/NPS/ordinance/stormwater.htm

92 EPA, *MS4 Permit Improvement Guide* (2010) EPA 833-R-10-001, http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf

93 EPA, *MS4 Program Evaluation Guidance* (2007) EPA-833-R-07-003, http://www.epa.gov/npdes/pubs/ms4guide_withappendixa.pdf

94 EPA, *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed*, (2010) http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3fmal07_29_10.pdf

verification mechanisms, such as inspections, and an electronic inventory system to ensure the long-term integrity of stormwater controls in the District.

In addition the District is required to develop a Stormwater Management Guidebook and associated training within eighteen months of the effective date of the Final Permit. This requirement is based on commitments in the 2008 Modified Letter of Agreement to the 2004 Permit[95]. Completion of the Guidebook has been delayed pending finalization of the District's revised stormwater regulations. However EPA expects Guidebook completion to parallel finalization of the District's revised stormwater regulations, which incorporate the standards and requirements of the Final Permit.

(4.3 Management of District Government Areas): Requirements in this section of the Final Permit largely continue provisions in the 2004 Permit. EPA received few comments on most elements of this section of the Draft Permit. The following revisions were made:

1) The District now must notify not only public health agencies within 24-hours in the event of a sanitary sewer overflow, but also ensure adequate public notification procedures within that same time period (Section 4.3.1 of the Final Permit). EPA emphasizes that this provision in no way authorizes sanitary sewer overflow discharges either directly or via the MS4. Those discharges are expressly prohibited.
2) Within 18 months of the effective date of the Final Permit, the District shall complete, public notice and submit to EPA for review and approval a plan for optimal catch basin inspections, cleaning and repairs. The District shall fully implement the plan upon EPA approval. This revision is based on comments that the catch basin maintenance provisions on the Draft Permit were vague and not within the context of a comprehensive plan (Section 4.3.5.1 of the Final Permit).
3) Section 3.2 of the Draft Permit required the District to update its outfall inventory. One commenter noted that the District's 2006 Outfall Survey had already essentially accomplished this, and that meanwhile many of these outfalls were in severe disrepair, thus contributing to increased sediment loading to receiving waters. EPA agrees this is a serious concern, and has thus modified the Final Permit to require the District to undertake the following: within 18 months of the effective date of the Final Permit, and consistent with the 2006 Outfall Survey, the District shall complete, public notice and submit to EPA for review and approval an outfall repair schedule to ensure that approximately 10% of all outfalls needing repair are repaired annually, with the overall objective of having all outfalls in good repair by 2022 (Section 4.3.5.3 of the Final Permit).
4) Consistent with the District's *Enhanced Street Sweeping and Fine Particle Removal Strategy*,[96] an additional element has been included in Table 3, Street Sweeping. The

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95 District Department of Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

96 District Department of the Environment, *Municipal Separate Storm Sewer System Program Annual Report* (2010)

table now documents that environmental hotspots in the Anacostia River Watershed will now be swept at least two times per month from March through October.

(4.6 Management of Construction Activities): Requirements in this Section of the Final Permit largely continue provisions in the 2004 Permit. Several commenters suggested that these provisions needed to be significantly improved, including specifying more stringent effluent limitations, in order to address the impairments attributable to sediment.

While permitting authorities have a fair amount of latitude to modify many elements of a permit based on public comments, inclusion of a *de novo* numeric effluent limitation, when neither the Draft Permit nor the Draft Fact Sheet suggested such an option would require further public notice. Therefore, this Final Permit does not include a numeric effluent limitation for sediment discharged in stormwater from active construction sites.

However, EPA agrees that construction activities cause serious water quality problems, and has revised this section to require more robust oversight of construction stormwater controls. A significant cause of water quality problems caused by construction activities is the failure of construction site operators to comply with existing regulations. Thus, EPA expects increased inspections and enforcement activity to result in improved compliance and therefore reduced sediment loads.[97] Therefore the Final Permit includes construction site inspection frequency requirements to ensure compliance with the District erosion and sediment requirements.

(4.8 Flood Control Projects): Requirements in this Section of the Final Permit largely continue provisions in the 2004 Permit. EPA received few comments on this section. The following revision was made: a start date of six months after the effective date of the Final Permit was added for the requirement to collect data on the percentage of impervious surface area located in flood plain boundaries for all proposed development.

(4.10 Total Maximum Daily Load (TMDL) Wasteload Allocation (WLA) Planning and Implementation): There are several TMDLs with wasteload allocations that either directly or indirectly affect the District's MS4 discharges. The following are those that EPA has determined to be relevant for purposes of implementation via the Final Permit:

1. TMDL for Biochemical Oxygen Demand (BOD) in the Upper and Lower Anacostia River (2001)
2. TMDL for Total Suspended Solids (TSS) in the Upper and Lower Anacostia River (2002)
3. TMDL for Fecal Coliform Bacteria in the Upper and Lower Anacostia River (2003)
4. TMDL for Organics and Metals in the Anacostia River and Tributaries (2003)
5. TMDL for Fecal Coliform Bacteria in Kingman Lake (2003)
6. TMDL for Total Suspended Solids, Oil and Grease and Biochemical Oxygen Demand in Kingman Lake (2003)

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97 EPA, *Office of Enforcement and Compliance Assurance Accomplishments Report* (2008) http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy08accomplishment.pdf

7. TMDL for Fecal Coliform Bacteria in Rock Creek (2004)
8. TMDL for Organics and Metals in the Tributaries to Rock Creek (2004)
9. TMDL for Fecal Coliform Bacteria in the Upper, Middle and Lower Potomac River and Tributaries (2004)
10. TMDL for Organics, Metals and Bacteria in Oxon Run (2004)
11. TMDL for Organics in the Tidal Basin and Washington Ship Channel (2004)
12. TMDL for Sediment/Total Suspended Solids for the Anacostia River Basin in Maryland and the District (2007) [pending resolution of court vacature, Anacostia Riverkeeper, Inc. v. Jackson, No. 09-cv-97 (RCL)]
13. TMDL for PCBs for Tidal Portions of the Potomac and Anacostia Rivers in the District of Columbia, Maryland and Virginia (2007)
14. TMDL for Nutrients/Biochemical Oxygen Demand for the Anacostia River Basin in Maryland and the District (2008)
15. TMDL for Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia (2010)
16. TMDL for Nitrogen, Phosphorus and Sediment for the Chesapeake Bay Watershed (2010)

On July 25, 2011, in connection with a challenge by the Anacostia Riverkeeper and other environmental organizations, the U.S. District Court for the District of Columbia vacated EPA's approval of a total maximum daily load (TMDL) for sediment in the Anacostia River. While the court ruled in EPA's favor on a number of issues of significant importance to the TMDL program and that the TMDL adequately would achieve the designated aquatic life use, the court held that EPA's decision record did not adequately support EPA's determination that the TMDL would lead to river conditions that would support the primary (swimming) and secondary (boating) contact recreation and aesthetic designated uses. Based on its holding regarding the recreational and aesthetic uses, the court vacated the TMDL, but stayed its vacatur for one year to give EPA sufficient time to address the court's concerns. This TMDL is included in the above list (#12), because EPA expects this vacatur to be resolved within the time frame for TMDL efforts outlined in this permit. However, District planning and implementation efforts on this TMDL are not required until such time as the legal challenge is resolved and the TMDL is established.

Most EPA developed TMDLs for the District, as well as all District developed and EPA approved TMDLs can be found at the following website:
http://www.epa.gov/reg3wapd/tmdl/dc_tmdl/index.htm.

The Chesapeake Bay TMDL for nitrogen, phosphorus and sediment is available at:
http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html.

The District also has a number of TMDL-related documents on its website:
http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,495456.asp.

In addition, the tidal Anacostia River is listed as impaired for TSS and BOD, and the Upper Potomac River is listed as impaired for pH. TMDL establishment by EPA is pending for both.

As part of permit reissuance EPA has reviewed several existing TMDL implementation plans, including those for the Potomac River, Anacostia River and Rock Creek. EPA has identified the relevant implementation actions from those Plans and included them as requirements of the Final Permit, *e.g.*, green roofs, tree plantings. This approach provides more clarity for the District and the general public, and is also consistent with the obligation of NPDES permit writers to articulate enforceable provisions in permits to implement TMDL WLAs.

EPA took the same approach with the Anacostia River Watershed Trash TMDL[98] (Trash TMDL) (Part 4.10.1 of the Final Permit), which was finalized in September 2010. This TMDL was well-developed with quantifiable information about the sources and causes of impairment. The Trash TMDL assigned a specific WLA to MS4 discharges: removal of 103,188 pounds of trash annually. The Final Permit requires the District to attain this WLA as a specific single-year measure by the fifth year of this permit term. The Final Permit provision is based on the annual trash WLA for the District MS4. In the TMDL, annual WLAs were divided by 365 days to obtain daily WLAs. Given the fact that the daily and annual WLAs are congruent with each other, use of the annual WLA as the permit metric is consistent with the assumptions and requirements of the TMDL and is a more feasible measure for monitoring purposes.

Because the Anacostia River Watershed Trash TMDL provided a solid foundation for action, EPA determined the implementation requirements and included them in the Final Permit rather than require the District to develop a separate implementation plan. The Permit requires the District to determine a method for estimating trash reductions and submit that to EPA for review and approval within one year of the effective date of the Final Permit. In addition, the District must annually report the trash prevention/removal approaches utilized, and the overall total weight (in pounds) of trash captured for each type of approach.

On December 29, 2010, the U.S. Environmental Protection Agency established the Chesapeake Bay TMDL[99] to restore clean water in the Chesapeake Bay Watershed. The TMDL identifies the necessary reductions of nitrogen, phosphorus and sediment from Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia and the District of Columbia that, when attained, will allow the Bay to meet applicable water quality standards. EPA based the TMDL allocations, where possible, on information provided by the Bay jurisdictions in their final Phase I WIPs. The TMDL requires the Bay jurisdictions to have in place by 2017 the necessary controls to attain 60% of the reductions called for in the TMDL, and to have all controls in place by 2025. EPA has committed to hold jurisdictions accountable for results along the way, including ensuring that NPDES permits contain provisions and limits that are consistent with the assumptions and requirements of the relevant WLAs.

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98 Maryland Department of the Environment and District of Columbia Department of Environment, *Total Maximum Daily Loads of Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia* (2010) http://www.epa.gov/reg3wapd/pdf/AnacostiaTMDLPortfolio.pdf

99 EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* (2010) http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html

The District's final Phase I Chesapeake Bay WIP proposed very aggressive targets for pollutant reductions in its MS4 program.

Pollutant of Concern	% Reductions in Urban Runoff Loads by 2025 from 2009 Baseline	Reductions in Urban Runoff Loads by 2025 from 2009 Baseline
Total Nitrogen	17	29,310 lbs/yr
Total Phosphorus	33	7,740 lbs/yr
Sediment	35	2,192 tons/yr

These numbers are from the District's final input deck to the Chesapeake Bay Model in association with the final Phase I WIP.

The Final Permit requires a very robust set of measures, based on a determination that these measures are necessary to ultimately achieve the specified reductions. EPA took a similar approach with the Chesapeake Bay TMDL as it did with the aforementioned TMDLs, and incorporated specific implementation measures into the Final Permit. Although EPA did not finalize the Chesapeake Bay TMDL until December 2010, EPA had a reasonably clear understanding of what would be needed even prior to publishing the Draft Permit because of the significant amount of data, modeling output and other information available in advance of its finalization, as well as many months of ongoing discussions with the District about the elements of its final Phase I WIP.[100] Based on the final TMDL , EPA is assured that the Final Permit is consistent with the assumptions and requirements of the WLAs in the TMDL.

In partial fulfillment of attaining the Chesapeake Bay WLAs, the Final Permit contains: a new performance standard for development, a requirement for an offset program for development, numeric requirements for tree plantings and green roof installation, numeric requirements for retrofits, and a variety of other actions. The relevant sections of this Final Fact Sheet discuss those provisions more fully.

There will be two additional permit terms prior to 2025 during which the District will implement many additional and/or more robust measures to attain its Bay TMDL WLAs. Provisions, targets and numeric thresholds in this Final Permit are not necessarily the ones that will be included in subsequent permits. EPA believes, however, that the 2011 Final Permit sets the foundation for a number of actions and policies upon which those future actions will be based.

Section 4.10.2 of the Final Permit requires the District to implement and complete the proposed replacement/rehabilitation, inspection and enforcement, and public education aspects of the strategy for Hickey Run to satisfy the applicable oil and grease TMDL wasteload allocations. In addition, the District is required to install end-of-pipe management practices at four identified outfalls to address oil and grease and trash in Hickey Run no later than the end of this permit term. Implementation requirements to attain these WLAs were initiated during prior

100 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

permit terms. The requirements of today's Final Permit are intended to bring the District to the concluding stages of attaining the Hickey Run oil and grease and trash WLAs.

The 2003 District of Columbia TMDL for oil and grease in the Anacostia River noted that the waterbody was no longer impaired by oil and grease. In particular data from Hickey Run, which provided the basis for listing the Anacostia River as an impaired water body, had demonstrated consistent compliance with applicable water quality standards for oil and grease: for twenty-one samples taken in Hickey Run between January and December 2002, no values exceeded the 10mg/L standard, and only one sample exceeded a 5 mg/L detection limit value. The 2003 TMDL further concluded that on-going implementation activities, which included public education and automobile shop enforcement actions, caused a significant decrease in ambient pollutant concentrations.[101] The Final Permit includes a provision for additional controls on oil and grease in Hickey Run should monitoring during this permit term indicate it is necessary. However, per the demonstration noted above, EPA believes it likely this may not be necessary.

One commenter indicated that the shift from an aggregate numeric effluent limit for four outfalls into Hickey Run in the 2004 permit to a management practice-based approach in the Draft Permit violated the Clean Water Act's prohibition against backsliding, section 402(o)(1) of the CWA, 33 U.S.C. § 1342(o)(1) ("[A] Permit may not be renewed, reissued, or modified ... subsequent to the original issuance of such Permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous Permit"). In response, EPA notes that a non-numeric effluent limitation is not automatically less stringent than a numeric effluent limitation. A different (numeric or non-numeric) effluent limitation only violates the anti-backsliding prohibition if it can be fairly compared to the prior numeric limit and found to be less stringent than that requirement. *See e.g., Communities for a Better Environment v. State Water Resources Control Bd.,* 132 Cal. App. 4th 1313 (August 29, 2005) (finding that no backsliding had occurred where the effluent limit in existing permit was not "comparable" to WQBEL in previous permit). In this case EPA 1) notes that additional controls on oil and grease may not be needed (as explained above), and 2) has determined regardless that compliance with the performance standards in the Final Permit will result in improved water quality protections for the District MS4 receiving streams more effectively than did the previous numeric effluent limitations (see discussions in relevant sections).

Section 4.10.3 of today's Final Permit requires the District to develop a Consolidated TMDL Implementation Plan (Consolidated Plan) for all TMDL wasteload allocations assigned to District MS4 discharges. All applicable WLAs must be considered in this plan, though the TMDLs listed at the beginning of this Section form the basis for District action to meet this requirement. EPA has evaluated these TMDLs along with existing water quality data and has concluded that *E. coli*, total nitrogen, total phosphorus, total suspended solids, copper, lead, zinc and trash are critical pollutants of concern for District waters, and should be the focus of implementation measures as well as of a revised monitoring program (*see* Section 5.1 for a

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101 District of Columbia, *Final Total Maximum Daily Load for Oil and Grease in the Anacostia River* (2003) http://www.epa.gov/reg3wapd/tmdl/dc_tmdl/AnacostiaRiver/AnacoatiaOilReport.pdf

discussion of the latter).

The rationale for a Consolidated Plan is to allow for more efficient implementation of control measures. In many cases TMDLs have been developed on a stream segment basis, which is not always the most logical framework for implementation of controls. In addition, the solutions for reducing many pollutants and/or improving water bodies will be the same stormwater control measures and/or policies, and it would be wasteful of resources and duplicative to have separate implementation plans under those circumstances.

The Final Permit requires the Consolidated Plan to include:

1) Specified schedules for attaining applicable wasteload allocations for each TMDL; such schedules must includes numeric benchmarks that specify annual pollutant load reductions and the extent of control actions to achieve these numeric benchmarks.
2) Interim numeric milestones for TMDLs where final attainment of applicable wasteload allocations requires more than one permit cycle. These milestones shall originate with the third year of this permit term and every five years thereafter.
3) Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment.
4) The Consolidated TMDL Implementation Plan elements required in this section will become enforceable permit terms upon approval of such Plans, including the interim and final dates in this section for attainment of applicable WLAs.
5) Where data demonstrate that existing TMDLs are no longer appropriate or accurate, the Plan shall include recommended solutions, including, if appropriate, revising or withdrawing TMDLs.

Some of the applicable TMDLs developed within the District were based on limited or old data. In those cases the District may choose to reevaluate these waters and impairments to determine if revising or withdrawing the TMDL, or other action, would be appropriate.

The District has two years from the date of Final Permit issuance to develop, public notice and submit the Consolidated Plan to EPA for review and approval. EPA believes the required elements (1-5, above) will ensure clarity and enforceability, but also encourages interested parties to participate in the public process. EPA added this public notice requirement to the Final Permit because of the significant interest expressed by commenters on District TMDLs.

Section 4.10.4, Adjustments to TMDL Implementation Strategies, requires the District to make mid-course improvements to implementation measures and policies whenever data indicate insufficient progress towards attaining any relevant WLA. The District must adjust its management programs to compensate for the inadequate progress within 6 months, and document the modifications in the Consolidated TMDL Implementation Plan. The Plan modification shall include a reasonable assurance demonstration of the additional controls to achieve the necessary reductions, *i.e.*, quantitatively linking sources and causes to discharge

quality. In addition, annual reports must include a description of progress as evaluated against all implementation objectives, milestones and benchmarks, as relevant.

Finally, with respect to any new or revised TMDL that may be approved during the permit term, the Final Permit makes allowances for reopening the permit to address those WLAs (see Section 8.19 of the Final Permit: Reopener Clause for Permits), if necessary. EPA believes that reopening the permit will not typically be necessary since the Final Permit requires the District to update the Consolidated Plan within six months for any TMDL approved during the permit term with wasteload allocations assigned to District MS4 discharges, and also to include a description of revisions in the next regularly scheduled annual report.

(4.11 Additional Pollutant Sources): Requirements in this Section of the Final Permit largely continue provisions in the 2004 Permit. EPA notes that the provisions of this section were mostly included in Section 3 of the Draft Permit.

5. MONITORING AND ASSESSMENT OF CONTROLS

(5.1 Revised Monitoring Program): As included in the Draft Permit, the monitoring requirements for the District's stormwater program have been significantly updated from the last permit cycle. This revision reflects the fact that the District has already performed broad monitoring of a variety of parameters over the last two permit cycles. The Phase I stormwater regulations require representative sampling for the purpose of discharge characterization in the first permit term, or initial years of the program (40 C.F.R. §122.26(d)(1)(iv)(E)). The District now has a decade worth of this type of data, and it is timely to update the monitoring program to more effectively evaluate the effectiveness of the program, and to more effectively and efficiently use the District's funds for this purpose. As noted in the National Research Council's report *Urban Stormwater Management in the United States* [102], the quality of stormwater from urbanized areas has been well-characterized. Continuing the standard end-of-pipe monitoring typical of most MS4 programs has produced data of limited usefulness because of a variety of shortcomings (as detailed in the report). The NRC Report strongly recommends that MS4 programs modify their evaluation metrics and methods to include biological and physical monitoring, better evaluations of the performance/effectiveness of controls and overall programs, and an increased emphasis on watershed scale analyses to ascertain what is actually going on in receiving waters. The report also emphasizes the link between study design and the ability to interpret data, *e.g.*, having enough samples to ensure that conclusions are statistically significant.

Consistent with these goals, the Final Permit requires the District to develop a Revised Monitoring Program to meet the following objectives:

1) Make wet weather loading estimates of the parameters in Table 4 from the MS4 to receiving waters. Number of samples, sampling frequencies and number and locations of

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102 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

sampling stations must be adequate to ensure data are statistically significant and interpretable.

2) Evaluate the health of the receiving waters, to include biological and physical indicators such as macroinvertebrates and geomorphologic factors. Number of samples, frequencies and locations must be adequate to ensure data are statistically significant and interpretable for long-term trend purposes (not variation among individual years or seasons).

3) Any additional necessary monitoring for purposes of source identification and wasteload allocation tracking. This strategy must align with the Consolidated TMDL Implementation Plan required in Part 4.10.3 For all pollutants in Table 4 monitoring must be adequate to determine if relevant WLAs are being attained within specified timeframes in order to make modifications to relevant management programs, as necessary.

The Final Permit requires the District to public notice the Revised Monitoring Program, and to submit it to EPA for review and approval within two years of the effective date of the Final Permit.

EPA also significantly refined the list of required pollutant analytes/parameters for which monitoring is required from over 120 to 9:

(Table 4 from the Final Permit)
Monitoring Parameters

Parameter
E. coli
Total nitrogen
Total phosphorus
Total Suspended Solids
Cadmium
Copper
Lead
Zinc
Trash

These parameters are those for which relevant stormwater wasteload allocations exist, or (in the case of cadmium) where monitoring data indicate that the pollutant is occurring in discharges at concentrations and frequencies to consider it a pollutant of concern. End-of-pipe analytical monitoring is an expensive undertaking, and EPA feels strongly that the District's water quality-related evaluations will be much more robust and actionable with an enhanced focus on true pollutants of concern, along with the elimination of analytes for which monitoring routinely shows non-detect concentrations, and/or those to which notable water quality problems have not been linked.

One modification has been made to this list for the Final Permit from the Draft Permit.

The Draft Permit required evaluation of Trash reductions in the relevant sections for the Anacostia River Watershed Trash TMDL (4.10.1), but failed to include it in Table 4 (Table 3 of the Draft Permit). EPA has added trash as a monitoring parameter to this table to correct that oversight.

(5.2 Interim Monitoring): During the interim period from the effective date of the Final Permit until EPA approves the Revised Monitoring Program, the Final Permit requires the District to largely continue the monitoring program established and updated under the 2000 and 2004 permits, except the monitoring program is only required for the list of monitoring parameters in Table 4, which has been reduced to the nine parameters as discussed above.

EPA received several comments and questions on the interim monitoring requirements. Individual responses are included in the Responsiveness Summary published with the Final Permit and this Final Fact Sheet. EPA chose to not modify the interim monitoring provisions for the Final Permit because: 1) they are largely an extension of the same requirements and methods already approved and established under prior permits, which will ensure that data collected during the interim monitoring period are comparable to data collected during the past decade, thus providing "apples to apples" comparisons in data interpretation; and 2) EPA believes that the District's monitoring-related resources are more effectively spent developing a robust revised program, rather than revising the interim program.

(5.4 Area and/or Source Identification Program): The Final Permit provides that "[t]he permittee shall continue to implement a program to identify, investigate, and address areas and/or sources within its jurisdiction that may be contributing excessive levels of pollutants to the MS4 and receiving waters, including but not limited to those pollutants identified in Table 4 herein." This is identical in substance to section 5.5 in the Draft Permit and essentially continues the requirements from the 2004 MS4 Permit. EPA received a comment that this provision has been inadequate to identify sources contributing pollutants to MS4 discharges. EPA recognizes that this provision is general, but believes that the District's ongoing practices are sufficient during the interim monitoring period. EPA notes that the Final Permit requires the Revised Monitoring Program to include any additional necessary monitoring for purposes of source identification and wasteload allocation tracking. The public will have a chance to comment on the proposed objectives and methods in Plan, and EPA will review and approve this Plan. Therefore there will be several opportunities to ensure that the District has robust methods for identify additional pollutant inputs to District MS4 discharges.

(5.7 Reporting of Monitoring Results): In response to several comments, and because of the potential availability of electronic reporting in the future, EPA made several modifications to this Section of the Final Permit. When available the District may submit monitoring data through NetDMR, a national tool for regulated Clean Water Act permittees to submit discharge monitoring reports (DMRs) electronically via a secure Internet application to EPA. *See* http://www.epa.gov/netdmr/. However, if this system is not available to the National Marine Fisheries Service, then the District must continue to submit hard copies. The Final Permit eliminates the requirement for the District to submit monitoring reports to itself. This section

clarifies (consistent with Section 6.2) that all monitoring results from a given year be summarized in the following annual report.

6. REPORTING REQUIREMENTS

Permit reporting is required pursuant to 40 C.F.R. § 122.41(l). EPA has made a number of minor edits to this section primarily for the purposes of: maintaining consistency with other Sections of the Final Permit (as those provisions necessitated changes in reporting, the Final Fact Sheet discusses those changes in association with the relevant Section); eliminating redundancy; and to provide clarification.

(6.2 Annual Reporting): Consistent with comments from a number of commenters regarding public access to documents, today's Final Permit requires the District to post each Annual Report on its website at the same time the Report is submitted to EPA.

The separate 'Reporting on Funding' in the Draft Permit has been eliminated in the Final Permit because it was largely redundant with other reporting requirements, and because it was beyond the scope of what is needed from the District. The Final Permit requires annual reporting on projected costs and budget for the coming year as well as expenditures and budget for the prior year, including (i) an overview of the District's financial resources and budget, (ii) overall indebtedness and assets, (iii) sources for funds for stormwater programs, and (iv) a demonstration of adequate fiscal capacity to meet the permit requirements. However, EPA has concluded that additional detail would be superfluous. In addition, beyond a demonstration of basic budget considerations as outlined in the Final Permit, how the District chooses to allocate resources to comply with the permit is an internal decision.

EPA has also included a provision for an Annual Report Meeting in this permit in order to improve communication between the District and the Agency. This meeting will provide an opportunity for EPA to obtain more in-depth knowledge of the District's program, and should also enhance feed-back on the program. The permit requires the District to convene the first Annual Report Meeting within 12 months of issuance of the permit. If both parties agree that this first meeting was successful, the Annual Report meeting shall be extended for the duration of the permit term.

7. STORMWATER MODEL

The Stormwater Model and associated Geographical Information System are tools used by the District to help track and evaluate certain components of the water quality program. The Final Permit requires the use and maintenance of this system as a component of the District's Stormwater Management Program. There were no modifications to this Section between the Draft Permit and the Final Permit.

8. STANDARD PERMIT CONDITIONS FOR NPDES PERMITS

The provisions in Part 8 are requirements generally applicable to all NPDES permits, pursuant to 40 C.F.R. § 122.41, as well as other applicable conditions pursuant to § 122.49 and specific statutory or regulatory provisions as noted in the permit. No changes were made to this section of the permit.

9. PERMIT DEFINITIONS

Most changes to this section from the Draft Permit consist of minor clarifications. In addition, several terms were eliminated from this section because they do not appear elsewhere in the Final Permit: 'goal', 'internal sampling station', 'significant spills', and 'significant materials'. The definition of 'MS4 Permit Area' was removed because it is already defined in Part 1.1.

A definition of "development" was added to clarify that development is "the undertaking of any activity that disturbs a surface area greater than or equal to 5,000 square feet." The definition further clarifies that the relevant performance standard for development applies to projects that commence after 18 months from the effective date of the Final Permit or as soon as the District's stormwater regulations go into effect, whichever is sooner.

The definition of 'green roof' was modified to allow for the fact that some types of ecoroofs may be constructed without vegetation or soil media.

The definition of "retrofit" was modified to focus on environmental outcomes, *i.e.,* reductions in discharge volumes and pollutant loads and improvements in water quality, rather than implementation of conveyance measures.

The definition of "predevelopment hydrology" was enhanced to clarify that the phrase refers to a "stable, natural hydrologic site condition that protects or restores to the degree relevant for that site, stable hydrology in the receiving water, which will not necessarily be the hydrologic regime of that receiving water prior to any human disturbance in the watershed." This definition is consistent with several seminal publications on the topic including *Urban Stormwater Management in the United States*[103] and references therein, *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act*[104], and *Guidance for Federal Land Management in the Chesapeake Bay Watershed*[105], issued in fulfillment of Part 502 of E.O. 13508.

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103 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

104 EPA, *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act* (2009) http://www.epa.gov/owow_keep/nps/lid/section438/

105 EPA, *Guidance for Federal Land Management in the Chesapeake Bay Watershed*, Chapter 3. Urban

RELATIONSHIP TO NON-POINT SOURCE PROGRAM:

It should be noted that the measures required by the Permit are separate from those projects identified in the District's EPA-approved Non-Point Source Management Plan as being funded wholly or partially by funds pursuant to Section 319(h) of the Clean Water Act. See Section 3 of Permit ("These Permit requirements do not prohibit the use of 319(h) funds for other related activities that go beyond the requirements of this Permit, nor do they prohibit other sources of funding and/or other programs where legal or contractual requirements preclude direct use for stormwater permitting activities.").

ADMINISTRATIVE RECORD:

Copies of the documents that comprise the administrative record for the Permit are available to the public for review at the Martin Luther King, Jr. Public Library, which is located at 901 G Street, N.W. in Washington, D.C. An electronic copy of the proposed and final Permits and proposed and Final Fact Sheets are also available on the EPA Region III website, http://www.epa.gov/reg3wapd/npdes/draft_permits.html. For additional information, please contact Ms. Kaitlyn Bendik, Mail Code 3WP41, NPDES Permits Branch, Office of Permits and Enforcement, EPA Region III, United States Environmental Protection Agency, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029.

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and Suburban, EPA841-R-10-002, (2010) (http://www.epa.gov/owow_keep/NPS/chesbay502/pdf/chesbay_chap03.pdf)

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EXHIBIT 5

Boston, MA – Boston Water and Sewer Commission MS4 Permit

(Permit No. MAS010001)

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AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the federal Clean Water Act, as amended, 33 U.S.C. §§1251 et seq., and the Massachusetts Clean Waters Act, as amended, Mass. Gen. Laws. ch. 21, §§26-53, the

Boston Water and Sewer Commission

is authorized to discharge from all of its new or existing separate storm sewers: **195 identified Separate Storm Sewer Outfalls and associated receiving waters are Listed in Attachment A** to receiving waters named: **Belle Island Inlet, Boston Harbor, Boston Inner Harbor, Brook Farm Brook, Bussey Brook, Canterbury Brook, Chandler's Pond, Charles River, Chelsea River, Cow Island Pond, Dorchester Bay, Fort Point Channel, Goldsmith Brook, Jamaica Pond, Little Mystic Channel, Mill Pond, Millers River, Mother Brook, Muddy River, Mystic River, Neponset River, Old Harbor, Patten's Cove, Reserved Channel, Sprague Pond, Stony Brook, Turtle Pond and unnamed wetlands, brooks and streams.**

in accordance with effluent limitations, monitoring requirements and other conditions set forth herein.

This permit shall become effective 30 days from date of signature.

This permit and the authorization to discharge expire at midnight, five years from the effective date.

This permit consists **of 20** pages and **Attachment A** in Part I including monitoring requirements, etc., and 35 pages in Part II including General Conditions and Definitions.

Signed this 29 day of September, 1999

Director
Office of Ecosystem Protection
Environmental Protection Agency
Region I
Boston, MA

Director, Division of
Watershed Management
Department of Environmental Protection
Commonwealth of Massachusetts
Boston, MA

PART I. MUNICIPAL SEPARATE STORM SEWER SYSTEM

A. DISCHARGES THROUGH THE MUNICIPAL SEPARATE STORM SEWER SYSTEM AUTHORIZED UNDER THIS PERMIT

1. Permit Area. This permit covers all areas within the corporate boundary of the City of Boston or otherwise contributing to new or existing separate storm sewers owned or operated by the Boston Water and Sewer Commission, the "permittee".

2. Authorized Discharges. This permit authorizes all storm water discharges to waters of the United States from all existing or new separate storm sewer outfalls owned or operated by the permittee (existing outfalls are identified in Attachment A). This permit also authorizes the discharge of storm water commingled with flows contributed by wastewater or storm water associated with industrial activity provided such discharges are authorized under separate NPDES permits and are in compliance with applicable Federal, State and Boston Water and Sewer Commission regulations (Regulations Regarding the Use of Sanitary and Combined Sewers and Storm Drains of the Boston Water and Sewer Commission). The permittee shall provide a notification to EPA and MA DEP of all new separate storm sewer outfalls as they are activated and of all existing outfalls which are de-activated. The annual report (Part I.E.) will reflect all of the changes to the number of outfalls throughout the year.

3. Limitations on Coverage. Discharges of non-storm water or storm water associated with industrial activity through outfalls listed at Attachment A are not authorized under this permit except where such discharges are:

   a. authorized by a separate NPDES permit; or

   b. identified by and in compliance with Part I.B.2.g.2 of this permit.

B. STORM WATER POLLUTION PREVENTION & MANAGEMENT PROGRAMS

The permittee is required to develop and implement a storm water pollution prevention and management program designed to reduce, to the maximum extent practicable the discharge of pollutants from the Municipal Separate Storm Sewer System. The permittee may implement Storm Water Management Program (SWMP) elements through participation with other public agencies or private entities in cooperative efforts satisfying the requirements of this permit in lieu of creating duplicate program elements. Either cumulatively, or separately, the permittee's storm water pollution prevention and management programs shall satisfy the requirements of Part I.B.1-7. below for all portions of the Municipal Separate Storm Sewer System (MS4) authorized to discharge under this permit and shall reduce the discharge of pollutants to the maximum extent practicable. The storm water pollution prevention and management program requirements of this Part shall be implemented through the SWMP submitted as part of the permit application and revised as necessary.

1. POLLUTION PREVENTION REQUIREMENTS The permittee shall develop and implement the following pollution prevention measures as they relate to discharges to the separate storm sewer:

a. Development The permittee shall assist and coordinate with the appropriate municipal agencies with jurisdiction over land use to ensure that municipal approval of all new development and significant redevelopment projects within the City of Boston which discharge to the MS4 is conditioned on due consideration of water quality impacts. The permittee shall cooperate with appropriate municipal agencies to ensure that development activities conform to applicable state and local regulations, guidance and policies relative to storm water discharges to separate storm sewers. Such requirements shall limit increases in the discharge of pollutants in storm water as a result of new development, and reduce the discharge of pollutants in storm water as a result of redevelopment.

b. Used Motor Vehicle Fluids The permittee shall coordinate with appropriate municipal agencies or private entities to assist in the implementation of a program to collect used motor vehicle fluids (including, at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal. Such program shall be readily available to all residents of the City of Boston and publicized and promoted at least annually.

c. Household Hazardous Waste (HHW) The permittee shall coordinate with appropriate municipal agencies or private entities to assist in the implementation of a program to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal and promote proper handling and disposal. Such program shall be readily available to all private residents. This program shall be publicized and promoted at least annually.

2. STORM WATER MANAGEMENT PROGRAM REQUIREMENTS: The permittee shall continue to implement the Storm Water Management Program (SWMP) which it described in its May 17, 1993 storm water permit application and updated June 1995 and June 1998 in accordance with Section 402(p)(3)(B) of the Clean Water Act (CWA or "the Act"). This SWMP outlined in the permit application, including all updates, is approvable upon issuance of this permit.

In accordance with Part I.E. Annual Report, no later than **March 1, 2000** the permittee shall describe all the updates which it has conducted and all additional measures it will take to satisfy the requirements of this permit and the goals of the storm water management program. The Controls and activities identified in the SWMP shall clearly identify goals, a description of the controls or activities, and a description of the roles and responsibilities of other entities' areas of applicability on a system, jurisdiction, or specific area basis. The permittee will specifically address its roles and activities as they relate to portions of the SWMP which are not under its direct control (e.g. street sweeping, HHW collection, development, redevelopment). The permit may be modified to designate the agencies that administer these programs as co-permittees or require a separate permit. These entities would then be responsible for applicable permit conditions and requirements. The SWMP, and all approved updates, are hereby incorporated by reference and shall be implemented in a manner consistent with the following requirements:

a. Statutory Requirements: The SWMP shall include controls necessary to reduce the discharge of pollutants from the Municipal Separate Storm Sewer System to the Maximum Extent Practicable (MEP). Controls may consist of a combination of best management practices, control techniques, system design and engineering methods, and such other provisions as the permittee, Director or the State determines appropriate. The various components of the SWMP, taken as a whole (rather than individually), shall be sufficient to meet this standard. The SWMP shall be updated as necessary to ensure conformance with the requirements of CWA § 402(p)(3)(B). The permittee shall select measures or controls to satisfy the following water quality prohibitions:

No discharge of toxics in toxic amounts.

No discharge of pollutants in quantities that would cause a violation of State water quality standards.

No discharge of either a visible oil sheen, foam, or floating solids, in other than trace amounts.

b. Structural Controls: The permittee shall operate and maintain all storm water structural controls which it owns or operates in a manner so as to reduce the discharge of pollutants to the MEP.

c. Areas of New Development and Significant Redevelopment: The permittee shall continue to implement its site plan review process and ensure compliance with its existing regulations. The permittee shall also coordinate with appropriate municipal agencies to assist in the development, implementation, and enforcement of controls to minimize the discharge of pollutants to the separate storm sewer system from areas of new development and significant re-development during and after construction. The permittee shall assist appropriate municipal agencies to ensure that development activities conform to applicable state and local regulations, guidance and policies relative to storm water discharges to separate storm sewers.

d. Roadways: The permittee shall coordinate with appropriate agencies to assist in the implementation of measures to ensure that roadways and highways are operated and maintained in a manner so as to minimize the discharge of pollutants to the separate storm sewer system (including those related to deicing or sanding activities).

e. Flood Control Projects: The permittee shall ensure that any flood management projects within its direct control are completed after consideration of impacts on the water quality of receiving waters. The permittee shall also evaluate the feasibility of retro-fitting existing structural flood control devices it owns or operates to provide additional pollutant removal from storm water.

f. Pesticide, Herbicide, and Fertilizer Application: The permittee shall cooperate with appropriate municipal agencies to evaluate existing measures to reduce the discharge of pollutants related to the application of pesticides, herbicides, and fertilizers applied by municipal or public agency employees or contractors to public right of ways, parks, and other municipal facilities. The permittee shall evaluate the necessity to implement controls to reduce discharge of pollutants related to the application and distribution of pesticides, herbicides, and fertilizers by commercial and wholesale distributors and applicators. The permittee shall require controls, within its authority, as necessary.

g. Illicit Discharges and Improper Disposal: The permittee shall continue to implement its program to detect and remove illicit discharges (or require the discharger to the MS4 to remove or obtain a separate NPDES permit for the discharge) and improper disposal into the separate storm sewer.

1. The permittee shall effectively prohibit non-storm water discharges to the Municipal Separate Storm Sewer System, other than those authorized under this permit or a separate NPDES permit.

2. Unless identified by either the permittee, the Director, or the State as significant sources of pollutants to waters of the United States, the following non-storm water discharges are authorized to enter the MS4. As necessary, the permittee may incorporate appropriate control measures in the SWMP to ensure these discharges are not significant sources of pollutants to waters of the United States.

(a) water line flushing;
(b) landscape irrigation;
(c) diverted stream flows;
(d) rising ground waters;
(e) uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers;

(f) uncontaminated pumped ground water;
(g) discharges from potable water sources;
(h) foundation drains;
(i) uncontaminated air conditioning or compressor condensate;
(j) irrigation water;
(k) uncontaminated springs;
(l) water from crawl space pumps;
(m) footing drains;
(n) lawn watering;
(o) non-commercial car washing;
(p) flows from riparian habitats and wetlands;
(q) swimming pool discharges which have been dechlorinated;
(r) street wash waters;
(s) discharges or flows from emergency fire fighting activities;
(t) fire hydrant flushing; and
(u) building washdown water which does not contain detergents.

3. The permittee shall prevent unpermitted discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall implement a program to identify and limit the infiltration of seepage from sanitary sewers into the MS4.

4. The permittee shall prohibit the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into separate storm sewers. The permittee must demonstrate that the prohibition is publicized at least annually, and that the information is available for non-English speaking residents of the City.

5. The permittee shall require the elimination of illicit connections as expeditiously as possible and the immediate cessation of improper disposal practices upon identification of responsible parties. The permittee shall describe its procedure for identification and elimination of illicit discharges. This information shall be included in the annual report required under Part I.E. below. Where elimination of an illicit connection within sixty (60) days is not possible, the permittee shall establish a schedule for the expeditious removal of the discharge. In the interim, the permittee shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

h. Spill Prevention and Response: The permittee shall cooperate with appropriate federal, state, and municipal agencies in the development and implementation of a program to prevent, contain, and respond to spills that may discharge into or through the MS4. The spill response program may include a combination of spill response actions by the permittee (and/or other public or private entities), and requirements for private entities through the permittee's sewer use regulations. Except as explicitly authorized, materials from spills may not be discharged to Waters of the United States.

i. Industrial & High Risk Runoff: In cooperation with the DEP and EPA, the permittee shall implement a program to identify, monitor, and control pollutants in storm water discharges to the MS4 from municipal landfills; hazardous waste treatment, storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee determines is contributing a substantial pollutant loading to the MS4. The program shall include:

1. priorities and procedures for inspections and establishing and implementing control measures for such discharges;

2. a monitoring (or self-monitoring) program for facilities identified under this section, including the collection of quantitative data on the following constituents:

(a) any pollutants for which the discharger may monitor or which are limited in an existing NPDES permit for an identified facility;

(b) any information on discharges required under 40 CFR 122.21(g)(7)(iii) and (iv);

(c) any pollutant the permittee has a reasonable expectation is discharged in substantial quantity from the facility to the separate storm sewer system.

Data collected by the industrial facility to satisfy the monitoring requirements of an NPDES or State discharge permit may be used to satisfy this requirement. The permittee may require the industrial facility to conduct self-monitoring to satisfy this requirement.

j. Construction Site Runoff: The permittee shall continue to implement its site plan review process and ensure compliance with its existing regulations. The permittee shall also cooperate with appropriate municipal agencies in the development and implementation of a program to reduce the discharge of pollutants from construction sites to the MS4, including:

1. requirements for the use and maintenance of appropriate structural and non-structural best management practices to reduce pollutants discharged to the MS4 during the time construction is underway;

2. procedures for site planning which incorporate considerations for potential short term and long term water quality impacts and measures to minimize these impacts;

3. prioritized inspection of construction sites and enforcement of control measures as required by the permittee;

4. providing assistance to appropriate municipal agencies in the development of education and training measures for construction site operators; and

5. providing assistance to appropriate municipal agencies in the development of a notification to appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff.

k. Public Education: The permittee, in coordination with other appropriate municipal agencies, shall implement a public education program including, but not limited to:

1. A program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4 (e.g. curb inlet stenciling, citizen "streamwatch" groups, "hotlines" for reporting dumping, outreach materials included in billings, advertising on public access/government cable channels, etc.);

2. a program to promote, publicize, and facilitate the proper management and disposal of used oil, vehicle fluids and lubricants, and household hazardous wastes;

3. a program to promote, publicize, and facilitate the proper use, application, and disposal of pesticides, herbicides, and fertilizers;

4. where applicable and feasible, the permittee should publicize those best management practices (including but not limited to the use of reformulated or redesigned products, substitution of less toxic materials, and improvements in housekeeping) developed by municipal agencies or environmental organizations that facilitate better use, application, and/or disposal of materials identified in k.1 - k.3 of this section.

3. DEADLINES FOR PROGRAM COMPLIANCE: Except as provided in PART II, and Part I.B.7. the permittee shall continue to implement its Storm Water Management Program.

4. ROLES AND RESPONSIBILITIES OF PERMITTEE: The Storm Water Management Program shall clearly identify the roles and responsibilities of the permittee and appropriate municipal agencies impacting its efforts to comply with this permit.

5. LEGAL AUTHORITY: The permittee has demonstrated and shall maintain legal authority to control discharges to and from those portions of the MS4 which it owns or operates. This legal authority may be a combination of statute, regulation, permit, contract, or an order to:

a. Control the contribution of pollutants to the MS4 by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

b. Prohibit illicit discharges to the MS4;

c. As necessary, control the discharge of spills and the dumping or disposal of materials other than storm water (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4;

d. Control through interagency or inter-jurisdictional agreements the contribution of pollutants from one portion of the MS4 to another;

e. Require compliance with conditions in regulations, permits, contracts or orders; and

f. Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance with permit conditions.

6. STORM WATER MANAGEMENT PROGRAM RESOURCES The permittee shall provide adequate finances, staff, equipment, and support capabilities to implement its SWMP.

7. STORM WATER MANAGEMENT PROGRAM REVIEW AND MODIFICATION

a. Demonstration Project: Within **180** days of the effective date of the permit, the permittee shall submit a plan to assess the effectiveness of existing non-structural BMPs. This plan shall identify a drainage area or sub-area which has undergone an investigation for illicit connections and is believed to be reasonably free of sanitary sewer influence. The plan shall clearly specify activities to be conducted, responsible parties and method of assessment. The project shall commence within one year of the effective date of the permit and continue for at least one year. Within **90** days of project completion the permittee shall submit a report which identifies measures undertaken and effectiveness of those measures.

b. Program Review: The permittee shall participate in an annual review of its current SWMP in conjunction with preparation of the annual report required under Part I.E. This annual review shall include:

1. A review of the status of program implementation and compliance with program elements and other permit conditions as necessary;

2. An assessment of the effectiveness of controls established by the SWMP;

3. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings;

4. An assessment of any SWMP modifications needed to comply with the CWA §402(p)(3)(B)(iii) requirement to reduce the discharge of pollutants to the maximum extent practicable (MEP).

5. An assessment of staff and funding levels adequate to comply with the permit conditions.

c. Program Modification: The permittee may modify the SWMP in accordance with the following procedures:

1. The approved SWMP shall not be modified by the permittee(s) without the prior approval of the Director, unless in accordance with items c.2. or c.3. below.

2. Modifications adding (but not subtracting or replacing) components, controls, or requirements to the approved SWMP may be made by the permittee at any time upon written notification to the Director.

3. Modifications replacing or eliminating an ineffective or infeasible BMP specifically identified in the SWMP with an alternative BMP may be requested at any time. Unless the Director comments on or denies the request within 60 days from submittal, the permittee shall implement the modification and proposed schedule. Such requests must include the following:

(a) an analysis of why the BMP is ineffective or infeasible (including cost considerations),

(b) expectations on the effectiveness of the replacement BMP and proposed schedule for implementation, and

(c) an analysis of why the replacement of the BMP is expected to achieve the goals of the BMP to be replaced,

(d) in the case of an elimination of the BMP, an analysis of why the elimination is not expected to cause or contribute to a water quality impact.

4. Modification requests and/or notifications must be made in writing and signed in accordance with Part II.D.2.

d. Modifications required by the Permitting Authority: The Director or the State may require the permittee to modify the SWMP as needed to:

1. Address impacts on receiving water quality caused, or contributed to, by discharges from the MS4;

2. Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements; or

3. Include such other conditions deemed necessary by the Director to comply with the goals and requirements of the Clean Water Act.

Modifications required by the Director shall be made in writing and set forth a time schedule for the permittee to develop the modification(s).

C. WET WEATHER MONITORING AND REPORTING REQUIREMENTS

1. Storm Event Discharges. The permittee shall implement a wet-weather monitoring program for the MS4 to provide data necessary to assess the effectiveness and adequacy of control measures implemented under the SWMP; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal pollutants in discharges from all outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation. Improvement in the quality of discharges from the MS4 will be assessed based on the monitoring information required by this section, along with any additional pertinent information. There have been no numeric effluent limits established for this permit. Further monitoring or effluent limits may be established to ensure compliance with the goals of the Clean Water Act, appropriate Water Quality Standards, or applicable technology based requirements.

a. Representative Monitoring: Within **90** days after the effective date of this permit, the permittee shall submit a proposed sampling plan. The permittee shall monitor a minimum of five (5) representative drainage areas to characterize the quality of storm water discharges from the MS4. The proposed sampling plan shall consider monitoring each site three (3) times a year for a period of at least two years. All five sites shall be completed within the five year permit term and may be done partially or consecutively. The permittee shall choose locations representing the different land uses or is representative of drainage areas served by the MS4. The permittee may submit an alternative plan for sampling frequency only subject to the approval of EPA and DEP. At a minimum, the monitoring program shall analyze for the following parameters: pH, Temperature, Dissolved Oxygen, Total Suspended Solids, BOD5, COD, Fecal Coliform, Total Nitrogen, Nitrate/Nitrite, Ammonia (as N), Total Phosphorous, Ortho-Phosphate, Oil and Grease, Total Petroleum Hydrocarbons, Surfactants, Fluoride, Copper, and Zinc. Unless commented on or denied by the Director within **60** days after its submittal, the proposed sampling plan shall be deemed approved. This monitoring program shall commence no later than **180** days from the effective date of the permit unless otherwise specified by EPA and DEP. Subsequent monitoring locations and parameters for the remainder of the permit term shall be determined based upon the results of these sampling locations and other water quality information available to EPA, DEP and the permittee.

b. Receiving Water Quality Monitoring. The permittee shall monitor a minimum of four (4) receiving waters three (3) times a year throughout the permit term to characterize the water quality impacts of storm water discharges from the MS4. Sampling shall be conducted during a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (0.1 inch) storm event. Within **90** days after the effective date of this permit, the permittee shall submit its proposed sampling plan. At a minimum, the monitoring program shall analyze for the following parameters: pH, Temperature, Dissolved Oxygen, Total Suspended Solids, BOD5, COD, Fecal Coliform, Total Nitrogen, Nitrate/Nitrite, Ammonia (as N), Total Phosphorous, Ortho-Phosphate, Oil and Grease, Total Petroleum Hydrocarbons, Surfactants, Fluoride, Copper, and Zinc. Unless commented on or denied by the Director within **60** days after its submittal, the proposed sampling plan shall be deemed approved. This monitoring program shall commence no later than six months after the effective date of the permit.

c. Alternate Representative Monitoring: Monitoring locations may be substituted for just cause during the term of the permit. Requests for alternate monitoring locations by the permittee shall be made to the Director in writing and include the rationale for the requested monitoring station relocation. Unless commented on or denied by the Director, use of an alternate monitoring location may commence sixty (60) days from the date of the request.

2. Storm Event Data: For Part I.C.1.a Data shall be collected to estimate pollutant loadings and event mean concentrations for each parameter sampled. The permittee shall maintain records of the date and duration (hours) of the storm event sampled; rainfall measurements or estimates (inches) of the storm event which generated the sampled runoff; the duration (hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and the total estimated volume (in gallons) of the discharge sampled. If manual sampling is employed, the permittee shall record physical observations of the discharge such as color and smell; and visible water quality impacts such as floatables, oil sheen, or evidence of sedimentation in the vicinity of the outfall (e.g. sandbars).

3. Sample Type, Collection, and Analysis: The following requirements apply to samples collected pursuant to Part I.C.1.a.

a. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one grab sample may be taken.

b. Grab samples shall be used for the analysis of pH, temperature, cyanide, total phenols, residual chlorine, oil & grease, fecal coliform, and fecal streptococcus. For all other parameters, data shall be reported for flow weighted composite samples of the entire event or, at a minimum, the first three hours of discharge.

c. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Composite samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes.

d. Analysis and collection of samples shall be conducted in accordance with the methods specified at 40 CFR Part 136. Where an approved Part 136 method does not exist, any available method may be used.

4. Sampling Waiver. When the permittee is unable to collect samples required by Part I.C.1.a due to adverse climatic conditions, the discharger must submit, in lieu of sampling data, a description of why samples could not be collected, including available documentation of the event. Adverse climatic conditions which may prohibit the collection of samples include weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.) or otherwise make the collection of a sample impracticable (drought, extended frozen conditions, etc.).

5. Sampling Results. The permittee shall record the results of sampling and assessment of the data in a report and submit results with its Annual Report.

6. Wet Weather Screening: The permittee shall develop and implement a program to identify, investigate, and address areas within their jurisdiction that may be contributing excessive levels of pollutants to the MS4 as a result of rainfall or snow melt. Screening shall be conducted at anytime precipitation causes a flow from the storm sewer. At a minimum the wet weather screening program:

a. shall screen all major outfalls at least once during the permit term;

b. shall record the structural integrity of the outfall (if visible); physical observations of the discharge (if visible) such as color and smell; and visible water quality impacts such as floatables, oil sheen, or evidence of sedimentation in the vicinity of the outfall (e.g. sandbars).

c. shall summarize the results of the program in its Annual Report.

d. The permittee may submit an alternate wet weather screening pilot program on a watershed or sub-watershed basis. The pilot project concept must be submitted to EPA and DEP within 90 days of the effective date of the permit. The permittee shall identify reasons it believes that a system wide screening program would not be effective. The pilot project may be conducted in conjunction with Receiving Water Quality Monitoring (C.1.b.), but not Representative Monitoring(C.1.a.)

D. DRY WEATHER DISCHARGES

1. Dry Weather Screening Program: At least once during the permit term, the permittee shall inspect all major outfalls, or nearest upstream location not subject to tidal influence or backflow, during dry weather to identify those outfalls with dry weather flow. Dry weather screening shall be conducted when there has been no greater than 0.10 inches of precipitation in the 72 hours prior to screening. The permittee shall record the structural integrity of the outfall (if visible). If flow is observed, the permittee shall record physical observations such as color, visible sheen, turbidity, floatables, smell, and an estimate of flow. If sewage is suspected, the permittee shall develop a schedule for follow-up activities to eliminate the source as soon as is practicable. The permittee shall summarize the results in its Annual Report

2. Screening Procedures: Screening methodology need not conform to the protocol at 40 CFR §122.26(d)(1)(iv)(D) or sample and collection methods of 40 CFR §136.

3. Follow-up on Dry Weather Screening Results: Follow-up activities shall be prioritized on the basis of:

   a. magnitude and nature of the suspected discharge;

   b. sensitivity of the receiving water; and

   c. other factors the permittee deems appropriate.

4. The permittee shall summarize the results of dry weather screening and submit with its Annual Report.

E. ANNUAL REPORT:

The permittee shall prepare and submit an annual report to be submitted by no later than **March 1, 2000** and annually thereafter. The report shall include the following separate sections, with an overview for the entire MS4:

1. The status of implementing the storm water management program(s);

2. Proposed changes to the storm water management program(s);

3. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (d)(2)(v);

4. A summary of the data, including monitoring or screening data, that is accumulated throughout the reporting year;

5. A revised list of all current separate storm sewer outfalls and their locations, reflecting changes of the previous year.

6. Annual expenditures for the reporting period, with a breakdown of the major elements of the storm water management program, and the budget for the year following each annual report as well as an assessment of adequacy of staffing and equipment;

7. A summary describing the number and nature of enforcement actions, inspections, and public education programs;

8. Identification of water quality improvements or degradation attributable to the permittee;

9. An analysis of the effectiveness and removal efficiencies of structural controls owned or operated by the permittee (such as the off-line particle separator in Fenwood Road); and,

10. An update on the illicit connection program to include the total number of identified connections with an estimate of flow for each, total number of connections found in the reporting period to include how they were found (i.e. citizen complaint, routine inspection), number of connections corrected in the reporting period to include total estimated flow, and the costs of such repairs to include how the repairs were financed (i.e. by the permittee, costs provided to the permittee by the responsible party, repairs effected and financed by the responsible party). As an attachment to the report, the permittee should submit any existing tracking system information.

F. CERTIFICATION AND SIGNATURE OF REPORTS

All reports required by the permit and other information requested by the Director shall be signed and certified in accordance with the General Conditions-Part II of this permit.

G. REPORT SUBMISSION

1. Original signed copies of all notifications and reports required herein, shall be submitted to the Director at the following address:

U.S. Environmental Protection Agency
NPDES PROGRAMS (SPA)
P.O. Box 8127
Boston, MA 02114

2. Signed copies of all notifications and reports shall be submitted to the State at:

Massachusetts Department of Environmental Protection
1 Winter Street
Boston, MA 02108
Attn: Mr. Steve Lipman

and

Massachusetts Department of Environmental Protection
Metro Boston/Northeast Regional Office
205A Lowell Street
Wilmington, MA 01887
Attn: Mr. Sabin Lord

H. RETENTION OF RECORDS

The permittee shall retain all records of all monitoring information, copies of all reports required by this permit and records of all other data required by or used to demonstrate compliance with this permit, until at least three years after coverage under this permit terminates. This period may be modified by alternative provisions of this permit or extended by request of the Director at any time. The permittee shall retain the latest approved version of the SWMP developed in accordance with Part I of this permit until at least three years after coverage under this permit terminates.

I. STATE PERMIT CONDITIONS

1. This Discharge Permit is issued jointly by the U. S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection under Federal and State law, respectively. As such, all the terms and conditions of this permit are hereby incorporated into and constitute a discharge permit issued by the Commissioner of the Massachusetts DEP pursuant to M.G.L. Chap. 21, §43.

2. Each Agency shall have the independent right to enforce the terms and conditions of this Permit. Any modification, suspension or revocation of this Permit shall be effective only with respect to the Agency taking such action, and shall not affect the validity or status of this Permit as issued by the other Agency, unless and until each Agency has concurred in writing with such modification, suspension or revocation. In the event any portion of this Permit is declared, invalid, illegal or otherwise issued in violation of State law such permit shall remain in full force and effect under Federal law as an NPDES Permit issued by the U.S. Environmental Protection Agency. In the event this Permit is declared invalid, illegal or otherwise issued in violation of Federal law, this Permit shall remain in full force and effect under State law as a Permit issued by the Commonwealth of Massachusetts.

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

OUTFALL NUMBER	OUTFALL TYPE	LOCATION	NEIGHBORHOOD	SIZE (INCHES)	TIDEGATES No. OF GATES / NUMBER	RECEIVING WATER
08B066	MAJOR	EASEMENT/VFW PARKWAY	WEST ROXBURY	18		CHARLES RIVER
08B122	MAJOR	EASEMENT/NORTH OF SPRING STREET	WEST ROXBURY	30		CHARLES RIVER
08B126	MINOR	SPRING STREET EXTENDED	WEST ROXBURY	24		CHARLES RIVER
09B049	MAJOR	EASEMENT/RIVERMOOR STREET	WEST ROXBURY	30		COW ISLAND POND/ CHARLES RIVER
10B015	MAJOR	EASEMENT/CHARLES PARK ROAD	WEST ROXBURY	21		COW ISLAND POND/ CHARLES RIVER
11B123	MAJOR	EASEMENT/EAST OF BAKER ST. EXT.	WEST ROXBURY	72		BROOK FARM BROOK
12B010	MINOR	BAKER STREET	WEST ROXBURY	15		BROOK FARM BROOK
12B014	MINOR	BAKER STREET	WEST ROXBURY	12		BROOK FARM BROOK
12B031	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B033	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B124	MAJOR	EASEMENT/LaGRANGE STREET	WEST ROXBURY	120x102		BROOK FARM BROOK
13B002	MINOR	LaGRANGE STREET	WEST ROXBURY	15		UNNAMED STREAM
13B011	MINOR	LaGRANGE STREET	WEST ROXBURY	12		UNNAMED STREAM
06C110	MAJOR	EASEMENT/PLEASANTDALE ST. EXT.	WEST ROXBURY	60		NONE SHOWN
07C006	MAJOR	EASEMENT/VFW PARKWAY/BELLE AVENUE	WEST ROXBURY	126x126		CHARLES RIVER
08C318	MAJOR	WEDGEMERE ROAD	WEST ROXBURY	24		NONE SHOWN
08C319	MINOR	WEDGEMERE ROAD	WEST ROXBURY	24		UNNAMED STREAM
14C009	MAJOR	EASEMENT/WESTGATE ROAD	WEST ROXBURY	36		UNNAMED WETLANDS
21C212	MINOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	30		CHANDLERS POND
22C384	MAJOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	36		CHANDLERS POND
24C174	MINOR	EASEMENT/NEWTON STREET	ALLSTON/BRIGHTON	9x20		CHARLES RIVER
24C031	MAJOR	PARSONS STREET	ALLSTON/BRIGHTON	60X60		CHARLES RIVER
06D057	MINOR	CEDAR CREST CIRCLE	WEST ROXBURY	21		NEPONSET RIVER
06D083	MINOR	MARGARETTA DRIVE	WEST ROXBURY	15		WETLANDS/CHARLES RIVER
06D084	MINOR	EASEMENT/MARGARETTA DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D085	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D086	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D091	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D184	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	18		WETLANDS/CHARLES RIVER
06D187	MAJOR	EASEMENT/GROVE STREET	WEST ROXBURY	36		BROOK GROVE STREET CEMETERY
13D077/078	MAJOR	WEST ROXBURY PARKWAY/VFW PARKWAY	WEST ROXBURY	2-60		BUSSEY BROOK
24D032	MAJOR	NORTH BEACON STREET, ABOUT 800' EAST OF PARSONS STREET	ALLSTON/BRIGHTON	119X130	1 / 24D032-18	CHARLES RIVER
24D150	MAJOR	SOLDIERS FIELD PLACE	ALLSTON/BRIGHTON	36		CHARLES RIVER
25D033	MAJOR	ABOUT 390' NORTH OF INTERSECTION OF SOLDIERS FIELD ROAD & WESTERN AVENUE	ALLSTON/BRIGHTON	36		CHARLES RIVER
01E024	MAJOR	EASEMENT/LAKESIDE	HYDE PARK	15		SPRAGUE POND/NEPONSET RIVER
03E185	MAJOR	NORTON STREET	HYDE PARK	2-18		WETLANDS/NEPONSET RIVER
03E186	MINOR	RIVER STREET	HYDE PARK	24		MILL POND/MOTHER BROOK
03E207	MINOR	RIVER STREET	HYDE PARK			MILL POND/MOTHER BROOK

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

04E064	MINOR	ALVARADO AVE./RIVER STREET BRIDGE	HYDE PARK	12		MILL POND/MOTHER BROOK
04E069	MAJOR	KNIGHT STREET DAM	HYDE PARK	36		MOTHER BROOK
05E180	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E181	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E182	MINOR	DEDHAM STREET	HYDE PARK	21		UNNAMED STREAM/CHARLES RIVER
05E183	MINOR	GEORGETOWN PLACE/DEDHAM PARKWAY	HYDE PARK	12		UNNAMED STREAM
08E031	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	18		TURTLE POND
08E033	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	UNKNOWN		TURTLE POND
08E035	MINOR	WASHINGTON STREET	WEST ROXBURY	15		TURTLE POND
09E229	MINOR	GRANDVIEW STREET	WEST ROXBURY	12		NONE SHOWN
09E243	MAJOR	BLUE LEDGE TR./EASEMENT	WEST ROXBURY	30		UNNAMED STREAM
13E174	MINOR	EASEMENT/VFW PARKWAY	ROSLINDALE	24		BUSSEY BROOK
13E175	MAJOR	EASEMENT/VFW PARKWAY	ROSLINDALE	108X86		BUSSEY BROOK
13E176	MAJOR	EASEMENT/WELD STREET	ROXBURY	15		NONE SHOWN
25E037	MAJOR	EASEMENT/TELFORD STREET EXTENDED	ALLSTON/BRIGHTON	66		CHARLES RIVER
01F031	MAJOR	EASEMENT/MILLSTONE ROAD	HYDE PARK	48x24		NEPONSET RIVER
02F085	MINOR	LAWTON STREET	HYDE PARK	12		NEPONSET RIVER RESERVATION
02F093	MAJOR	EASEMENT/SIERRA ROAD	HYDE PARK	15		NEPONSET RIVER
02F120	MAJOR	EASEMENT/WOLCOTT CT./HYDE PARK AVE. EXT.	HYDE PARK	54		NEPONSET RIVER
04F016	MAJOR	EASEMENT RIVER STREET	HYDE PARK	30		MOTHER BROOK/NEPONSET RIVER
04F118	MINOR	MASON STREET EXT.	HYDE PARK	18		NEPONSET RIVER
04F119	MAJOR	EASEMENT/HYDE PARK AVE./RESERVATION RD.	HYDE PARK	24		NEPONSET RIVER
04F189	MAJOR	RESERVATION ROAD	HYDE PARK	36		MOTHER BROOK/NEPONSET RIVER
04F191	MINOR	FARADAY STREET	HYDE PARK	24		NONE SHOWN/NEPONSET RIVER
04F203	MINOR	GLENWOOD AVE	HYDE PARK	28		NEPONSET RIVER
04F204	MAJOR	TRUMAN HWY./CHITTICK STREET	HYDE PARK	36		NEPONSET RIVER
05F117	MAJOR	EASEMENT/TRUMAN HWY./WILLIAMS AVE.	HYDE PARK	33		NEPONSET RIVER
05F244	MINOR	HYDE PARK AVENUE BRIDGE	HYDE PARK	20		MOTHER BROOK/NEPONSET RIVER
05F245	MINOR	HYDE PARK AVENUE	HYDE PARK	33		MOTHER BROOK/NEPONSET RIVER
05F253	MAJOR	EASEMENT/BUSINESS ST., NEAR BUSINESS TERRACE	HYDE PARK	48x24		MOTHER BROOK/NEPONSET RIVER
05F254	MINOR	DANA AVENUE	HYDE PARK	12		NEPONSET RIVER
05F265	MAJOR	BEHIND L.E. MASON CO.	HYDE PARK	15		MOTHER BROOK/NEPONSET RIVER
06F233	MINOR	MOUNT ASH ROAD	HYDE PARK	UNK		WETLAND - STONY BROOK RESERVATION
12F322	MINOR	EASEMENT/WALTER STREET	ROSLINDALE	18		NONE SHOWN
13F095	MINOR	EASEMENT/BUSSEY STREET	ROSLINDALE	12		BUSSEY BROOK
14F181	MAJOR	CENTER STREET EXTENSION	ROSLINDALE	38X86		GOLDSMITH BROOK
14F185	MINOR	ALLANDALE STREET	ROSLINDALE	12		BUSSEY BROOK
15F288	MAJOR	ARNOLD ARBORETUM/MURRAY CIRCLE	JAMAICA PLAIN	54		GOLDSMITH BROOK
15F307	MAJOR	ARNOLD ARBORETUM, 100' EAST OF ARBORWAY & SAINT JOSEPH STREET	JAMAICA PLAIN	36X36		GOLDSMITH BROOK
17F012	MINOR	FRANCIS PARKMAN DRIVE	JAMAICA PLAIN	15		JAMAICA POND

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

26F038	MAJOR	HARVARD STREET EXT.	ALLSTON/BRIGHTON	36		CHARLES RIVER
05G112	MAJOR	EASEMENT/RR ROW/WATER ST. EXT.	HYDE PARK	30		NEPONSET RIVER
05G115	MINOR	FAIRMOUNT AVENUE BRIDGE (NORTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116	MINOR	FAIRMOUNT AVE, BRIDGE (SOUTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116A	MINOR	WARREN AVENUE	HYDE PARK	24		NEPONSET RIVER
06G108	MAJOR	EASEMENT/WEST OF WOOD AVE. EXT.	HYDE PARK	69		NEPONSET RIVER
06G109	MAJOR	RIVER TERRACE EXT. NEAR ROSA STREET	HYDE PARK	48		NEPONSET RIVER
06G110	MAJOR	EASEMENT/WEST STREET EXT.	HYDE PARK	30		NEPONSET RIVER
06G111	MINOR	EASEMENT/VOSE STREET EXT., TRUMAN HWY.	HYDE PARK	24		NEPONSET RIVER
06G165	MINOR	TRUMAN HIGHWAY/METROPOLITAN AVE	HYDE PARK	10		NEPONSET RIVER
06G166	MAJOR	ABOUT 30 FEET FROM GUARDRAIL NORTHERLY SIDE OF TRUMAN HIGHWAY NEAR MILTON LINE.	HYDE PARK	36x36		NEPONSET RIVER
11G318	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	24		CANTERBURY BROOK
11G319	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	18		CANTERBURY BROOK
11G344	MAJOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	162X78		CANTERBURY BROOK
18G233	MINOR	WILLOW POND ROAD	JAMAICA PLAIN	15		MUDDY RIVER
19G043	MAJOR	HUNTINGTON AVENUE	ROXBURY/MISSION HALL	45x45		MUDDY RIVER
19G194	MINOR	HUNTINGTON AVENUE	ROXBURY/MISSION HILL	24		MUDDY RIVER
19G199	MINOR	JAMAICA WAY	ROXBURY/MISSION HILL	10		MUDDY RIVER
20G161	MAJOR	EASEMENT/BROOKLINE AVENUE	ROXBURY/MISSION HILL	36		MUDDY RIVER
20G163	MINOR	EASEMENT/RIVERWAY	ROXBURY/MISSION HILL	20		MUDDY RIVER
23G132	MAJOR	EASEMENT/MASS TURNPIKE/WEST OF B.U. BRIDGE	ALLSTON/BRIGHTON	60		CHARLES RIVER
24G034	MAJOR	SOLDIER'S FIELD ROAD, SOUTH OF CAMBRIDGE STREET	ALLSTON/BRIGHTON	36	1 / 24G034-1	CHARLES RIVER
24G035	MAJOR	SOLDIERS FIELD ROAD/BABCOCK STREET	ALLSTON/BRIGHTON	90x84		CHARLES RIVER
25G005	MINOR	FROM WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	12		CHARLES RIVER
25G041	MINOR	SOLDIERS FIELD ROAD/NORTH OF WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	24		CHARLES RIVER
06H106	MINOR	OSCEOLA STREET	HYDE PARK	24		NEPONSET RIVER
06H107	MAJOR	EASEMENT/BELNEL ROAD	HYDE PARK	24		NEPONSET RIVER
07H105	MAJOR	EASEMENT/EDGEWATER/SOUTH RIVER STREET	NEPONSET/MATTAPAN	102x72		NEPONSET RIVER
07H285	MAJOR	BLUE HILL AVENUE	NEPONSET/MATTAPAN	106x63		NEPONSET RIVER
07H287	MINOR	RIVER STREET/EDGEWATER DRIVE	NEPONSET/MATTAPAN	12		NEPONSET RIVER
07H346	MINOR	EDGEWATER DRIVE/HOLMFIELD AVENUE	HYDE PARK	18		NEPONSET RIVER
07H347	MINOR	EDGEWATER DRIVE/BURMAH ROAD	NEPONSET/MATTAPAN	21		NEPONSET RIVER
07H348	MINOR	EDGEWATER DRIVE/TOPALIAN STREET	NEPONSET/MATTAPAN	24		NEPONSET RIVER
12H085	MINOR	MORTON STREET	ROSLINDALE	15		CANTERBURY BROOK
	MAJOR	AMERICAN LEGION HIGHWAY	WEST ROXBURY	24		CANTERBURY BROOK
21H047	MINOR	PALACE ROAD EXT.	BOSTON PROPER	24		MUDDY RIVER

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

21H048	MINOR	EASEMENT/FENWAY/EVANS WAY	BOSTON PROPER	15		MUDDY RIVER
21H201	MINOR	PALACE ROAD EXT.	BOSTON PROPER	6		MUDDY RIVER
23H040	MINOR	RALEIGH STREET EXT.	BOSTON PROPER	24		CHARLES RIVER
23H042	MAJOR	DEERFIELD STREET	BOSTON PROPER	116x120		CHARLES RIVER
08I153	MINOR	DUXBURY ROAD	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I154	MINOR	EASEMENT/RIVER STREET/GLADSIDE AVE	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I155	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I156	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I158	MINOR	EASEMENT/RIVER STREET/FREMONT ST.	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I207	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I209	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	12		NEPONSET RIVER
11I577	MAJOR	HARVARD STREET	NEPONSET/MATTAPAN	102x102		CANTERBURY BROOK
08J041	MINOR	RIVER STREET	DORCHESTER	18		NEPONSET RIVER
08J102	MINOR	ADAMS STREET	DORCHESTER	15x15		NEPONSET RIVER
08J103	MAJOR	EASEMENT/CENTRAL AVENUE BRIDGE	DORCHESTER	30		NEPONSET RIVER
08J49/50	MAJOR	DESMOND ROAD	DORCHESTER	2-18&24		NEPONSET RIVER
26J052	MINOR	MONSIGNOR O'BRIEN HIGHWAY	BOSTON PROPER	12		CHARLES RIVER
26J055	MINOR	LEVERETT CIRCLE	BOSTON PROPER	12	1 / NOT MAPPED	CHARLES RIVER
27J001	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	72		MILLERS RIVER
27J044	MAJOR	PRISON POINT BRIDGE	CHARLESTOWN	15		MILLERS RIVER
27J096	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	54		MILLERS RIVER
29J029	MINOR	ALFORD STREET/RYAN PLGD. EXT.	CHARLESTOWN	15		MYSTIC RIVER
29J129	MINOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
29J212	MAJOR	EASEMENT/MEDFORD STREET (ALSO OF017)	CHARLESTOWN	72		MYSTIC RIVER
30J006	MAJOR	EASEMENT/ALFORD STREET	CHARLESTOWN	18		MYSTIC RIVER
30J019	MAJOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
30J030	MAJOR	EASEMENT/ARLINGTON AVENUE	CHARLESTOWN	42	1 / NOT MAPPED	MYSTIC RIVER
08K049	MINOR	BEARSE AVENUE	DORCHESTER	12		NEPONSET RIVER
09K016	MINOR	EASEMENT/BEARSE AVENUE EXT.	DORCHESTER	15		NEPONSET RIVER
09K100	MAJOR	EASEMENT/MELLISH ROAD	DORCHESTER	34X24		NEPONSET RIVER
09K101	MINOR	EASEMENT/HUNTOON STREET EXT.	DORCHESTER	24		NEPONSET RIVER
21K069	MAJOR	EAST BERKELEY STREET	BOSTON PROPER	48	1 / 21K069-1	FORT POINT CHANNEL
26K099	MAJOR	CHELSEA STREET EXT.	CHARLESTOWN	84		CHARLES RIVER

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BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

26K245	MINOR	EASEMENT	CHARLESTOWN	15		CHARLES RIVER
28K018	MAJOR	OLD LANDING WAY EXT.	CHARLESTOWN	42	1 / 28K058	LITTLE MYSTIC CHANNEL
28K061	MAJOR	EASEMENT/MEDFORD STREET	CHARLESTOWN	42	1 / 28K062	LITTLE MYSTIC CHANNEL
28K386	MAJOR	EASEMENT/TERMINAL STREET	CHARLESTOWN	30	1 / 28K385	LITTLE MYSTIC CHANNEL
10L094	MAJOR	EASEMENT/GALLIVAN BOULEVARD	DORCHESTER	74x93		NEPONSET RIVER VIA DAVENPORT BROOK
10L096	MAJOR	HILLTOP AND LENOXDALE STREETS	DORCHESTER	36		NEPONSET RIVER
12L092	MAJOR	PINE NECK CREEK STORM DRAIN TENEAN STREET WEST OF LAWLEY	DORCHESTER	72	2 / 12L294	NEPONSET RIVER
16L097	MAJOR	EASEMENT/OFF SAVIN HILL AVENUE	DORCHESTER	24		PATTEN'S COVE
20L081	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
20L083	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
21L077	MAJOR	CLAFLIN STREET EXT./EAST STREET EXT.	SOUTH BOSTON	24	1 / NOT MAPPED	RESERVED CHANNEL
23L016	MINOR	NORTHERN AVENUE	SOUTH BOSTON	2-15&16		BOSTON INNER HARBOR
23L074	MINOR	SUMMER STREET BRIDGE	SOUTH BOSTON	15		FORT POINT CHANNEL
23L075	MAJOR	CONGRESS STREET BRIDGE	SOUTH BOSTON	54		FORT POINT CHANNEL
23L140	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L145	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L164	MAJOR	CONGRESS STREET BRIDGE	BOSTON PROPER	48	1 / 23L164 IN CHANNEL WALL	FORT POINT CHANNEL
23L195	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
23L196	MAJOR	NEW NORTHERN AVENUE BRIDGE	SOUTH BOSTON	36		FORT POINT CHANNEL
23L202	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
24L057	MINOR	STATE STREET EXT.	BOSTON PROPER	18x18		BOSTON INNER HARBOR
24L233	MAJOR	ROWE'S WHARF/ATLANTIC AVENUE	BOSTON PROPER	42		BOSTON HARBOR
25L058	MAJOR	CHRISTOPHER COLUMBUS PARK - WATERFRONT	BOSTON PROPER	84		BOSTON INNER HARBOR
25L144	MINOR	CLARK STREET	BOSTON PROPER	12		BOSTON INNER HARBOR
26L055	MAJOR	NEAR BATTERY WHARF	BOSTON PROPER	24X24		BOSTON INNER HARBOR
26L070	MAJOR	HANOVER STREET EXT.	BOSTON PROPER	36		BOSTON INNER HARBOR
26L84	MINOR	LEWIS STREET	EAST BOSTON	18		BOSTON INNER HARBOR
27L020	MAJOR	PIER NO. 4 EASEMENT - NAVY YARD	CHARLESTOWN	2-20&24	1 / 27K020-1	BOSTON INNER HARBOR
28L073	MINOR	EASEMENT/4TH STREET - NAVY YARD	CHARLESTOWN	6		LITTLE MYSTIC CHANNEL
28L074/075/076	MAJOR	16TH STREET/4TH AVENUE - NAVY YARD	CHARLESTOWN	3-30		LITTLE MYSTIC CHANNEL
28L077	MINOR	EASEMENT/4TH AVENUE - NAVY YARD	CHARLESTOWN	10		LITTLE MYSTIC CHANNEL
11M093	MAJOR	NEPONSET AVENUE AT NROTHWEST END OF NEPONSET AVENUE BRIDGE	DORCHESTER	48		NEPONSET RIVER
12M091	MAJOR	ERICSSON/WALNUT ST.	NEPONSET/MATTAPAN	36		NEPONSET RIVER
17M033	MAJOR	HARBOR POINT PARK (RELOCATED MT. VERNON ST. DRAIN)	DORCHESTER	72		DORCHESTER BAY
21M005	MAJOR	SUMMER STREET	SOUTH BOSTON	18		RESERVED CHANNEL

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

29M032	MINOR	CONDOR STREET	EAST BOSTON	30		CHELSEA RIVER
29M041	MAJOR	EASEMENT/CONDOR STREET	EAST BOSTON	36x30		CHELSEA RIVER
29M049	MINOR	CONDOR STREET	EAST BOSTON	24		CHELSEA RIVER
29N135	MAJOR	ADDISON STREET	EAST BOSTON	30x30		CHELSEA RIVER
28N156	MINOR	COLERIDGE STREET EXT.	EAST BOSTON	12		BOSTON HARBOR
29O001	MAJOR	BENNINGTON STREET	EAST BOSTON	66	1 / 290062	BOSTON HARBOR NEAR CONSTITUTION BEACH
31O004	MINOR	EASEMENT/WALDEMAR AVENUE	EAST BOSTON	15		CHELSEA RIVER
28P001	MINOR	EASEMENT	EAST BOSTON	12		BOSTON HARBOR NEAR CONSTITUTION BEACH
29P015	MINOR	EASEMENT/BARNES AVENUE	EAST BOSTON	12		BELLE ISLE INLET
29P044	MINOR	SHAWSHEEN STREET	EAST BOSTON	12		BOSTON HARBOR
30P062	MINOR	PALERMO AVENUE EXTENSION	EAST BOSTON	12		WETLANDS
31P084	MINOR	EASEMENT/BENNINGTON STREET	EAST BOSTON	30		BELLE ISLE INLET, REVERE

Major* : 93

Minor : 102

Total: 195

* Major outfall means : An outfall that discharges from a single pipe of 36" or larger in diameter or a non-circular pipe which is associated with drainage area of more than 50 acres; or an outfall that discharges from a single pipe of 12" or larger in diameter serving lands zoned for industrial activity or a non-circular pipe which is associated with drainage area of 2 acres or more.

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

OUTFALL NUMBER	OUTFALL TYPE	LOCATION	NEIGHBORHOOD	SIZE (INCHES)	TIDEGATES No. OF GATES / NUMBER	RECEIVING WATER
08B066	MAJOR	EASEMENT/VFW PARKWAY	WEST ROXBURY	18		CHARLES RIVER
08B122	MAJOR	EASEMENT/NORTH OF SPRING STREET	WEST ROXBURY	30		CHARLES RIVER
08B126	MINOR	SPRING STREET EXTENDED	WEST ROXBURY	24		CHARLES RIVER
09B049	MAJOR	EASEMENT/RIVERMOOR STREET	WEST ROXBURY	30		COW ISLAND POND/ CHARLES RIVER
10B015	MAJOR	EASEMENT/CHARLES PARK ROAD	WEST ROXBURY	21		COW ISLAND POND/ CHARLES RIVER
11B123	MAJOR	EASEMENT/EAST OF BAKER ST. EXT.	WEST ROXBURY	72		BROOK FARM BROOK
12B010	MINOR	BAKER STREET	WEST ROXBURY	15		BROOK FARM BROOK
12B014	MINOR	BAKER STREET	WEST ROXBURY	12		BROOK FARM BROOK
12B031	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B033	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B124	MAJOR	EASEMENT/LaGRANGE STREET	WEST ROXBURY	120x102		BROOK FARM BROOK
13B002	MINOR	LaGRANGE STREET	WEST ROXBURY	15		UNNAMED STREAM
13B011	MINOR	LaGRANGE STREET	WEST ROXBURY	12		UNNAMED STREAM
06C110	MAJOR	EASEMENT/PLEASANTDALE ST. EXT.	WEST ROXBURY	60		NONE SHOWN
07C006	MAJOR	EASEMENT/VFW PARKWAY/BELLE AVENUE	WEST ROXBURY	126x126		CHARLES RIVER
08C318	MAJOR	WEDGEMERE ROAD	WEST ROXBURY	24		NONE SHOWN
08C319	MINOR	WEDGEMERE ROAD	WEST ROXBURY	24		UNNAMED STREAM
14C009	MAJOR	EASEMENT/WESTGATE ROAD	WEST ROXBURY	36		UNNAMED WETLANDS
21C212	MINOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	30		CHANDLERS POND
22C384	MAJOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	36		CHANDLERS POND
24C174	MINOR	EASEMENT/NEWTON STREET	ALLSTON/BRIGHTON	9x20		CHARLES RIVER
24C031	MAJOR	PARSONS STREET	ALLSTON/BRIGHTON	60X60		CHARLES RIVER
06D057	MINOR	CEDAR CREST CIRCLE	WEST ROXBURY	21		NEPONSET RIVER
06D083	MINOR	MARGARETTA DRIVE	WEST ROXBURY	15		WETLANDS/CHARLES RIVER
06D084	MINOR	EASEMENT/MARGARETTA DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D085	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D086	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D091	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D184	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	18		WETLANDS/CHARLES RIVER
06D187	MAJOR	EASEMENT/GROVE STREET	WEST ROXBURY	36		BROOK GROVE STREET CEMETERY
13D077/078	MAJOR	WEST ROXBURY PARKWAY/VFW PARKWAY	WEST ROXBURY	2-60		BUSSEY BROOK
24D032	MAJOR	NORTH BEACON STREET, ABOUT 800' EAST OF PARSONS STREET	ALLSTON/BRIGHTON	119X130	1 / 24D032-18	CHARLES RIVER
24D150	MAJOR	SOLDIERS FIELD PLACE	ALLSTON/BRIGHTON	36		CHARLES RIVER
25D033	MAJOR	ABOUT 390' NORTH OF INTERSECTION OF SOLDIERS FIELD ROAD & WESTERN AVENUE	ALLSTON/BRIGHTON	36		CHARLES RIVER
01E024	MAJOR	EASEMENT/LAKESIDE	HYDE PARK	15		SPRAGUE POND/NEPONSET RIVER
03E185	MAJOR	NORTON STREET	HYDE PARK	2-18		WETLANDS/NEPONSET RIVER
03E186	MINOR	RIVER STREET	HYDE PARK	24		MILL POND/MOTHER BROOK
03E207	MINOR	RIVER STREET	HYDE PARK			MILL POND/MOTHER BROOK

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
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04E064	MINOR	ALVARADO AVE./RIVER STREET BRIDGE	HYDE PARK	12		MILL POND/MOTHER BROOK
04E069	MAJOR	KNIGHT STREET DAM	HYDE PARK	36		MOTHER BROOK
05E180	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E181	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E182	MINOR	DEDHAM STREET	HYDE PARK	21		UNNAMED STREAM/CHARLES RIVER
05E183	MINOR	GEORGETOWN PLACE/DEDHAM PARKWAY	HYDE PARK	12		UNNAMED STREAM
08E031	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	18		TURTLE POND
08E033	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	UNKNOWN		TURTLE POND
08E035	MINOR	WASHINGTON STREET	WEST ROXBURY	15		TURTLE POND
09E229	MINOR	GRANDVIEW STREET	WEST ROXBURY	12		NONE SHOWN
09E243	MAJOR	BLUE LEDGE TR./EASEMENT	WEST ROXBURY	30		UNNAMED STREAM
13E174	MINOR	EASEMENT/VFW PARKWAY	ROSLINDALE	24		BUSSEY BROOK
13E175	MAJOR	EASEMENT/VFW PARKWAY	ROSLINDALE	108X86		BUSSEY BROOK
13E176	MAJOR	EASEMENT/WELD STREET	ROXBURY	15		NONE SHOWN
2SE037	MAJOR	EASEMENT/TELFORD STREET EXTENDED	ALLSTON/BRIGHTON	66		CHARLES RIVER
01F031	MAJOR	EASEMENT/MILLSTONE ROAD	HYDE PARK	48x24		NEPONSET RIVER
02F085	MINOR	LAWTON STREET	HYDE PARK	12		NEPONSET RIVER RESERVATION
02F093	MAJOR	EASEMENT/SIERRA ROAD	HYDE PARK	15		NEPONSET RIVER
02F120	MAJOR	EASEMENT/WOLCOTT CT./HYDE PARK AVE. EXT.	HYDE PARK	54		NEPONSET RIVER
04F016	MAJOR	EASEMENT RIVER STREET	HYDE PARK	30		MOTHER BROOK/NEPONSET RIVER
04F118	MINOR	MASON STREET EXT.	HYDE PARK	18		NEPONSET RIVER
04F119	MAJOR	EASEMENT/HYDE PARK AVE./RESERVATION RD.	HYDE PARK	24		NEPONSET RIVER
04F189	MAJOR	RESERVATION ROAD	HYDE PARK	36		MOTHER BROOK/NEPONSET RIVER
04F191	MINOR	FARADAY STREET	HYDE PARK	24		NONE SHOWN/NEPONSET RIVER
04F203	MINOR	GLENWOOD AVE	HYDE PARK	28		NEPONSET RIVER
04F204	MAJOR	TRUMAN HWY./CHITTICK STREET	HYDE PARK	36		NEPONSET RIVER
05F117	MAJOR	EASEMENT/TRUMAN HWY./WILLIAMS AVE.	HYDE PARK	33		NEPONSET RIVER
05F244	MINOR	HYDE PARK AVENUE BRIDGE	HYDE PARK	20		MOTHER BROOK/NEPONSET RIVER
05F245	MINOR	HYDE PARK AVENUE	HYDE PARK	33		MOTHER BROOK/NEPONSET RIVER
05F253	MAJOR	EASEMENT/BUSINESS ST., NEAR BUSINESS TERRACE	HYDE PARK	48x24		MOTHER BROOK/NEPONSET RIVER
05F254	MINOR	DANA AVENUE	HYDE PARK	12		NEPONSET RIVER
05F265	MAJOR	BEHIND L.E. MASON CO.	HYDE PARK	15		MOTHER BROOK/NEPONSET RIVER
06F233	MINOR	MOUNT ASH ROAD	HYDE PARK	UNK		WETLAND - STONY BROOK RESERVATION
12F322	MINOR	EASEMENT/WALTER STREET	ROSLINDALE	18		NONE SHOWN
13F095	MINOR	EASEMENT/BUSSEY STREET	ROSLINDALE	12		BUSSEY BROOK
14F181	MAJOR	CENTER STREET EXTENSION	ROSLINDALE	38X86		GOLDSMITH BROOK
14F185	MINOR	ALLANDALE STREET	ROSLINDALE	12		BUSSEY BROOK
15F288	MAJOR	ARNOLD ARBORETUM/MURRAY CIRCLE	JAMAICA PLAIN	54		GOLDSMITH BROOK
15F307	MAJOR	ARNOLD ARBORETUM, 100' EAST OF ARBORWAY & SAINT JOSEPH STREET	JAMAICA PLAIN	36X36		GOLDSMITH BROOK
17F012	MINOR	FRANCIS PARKMAN DRIVE	JAMAICA PLAIN	15		JAMAICA POND

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26F038	MAJOR	HARVARD STREET EXT.	ALLSTON/BRIGHTON	36		CHARLES RIVER
05G112	MAJOR	EASEMENT/RR ROW/WATER ST. EXT.	HYDE PARK	30		NEPONSET RIVER
05G115	MINOR	FAIRMOUNT AVENUE BRIDGE (NORTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116	MINOR	FAIRMOUNT AVE, BRIDGE (SOUTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116A	MINOR	WARREN AVENUE	HYDE PARK	24		NEPONSET RIVER
06G108	MAJOR	EASEMENT/WEST OF WOOD AVE. EXT.	HYDE PARK	69		NEPONSET RIVER
06G109	MAJOR	RIVER TERRACE EXT. NEAR ROSA STREET	HYDE PARK	48		NEPONSET RIVER
06G110	MAJOR	EASEMENT/WEST STREET EXT.	HYDE PARK	30		NEPONSET RIVER
06G111	MINOR	EASEMENT/VOSE STREET EXT., TRUMAN HWY.	HYDE PARK	24		NEPONSET RIVER
06G165	MINOR	TRUMAN HIGHWAY/METROPOLITAN AVE	HYDE PARK	10		NEPONSET RIVER
06G166	MAJOR	ABOUT 30 FEET FROM GUARDRAIL NORTHERLY SIDE OF TRUMAN HIGHWAY NEAR MILTON LINE.	HYDE PARK	36x36		NEPONSET RIVER
11G318	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	24		CANTERBURY BROOK
11G319	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	18		CANTERBURY BROOK
11G344	MAJOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	162X78		CANTERBURY BROOK
18G233	MINOR	WILLOW POND ROAD	JAMAICA PLAIN	15		MUDDY RIVER
19G043	MAJOR	HUNTINGTON AVENUE	ROXBURY/MISSION HALL	45x45		MUDDY RIVER
19G194	MINOR	HUNTINGTON AVENUE	ROXBURY/MISSION HILL	24		MUDDY RIVER
19G199	MINOR	JAMAICA WAY	ROXBURY/MISSION HILL	10		MUDDY RIVER
20G161	MAJOR	EASEMENT/BROOKLINE AVENUE	ROXBURY/MISSION HILL	36		MUDDY RIVER
20G163	MINOR	EASEMENT/RIVERWAY	ROXBURY/MISSION HILL	20		MUDDY RIVER
23G132	MAJOR	EASEMENT/MASS TURNPIKE/WEST OF B.U. BRIDGE	ALLSTON/BRIGHTON	60		CHARLES RIVER
24G034	MAJOR	SOLDIER'S FIELD ROAD, SOUTH OF CAMBRIDGE STREET	ALLSTON/BRIGHTON	36	1 / 24G034-1	CHARLES RIVER
24G035	MAJOR	SOLDIERS FIELD ROAD/BABCOCK STREET	ALLSTON/BRIGHTON	90x84		CHARLES RIVER
25G005	MINOR	FROM WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	12		CHARLES RIVER
25G041	MINOR	SOLDIERS FIELD ROAD/NORTH OF WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	24		CHARLES RIVER
06H106	MINOR	OSCEOLA STREET	HYDE PARK	24		NEPONSET RIVER
06H107	MAJOR	EASEMENT/BELNEL ROAD	HYDE PARK	24		NEPONSET RIVER
07H105	MAJOR	EASEMENT/EDGEWATER/SOUTH RIVER STREET	NEPONSET/MATTAPAN	102x72		NEPONSET RIVER
07H285	MAJOR	BLUE HILL AVENUE	NEPONSET/MATTAPAN	106x63		NEPONSET RIVER
07H287	MINOR	RIVER STREET/EDGEWATER DRIVE	NEPONSET/MATTAPAN	12		NEPONSET RIVER
07H346	MINOR	EDGEWATER DRIVE/HOLMFIELD AVENUE	HYDE PARK	18		NEPONSET RIVER
07H347	MINOR	EDGEWATER DRIVE/BURMAH ROAD	NEPONSET/MATTAPAN	21		NEPONSET RIVER
07H348	MINOR	EDGEWATER DRIVE/TOPALIAN STREET	NEPONSET/MATTAPAN	24		NEPONSET RIVER
12H085	MINOR	MORTON STREET	ROSLINDALE	15		CANTERBURY BROOK
	MAJOR	AMERICAN LEGION HIGHWAY	WEST ROXBURY	24		CANTERBURY BROOK
21H047	MINOR	PALACE ROAD EXT.	BOSTON PROPER	24		MUDDY RIVER

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21H048	MINOR	EASEMENT/FENWAY/EVANS WAY	BOSTON PROPER	15		MUDDY RIVER
21H201	MINOR	PALACE ROAD EXT.	BOSTON PROPER	6		MUDDY RIVER
23H040	MINOR	RALEIGH STREET EXT.	BOSTON PROPER	24		CHARLES RIVER
23H042	MAJOR	DEERFIELD STREET	BOSTON PROPER	116x120		CHARLES RIVER
08I153	MINOR	DUXBURY ROAD	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I154	MINOR	EASEMENT/RIVER STREET/GLADSIDE AVE	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I155	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I156	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I158	MINOR	EASEMENT/RIVER STREET/FREMONT ST.	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I207	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I209	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	12		NEPONSET RIVER
11I577	MAJOR	HARVARD STREET	NEPONSET/MATTAPAN	102x102		CANTERBURY BROOK
08J041	MINOR	RIVER STREET	DORCHESTER	18		NEPONSET RIVER
08J102	MINOR	ADAMS STREET	DORCHESTER	15x15		NEPONSET RIVER
08J103	MAJOR	EASEMENT/CENTRAL AVENUE BRIDGE	DORCHESTER	30		NEPONSET RIVER
08J49/50	MAJOR	DESMOND ROAD	DORCHESTER	2-18&24		NEPONSET RIVER
26J052	MINOR	MONSIGNOR O'BRIEN HIGHWAY	BOSTON PROPER	12		CHARLES RIVER
26J055	MINOR	LEVERETT CIRCLE	BOSTON PROPER	12	1 / NOT MAPPED	CHARLES RIVER
27J001	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	72		MILLERS RIVER
27J044	MAJOR	PRISON POINT BRIDGE	CHARLESTOWN	15		MILLERS RIVER
27J096	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	54		MILLERS RIVER
29J029	MINOR	ALFORD STREET/RYAN PLGD. EXT.	CHARLESTOWN	15		MYSTIC RIVER
29J129	MINOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
29J212	MAJOR	EASEMENT/MEDFORD STREET (ALSO OF017)	CHARLESTOWN	72		MYSTIC RIVER
30J006	MAJOR	EASEMENT/ALFORD STREET	CHARLESTOWN	18		MYSTIC RIVER
30J019	MAJOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
30J030	MAJOR	EASEMENT/ARLINGTON AVENUE	CHARLESTOWN	42	1 / NOT MAPPED	MYSTIC RIVER
08K049	MINOR	BEARSE AVENUE	DORCHESTER	12		NEPONSET RIVER
09K016	MINOR	EASEMENT/BEARSE AVENUE EXT.	DORCHESTER	15		NEPONSET RIVER
09K100	MAJOR	EASEMENT/MELLISH ROAD	DORCHESTER	34X24		NEPONSET RIVER
09K101	MINOR	EASEMENT/HUNTOON STREET EXT.	DORCHESTER	24		NEPONSET RIVER
21K069	MAJOR	EAST BERKELEY STREET	BOSTON PROPER	48	1 / 21K069-1	FORT POINT CHANNEL
26K099	MAJOR	CHELSEA STREET EXT.	CHARLESTOWN	84		CHARLES RIVER

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26K245	MINOR	EASEMENT	CHARLESTOWN	15		CHARLES RIVER
28K018	MAJOR	OLD LANDING WAY EXT.	CHARLESTOWN	42	1 / 28K058	LITTLE MYSTIC CHANNEL
28K061	MAJOR	EASEMENT/MEDFORD STREET	CHARLESTOWN	42	1 / 28K062	LITTLE MYSTIC CHANNEL
28K386	MAJOR	EASEMENT/TERMINAL STREET	CHARLESTOWN	30	1 / 28K385	LITTLE MYSTIC CHANNEL
10L094	MAJOR	EASEMENT/GALLIVAN BOULEVARD	DORCHESTER	74x93		NEPONSET RIVER VIA DAVENPORT BROOK
10L096	MAJOR	HILLTOP AND LENOXDALE STREETS	DORCHESTER	36		NEPONSET RIVER
12L092	MAJOR	PINE NECK CREEK STORM DRAIN TENEAN STREET WEST OF LAWLEY	DORCHESTER	72	2 / 12L294	NEPONSET RIVER
16L097	MAJOR	EASEMENT/OFF SAVIN HILL AVENUE	DORCHESTER	24		PATTEN'S COVE
20L081	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
20L083	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
21L077	MAJOR	CLAFLIN STREET EXT./EAST STREET EXT.	SOUTH BOSTON	24	1 / NOT MAPPED	RESERVED CHANNEL
23L016	MINOR	NORTHERN AVENUE	SOUTH BOSTON	2-15&16		BOSTON INNER HARBOR
23L074	MINOR	SUMMER STREET BRIDGE	SOUTH BOSTON	15		FORT POINT CHANNEL
23L075	MAJOR	CONGRESS STREET BRIDGE	SOUTH BOSTON	54		FORT POINT CHANNEL
23L140	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L145	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L164	MAJOR	CONGRESS STREET BRIDGE	BOSTON PROPER	48	1 / 23L164 IN CHANNEL WALL	FORT POINT CHANNEL
23L195	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
23L196	MAJOR	NEW NORTHERN AVENUE BRIDGE	SOUTH BOSTON	36		FORT POINT CHANNEL
23L202	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
24L057	MINOR	STATE STREET EXT.	BOSTON PROPER	18x18		BOSTON INNER HARBOR
24L233	MAJOR	ROWE'S WHARF/ATLANTIC AVENUE	BOSTON PROPER	42		BOSTON HARBOR
25L058	MAJOR	CHRISTOPHER COLUMBUS PARK - WATERFRONT	BOSTON PROPER	84		BOSTON INNER HARBOR
25L144	MINOR	CLARK STREET	BOSTON PROPER	12		BOSTON INNER HARBOR
26L055	MAJOR	NEAR BATTERY WHARF	BOSTON PROPER	24X24		BOSTON INNER HARBOR
26L070	MAJOR	HANOVER STREET EXT.	BOSTON PROPER	36		BOSTON INNER HARBOR
26L84	MINOR	LEWIS STREET	EAST BOSTON	18		BOSTON INNER HARBOR
27L020	MAJOR	PIER NO. 4 EASEMENT - NAVY YARD	CHARLESTOWN	2-20&24	1 / 27K020-1	BOSTON INNER HARBOR
28L073	MINOR	EASEMENT/4TH STREET - NAVY YARD	CHARLESTOWN	6		LITTLE MYSTIC CHANNEL
28L074/075/076	MAJOR	16TH STREET/4TH AVENUE - NAVY YARD	CHARLESTOWN	3-30		LITTLE MYSTIC CHANNEL
28L077	MINOR	EASEMENT/4TH AVENUE - NAVY YARD	CHARLESTOWN	10		LITTLE MYSTIC CHANNEL
11M093	MAJOR	NEPONSET AVENUE AT NROTHWEST END OF NEPONSET AVENUE BRIDGE	DORCHESTER	48		NEPONSET RIVER
12M091	MAJOR	ERICSSON/WALNUT ST.	NEPONSET/MATTAPAN	36		NEPONSET RIVER
17M033	MAJOR	HARBOR POINT PARK (RELOCATED MT. VERNON ST. DRAIN)	DORCHESTER	72		DORCHESTER BAY
21M005	MAJOR	SUMMER STREET	SOUTH BOSTON	18		RESERVED CHANNEL

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29M032	MINOR	CONDOR STREET	EAST BOSTON	30		CHELSEA RIVER
29M041	MAJOR	EASEMENT/CONDOR STREET	EAST BOSTON	36x30		CHELSEA RIVER
29M049	MINOR	CONDOR STREET	EAST BOSTON	24		CHELSEA RIVER
29N135	MAJOR	ADDISON STREET	EAST BOSTON	30x30		CHELSEA RIVER
28N156	MINOR	COLERIDGE STREET EXT.	EAST BOSTON	12		BOSTON HARBOR
29O001	MAJOR	BENNINGTON STREET	EAST BOSTON	66	1 / 29O062	BOSTON HARBOR NEAR CONSTITUTION BEACH
31O004	MINOR	EASEMENT/WALDEMAR AVENUE	EAST BOSTON	15		CHELSEA RIVER
28P001	MINOR	EASEMENT	EAST BOSTON	12		BOSTON HARBOR NEAR CONSTITUTION BEACH
29P015	MINOR	EASEMENT/BARNES AVENUE	EAST BOSTON	12		BELLE ISLE INLET
29P044	MINOR	SHAWSHEEN STREET	EAST BOSTON	12		BOSTON HARBOR
30P062	MINOR	PALERMO AVENUE EXTENSION	EAST BOSTON	12		WETLANDS
31P084	MINOR	EASEMENT/BENNINGTON STREET	EAST BOSTON	30		BELLE ISLE INLET, REVERE

Major* : 93

Minor : 102

Total: 195

* Major outfall means : An outfall that discharges from a single pipe of 36" or larger in diameter or a non-circular pipe which is associated with drainage area of more than 50 acres; or an outfall that discharges from a single pipe of 12" or larger in diameter serving lands zoned for industrial activity or a non-circular pipe which is associated with drainage area of 2 acres or more.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
JOHN F. KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203

FACT SHEET

DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT TO DISCHARGE TO WATERS OF THE UNITED STATES.

NPDES PERMIT NO.: MAS010001

NAME AND ADDRESS OF APPLICANT:

Boston Water and Sewer Commission
425 Summer Street
Boston, Massachusetts 02210

NAME AND ADDRESS OF FACILITIES WHERE DISCHARGES OCCUR:

195 Storm water Outfalls listed in Permit Attachment A

RECEIVING WATERS:

Belle Isle Inlet, Boston Harbor, Boston Inner Harbor, Brook Farm Brook, Bussey Brook, Canterbury Brook, Chandler Pond, Charles River, Chelsea River, Dorchester Bay, Fort Point Channel, Goldsmith Brook, Jamaica Pond, Little Mystic Channel, Mill Pond, Millers River, Mother Brook, Muddy River, Mystic River, Neponset River, Old Harbor, Patten's Cove, Reserved Channel, Sprague Pond, Stony Brook, Turtle Pond, and unnamed wetlands, brooks and streams .

CLASSIFICATION: **Class SB and B**

I. Proposed Action, Type of Facility and Discharge Location.

The Boston Water and Sewer Commission(BWSC), the permittee, is empowered to promulgate rules and regulations regarding the use of its common sewers, including its sanitary sewers, combined sewers and storm drains. BWSC applied for its Municipal Separate Storm Sewer System(MS4) permit, which will discharge storm water from 195 identified separate storm sewer outfalls to receiving waters listed in Attachment A.

1. Discharge Characteristics

At the time of this draft, BWSC operates 195 identified separate storm sewer outfalls. Locations, size, and receiving waters for these outfalls are identified in Attachment A. Storm water discharge sampling results from five representative outfalls are shown on Table 3-21 of the permit application (Part II) dated May 17, 1993 and are included as Attachment B. A discussion of the results of sampling can be found in Part II Chapter 3 of the application.

2. Limitations and Conditions.

Permit conditions and all other requirements described herein may be found in Part I of the draft permit. No numeric effluent limitations have been established for this draft permit.

3. Permit Basis and Explanation of Permit Conditions.

As authorized by Section 402(p) of the Act, this permit is being proposed on a system-wide basis. This permit covers all areas under the jurisdiction of BWSC or otherwise contributing to discharges from municipal separate storm sewers owned or operated by the permittee.

a. Statutory basis for permit conditions. The conditions established by this permit are based on Section §402(p)(3)(B) of the Act which mandates that a permit for discharges from MS4s must: effectively prohibit the discharge of non-storm water to the MS4 and require controls to reduce pollutants in discharges from the MS4 to the maximum extent practicable including best management practices, control techniques, and system design and engineering methods, and such other provisions determined to be appropriate. MS4s are required to achieve compliance with Water Quality Standards. Section 301(b)(1)(C) of the Act, requires that NPDES permits include limitations, including those necessary to meet water quality standards. The intent of the permit conditions is to meet the statutory mandate of the Act.

EPA has determined that under the provisions of 40 CFR 122.44(k) the permit will include Best Management Practices (BMPs). A comprehensive Storm Water Management Program (SWMP) includes BMPs to demonstrate compliance with the maximum extent practicable standard. Section 402(p)(3)(B)(iii) of the Act clearly includes structural controls as a component of the maximum extent practicable requirement as necessary to achieve compliance with Water Quality Standards.

EPA encourages the permittee to explore opportunities for pollution prevention measures, while reserving the more costly structural controls for higher priority watersheds, or where pollution prevention measures prove unfeasible or ineffective in achieving water quality goals and standards.

b. Regulatory basis for permit conditions. As a result of the statutory requirements of the Act the EPA promulgated the MS4 Permit application regulations, 40 CFR 122.26(d). These regulations describe in detail the permit application requirements for operators of MS4s. The information in the application (Parts 1 and 2) and supplemental information provided in June 1995 and June 1998 was used to develop the draft permit conditions.

4. Discharges Authorized By This Permit.

a. Storm water. This permit authorizes all existing or new storm water point source discharges to waters of the United States from the MS4.

b. Non-storm water. This permit authorizes the discharge of storm water commingled with flows contributed by wastewater, or Storm Water Associated with Industrial Activity, provided such discharges are authorized by separate NPDES permits and in compliance with the permittee's regulations regarding the use of storm drains. Nothing in this draft permit conveys a right to discharge to the permittee's system without the permittee's authorization. In addition, certain types of non-storm waters identified in the draft permit at Part I.B.2.g. are authorized if appropriately addressed in the permittee's Storm Water Management Program.

The following demonstrates the difference between the Act's statutory requirements for discharges from municipal storm sewers and industrial sites:

i. Section 402(p)(3)(B) of the Act requires an effective prohibition on non-storm water discharges to a MS4 and controls to reduce the discharge of pollutants from the MS4 to the Maximum Extent Practicable (MEP).

ii. Section 402(p)(3)(A) of the Act requires compliance with treatment technology (BAT/BCT) and Section 301 water quality requirements on discharges of Storm Water Associated with Industrial Activity.

The Act requires Storm Water Associated with Industrial Activity discharging to the MS4 to be covered by a separate NPDES permit. However, the permittee is responsible for the quality of the ultimate discharge, and has a vested interest in locating uncontrolled and unpermitted discharges to the system.

c. Spills. This permit does not authorize discharges of material resulting from a spill. If discharges from a spill are unavoidable to prevent imminent threat to human life, personal injury, or severe property damage, the permittee has the responsibility to take (or insure the party responsible for the spill takes) reasonable and prudent measures to minimize the impact of discharges on human health and the environment.

5. Receiving Stream Segments and Discharge Locations.

The permittee discharges to the receiving waters listed in Attachment A, which are classified according to the Massachusetts Surface Water Quality Standards as Class B, B_{CSO}, SB, and SB_{CSO} water bodies. Despite variance conditions and CSO designation, storm water discharges shall achieve compliance with Class B and SB standards. Class B and SB waters shall be of such quality that they are suitable for the designated uses of protection and propagation of fish, other aquatic life and wildlife; and for primary and secondary contact recreation. Notwithstanding specific conditions of this permit, the discharges must not lower the quality of any classified water body below such classification, or lower the existing quality of any water body if the existing quality is higher than the classification, except in accordance with Massachusetts' Antidegradation Statutes and Regulations.

6. SWMP.

The following prohibitions apply to discharges from MS4s and were considered in review of the current management programs which the permittee is operating. In implementing the SWMP, the permittee is required to select measures or activities intended to achieve the following prohibitions.

No discharge of toxics in toxic amounts. The discharge of toxics in toxic amounts is prohibited (Section 101(a)(3) of the Act).

No discharge of pollutants in quantities that would cause a violation of State water quality standards. Section 301(b)(1)(C) of the Act and 40 CFR 122.44(d) require that NPDES permits include "...any more stringent limitations, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to State law or regulations..." Implementation of the SWMP is reasonably expected to provide for protection of State water quality standards.

No discharge of non-storm water from the municipal separate storm sewer system, except in accordance with Part II.B.2. Permits issued to MS4s are specifically required by Section 402(p)(3)(B) of the Act to "...include a requirement to effectively prohibit non-storm water discharges into the storm sewers..." The regulations (40 CFR 122.26(d)(2)(iv)(B)(1)) allow the permittee to accept certain non-storm water discharges where they have not been identified as significant sources of pollutants. Any discharge allowed by the permittee and authorized by a separate NPDES permit is not subject to the prohibition on non-storm water discharges.

No numeric effluent limitations are proposed in the draft permit. In accordance with 40 CFR §122.44(k), the EPA has required a series of Best Management Practices, in the form of a comprehensive SWMP, in lieu of numeric limitations.

7. Storm Water Management Program.

BWSC provided updates to its SWMP in June 1995 and June 1998. The current SWMP addresses all required elements. Some of the elements of the SWMP are wholly or in part the responsibility of the City of Boston rather than BWSC. The permit requires the permittee to cooperate with appropriate municipal agencies to assure that the goals of the SWMP are achieved by building upon existing programs and procedures which address activities impacting storm water discharges to the MS4.

EPA has requested permit application information from the City of Boston. This information will be used to develop permit conditions for the City to implement the SWMP measures which are under its control. This will be effected through a permit modification identifying the City as a co-permittee and specifying its responsibilities or through the issuance of a separate permit to the City.

Table A identifies the required elements of the SWMP, the regulatory cite, and the relevant draft permit condition.

Table A - Storm Water Management Program Elements

Required Program Element	Permit Parts	Regulatory References (40 CFR 122.26...)
Structural Controls	I.B.2.b	(d)(2)(iv)(A)(1)
Areas of new development & significant redevelopment	I.B.2.c	(d)(2)(iv)(A)(2)
Roadways	I.B.2.d	(d)(2)(iv)(A)(3)
Flood Control Projects	I.B.2.e	(d)(2)(iv)(A)(4)
Pesticides, Herbicides, & Fertilizers Application	I.B.2.f	(d)(2)(iv)(A)(6)
Illicit Discharges and Improper Disposal	I.B.2.g	(d)(2)(iv)(B)(1)-(3), (iv)(B)(7)
Spill Prevention and Response	I.B.2.h	(d)(2)(iv)(B)(4)
Industrial and High Risk Runoff	I.B.2.i	(d)(2)(iv)(C), (iv)(A)(5)
Construction Site Runoff	I.B.2.j	(d)(2)(iv)(D)
Public Education	I.B.2.k	(d)(2)(iv)(A)(6), (iv)(B)(5), (iv)(B)(6)
Monitoring Program	I.C	(d)(2)(iv)(B)(2), (iii), (iv)(A), (iv)(C)(2)

Attachment C provides a discussion of the permit condition and the permittee's existing SWMP.

8. Legal Authority. BWSC has demonstrated its authority to promulgate regulations regarding the use of its common sewers, including its sanitary sewers, combined sewers and storm drains. Regulations Governing the Use of Sanitary and Combined Sewers and Storm Drains of the Boston Water and Sewer Commission were adopted January 15, 1998 and effective February 27, 1998.

9. Resources. Part I.B.6 of the permit requires the permittee to provide adequate support capabilities to implement its activities under the SWMP. Compliance with this requirement will be demonstrated by the permittee's ability to fully implement the SWMP, monitoring programs, and other permit requirements. The permit does not require specific funding or staffing levels, thus providing the permittee with the ability, and incentive, to adopt the most efficient and cost effective methods to comply with the permit requirements. The draft permit also requires an Annual Report (Part I.E.) which includes an evaluation of resources to implement the plan.

10. Monitoring and Reporting.

a. Monitoring. The BWSC sampled five locations which were selected to provide representative data on the quality and quantity of discharges from the MS4 as a whole. Parameters sampled included conventional, non-conventional, organic toxics, and other toxic pollutants. The EPA reviewed this information during the permitting process. Monitoring data is intended to be used by the BWSC to assist in its determination of appropriate storm water management practices. EPA used the data to identify the minimum parameters for sampling under Part I.C of the permit.

The BWSC is required (40 CFR §122.26(d)((2)(iii)(C) and (D)) to monitor the MS4 to provide data necessary to assess the effectiveness and adequacy of SWMP control measures; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal pollutants in discharges from major outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation. The BWSC is responsible for conducting any additional monitoring necessary to accurately characterize the quality and quantity of pollutants discharged from the MS4.

EPA will make future permitting decisions based on the monitoring data collected during the permit term and available water quality information. Where the required permit term monitoring proves insufficient to show pollutant reductions, the EPA may require more stringent Best Management Practices, or where necessary to protect water quality, establish numeric effluent limitations.

1. Representative monitoring: The monitoring of the discharge of representative outfalls during actual storm events will provide information on the quality of runoff from the MS4, a basis for estimating annual pollutant loadings, and a mechanism to evaluate reductions in pollutants discharged from the MS4. Results from the monitoring program will be submitted annually with the annual report.

2. Requirements: The BWSC shall monitor representative discharges to characterize the quality of storm water discharges from the MS4. Within **90** days after the effective date of this permit, the BWSC will submit its proposed sampling plan. The BWSC shall choose five locations representing the different land uses or drainage areas representative of the system, with a focus on what it considers priority areas, such as an outfall in the vicinity of a public beach or a shellfish bed. This submittal shall also include any related monitoring which the BWSC has done since its MS4 permit application was submitted. Unless commented on or denied by the Director within **60** days after its submittal, the proposed sampling plan shall be deemed approved.

3. Parameters: The EPA established minimum permit parameter monitoring requirements based on the information available regarding storm water discharges and potential impacts of these discharges. The basic parameter list allows satisfaction of the regulatory requirement [40 CFR §122.26(d)(2)(iii)] to provide estimates of pollutant loadings for each major outfall.

4. Frequency: The frequency of annual monitoring is based on monitoring at least one representative storm event three times a year. The plan should consider sampling events in the spring, summer, and fall (excluding January to March). Monitoring frequency is based on permit year, not a calendar year. The first complete calendar year monitoring could be less than the stated frequency.

5. Receiving Water Quality Monitoring: The draft permit is conditioned to include four sampling stations to assess the impact of storm water discharges from the MS4 to receiving waters. The permittee shall submit a plan to sample four locations three times a year for the permit term within 90 days of the effective date of the permit. The minimum parameters for analysis are consistent with the representative monitoring requirements.

b. Screening. The draft permit requires two screening programs. Part I.C.6 requires the permittee to develop a Wet Weather Screening Program. This screening shall record physical observations of wet weather flows from all major outfalls at least once during the permit term. The program will identify discharges which may be contributing to water quality impairments short of analytical monitoring. Part I.D. requires a dry weather screening program.

c. Reporting. The permittee is required (40 CFR §122.42(c)(1)) to contribute to the preparation of an annual system-wide report including the status of implementing the SWMP; proposed changes to the SWMP; revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application; a summary of the data, including monitoring data, that is accumulated throughout the reporting year; annual expenditures and the budget for the year following each annual report; a summary describing the number and nature of enforcement actions, inspections, and public education programs; and identification of water quality improvements or degradation. Part I.E. of the draft permit requires the permittee to do annual evaluations on the effectiveness of the SWMP, and institute or propose modifications necessary to meet the overall permit standard of reducing the discharge of pollutants to the maximum extent practicable. In order to allow the orderly collection of budgetary and monitoring data it was determined to establish the annual report due date relative to the permittee's annual fiscal year. BWSC's fiscal year ends on **December 31** and the annual report is due on **March 1** each year commencing March 1, 1999.

11. Permit Modifications.

a. Reopener Clause. The EPA may reopen and require modifications to the permit (including the SWMP) based on the following factors: changes in the State's Water Quality Management Plan and State or Federal requirements; adding co-permittee(s); SWMP changes impacting compliance with permit requirements; other modifications deemed necessary by the EPA to adhere to the requirements of the Clean Water Act. Co-permittees may be incorporated into this permit or separate permits may be required as necessary to achieve the goals of the SWMP. Implementation of the SWMP is expected to result in the protection of water quality. The draft permit contains a reopener clause should new information indicate that the discharges from the MS4 are causing, or are significantly contributing to, a violation of the State's water quality standards.

b. SWMP Changes. The SWMP is intended to be a tool to achieve the maximum extent practicable and water quality standards. Therefore, minor changes and adjustments to the various SWMP elements are expected and encouraged where necessary. Changes may be necessary to more successfully adhere to the goals of the permit. Part I.B.7.c of the draft permit describes the allowable procedure for the permittee to make changes to the SWMP. Any changes requested by a permittee shall be reviewed by the EPA and DEP. The EPA and DEP have 60 days to respond to the permittee and inform the permittee if the suggested changes will impact or change the SWMP's compliance with a permit requirement.

c. Additions. The EPA intends to allow the permittee to annex lands, activate new outfalls, deactivate existing outfalls, and accept the transfer of operational authority over portions of the MS4 without mandating a permit modification. Implementation of appropriate SWMP elements for these additions (annexed land or transferred authority) is required. Upon notification of the additions in the Annual Report, the EPA shall review the information to determine if a modification to the permit is necessary based on changed circumstances.

The remaining conditions of the permit are based on the NPDES regulations, 40 CFR Parts 122 though 125, and consist primarily of management requirements common to all permits.

II. State Certification Requirements.

EPA may not issue a permit unless the State Water Pollution Control Agency with jurisdiction over the receiving waters certifies that the effluent limitations contained in the permit are stringent enough to assure that the discharge will not cause the receiving water to violate State Water Quality Standards. The staff of the Massachusetts Department of Environmental Protection has reviewed the draft permit and advised EPA that the limitations are adequate to protect water quality. EPA has requested permit certification by the State and expects that the draft permit will be certified.

III. Comment Period, Hearing Requests and Procedures for Final Decisions.

All persons, including applicants, who believe any condition of the draft permit is inappropriate must raise all issues and submit all available arguments and all supporting material for their arguments in full by the close of the public comment period, to the U.S. EPA, Planning and Administration (SPA), P.O. Box 8127, Boston, MA 02114. Any person, prior to such date, may submit a request in writing for a public hearing to consider the draft permit to EPA and the State Agency. Such requests shall state the nature of the issues proposed to be raised in the hearing. A public hearing may be held after at least thirty days public notice whenever the Regional Administrator finds that response to this notice indicates significant public interest. In reaching a final decision on the draft permit the Regional Administrator will respond to all significant comments and make those responses available to the public at EPA's Boston Office.

Following the close of the comment period, and after a public hearing, if such hearing is held, the Regional Administrator will issue a final permit decision and forward a copy of the final decision to the applicant and to each person who has submitted written comments or requested notice. Within 30 days following the notice of the final permit decision any interested person any submit a request for a formal hearing to reconsider or contest the final decision. Requests for formal hearings must satisfy the requirements of 40 CFR §124.74, 48 Fed. Reg. 14279-14280 (April 1, 1983).

IV. EPA Contact

Additional information concerning the draft permit may be obtained between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday, excluding holidays from:

Jay Brolin
U.S. Environmental Protection Agency
John F. Kennedy Federal Building
Office of Ecosystem Protection (CMA)
Boston, MA 02203-0001
Telephone: (617) 565-9453 Fax: (617) 565-4940

September 2, 1998
Date

Linda M. Murphy, Director
Office of Ecosystem Protection
U.S. Environmental Protection Agency

Attachment C

Structural Controls: The permittee shall operate the separate storm sewer system and any storm water structural controls in a manner to reduce the discharge of pollutants to the Maximum Extent Practicable. The permittee's existing SWMP includes operation and maintenance procedures to include an inspection schedule of storm water structural controls adequate to satisfy the permit condition.

Areas of New Development and Significant Redevelopment: The permittee has no authority over land use issues. The draft permit is conditioned to require the permittee to coordinate with the appropriate municipal agencies as it relates to discharges to the MS4. The permittee has its own site plan review process relating to new or modified connections for water, sewer, and drains and has the authority to require controls on discharges to the storm drain system during and after construction.

Roadways: The permittee has no authority to ensure that public streets, roads, and highways are operated and maintained in a manner to minimize discharge of pollutants, including those pollutants related to deicing or sanding activities. The draft permit is conditioned to require the permittee to coordinate with appropriate municipal agencies as it relates to discharge to the MS4.

Pesticide, Herbicide, and Fertilizer Application: The permittee shall coordinate with appropriate municipal agencies to evaluate existing measures to reduce the discharge of pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied to public property.

Non-Storm Water discharges: Non-storm water discharges shall be effectively prohibited. However, the permittee may allow certain non-storm water discharges as listed in 122.26(d)(2)(iv)(B)(1) and Part I.B.2 of the draft permit. The permittee has identified allowable non-storm water discharges in its regulations.

The permittee shall implement controls to prevent discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall also control the infiltration of seepage from sanitary sewers into the MS4. This is presently accomplished through the permittee's illicit connection program and it's Inflow/Infiltration program.

The discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into the MS4 is prohibited in accordance with the permittee's regulations. The permittee shall coordinate with appropriate

regulations. The permittee shall coordinate with appropriate public and private agencies to ensure continued implementation of programs to collect used motor vehicle fluids (at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal and to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. The City of Boston has an existing program.

Illicit Discharges and Improper Disposal: The BWSC shall continue to implement its program to locate and eliminate illicit discharges and improper disposal into the MS4. This program shall include dry weather screening activities to locate portions of the MS4 with suspected illicit discharges and improper disposal. Follow-up activities to eliminate illicit discharges and improper disposal may be prioritized on the basis of magnitude and nature of the suspected discharge; sensitivity of the receiving water; and/or other relevant factors. This program shall establish priorities and schedules for screening the entire MS4 at least once every five years. At present the permittee has on-going programs in Brighton (BOS 032) discharges to the Charles River, discharges to Brookline's Village and Tannery Brook drainage systems, and discharges through Dedham to Mother Brook. Facility inspections may be carried out in conjunction with other programs (e.g. pretreatment inspections of industrial users, health inspections, fire inspections, etc.).

The BWSC shall eliminate illicit discharges as expeditiously as possible and require the immediate termination of improper disposal practices upon identification of responsible parties. Where elimination of an illicit discharge within sixty (60) days is not possible, the BWSC shall establish an expeditious schedule for removal of the discharge. In the interim, the BWSC shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

Spill Prevention and Response: The permittee shall coordinate with appropriate municipal agencies to implement a program to prevent, contain, and respond to spills that may discharge into the MS4. The existing spill response program in the City includes a combination of spill response actions by the permittee, municipal agencies and private entities. The permittee's regulations include legal requirements for public and private entities within the permittee's jurisdiction.

Industrial & High Risk Runoff: The permittee shall coordinate with EPA and DEP to develop a program to identify and control pollutants in storm water discharges to the MS4 from municipal landfills; other treatment, storage, or disposal facilities for municipal waste (e.g. transfer stations, incinerators, etc.);

hazardous waste treatment, storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge which the permittee determine is contributing a substantial pollutant loading to the MS4 shall be implemented. The program shall include inspections, a monitoring program and a list of industrial storm water sources discharging to the MS4 which shall be maintained and updated as necessary. This requirement is not meant to cover all such discharges, but is intended to prioritize those discharges from this group which are believed to be contributing pollutants to the MS4 and to identify those dischargers which may require NPDES permit coverage or are not in compliance with existing permits.

Construction Site Runoff: The permittee shall coordinate with appropriate municipal agencies to implement a program to reduce the discharge of pollutants from construction sites to the separate storm sewer. This program shall include: requirements for the use and maintenance of appropriate structural and non-structural control measures to reduce pollutants discharged to the MS4 from construction sites; inspection of construction sites and enforcement of control measure requirements required by the permittee; appropriate education and training measures for construction site operators; and notification of appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff and any post-construction permitting.

Public Education: The permittee shall coordinate with appropriate municipal agencies to implement a public education program with the following elements: (a) a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials into the MS4; (b) a program to promote, publicize, and facilitate the proper management and disposal of used oil and household hazardous wastes; and (c) a program to promote, publicize, and facilitate the proper use, application, and disposal of pesticides, herbicides, and fertilizers.

EXHIBIT 6

Worcester, MA – Department of Public Works MS4 Permit

(Permit No. MAS010002)

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AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the federal Clean Water Act, as amended, 33 U.S.C. §§1251 et seq., and the Massachusetts Clean Waters Act, as amended, Mass. Gen. Laws. ch. 21, §§26-53, the

City of Worcester
Department of Public Works

and is authorized to discharge from all new or existing separate storm sewers: **existing Separate Storm Sewer Outfalls which are listed in Attachment A (93 major outfalls) and all other known outfalls (170 minor outfalls)**

to receiving waters (in the BLACKSTONE RIVER BASIN) named: **Beaver Brook, Blackstone River, Broad Meadow Brook, Coal Mine Brook, Coes Pond, Curtis Pond, Fitzgerald Brook, Indian Lake, Kendrick Brook, Kettle Brook, Lake Quinsigamond, Leesville Pond, Middle River, Mill Brook, Mill Brook Tributary, Tatnuck Brook, Patch Reservoir, Poor Farm Brook, Smiths Pond, Weasel Brook and Williams Millpond** in accordance with effluent limitations, monitoring requirements and other conditions set forth herein.

This permit shall become effective thirty (30) days after the date of signature.

This permit and the authorization to discharge expire at midnight, five years from the effective date.

This permit consists of **21** pages and **Attachment A** in Part I including wet and dry weather monitoring requirements, etc., and 35 pages in Part II including General Conditions and Definitions.

Signed this 30 day of September, 1998

Director
Office of Ecosystem Protection
Environmental Protection Agency
Region I
Boston, MA

Director, Division of
Watershed Management
Department of Environmental
Protection
Commonwealth of Massachusetts
Boston, MA

PART I. MUNICIPAL SEPARATE STORM SEWER SYSTEM

A. DISCHARGES THROUGH THE MUNICIPAL SEPARATE STORM SEWER SYSTEM AUTHORIZED UNDER THIS PERMIT

1. Permit Area. This permit covers all areas within the corporate boundary of the City of Worcester served by, or otherwise contributing to discharges from new or existing separate storm sewers owned or operated by the Department of Public Works, the "permittee".

2. Authorized Discharges. This permit authorizes all storm water discharges to waters of the United States from all existing or new outfalls owned or operated by the permittee (existing outfalls are identified in Attachment A). This permit also authorizes the discharge of storm water commingled with flows contributed by process wastewater, non-process wastewater, or storm water associated with industrial activity provided such discharges are authorized under separate NPDES permits and in compliance with applicable Federal, State and local regulations.

   Storm water discharges related to industrial activity which are not under the jurisdiction of the storm water program are authorized. The permittee shall provide in the annual report (Part I.E.) to EPA and MA DEP a review of all new separate storm sewer outfalls that are activated and of all existing outfalls which are de-activated.

3. Limitations on Coverage. The following discharges are not authorized by this permit:

   a. Discharges of non-storm water or storm water associated with industrial activity through outfalls listed in Attachment A are not authorized under this permit except where such discharges are:

      I. authorized by a separate NPDES permit; or

      ii. identified by and in compliance with Part B.2.g of this permit.

B. STORM WATER POLLUTION PREVENTION & MANAGEMENT PROGRAMS

The permittee is required to continue to develop, implement and revise as necessary, a storm water pollution prevention and management program designed to reduce, to the maximum extent practicable, the discharge of pollutants from the Municipal Separate Storm Sewer System (MS4). The permittee may implement Storm Water Management Program (SWMP) elements through participation with other public agencies or private entities in cooperative efforts satisfying the requirements of this permit in lieu of creating duplicate program elements. Either cumulatively, or separately, the permittee's storm water pollution prevention and management programs shall satisfy the requirements of Part I.B.1-7. below for all portions of the MS4.

1. POLLUTION PREVENTION REQUIREMENTS The permittee shall develop and implement the following pollution prevention measures:

a. Development The permittee, in cooperation with the agency with jurisdiction over land use, shall include requirements to consider water quality impacts of new development and significant re-development. The permittee shall ensure that development activities conform to applicable state and local regulations, guidance and policies relative to the discharge of storm water into the MS4. The goals of these requirements shall be to limit increases in the discharge of pollutants into the MS4 from new development and to reduce the discharge of pollutants into the MS4 from existing sources due to re-development.

b. Used Motor Vehicle Fluids The permittee shall describe educational activities, public information activities and other appropriate activities to facilitate the proper management, including recycling, reuse and disposal, of used motor vehicle fluids. The permittee shall coordinate with appropriate public agencies or private agencies where necessary. Such activities shall be readily available to all private residents and be publicized and promoted on a regular basis (at least annually).

c. Household Hazardous Waste (HHW) The permittee shall coordinate with the appropriate public agency or private entities to ensure the implementation of a program to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. Such program shall be readily

available to all private residents and be publicized and promoted on a regular basis (at least annually).

2. STORM WATER MANAGEMENT PROGRAM REQUIREMENTS: The permittee shall continue to implement the current elements of its' Storm Water Management Program (SWMP) which was described in the May 11, 1993 Part II application in accordance with Section 402(p)(3)(B) of the Clean Water Act (CWA or "the Act"), including any updates.

The current SWMP does not adequately address all the required elements described on Pages 5-11 below. The EPA sent a letter to the City of Worcester on June 6, 1997 specifying which portions of the current SWMP needed more description, effort, or clarification. The items included were the illicit connection program, a discussion of the City's indebtedness and funding for storm water programs, geographic mapping, reevaluation of wet weather sampling locations, construction area oversight, and public education. The City submitted a letter addressing these concerns on March 25, 1998. Although most issues were discussed, there is still some detail and proposed effort that is insufficient.

In particular, the sampling plan proposes grab samples at five different outfalls, three times per year. In order to get a sense of any trend and how parameter concentrations change over time during storm events, the permittee must conduct composite sampling or a series of grab samples for the summer sampling event at each of the five outfalls, as described later. In Section C. below, this permit includes minimum expectations for outfall monitoring and instream monitoring during wet weather. Instream monitoring could provide information on both the pollutant concentration peaks as well as the pollutant loading increases that occur as a result of storm events.

More detail and effort is needed for the catch basin cleaning and inspection program, as shown on Page 6. This last issue was not raised in the letter of June 6, 1997, but this program was found to be deficient upon further review.

Within **120** days after the effective date of this permit, the permittee shall submit a written description of all additional measures it will take, relative to items mentioned above, to satisfy the requirements of this permit and the goals of the proposed SWMP. **This submittal will include the entire SWMP effort, including all the original items as included in Worcester's Part II application.** This

shall be submitted to the EPA the MA DEP at the addresses in Section G. Unless disapproved by EPA or the MA DEP within 60 days after its submittal, the SWMP shall be deemed approved. The permittee shall respond to all written comments by EPA and the MA DEP and shall make all changes to the SWMP required for its approval. As noted later, compliance with the SWMP shall occur no later than 180 days after the effective date of the permit or no later than EPA and DEP's approval of the SWMP. This SWMP shall be displayed at a convenient location accessible to the public.

The Controls and activities identified in the SWMP shall clearly identify goals, a description of the controls or activities, and a description of the roles and responsibilities of other entities' areas of applicability on a system, jurisdiction, or specific area basis.

The permittee will specifically address how it will have input on any portions of the SWMP which may not be under its direct control (i.e. Mass Highway Department's maintenance of interstate highway) and how it will cooperate with such entities to achieve the goals of the SWMP.

If, during the life of this permit, EPA and the DEP determine that the permittee cannot substantively operate these programs to effectively reduce pollutants to the MS4, then the permit may be modified to designate one or more agencies that administer these programs as co-permittees. These entities would then be responsible for applicable permit conditions and requirements. Alternatively, one or more entities may be required to apply for and obtain an individual storm water permit for their discharges. The SWMP, and all approved updates, are hereby incorporated by reference and shall be implemented in a manner consistent with the following requirements:

a. Statutory Requirements: SWMPs shall include controls necessary to reduce the discharge of pollutants from the MS4 to the Maximum Extent Practicable,"MEP". Controls may consist of a combination of best management practices, control techniques, system design and engineering methods, and such other provisions as the permittee, the Director or the State determines appropriate. The various components of the SWMP, taken as a whole (rather than individually), shall be sufficient to meet this "MEP" standard. The SWMPs shall be updated as necessary to ensure conformance with the requirements of CWA § 402(p)(3)(B). In implementing the SWMP, the permittee

is required to select measures or activities intended to meet these requirements:

No discharge of toxics in toxic amounts.

No discharge of pollutants in quantities that would cause a violation of State water quality standards.

No discharge of either a visible oil sheen, foam, or floating solids, in other than trace amounts, at any time.

No discharge of suspended or settleable solids in concentrations or combinations that would impair the uses of the class of receiving waters.

b. Structural Controls: The permittee shall operate and maintain any storm water structural controls, for which it is the owner or operator, in a manner so as to reduce the discharge of pollutants to the MEP. Each catch basin shall be cleaned at least every other year as described in the SWMP.

The cleaning program must include the recording and inputting of all activities in an automated database for all catch basins, including the date of cleaning, the location of each catch basin, and an estimate of how full the catch basin was when it was cleaned. For those catch basins which are found to be more than approximately 50% full, a follow up inspection will be conducted within 3 - 6 months and cleaning schedules modified as appropriate.

During the life of this permit, the permittee shall conduct a structural control demonstration. Within 180 days after the effective date of the permit, the permittee shall submit a demonstration proposal and schedule to the EPA and MA DEP. Unless disapproved by the EPA or the MA DEP within 30 days after its submittal, the proposed demonstration project shall be deemed approved.

The permittee can reference the MA DEP document titled, Stormwater Management, Volume 1: Stormwater Policy Handbook and Stormwater Management, Volume II: Stormwater BMP Handbook. This provides an overview of storm water controls, including ranges of removal for typical storm water pollutants. This proposal shall measure the removal efficiency of a particular structural control in the MS4 area for several pollutants with influent and effluent sampling during the life of this permit.

c. Areas of New Development and Significant Redevelopment: The permittee and/or cooperating agencies shall develop, implement, and enforce controls to minimize the discharge of pollutants to the separate storm sewer system from areas of new development and significant re-development during and after construction. The permittee and/or cooperating agencies shall ensure development activities conform to applicable state and local regulations, guidance and policies. The permittee and/or cooperating agencies shall consider water quantity and water quality impacts related to development and significant redevelopment. The permittee and/or cooperating agencies shall conform to the policy of the MA DEP titled **Performance Standards and Guidelines for Stormwater Management in Massachusetts.**

d. Roadways: The permittee shall coordinate with appropriate agencies to implement measures to ensure that roadways and highways are operated and maintained in a manner so as to minimize the discharge of pollutants to the separate storm sewer system (including discharges related to deicing and sanding activities and snow removal and disposal).

The permittee shall conduct an investigation of the drainage from roadways that are owned or operated by other entities, primarily the Massachusetts Highway Department. Within 180 days after the effective date of the permit, **the permittee shall report to the EPA and the MA DEP, which of these roadway drainage systems are connected to the MS4.** The SWMP will also include a description of how the permittee will coordinate with such entities to assure that discharges to the MS4 through such drainage meets the requirements of the permit.

e. Flood Control Projects: The permittee shall ensure any flood management projects consider impacts on the water quality of receiving waters. The permittee shall also evaluate the feasibility of retro-fitting existing structural flood control devices to provide additional pollutant removal from storm water.

f. Pesticide, Herbicide, and Fertilizer Application: The permittee shall implement measures to reduce the discharge of pollutants to the MS4 related to the application and storage of pesticides, herbicides, and fertilizers applied by municipal or public agency employees or contractors to public right of ways, parks, and other municipal facilities. The permittee, in cooperation with the entity with jurisdiction over land use (e.g. Parks Department), shall implement

controls to reduce discharge of pollutants to the MS4 related to the application and distribution of pesticides, herbicides, and fertilizers by commercial and wholesale distributors and applicators and its own employees.

g. Authorized Non-Storm Water Discharges: Unless identified by either the permittee, the EPA, or the State as significant sources of pollutants to waters of the United States, the following non-storm water discharges are authorized to enter the MS4. As necessary, the permittee shall incorporate appropriate control measures in the SWMP to insure that these discharges are not significant sources of pollutants to waters of the United States.

(a) water line flushing;
(b) landscape irrigation;
(c) diverted stream flows;
(d) rising ground waters;
(e) uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers;
(f) uncontaminated pumped ground water;
(g) discharges from potable water sources;
(h) foundation drains;
(I) uncontaminated air conditioning or compressor condensate;
(j) irrigation water;
(k) uncontaminated springs;
(l) water from crawl space pumps;
(m) footing drains;
(n) lawn watering;
(o) non-commercial car washing;
(p) flows from riparian habitats and wetlands;
(q) swimming pool discharges which have been dechlorinated;
(r) street wash waters; and
(s) discharges or flows from emergency fire fighting activities.
(t) fire hydrant flushing
(u) building washdown water which does not contain detergents

h. Illicit Discharges and Improper Disposal: The permittee shall continue to implement its ongoing program to detect and remove (or require the discharger to the MS4 to remove or obtain a separate NPDES permit for) illicit discharges and improper disposal into the separate storm sewer.

1. The permittee shall effectively prohibit unpermitted, industrial storm water discharges which are required to have a federal storm water permit, to the MS4.

2. The permittee shall prohibit unpermitted discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall identify and limit the infiltration of seepage from sanitary sewers into the MS4.

3. The permittee shall prohibit the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into separate storm sewers. Public education programs for proper disposal of these materials shall be included in the SWMP and publicized at least annually and shall include material for non-English speaking residents.

4. The permittee shall require the elimination of illicit connections as expeditiously as possible and the immediate cessation of improper disposal practices upon identification of responsible parties. The permittee shall describe its procedure for the identification, costing and elimination of illicit discharges. This information shall be included in the annual report required under Part I.E. below. Where elimination of an illicit connection within thirty (30) days is not possible, the permittee shall establish a schedule for the expeditious removal of the discharge. In the interim, the permittee shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

i. Spill Prevention and Response: The permittee shall implement procedures to prevent, contain, and respond to spills that may discharge into the MS4. The spill response procedures may include a combination of spill response actions by the permittee (and/or other public or private entities), and requirements for private entities through the permittee's sewer use ordinances. The discharges of materials resulting from spills is prohibited.

j. Industrial & High Risk Runoff: The permittee shall implement a program to identify, monitor, and control pollutants in storm water discharges to the MS4 from municipal landfills; hazardous waste treatment,

storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee determines is contributing a substantial pollutant loading to the MS4. A list of these facilities which discharge to the MS4 shall be

maintained and updated as necessary. This shall include industrial activities which are listed at 40 CFR §122.26(b)(14), which are required to obtain federal storm water permit coverage. The program shall include:

1. priorities and procedures for inspections and establishing and implementing control measures for such discharges;

2. a monitoring (or self-monitoring) program for facilities identified under this section, including the collection of quantitative data on the following constituents:

(a) any pollutants which the discharger may monitor for or are limited to in an existing NPDES permit for an identified facility;

(b) any information on discharges required under 40 CFR 122.21(g)(7)(iii) and (iv).

(c) any pollutant the permittee has a reasonable expectation is discharged in substantial quantity from the facility to the separate storm sewer system

Data collected by the industrial facility to satisfy the monitoring requirements of an NPDES or State discharge permit may be used to satisfy this requirement. The permittee may require the industrial facility to conduct self-monitoring to satisfy this requirement.

3. Alternative Certification: In lieu of monitoring, the permittee may accept a certification from a facility stating that raw and waste materials, final and intermediate products, by-products, material handling equipment or activities, and/or loading/unloading operations are not expected to be exposed to storm water for the certification period. The permittee shall still reserve the right to conduct and shall consider conducting site inspections for these facilities during the life of this permit.

k. Construction Site Runoff: The permittee shall implement a program to reduce the discharge of pollutants from construction sites into the MS4, including:

1. requirements for the use and maintenance of appropriate structural and non-structural best management practices to reduce pollutants discharged to the MS4 during the time construction is underway;

2. procedures for site planning which incorporate considerations for potential short term and long term water quality impacts to the MS4 and minimizes these impacts;

3. prioritized inspections of construction sites and enforcement of control measures;

4. appropriate education and training measures for construction site operators;

5. notification to appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff.

l. Public Education: The permittee shall implement a public education program including, but not limited to the following items. Cooperation should be sought with city and state agencies where necessary. This program shall also include material for non-English speaking residents.

1. A program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials (e.g. floatables, industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4 (e.g. curb inlet stenciling, citizen "streamwatch" groups, "hotlines" for reporting dumping, outreach materials included in billings, public access/government cable channels, etc.);

2. a program to promote, publicize, and facilitate the proper management and disposal of used oil and household hazardous wastes;

3. a program to promote, publicize, and facilitate the proper use, application, and disposal of

pesticides, herbicides, and fertilizers by the public and commercial and private applicators and distributors;

4. where applicable and feasible, the permittee should publicize those best management practices (including but not limited to the use of reformulated or redesigned products, substitution of less toxic materials, and improvements in housekeeping) used by the permittee that facilitate better use, application, and/or disposal of materials identified in 1.1 and 1.2 above.

2. Deadlines for Program Compliance. Except as provided in PART II, and Part I.B.7. compliance with the storm water management program shall be required within **180** days from the effective date of the permit.

3. Roles and Responsibilities of Permittee: The Storm Water Management Program shall clearly identify the roles and responsibilities of the permittee and any party impacting its efforts to comply with this permit.

4. Legal Authority: The permittee and/or cooperating agencies shall ensure that they have and maintain legal authority to control discharges to and from those portions of the MS4 which it owns or operates. This legal authority may be a combination of statute, ordinance, permit, contract, or an order to:

a. Control the contribution of pollutants to the MS4 by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

b. Prohibit illicit discharges to the MS4;

c. Control the discharge of spills and the dumping or disposal of materials other than storm water (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4;

d. Control through interagency or inter-jurisdictional agreements the contribution of pollutants from one portion of the MS4 to another;

e. Require compliance with conditions in ordinances, permits, contracts or orders; and

f. Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance with permit conditions.

5. Storm Water Management Program Resources The permittee shall provide adequate finances, staff, equipment, and support capabilities to implement its SWMP.

6. Storm Water Management Program Review and Modification

a. Program Review: The permittee shall participate in an annual review of its current or modified SWMP in conjunction with preparation of the annual report required under Part I.E. This annual review shall include:

1. A review of the status of program implementation and compliance with program elements and other permit conditions as necessary;

2. An assessment of the effectiveness of controls established by the SWMP;

3. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings;

4. An assessment of any SWMP modifications needed to comply with the CWA §402(p)(3)(B)(iii) requirement to reduce the discharge of pollutants to the maximum extent practicable (MEP).

5. An annual public informational meeting held within two months of submittal of the Annual report.

b. Program Modification: The permittee may modify the SWMP in accordance with the following procedures:

1. The approved SWMP shall not be modified by the permittee(s) without the prior approval of the Director, unless in accordance with items 2. or 3. below.

2. Modifications adding (but not subtracting or replacing) components, controls, or requirements to the approved SWMP may be made by the permittee at any time upon written notification to the Director.

3. Modifications replacing an ineffective or unfeasible BMP specifically identified in the SWMP with an alternative BMP may be requested at any time. Unless denied by the Director, the modification shall be deemed approved and shall be implemented by the permittee 60 days from submittal of the request. Such requests must include the following:

(a) an analysis of why the BMP is ineffective or infeasible (including cost prohibitive),

(b) expectations on the effectiveness of the replacement BMP, and

(c) an analysis of why the replacement BMP is expected to achieve the goals of the BMP to be replaced.

4. Modification requests and/or notifications must be made in writing and signed in accordance with Part I.F.

c. Modifications required by the Permitting Authority: The permitting authority may require the permittee to modify the SWMP as needed to:

1. Address impacts on receiving water quality caused or contributed to by discharges from the MS4;

2. Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements; or

3. Include such other conditions deemed necessary by the Director to comply with the goals and requirements of the Clean Water Act.

Modifications requested by the Director shall be made in writing and set forth a time schedule for the permittee to develop the modification(s).

C. WET WEATHER MONITORING AND REPORTING REQUIREMENTS

1. Storm Event Discharges. The permittee shall implement a wet weather monitoring program for the MS4 to provide data necessary to assess the effectiveness and adequacy of control measures implemented under the SWMP; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal pollutants in discharges from all major outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation.

The permittee is responsible for conducting any additional monitoring necessary to accurately characterize the quality and quantity of pollutants discharged from the MS4. Improvement in the quality of discharges from the MS4 will be assessed based on the

necessary monitoring information required by this section, along with any additional monitoring which is made available. There have been no effluent limits established for this draft permit. Numeric effluent limits may be established in the next permit to control impacts on water quality, to improve aesthetics, or for other reasons as necessary.

a. Representative Monitoring: The permittee shall monitor representative outfalls, internal sampling stations, and/or instream monitoring locations to characterize the quality of storm water discharges from the MS4. Within **90** days after the effective date of this permit, the permittee will submit its proposed sampling plan to the EPA and MA DEP for review. The permittee shall choose locations representing different land uses, with a focus on what it considers priority areas, such as an outfall in the vicinity of a public beach. The plan shall outline the parameters to be sampled, the frequency of sampling and reporting of results. This submittal shall also include any related monitoring which the permittee has done since its MS4 permit application was originally submitted. Unless disapproved by the EPA or MA DEP within **30** days after its submittal, the proposed sampling plan shall be deemed approved.

The sampling locations which the permittee submitted in its letter of March 25, 1998 to EPA appear to be adequate. These locations shall be monitored at least three times per year (spring, summer and fall) for all the parameters suggested, including cadmium and replacing oil & grease with Total Petroleum Hydrocarbons (TPH). The summer sampling event shall consist of composite samples, which shall be composed of, at a minimum, samples taken at hours 0 (pre-runoff), 4, 8, 12, 16 and 20. These samples shall be flow composited.

Instream sampling: This sampling is required as a supplement to the outfall monitoring as follows:

1) The mouth of the Mill Brook Conduit shall be grab sampled for fecal coliform during the spring and summer sampling seasons;

2) the high zinc load that was found during the Blackstone River Initiative (BRI) sampling from the Mill Brook conduit shall be investigated. Findings shall be reported in the annual report;

3) the two instream locations to be sampled are:

   a. Sampling station 00 from the BRI study; and

   b. A station downstream of where Beaver Brook and Tatnuck Brook completely mix, but above the Kettle Brook confluence

These two stations will be monitored during the spring and summer sampling events. The sampling parameters will be identical to those of the outfall sampling, with the addition of flow at station 00. Similar to the outfall monitoring, the summer sampling event shall

be conducted with composite samples. At station 00, flow can be determined from measuring the distance from a fixed point on the bridge to the water surface. The EPA will provide information on the relationship between this stage measurement and stream flows. The second sampling station can be flow composited using flow data derived from Station 00. For all instream sampling events, sampling shall be conducted during wet weather.

b. Alternate representative monitoring locations may be substituted for just cause during the term of the permit. Requests for approval of alternate monitoring locations shall be made to the Director in writing and include the rationale for the requested monitoring station relocation. Unless disapproved by the Director, use of an alternate monitoring location may commence thirty (30) days from the date of the request.

2. Storm Event Data: For Part I.C.1.a - Representative Monitoring only - quantitative data shall be collected to estimate pollutant loadings and event mean concentrations for each parameter sampled. In addition to the parameters which are to be sampled for in the sampling plan to be submitted, the permittee shall maintain records of the date and duration (in hours) of the storm event(s) sampled; rainfall measurements or estimates (in inches) of the storm event which generated the sampled runoff; the duration (in hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; an estimate of the total volume (in gallons) of the discharge sampled and a description of the presence and extent of floatable debris, oils, scum, foam, solids or grease in any storm water discharges or in the receiving waters.

3. Sample Type, Collection, and Analysis: The following requirements apply only to samples collected for Part C.1.a - Representative Monitoring.

a. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water

discharged during the 24 hours previous to the time that the sample is collected) a minimum of one grab sample may be taken.

b. Grab samples taken during the first two hours of discharge shall be used for the analysis of pH, temperature, Total Petroleum Hydrocarbons (TPH), fecal coliform and residual chlorine. For all other parameters, data shall be reported for flow weighted composite samples as described on Page 15.

c. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.25 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Composite samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes.

d. Analysis and collection of samples shall be conducted in accordance with the methods specified at 40 CFR Part 136. Where an approved Part 136 method does not exist, any available method may be used.

4. Sampling Waiver. When a discharger is unable to collect samples required by Part I.C.1.a (Representative Monitoring) due to adverse climatic conditions, the discharger must submit in lieu of sampling data a description of why samples could not be collected, including available documentation of the event. Adverse climatic conditions which may prohibit the collection of samples include weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms,etc.) or otherwise make the collection of a sample impracticable (drought, extended frozen conditions, etc.).

5. Wet Weather Screening Program: The permittee shall implement a program to identify, investigate, and address areas within their jurisdiction that may be contributing excessive levels of pollutants to the MS4. The wet weather screening program:

a. Shall screen the MS4, in accordance with the procedures specified in the SWMP, at least once during the permit term.

b. Shall specify the sampling and non-sampling techniques (such as observations or quantitative methods), to be used for initial screening and follow-up purposes. For samples collected for screening purposes only, sample collection and analysis need not conform to the requirements of 40 CFR Part 136 and are not subject to the requirements of Paragraphs 1, 2, and 3 above.

D. DRY WEATHER DISCHARGES

1. Dry Weather Screening Program: The permittee shall continue ongoing efforts to detect the presence of illicit connections and improper discharges to the MS4. All major outfalls identified in the Part I application and all other areas (but not necessarily all outfalls) of the MS4 must be screened at least once during the permit term. A schedule of inspections shall be identified to support activities undertaken in accordance with Part I.B.2.g. and may be in conjunction with any activities undertaken in accordance with Part I.C.. The schedule of inspections shall be included in the annual report Part I.E.

2. Screening Procedures: Screening methodology may be developed and/or modified based on experience gained during actual field screening activities and need not conform to the protocol at 40 CFR §122.26(d)(1)(iv)(D).

3. Follow-up on Dry Weather Screening Results: The permittee shall implement a program to locate and eliminate suspected sources of illicit connections and improper disposal identified during dry weather screening activities. Follow-up activities shall be prioritized on the basis of:

a. magnitude and nature of the suspected discharge;

b. sensitivity of the receiving water; and

c. other relevant factors.

E. ANNUAL REPORT:

The permittee shall prepare an annual system-wide report to be submitted no later than April 1, 2000 and annually thereafter. The report shall include the following separate sections, with an overview for the entire MS4:

1. The status of implementing the storm water management program(s) (status of compliance with any schedules established under this permit shall be included in this section);

2. Proposed changes to the storm water management program(s);

3. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (d)(2)(v);

4. An evaluation of all the authorized non-storm water discharges at Part I.B.2.g. and whether it was determined that any controls or restrictions are necessary for any of these and descriptions of such;

5. A summary of the data, including monitoring data, that is accumulated throughout the reporting year; a portion of this data shall be compared to National Urban Runoff Program (NURP) values, as was done in the Part II application and to ambient water quality criteria.

6. A revised list of all current separate storm sewer outfalls and their locations, reflecting changes of the previous year and justification for any new outfalls.

7. Annual expenditures for the reporting period, with a breakdown of the major elements of the storm water management program, and the budget for the year following each annual report;

8. A summary describing the number and nature of enforcement actions, inspections, and public education programs;

9. Identification of water quality improvements or degradation; and,

10. Update on the illicit connection program to include the total number of identified connections with an estimate of flow for each, total number of connections found in the reporting period to include how they were found (i.e. citizen complaint, routine inspection), number of connections corrected in the reporting period to include total estimated flow, and the financing required for such to include how the repairs were financed (i.e. by the permittee, costs provided to the permittee by the responsible party, repairs effected and financed by the responsible party). As an attachment to the report, the permittee should submit any existing tracking system information. Also include updates to schedules and a summary of activities conducted under Parts I.C. and I.D.

F. CERTIFICATION AND SIGNATURE OF REPORTS

All reports required by the permit and other information requested by the Director shall be signed and certified in accordance with the General Conditions - Part II of this permit.

G. REPORT SUBMISSION

1. All original, signed notifications and reports required herein, shall be submitted to the Director at the following address:

U.S. Environmental Protection Agency
Water Technical Unit (SEW)
P.O. Box 8127
Boston, MA 02114
Attn: George Papadopoulos, Permit Writer

2. Signed copies of all other notifications and reports shall be submitted to the State at:

Massachusetts Department of Environmental Protection
Division of Watershed Management
Watershed Planning and Permitting Section
627 Main Street
Worcester, Massachusetts 01608

H. RETENTION OF RECORDS

The permittee shall retain all records of all monitoring information, copies of all reports required by this permit and records of all other data required by or used to demonstrate compliance with this permit, until at least three years after coverage under this permit terminates. This period may be modified by alternative provisions of this permit or extended by request of the Director at any time. The permittee shall retain the latest approved version of the SWMP developed in accordance with Part I of this permit until at least three years after coverage under this permit terminates.

I. STATE PERMIT CONDITIONS

1. This Discharge Permit is issued jointly by the U. S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection under Federal and State law, respectively. As such, all the terms and conditions of this permit are hereby incorporated into and constitute a discharge permit issued by the Commissioner of the Massachusetts DEP pursuant to M.G.L. Chap. 21, §43.

2. Each Agency shall have the independent right to enforce the terms and conditions of this Permit. Any modification, suspension or revocation of this Permit shall be effective only with respect to the Agency taking such action, and shall not affect the validity or status of this Permit as issued by the other Agency, unless and until each Agency has concurred in writing with such modification, suspension or revocation. In the event any portion of this Permit is declared, invalid, illegal or otherwise issued in violation of State law such permit shall remain in full force and effect under Federal law as an NPDES Permit issued by the U.S. Environmental Protection Agency. In the event this Permit is declared invalid, illegal or otherwise issued in violation of Federal law, this Permit shall remain in full force and effect under State law as a Permit issued by the Commonwealth of Massachusetts.

TABLE OF CONTENTS

ATTACHMENT A

CITY OF WORCESTER
OUTFALL INFORMATION

OUTFALL ID	GRID	LOCATION	OUTFALL SIZE	RECEIVING
2	5F	MOUNTAIN ST WEST	48 inch storm drain	KENDRICK B
6	6F	ARARAT ST	48 inch storm drain	UNNAMED B
7	7F	BROOKS ST	24 inch storm drain	KENDRICK B
8	6D	GROVE ST	36 inch storm drain	UNNAMED B
10	8F	W BOYLSTON DR/HWY	15 inch storm drain	MILL BROOK
11	7F	NEW BOND ST	24 inch storm drain	MILL BROOK
12	7E	INDIAN HILL RD NEAR NASHOBA PL	18 inch storm drain	INDIAN LAK
16	7E	INDIAN LAKE RD	36 inch storm drain	INDIAN LAK
17	7E	SHOREHAM RD	42 inch storm drain	INDIAN LAK
27	10B	EDWIDGE ST	48 inch storm drain	UNNAMED B
32	10C	MOWER ST	42 inch storm drain	TATNUCK BI
38	10C	MAPLE LEAF RD	48 inch storm drain	TATNUCK BI
39	11D	CHANDLER ST	42 inch storm drain	OVERLAND
40	12D	BEAV BK PLAYGROUND	42 inch storm drain	BEAVER BRO
45	13D	BEAVER BROOK PKWY	60 inch storm drain	BEAVER BRO
46	12E	BEAVBK PLG/CHANDLER	48 inch storm drain	BEAVER BRO
56	12E	BEAVBK PLG/CHANDLER	15 inch storm drain	BEAVER BRO
58	13E	MID BEAV BK PLG	33 X 48 inch storm drain	BEAVER BRO
62	14D	LAKESIDE AVE	21 inch storm drain	COES POND
65	15D	STAFFORD ST	48 inch storm drain	CURTIS PON
68	14D	MILL/PARK/MAIN	21 inch storm drain	BEAVER BRO
69	14D	MILL/PARK/MAIN	12 inch storm drain	BEAVER BRO
70	14D	MAIN ST	24 inch storm drain	BEAVER BRO
72	13D	OLIVER ST/PARK AVE	24 X 36 inch storm drain	BEAVER BRO
74	14D	WEBSTER ST	18 inch storm drain	MIDDLE RIVI
75	15D	CAMBRIDGE ST	24 inch storm drain	MIDDLE RIVI
77	15D	LYMAN ST	24 inch storm drain	CURTIS PON
78	15C	MAIN ST/TOWN LINE	12 inch storm drain	UNNAMED P
80	16C	STAFFORD ST	39 inch storm drain	KETTLE BRO
81	16C	JAMES ST	36 inch storm drain	KETTLE BRO
84	16E	SOUTHBRIDGE ST	54 inch storm drain	OVERLAND
85	15D	HWY/RR/S OF RIVER	36 inch storm drain	MIDDLE RIVE

CITY OF WORCESTER
OUTFALL INFORMATION

OUTFALL ID	GRID	LOCATION	OUTFALL SIZE	RECEIVING WATER
86	16E	SOUTHBRIDGE ST	24 inch storm drain	OVERLAND FLOW TO MIDDLE RIVER
87	15E	CAMP ST	24 X 36 inch storm drain	MIDDLE RIVER
88	15E	SOUTHBRIDGE ST/HWY	18 inch storm drain	BLACKSTONE RIVER
90	16F	FALMOUTH ST NEAR RR	24 inch storm drain	BLACKSTONE RIVER
91	17F	WISER AVE NEAR RR	30 inch storm drain	OVERLAND FLOW TO BLACKSTONE RIVER
92	17F	AGRAND ST/WARMLAND	36 inch storm drain	OVERLAND FLOW TO BLACKSTONE RIVER
93	18F	SEWAGE TMT PLANT	36 inch storm drain	WORCESTER SEWAGE TREATMENT PLANT
94	16G	MILLBURY ST	42 inch storm drain	BLACKSTONE RIVER
95	17G	MILLBURY ST	21 inch storm drain	BLACKSTONE RIVER
108	14H	JOLMA ROAD	12 inch storm drain	UNNAMED BROOK TO QUINSIGAMOND LAKE
109	14H	BRANDY LANE	36 inch storm drain	UNNAMED BROOK TO QUINSIGAMOND LAKE
110	12H	AYRSHIRE/COBURN	60 inch storm drain	UNNAMED BROOK TO QUINSIGAMOND LAKE
114	11H	BELMONT/LAKE	36 inch storm drain	QUINSIGAMOND LAKE
115	11H	SHERBROOK/LAKE AVE	36 inch storm drain	QUINSIGAMOND LAKE
119	9H	PLANT ST	36 inch storm drain	COAL MINE BROOK
124	7F	W BOYLSTON ST/BOURNE ST	36 inch storm drain	MILL BROOK
125	7F	W BOYLSTON ST/SUMMERHILL ST	36 inch storm drain	MILL BROOK TRIB
128	7G	CONSTITUTION AVE	42 inch storm drain	POOR FARM BROOK
129	7H	PLANT/W BOYLSTON	30 inch storm drain	POOR FARM BROOK
130	7F	BROOKS ST	30 inch storm drain	KENDRICK BROOK
131	6G	CLARK ST	36 inch storm drain	POOR FARM BROOK
134	6F	W BOYLSTON ST	36 inch storm drain	KENDRICK BROOK
135	6F	EAMES ST	24 inch storm drain	KENDRICK BROOK
138	5F	HIGGINS ST	30 inch storm drain	KENDRICK BROOK
139	8F	NEPONSET/W BOYLSTON	12 inch storm drain	MILL BROOK
140	9F	W BOYLSTON TER/GOLD STAR	18 inch storm drain	MILL BROOK
141	9F	W BOYLSTON TER/GOLD STAR	24 inch storm drain	MILL BROOK
142	9F	GENNIE ST/DIST CTR	36 inch storm drain	MILL BROOK
143	9F	GENNIE ST/DIST CTR	66 inch storm drain	MILL BROOK
144	9F	GENNIE ST	15 inch storm drain	MILL BROOK
192	15F	PERRY/MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
194	15F	MAXWELL/MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER

CITY OF WORCESTER
OUTFALL INFORMATION

OUTFALL ID	GRID	LOCATION	OUTFALL SIZE	RECEIVING WATER
202	8D	SALISBURY ST	36 inch storm drain	UNNAMED BROOK TO FLAGG ST SCHOOL
1007	13C	WILLIAMSBURG DR	60 inch storm drain	UNNAMED BROOK TO WILLIAMS MILLPOND
1008	15D	JACQUES ST	15 inch storm drain	MIDDLE RIVER
1012	17G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1013	17G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1014	18G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1015	18G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1016	16E	HOPE AVE/HWY	24 inch storm drain	LEESVILLE POND
1019	15E	MIDDLE RIV/HWY	12 inch storm drain	MIDDLE RIVER
1020	15E	MIDDLE RIV/HWY	12 inch storm drain	MIDDLE RIVER
1021	15E	MIDDLE RIV/HWY	48 inch storm drain	MIDDLE RIVER
1022	15E	MIDDLE RIV/HWY	48 inch storm drain	MIDDLE RIVER
1039	7F	STORES ST/SHORE RD	24 inch storm drain	DITCH TO MILL BROOK TRIB
1040	7F	STORES ST/SHORE DR	24 inch storm drain	DITCH TO MILL BROOK TRIB
1043	17H	ROUTE 20	12 inch storm drain	BROAD MEADOW BROOK
1045	8H	LAKE AVE	36 inch storm drain	QUINSIGAMOND LAKE
1046	9H	LAKE AVE	36 inch storm drain	QUINSIGAMOND LAKE
1048	15D	STAFFORD ST	30 inch storm drain	CURTIS POND
1049	17G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1050	17G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1051	8F	RT 190/WEST OF KENWOOD AVE	18 inch storm drain	MILL BROOK
1052	6F	HIGGINS ST	12 inch storm drain	KENDRICK BROOK
2003	16C	STAFFORD ST	30 inch storm drain	KETTLE BROOK
2004	16C	JAMES ST	12 inch storm drain	KETTLE BROOK
2006	17G	MILLBURY ST	30 inch storm drain	BLACKSTONE RIVER
3000	15G	DUNKIRK AND HAMPTON	60 inch storm drain	BROAD MEADOW BROOK
3001	5F	MOUNTAIN ST WEST	3.5 X 4 inch storm drain	KENDRICK BROOK
3002	10B	BAILEY ST AT AIRPORT DR	36 inch storm drain	UNNAMED BROOK TO TATNUCK BROOK
3003	6F	ARARAT ST	18 inch storm drain	UNNAMED BROOK TO KENDRICK BROOK

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EXHIBIT 7

Washington State – Joint Base Lewis-McChord Phase II MS4 Permit

(Permit No. WAS-026638)

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United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems

Authorization to Discharge Under the National Pollutant Discharge Elimination System

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §1251 *et seq.*, as amended by the Water Quality Act of 1987, P.L. 100-4, the "Act," the

Joint Base Lewis-McChord
(hereinafter "Permittee")

is authorized to discharge from all municipal separate storm sewer system (MS4) outfalls existing as of the effective date of this permit to waters of the United States, including Murray Creek, Clover Creek, Puget Sound and other associated waters of the United States, in accordance with the conditions and requirements set forth herein. In addition, pursuant to Ecology's certification and CWA Section 401(d), 33 U.S.C. § 1341(d), this permit also authorizes discharges from the MS4 to groundwater of the State of Washington.

This permit shall become effective on October 1, 2013.

This permit and the authorization to discharge shall expire at midnight, September 30, 2018.

The Permittee must reapply for permit reissuance on or before April 3, 2018, 180 days before the expiration of this permit if the Permittee intends to continue operations and discharges from the MS4 beyond the term of this permit.

Signed this 22nd day of August, 2013

Paula VanHaagen

Paula VanHaagen, Acting Director
Office of Water and Watersheds

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I. Applicability

A. Permit Area. This permit covers all geographic areas of the military installation located within Pierce and Thurston Counties, Washington, which are owned or operated by the Joint Base Lewis-McChord (JBLM), hereafter also referred to as "Permittee." The Permit Area includes but is not limited to the cantonment areas (comprised of and referred to as JBLM-Main, JBLM-North, and/or JBLM-McChord Field) and all military training areas. See Appendix D.

B. Discharges Authorized Under This Permit. During the effective dates of this permit, the Permittee is authorized to discharge stormwater to waters of the United States and to groundwater of the State of Washington from all portions its municipal separate storm sewer system (MS4) located within the boundaries the Permit Area described in Part I.A, subject to the conditions set forth herein. This permit also authorizes the discharge of flows categorized as allowable non-stormwater discharges in Part I.C.1.d of this permit.

C. Limitations on Permit Coverage

1. **Non-Stormwater Discharges.** The Permittee is authorized to discharge non-stormwater from the MS4, only where such discharges satisfy one of the following conditions:

   a) The non-stormwater discharges are in compliance with a separate NPDES permit;

   b) The discharges originate from emergency fire fighting activities;

   c) The non-stormwater discharges result from a spill and:

      - are the result of an unusual and severe weather event where reasonable and prudent measures have been taken to minimize the impact of such discharge; or
      - consist of emergency discharges required to prevent imminent threat to human health or severe property damage, provided that reasonable and prudent measures have been taken to minimize the impact of such discharges;

   or

   d) The non-stormwater discharges consist of one or more flows listed below, and such flows are managed by the Permittee in accordance with Parts II.B.3.c and II.B.6 of this permit.

      - potable water sources, including but not limited to, water line flushing, hyperchlorinated water line flushing, fire hydrant flushing, and pipeline hydrostatic test water;
      - Landscape watering and other irrigation runoff;

- Dechlorinated swimming pool, spa, and hot tub discharges;
- Street and sidewalk wash water, water used to control dust, and routine external building wash down that does not use detergents;
- Diverted stream flows;
- Rising ground waters;
- Uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20));
- Uncontaminated pumped ground water;
- Foundation drains;
- Air conditioning condensation;
- Irrigation water from agricultural sources that is commingled with urban stormwater;
- Springs;
- Uncontaminated water from crawl space pumps;
- Footing drains; and/or
- Flows from riparian habitats and wetlands.

2. **Discharges Threatening Water Quality**. The Permittee is not authorized to discharge stormwater that will cause, or have the reasonable potential to cause or contribute to an exceedance above the State of Washington water quality standards [including, but not limited to, those standards contained in Chapters 173-201A (surface water quality), 173-204 (sediment management) and 173-200 (groundwater) of the Washington Administrative Code]. The required response to such exceedances of these standards is defined in Part II.D.

3. **Snow Disposal to Receiving Waters.** The Permittee is not authorized to dispose of snow directly to waters of the United States or directly to the MS4(s). Discharges from Permittee-owned or operated snow disposal sites, and the Permittee's snow management practices, are authorized under this permit when such sites/practices are operated using Best Management Practices (BMPs) as required in Part II.B.6. Such BMPs must be designed to prevent pollutants in the runoff and prevent violations of the applicable water quality standards.

4. **Stormwater Discharges Associated with Industrial and Construction Activity.** The Permittee is authorized to discharge stormwater associated with industrial and construction activity through the MS4, only when such discharges are otherwise authorized under an appropriate NPDES permit.

II. Stormwater Management Program (SWMP) Requirements

A. General Requirements

1. **Implement a SWMP**. The Permittee must develop, implement and enforce a Stormwater Management Program (SWMP) designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, and protect water

quality in receiving waters. The SWMP must be implemented throughout the permit area described in Part I.A.

2. **Control Discharges of Pollutants from the MS4 to the Maximum Extent Practicable**. The Permittee must comply with the SWMP actions and activities outlined in Parts II.B and II.C, the required response provisions of Part II.D, and the assessment/monitoring requirements described in Part IV. The SWMP actions and activities require the Permittee to use BMPs, control measures, system design, engineering methods, and other provisions appropriate to control discharges of pollutants from the MS4 to the maximum extent practicable.

3. **SWMP Document.** The Permittee must prepare written documentation of its SWMP within one year from the effective date of this permit. The SWMP documentation must be organized according to the program components in Parts II.B and II.C, and the assessment/monitoring requirements of Part IV. The SWMP document must be updated at least annually and submitted as part of the Permittee's Annual Report. The SWMP document must include:
   a) A summary of the legal authorities which enable the Permittee to control discharges to and from the Permittee's MS4 as required by this Permit;
   b) A description of each minimum program control measure in Parts II.B and II.C;
   c) Any additional actions implemented by the Permittee pursuant to Parts II.B and II.C; and
   d) A description of the monitoring activity pursuant to Part IV.

4. **SWMP Information.** The Permittee's SWMP must include an on-going means for gathering, tracking, maintaining, and using information in order to evaluate SWMP development and implementation, permit compliance, and to set priorities.
   a) No later than one year from permit effective date, the Permittee must track the cost, or estimated cost, to develop and implement each program component of the SWMP. A summary of costs and funding sources, by program component, must be included in each Annual Report.
   b) The Permittee must track the number of inspections, official enforcement actions, types of public education activities, etc., as stipulated by the respective program component. Information summarizing these activities during the previous reporting period must be included in the Annual Report(s).

5. **SWMP Modification.** Modifications to the SWMP requirements must be made in accordance with Part II.E of this permit.

6. **Shared Implementation**. Implementation of one or more of the minimum control measures may be shared with, or delegated to, another entity other than the Permittee. The Permittee may rely on another entity only if:
   a) The other entity, in fact, implements the control measure;

b) The control measure, or component of that control measure, is at least as stringent as the corresponding permit requirement; and

c) The other entity agrees to implement the control measure on the Permittee's behalf. A binding written acceptance of this obligation is required. The Permittee must maintain this written obligation as part of the SWMP. If the other entity agrees to report on the minimum control measure, the Permittee must supply the other entity with the reporting requirements in Part IV.C of this permit. The Permittee remains responsible for compliance with the permit obligations if the other entity fails to implement the control measure

7. **Equivalent Documents, Plans or Programs**.

The Permittee may submit to EPA any existing documents, plans, or programs existing prior to the effective date of this Permit which the Permittee deems to fulfill a required SWMP minimum control measure or component as specified by this Permit. Such pre-existing documents, plans or programs must be individually submitted to EPA pursuant to Part IV.D for review and approval at least six months prior to the compliance date of the required SWMP minimum control measure. Where EPA determines, in writing, that the Permittee's pre-existing document, plan or program complies with the required SWMP minimum control measure, the Permittee is not required to develop of a separate SWMP document, plan or program for that control measure. A copy of EPA's written approval of each equivalent document, plan or program must be maintained within the SWMP document required in Part II.A.3 and referenced in subsequent Annual Reports. The Permittee must submit to EPA as specified in Part IV.D the following documentation with each individual request for review:

a) A complete copy of the relevant document, plan or program, (or applicable section of such documentation, provided the Permittee provides the full citation of the source material); and

b) A detailed written overview identifying the required SWMP program component addressed by the submittal, and the reasons, citations and references sufficient to demonstrate that the submitted material meets or exceeds the required SWMP program component.

B. Minimum Control Measures. The following minimum control measures must be accomplished through the Permittee's Stormwater Management Program:

1. Education and Outreach on Stormwater Impacts.

a) Within two years of the effective date of this permit, the Permittee must develop, implement, and evaluate an on-going program to educate targeted audiences about the adverse impacts of stormwater discharges on local water bodies and the steps that they can take to reduce pollutants in stormwater runoff. The Permittee must target its education and outreach program activities to reach the following audiences as appropriate:

- project managers;
- contractors;
- tenants;
- environmental staff; and
- business owners and operators.

b) The primary goal of the education and outreach program is to reduce or eliminate behaviors and practices that cause or contribute to adverse stormwater impacts. Using the topics listed in Part II. B.1.c, the Permittee may develop a prioritized schedule and plan to reach the target audiences through the on-going education effort.

c) The Permittee must select from the following topics to affect behavior change through its education and outreach program:

- Proper use, storage and disposal of household hazardous waste;
- Proper recycling;
- Appropriate stormwater management practices for commercial, food service, and automotive activities, including carpet cleaners, home-based or mobile businesses;
- Appropriate yard care techniques for protecting water quality, including proper timing and use of fertilizers;
- Proper pet waste management;
- Appropriate spill prevention practices;
- Proper management of street, parking lot, sidewalk, and building wash water;
- Proper methods for using water for dust control;
- Proper design and use of Low Impact Development (LID) techniques at new development and redevelopment sites; and

- Impacts of illicit discharges and how to report them.

d) Beginning two years from the effective date of this permit, the Permittee must measure and document the understanding and adoption of the targeted behavior[s] for at least one audience in at least one subject area listed above. The resulting measurements must be used to direct education and outreach resources most effectively through the remainder of the Permit term, The Permittee must evaluate and summarize resulting changes in adoption of the targeted behavior(s). The Permittee may meet this requirement individually or through cooperation with other entities.

e) The Permittee must document the specific education program goals, and track and maintain records of public education and outreach activities in the SWMP document.

2. Public Involvement/Participation.

a) The Permittee must comply with applicable federal, state and local public notice requirements when implementing a public involvement/participation program.

b) Within six months of the effective date of this permit, and at a regular schedule at least annually thereafter, the Permittee must conduct at least one of the following activities within the permit area throughout the permit term:

- Convene meeting(s) with the Environmental Division Chief & Environmental Compliance Program Manager, and/or other JBLM organizations as appropriate, to discuss and coordinate effective SWMP implementation, or
- Convene a JBLM Water Council or organize other means to provide opportunity for the military community to participate in development and implementation of SWMP activities.

c) No later than one year from the permit effective date, and annually thereafter, the Permittee must make the updated SWMP document required by Part II.A.3 available to the public on the Permittee's website.

d) At least once per year, the Permittee must provide one or more on-going volunteer activities as practicable to help actively engage residents and personnel at JBLM in understanding water resources and how their activities can affect water quality. In the SWMP document, the Permittee must maintain a log of public participation activities performed.

- Volunteer activities may include, but are not limited to, storm drain stenciling or marking program; establishing a website, email address and/or hotline for citizens to report pollution concerns; establishing a pet waste management program at American Lake or other resource areas.

3. Illicit Discharge Detection and Elimination (IDDE).

An illicit discharge is any discharge to a MS4 that is not composed entirely of stormwater as defined in 40 CFR § 122.26(b)(2). The Permittee's SWMP must include an on-going program to detect and remove illicit connections and discharges into the MS4. The Permittee must include a written description of the program in the SWMP document. No later than 180 days prior to the expiration date of this permit, the Permittee must implement an IDDE program which fully addresses each of the following components:

a) **Map of Cantonment Areas.** Within two years from the effective date of this permit, the Permittee must update and maintain a map of the MS4 located within the JBLM cantonment area. At a minimum, the cantonment area map must be periodically updated and include the following information:

- jurisdictional boundaries;
- known MS4 outfalls,
- receiving waters, other than groundwater;
- Tributary conveyances for all known MS4 outfalls. The following attributes must be mapped for all known outfalls:

  (i) tributary conveyances (type, material and size where known);

  (ii) associated drainage areas; and

  (iii) land use;
- Stormwater treatment and flow control BMPs/facilities owned, or operated, by the Permittee, including information about type, and design capacity.
- Geographic areas served by the Permittee's MS4 that do not discharge stormwater to surface waters;
- Points at which the Permittee's MS4 is interconnected with other MS4s or other storm/surface water conveyances; and
- Locations of all Permittee owned or operated industrial facilities, maintenance/storage facilities and snow disposal sites that discharge directly to the Permittee's MS4, and/or waters of the State.

The Permittee must maintain updated cantonment area MS4 maps. As necessary the Permittee must add data regarding any new connections to the MS4 which are allowed by the Permittee after the effective date of this permit. A copy of the completed MS4 map, as both a report and as an electronic file via Arc GIS compatible format, must be submitted to EPA upon request and as part of the Permit renewal application required in Part IV.B.

Consistent with national security laws and directives, the Permittee must provide mapping information to operators of adjacent regulated MS4s upon request.

b) **Map of Training Areas.** No later than 180 days prior to the expiration date of this permit, the Permittee must develop and submit to EPA a preliminary map identifying the presence of MS4 infrastructure located outside the cantonment area. The Permittee must prioritize the development of a training area MS4 map within the Muck Creek watershed/basin. The map must include the information items listed in Part II.B.3.a. A copy of the preliminary map, as both a report and as an electronic file via Arc GIS compatible format, must be submitted to EPA as part of the permit renewal application required in Part IV.B.

c) **Ordinance.** The Permittee must effectively prohibit, through ordinance or other regulatory mechanism, all illicit discharges into the MS4 to the maximum extent allowable under the legal authorities of JBLM. The ordinance or regulatory mechanism must be adopted, or existing mechanism amended, to comply with this Permit no later than thirty months from the effective date of this Permit.

The Permittee must implement appropriate enforcement procedures and actions associated with the ordinance or regulatory mechanism, including a written policy of enforcement escalation procedures for recalcitrant or repeat offenders.

Allowable Discharges: The regulatory mechanism does not need to prohibit the following categories of non-stormwater discharges, consistent with Part I.C.1.d:

- Diverted stream flows;
- Rising ground waters;
- Uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20));
- Uncontaminated pumped ground water;
- Foundation drains;
- Air conditioning condensation;
- Irrigation water from agricultural sources that is commingled with urban stormwater;
- Springs;
- Uncontaminated water from crawl space pumps
- Footing drains;
- Flows from riparian habitats and wetlands;
- Non-stormwater discharges covered by another NPDES permit; and/or
- Discharges from emergency fire fighting activities in accordance with Part 1.C.b.

Conditionally Allowable Discharges: The regulatory mechanism may allow the following categories of non-stormwater discharges, only if the stated conditions are met:

- *Discharges from potable water sources, including but not limited to water line flushing, hyperchlorinated water line flushing, fire hydrant*

system flushing, and pipeline hydrostatic test water: Planned discharges must be dechlorinated to a total residual chlorine concentration of 0.1 parts per million (ppm) or less, pH-adjusted, if necessary, and volumetrically and velocity controlled to prevent resuspension of sediments in the MS4.

- *Discharges from lawn watering and other irrigation runoff:* These discharges must be minimized through, at a minimum, public education activities (see Part II.B.2.a) and water conservation efforts.
- *Dechlorinated swimming pool, spa, and hot tub discharges:* The discharges must be dechlorinated to a total residual chlorine concentration of 0.1 ppm or less, pH-adjusted and reoxygenized if necessary, and volumetrically and velocity controlled to prevent re-suspension of sediments in the MS4. Discharges must be thermally controlled to prevent an increase in temperature of the receiving waters. Swimming pool cleaning wastewater and filter backwash must not be discharged to the MS4.
- *Street and sidewalk wash water, water used to control dust, and routine external building wash down that does not use detergents*: The Permittee must reduce these discharges through, at a minimum, public education activities (see Part II.B.2.a) and/or water conservation efforts. To avoid washing pollutants into the MS4, the Permittee must minimize the amount of street wash and dust control water used. At active construction sites, street sweeping must be performed prior to washing the street.
- *Other non-stormwater discharges.* The discharges must be in compliance with the requirements of a pollution prevention plan reviewed by the Permittee which addresses control of such discharges.

d) **Detection and Elimination.** No later than thirty months from the effective date of this permit, the Permittee must develop and implement an on-going program to detect and address non-stormwater discharges, spills, and illicit connections into their MS4. This program must be described within the SWMP document and include:

- *Procedures for locating priority areas likely to have illicit discharges,* including areas where complaints have been recorded in the past, and areas with storage of large quantities of materials that could result in spills;
- *Field assessment activities*, including visual inspection of outfalls draining priority areas during dry weather and for the purposes of verifying outfall locations, identifying previously unknown outfalls, and detecting illicit discharges. The dry weather screening activities

may include field tests of parameters selected by the Permitee as being indicators of discharge sources. The Permittee may utilize less expensive "field test kits," and test methods not approved by EPA under 40 CFR Part 136, provided the manufacturer's published detection ranges are adequate for the illicit discharge detection purposes;

i) No later than thirty months from the effective date of this permit, the Permittee must begin dry weather field screening for non-stormwater flows from stormwater outfalls.

ii) No later than 180 days prior to the permit expiration date, the Permittee must complete field screening of at least 75% of all MS4 outfalls located within the cantonment area;

iii) Screening for illicit connections may be conducted in accordance with *Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments*, Center for Watershed Protection, October 2004, or another methodology of comparable effectiveness;

- *Procedures for characterizing the nature of, and potential public or environmental threat posed by, any illicit discharges which are found by or reported to the Permittee*. Procedures must address the evaluation of whether the discharge must be immediately contained and steps to be taken for containment of the discharge;

  i) Compliance with this provision will be achieved by immediately responding to all illicit discharges including spills which are determined to be constitute a threat to human health or the environment; investigating (or referring to the appropriate agency), within seven (7) days, any complaints, reports or monitoring information that indicates a potential illicit discharge, including spills; and immediately investigating (or referring) problems and violations determined to be emergencies or otherwise judged to be urgent or severe;

- *Procedures for tracing the source of an illicit discharge;* including visual inspections, and when necessary, opening manholes, using mobile cameras, collecting and analyzing water samples, and/or other detailed inspection procedures; and

- *Procedures for eliminating the discharge*; including notification of appropriate authorities; notification of the responsible operator or organization; technical assistance; follow-up inspections; and escalating enforcement and legal actions if the discharge is not eliminated.

i) Compliance with this provision will be achieved by initiating an investigation within twenty one (21) days of a report or discovery of a

suspected illicit connection to determine the source of the connection, the nature and volume of discharge through the connection, and the party responsible for the connection. Upon confirmation of the illicit nature of a storm drain connection, the Permittee must take action in a documented effort to eliminate the illicit connection within forty five (45) days.

e) **Tracking.** The Permittee must implement a means of program evaluation and assessment which tracks the number and type of illicit discharges identified, dry weather screening efforts, and the location and any remediation efforts to address identified illicit discharges.

f) **Education**. Within two years from the effective date of this permit, the Permittee must inform employees, businesses, and the general public within the permit area of hazards associated with illegal discharges and improper disposal of waste. This program must be conducted in concert with the public education requirements outlined in Part II.B.1.

- No later than one year from the effective date of this permit, the Permittee must list and publicize a hotline or other local means for the public and JBLM personnel to report spills and other illicit discharges. The Permittee must maintain a record of calls received and follow-up actions taken in accordance with II.B.3.d above and include a summary in the Annual Report.

g) **Training.** Within two years of the effective date of this permit, the Permittee must ensure that all staff responsible for the identification, investigation, termination, clean up and reporting of illicit discharges, including spills and illicit connections, are trained to conduct these activities. Follow-up training must be provided as necessary to address changes in procedures, techniques or requirements. The Permittee must maintain records of relevant training provided or obtained, and the staff members trained. A summary of this training must be included in each Annual Report.

4. **Construction Site Stormwater Runoff Control.** Throughout the permit area, the Permittee must implement and enforce a program to reduce pollutants in stormwater runoff to the MS4 from construction activities resulting in land disturbance of greater than or equal to 5,000 square feet or more. The Permittee must include a written description of the construction site runoff control program in the SWMP document. At a minimum the program must include the following components:

a) **Oversight**. The Permittee must provide adequate direction and oversight to ensure that entities responsible for regulated construction activities within the permit area obtain authorization to discharge as necessary under the NPDES General Permit for Stormwater Discharges for Construction Activity for Federal Facilities in Washington, Permit #WAR12000F (Construction General Permit or CGP).

b) **Ordinance**. The Permittee must use an ordinance or other regulatory mechanism available under the legal authorities of JBLM to require erosion and sediment controls, onsite materials management and sanctions to ensure compliance with the terms of the SWMP and the CGP.

c) **Enforcement.** The Permittee must maintain a list of policies and procedures which can be used to enforce construction site compliance within JBLM independent of EPA staff directly enforcing the CGP. No later than two years from the effective date of this permit, the Permittee must include this list of policies and procedures in the SWMP document, and must update the list as necessary at least annually. The Permittee must summarize in each Annual Report any enforcement actions taken at construction sites during the previous reporting period.

d) **Construction Site BMPs.** The Permittee must maintain (or incorporate by reference) a list of appropriate construction site BMPs in the SWMP document; such a list must include associated criteria for maintenance and installation of each specific practice.

e) **Contractual Language.** The Permittee must work with other responsible organizations to ensure that all Requests For Proposal (RFPs) and construction contracts for new construction projects which will disturb 5,000 square feet or more within the permit area include specifications requiring compliance with the SWMP and, when applicable, the CGP. An example of such contract language must be included within the SWMP document.

f) **Pre-construction Site Plan Review**. The Permittee must implement procedures for reviewing all pre-construction site plans for potential water quality impacts, appropriate erosion and sediment controls, and appropriate control of other construction site materials. These procedures must include provisions for receipt and consideration of information submitted by the public. Information summarizing the number of site plans reviewed during the previous reporting period must be submitted as part of the corresponding Annual Report.

g) **Construction Site Inspection Plan**. Within six months of the permit effective date, the Permittee must develop and implement a construction site inspection plan. The construction site inspection plan must describe the criteria which triggers a site inspection, and must include a mandatory timeframe within which construction sites meeting the criteria will be inspected by the Permittee's staff or its representatives.

- The Permittee must develop methods for its staff or representatives to stop work on construction sites deemed to be in non-compliance with the construction site runoff control program.
- The Permittee must develop and utilize a construction site inspection form to document all construction site inspections.
- The written construction site inspection plan, and associated inspection form, must be included in the SWMP document.

- Information summarizing the site inspections conducted by the Permittee during the previous reporting period, including the location and total number of such inspections, must be submitted as part of the corresponding Annual Report.
- At a minimum, all sites addressed by plan must be inspected by the Permittee or their representatives at least quarterly.

h) **Training**. Throughout the permit term, the Permittee must ensure that all staff responsible for preconstruction site plan review, construction site inspections (or are otherwise implementing the construction site runoff control program) are adequately trained to conduct such activities. Follow-up training must be provided as necessary to address changes in procedures, techniques or requirements. The Permittee must maintain records of relevant training provided or obtained, and the staff members trained. A summary of this training occurring within the reporting period must be included in each Annual Report.

5. **Stormwater Management for Areas of New Development and Redevelopment.** Not later than one year from the effective date of this permit, the Permittee must implement a program to manage stormwater from developed areas in a manner that preserves and restores the area's predevelopment hydrology. The Permittee must use an ordinance (or other regulatory mechanism available under the legal authorities available to JBLM) to implement and enforce a program to control stormwater runoff from all public and private new development or redevelopment project sites that will disturb 5,000 square feet or more of land area.

   The Permittee must include a written description of the program within the SWMP document. In each Annual Report, the Permittee must summarize the implementation status of these requirements for all new development and redevelopment project sites occurring during the relevant reporting period.

   Certain projects may be exempt from specific provisions of this Part, as defined in Appendix C.

   At a minimum, within one year of the permit effective date, the Permittee must implement the following program components as described in Part II.B.5.a through k.

   a) **Site Planning Procedures.** For all new development and redevelopment project sites disturbing 5,000 square feet or more, the Permittee must adopt and implement a project site planning process, including criteria for BMP selection and design; the site planning procedures must be implemented to protect water quality, and reduce the discharge of pollutants to the maximum extent practicable.

   b) **Preparation of a Stormwater Site Plan.** For all new development and redevelopment project sites disturbing 5,000 square feet or more, the Permittee must require a project-specific Stormwater Site Plan. Stormwater Site Plans must be prepared consistent with Chapter 3, Volume 1-*Minimum Technical*

Requirements and Site Planning of the 2012 *Stormwater Management Manual for Western Washington;* and with Chapter 3 of the *Low Impact Development Technical Guidance Manual for the Puget Sound (2012).* For new development or redevelopment sites disturbing 5,000 square feet or more within Airport Operations Areas (AOA), stormwater site plans must be prepared consistent with the *Aviation Stormwater Design Manual (2008).*

c) **Source Control of Pollution**. The Permittee must require the use of available and reasonable source control BMPs at all new development and redevelopment project sites disturbing 5,000 square feet or more. Source control BMPs must be selected, designed, and maintained in accordance with Volume IV-*Source Control BMP*s of the 2012 *Stormwater Management Manual for Western Washington.)* For new development or redevelopment sites disturbing 5,000 square feet or more within Airport Operations Areas (AOA), source control BMPs must be selected, designed and maintained in accordance with the *Aviation Stormwater Design Manual (2008).*

d) **New Development and Redevelopment Site Design to Minimize Impervious Areas, Preserve Vegetation, and Preserve Natural Drainage Systems**. For all new development and redevelopment project sites disturbing 5,000 square feet or more, the Permittee must ensure such projects are designed to minimize impervious surfaces, retain vegetation, restore native vegetation, and preserve natural drainage systems, to the maximum extent feasible.

- The Permittee must require site design that minimizes the project's roadway surfaces and parking areas, incorporates clustered development, and ensures that vegetated areas are designed to receive stormwater dispersion from all developed project areas.
- To the maximum extent feasible, the Permittee must ensure that natural drainage patterns of the project site are maintained, and that discharge from the new development or redevelopment project site occurs at the natural location.
- The Permittee must ensure that the manner by which runoff is discharged from the new development project site does not cause a significant adverse impact to downstream receiving waters and/or down gradient properties.
- The Permittee must ensure that all outfalls utilize dissipation devices.

e) **Hydrologic Performance Requirement for On-site Stormwater Management.** For all new development or redevelopment project sites disturbing 5,000 square feet or more, the Permittee must require the use of on-site stormwater management practices intended to infiltrate, disperse, retain, and/or harvest and reuse stormwater runoff to the maximum extent technically feasible.

- *For lawn and landscape areas on the new development or redevelopment project site*, the Permittee must ensure the soil quality

meets the specifications within BMP T5.13 (Post-Construction Soil Quality and Depth) in Chapter 5 of Volume V-*Runoff Treatment BMPs* of the 2012 *Stormwater Management Manual for Western Washington (2012).* Lawn and landscape areas associated with project sites occurring within Airport Operations Areas must ensure the soil quality meets specifications of source control BMPs must be selected, designed and maintained in accordance with the *Aviation Stormwater Design Manual (2008).*

- *For new or redevelopment project sites creating or replacing 2,000 ≥ 4,999 square feet of hard surfaces,* the Permittee must ensure that stormwater dispersion or infiltration BMPs are used consistent with those specified in the 2012 *Stormwater Management Manual for Western Washington* and/or the *Low Impact Development Technical Guidance Manual for the Puget Sound (2012).* Such project sites within Airport Operations Areas must ensure that stormwater dispersion or infiltration BMPs are used consistent with those specified in the *Aviation Stormwater Design Manual (2008).*

- *For new development or redevelopment project sites creating or replacing 5,000 square feet or more of hard surfaces*, the Permittee must ensure stormwater controls are designed to retain on-site the volume of stormwater produced from the 95th percentile rainfall event.

  As an alternative, the Permittee may instead comply with this requirement to manage stormwater runoff from new or replaced hard surfaces ≥5,000 square feet by ensuring the post-development stormwater discharge flows from the project site do not exceed the pre-development discharge flows for the range of 8% of the 2-year peak flow to 50% of the 2-year peak flow, as calculated by using the Western Washington Hydrology Model (or other continuous runoff model).

- For the purposes of this permit, the modeled pre-development condition for all new development and redevelopment project sites must be "forested land cover" (with applicable soil and soil grade), unless reasonable historic information indicates the site was prairie prior to settlement (and may be modeled as "pasture" when using the Western Washington Hydrology Model).

f) **Hydrologic Performance Requirement for Flow Control**. The Permittee must ensure that the following new development and redevelopment project sites are designed to control post development discharge flows: sites which create ≥10,000 square feet effective impervious surface area; sites which convert ¾ acres or more from native vegetation to lawn/landscaping, and from which there is a surface discharge to a natural or manmade conveyance system; and, sites

which convert 2.5 acres or more of native vegetation to pasture, and from which there is a surface discharge to a natural or manmade conveyance system.

For these new development or redevelopment project sites, post-development stormwater discharge flows must not exceed the pre-development discharge flows for the range of 50% of the 2-year peak flow to 100% of the 50-year peak flow, as calculated by using the Western Washington Hydrology Model (or other continuous runoff model).

- For the purposes of this permit, the modeled pre-development condition for all new development and redevelopment project sites must be "forested land cover" (with applicable soil and soil grade), unless reasonable historic information indicates the site was prairie prior to settlement (and may be modeled as "pasture" when using the Western Washington Hydrology Model).
- The Permittee must prioritize the use of small scale dispersion or infiltration practices, or other appropriate Low Impact Development practices to meet this flow control requirement. The Permittee may not design new development or redevelopment sites to meet this hydrologic performance requirement for flow control solely through the use of large scale retention or detention practices.
- New development or redevelopment project sites that will discharge directly to the JBLM Canal, or indirectly through Outfalls #OF-4 or #OF-5, are exempt from this hydrologic performance requirement for flow control.

g) **Runoff Treatment.** The Permittee must ensure the proper construction of stormwater treatment facilities for all new development or redevelopment sites in accordance with Appendix B of this permit.

h) **Wetlands Protection.** The Permittee must ensure that discharges to wetlands from new development or redevelopment project sites maintain the hydrologic conditions, hydrophytic vegetation, and substrate characteristics necessary to support existing and designated uses. The hydrologic analysis must use the existing land cover condition to determine the existing hydrologic conditions, unless directed otherwise by a regulatory agency with jurisdiction.

i) **Inspections**. Within 14 months of the permit effective date, the Permittee must develop an inspection program intended to verify that the permanent stormwater facilities used for onsite management, flow control and treatment as required by this Part are properly installed and operational. The inspection plan must describe the criteria which the Permittee will use to trigger a post-construction site inspection, timeframes within which sites meeting the criteria will be inspected, and the anticipated response to address any deficiencies identified.

- The Permittee must develop and utilize a site inspection form to document all post-construction site inspections required by this subpart.

- The written post-construction site inspection plan, and associated inspection form, must be included in the SWMP document no later than two years from the effective date of this permit.
- Beginning with the 2nd Year Annual Report, and annually thereafter, information summarizing all inspections conducted by the Permittee during the previous reporting period, including the locations and total number of such site inspections, and resulting actions to address any deficiencies, must be submitted as part of the corresponding Annual Report.

j) **Operation and Maintenance.** The Permittee must ensure long term operation and maintenance (O&M) of all permanent stormwater facilities used for onsite management, flow control, and treatment. No later than three years from the effective date of this permit, the Permittee must implement O&M standards (in the form of a manual or other specific reference[s]) to address all permanent stormwater facilities used for onsite stormwater management, flow control and treatment and which are installed at new development and redevelopment project sites after the effective date of this permit. The O&M standards for all permanent stormwater facilities must be consistent with Chapter 4, Volume V-*Runoff Treatment BMPs* of the 2012 *Stormwater Management Manual for Western Washington (2012)*

- To ensure long term O&M of stormwater facilities, the Permittee must require all entities responsible for such O&M to use the referenced maintenance standards/manual required in this Part.
- The Permittee must maintain an inventory of all permanent stormwater facilities which are used for onsite stormwater management, flow control, and treatment, consistent with Part II.B.3.a of this permit, and must maintain records of all related maintenance activity.
- A summary of anticipated annual maintenance activity, by type and number of facilities, must be included in the SWMP documentation.
- A summary of facility maintenance activity accomplished during the previous reporting period must be included in the corresponding Annual Report

k) **Training**. No later than one year from the effective date of this permit, the Permittee must ensure all staff responsible for plan review, hydrologic modeling, site inspections and enforcement necessary to implement the program outlined in Part II.B.5, are adequately trained to conduct these activities. Follow-up training must be provided as necessary to address changes in procedures, techniques or requirements. The Permittee must maintain records of relevant training provided, or obtained, and the staff members trained. A summary of this training occurring within the reporting period must be included in each Annual Report.

6. **Pollution Prevention and Good Housekeeping for Municipal Operations & Maintenance.** Within two years from the effective date of this permit, the Permittee must update and implement its operations and maintenance (O&M) program to prevent or reduce pollutants in runoff from the Permittee's MS4 and from ongoing municipal operations. The written description of the program must be included in the SWMP document. At a minimum, the O&M program must address each of the following program components:

   a) **Maintenance Standards for Permanent Stormwater Facilities**. The Permittee must establish maintenance standards for its permanent stormwater facilities used for onsite management, flow control and treatment that are protective of facility function. The purpose of a maintenance standard is to determine if maintenance of a stormwater facility is required. The maintenance standard is not a measure of the facility's required condition at all times between inspections. Exceeding the maintenance standard between inspections is not a permit violation.

      Unless there are circumstances beyond the Permittee's control, if an inspection required in Part II.B.6.b identifies that a facility's maintenance standard has been exceeded, the Permittee must perform appropriate maintenance as follows:

      - Within 1 year for most facilities, except catch basins;
      - Within 6 months for catch basins; and/or
      - Within 2 years for maintenance that requires capital construction of less than $25,000.

      Where circumstances beyond the Permittee's control prevent the maintenance activity from occurring, the Permittee must document within the corresponding Annual Report the circumstances and how they were outside the Permittee's control. Circumstances beyond the Permittee's control may include, but are not limited to: denial or delay of access by property owners; denial or delay of necessary permit approvals; and unexpected reallocations of maintenance staff or resources to perform emergency work.

   b) **Inspection of Permanent Stormwater Facilities**. No later than two years from the effective date of this permit, the program must include annual inspection of all Permittee owned or operated permanent stormwater facilities used for flow control and treatment, other than catch basins. The Permittee must take appropriate maintenance actions in accordance with its adopted maintenance standards.

      - The Permittee may reduce the inspection frequency based on maintenance records of double the length of time of the proposed inspection frequency. In the absence of maintenance records, the Permittee may substitute written statements to document a specific less frequent inspection schedule. Written statements shall be based on actual inspection and maintenance experience and shall be

included within the SWMP document and certified in accordance with Part VI.E.

- As part of the 2nd Year Annual Report, the Permittee must document the total number of Permittee-owned or operated permanent stormwater facilities used for flow control and treatment to be inspected in compliance with this Part. Subsequent Annual Reports must document summarize the Permittee's inspection and maintenance of those permanent stormwater facilities.

c) **Spot Check Inspection of Permanent Stormwater Facilities**. The Permittee must conduct spot checks of potentially damaged permanent stormwater control facilities (other than catch basins) after major storm events. For the purposes of this permit, a major storm event is rainfall greater than the 24-hour, 10 year recurrence interval. The Permittee must conduct repairs or take appropriate maintenance action in accordance with maintenance standards established above, based on the results of the spot check inspections.

d) **Inspections of Catch Basins**. The Permittee must inspect all catch basins and inlets owned or operated by the Permittee at least once before the end of the permit term. The Permittee must clean catch basins if inspection indicates cleaning is needed. Decant water and solids must be disposed of in accordance with Appendix A of this permit.

- As part of the 2nd Year Annual Report, the Permittee must report the total number of Permittee-owned or operated catchbasins to be inspected annually in compliance with this Part; subsequent Annual Reports must document the Permittee's progress toward inspecting and maintaining all catchbasins prior to the permit expiration date.

e) **Compliance**. Compliance with the inspection requirements in Parts II.B.6.b, c. and d. above will be determined by evaluating Permittee records of an established stormwater facility inspection program. The Permittee must inspect at least 95% of the total universe of identified permanent stormwater facilities used for flow control and treatment, and 95% of all catchbasins, by the expiration date of the permit

f) **Maintenance Practices.** The Permittee must document and implement maintenance practices to reduce stormwater impacts associated with runoff from streets, parking lots, roads or highways, parks, open space, road right-of- way, maintenance yards, stormwater facilities used for flow control and treatment and from road maintenance activities located or conducted within the permit area by the Permittee or other entities. The Permittee must ensure that the following activities are conducted in a manner that is protective of receiving water quality:

- Pipe cleaning;
- Cleaning of culverts that convey stormwater in ditch systems;
- Ditch maintenance;
- Street cleaning;

- Road repair and resurfacing, including pavement grinding;
- Snow and ice control;
- Utility installation;
- Pavement striping maintenance;
- Maintaining roadside areas, including vegetation management; and
- Dust control.
- Application of fertilizer, pesticides, and herbicides, including the development of nutrient management and integrated pest management plans;
- Sediment and erosion control;
- Landscape maintenance and vegetation disposal;
- Trash management; and
- Building exterior cleaning and maintenance.

g) **Training.** The Permittee must develop and implement an on-going training program for JBLM facility maintenance staff, contracted companies, environmental project officers, or other staff whose construction, operations or maintenance job functions may impact stormwater quality. The training program must address the importance of protecting water quality; the requirements of this permit; operation and maintenance standards, inspection procedures; selection of appropriate BMPs as required in this Part; ways to perform their job activities to prevent or minimize impacts to water quality; and procedures for reporting water quality concerns, including potential illicit discharges. Follow-up training must be provided as needed to address changes in procedures, techniques, or requirements. The Permittee must maintain records of relevant training provided or obtained, and the staff members trained. A summary of this training must be included in each Annual Report.

h) **Stormwater Pollution Prevention Plans for Equipment Maintenance /Material Storage Yards.** Within two years of the effective date of this permit, the Permittee must develop and implement Stormwater Pollution Prevention Plans (SWPPP) for all heavy equipment maintenance or storage yards, and/or material storage facilities owned or operated by the Permittee within the permit area, which are not already regulated under the NPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities, #WAR05-000F or another NPDES permit. Implementation of non-structural BMPs must begin immediately after the SWPPP is developed. A schedule for installation of any necessary structural BMPs must be included in the SWPPP. The Permittee may use generic SWPPPs that can be tailored to multiple similar activity sites to comply with this requirement. The SWPPP(s) must include a summary of BMPs expected to be utilized at the site and periodic visual observation of discharges from the facility by responsible staff to verify the effectiveness of BMPs used to reduce pollutants in runoff.

i) **Documentation.** Records of all permanent stormwater facility inspections, catch basin inspections, maintenance, or repair activities conducted by the Permittee must be maintained in accordance with Part IV.C of this permit, and summarized for the preceding reporting period within the corresponding Annual Report.

C. Stormwater Retrofits to Reduce Discharges to Impaired and Degraded Receiving Waters.

1. The Permittee must conduct stormwater discharge, water quality and biological assessment monitoring as required in Part IV.

2. Within three years of the permit effective date, the Permittee must develop a stormwater retrofit plan to reduce flows and associated pollutant loadings from existing effective impervious surfaces into Clean Water Act Section 303(d) listed and other degraded water bodies. The retrofit plan must be consistent with the recommendations contained in the March 2007 *Murray/Sequalitchew Watershed Management Plan* and the 2008 *Chambers-Clover Creek Watershed Action Plan.*

a) At a minimum, the Permittee's retrofit plan must analyze potential locations to reduce both stormwater flow volume and pollutant loadings from cantonment area sub-basins draining to American Lake; Clover Creek; Murray Creek; and the Bell-McKay-Hamer Marshes near Sequalitchew Creek and the JBLM Canal.

b) For each potential location, the retrofit plan must evaluate the feasible use of low impact development techniques, and other controls that infiltrate, evapotranspire, harvest and re-use stormwater runoff, or which otherwise eliminate stormwater flow volume and pollutant loadings from existing surfaces discharging to waters listed in Part II.C.2.a.

c) The Permittee must evaluate and prioritize existing building locations where the disconnection of existing flows from rooftop downspouts into the MS4 and/or into waters of the United States could be accomplished. The Permittee must accomplish such retrofits as soon as practicable, with priority given to roof disconnection projects within the Clover Creek subbasin. The Permittee may consider using such techniques as full dispersion; downspout full infiltration systems; rain gardens; and/or other appropriate practices, as described in the 2012 *Stormwater Management Manual for Western Washington*.

d) The retrofit plan must include a prioritized list of potential projects and project locations for waterbodies listed in Part II.C.2.a. The Permittee must prioritize identified project locations through an evaluation and ranking process that includes the following considerations:
- Efficacy of eliminating stormwater flows to the receiving water;
- Feasibility;
- Cost effectiveness;

- Pollutant removal effectiveness;
- Effective impervious surface area potentially mitigated; and
- Long term maintenance requirements.

e) The Permittee must submit the retrofit plan to EPA as part of the 3rd Year Annual Report. In addition to the prioritized list of potential retrofit projects, the plan must include a summary of the Permittee's rooftop downspout disconnection evaluation and the total number of buildings/total square footage of rooftop disconnected from the MS4 or receiving waters after the Permit effective date.

f) Prior to the expiration date of this permit, the Permittee must initiate or complete one or more structural retrofit project(s) sufficient to disconnect and infiltrate discharges from identified effective impervious surfaces equal to five (5) acres of cumulative area. Calculation of the cumulative total effective impervious surface area to be retrofitted may not include the amount of roof area mitigated through the roof downspout disconnection effort required in Part II.C.2.c. The Permittee must submit a comprehensive retrofit implementation status report to EPA with the 5th Year Annual Report.

D. Required Response to Violations of Water Quality Standards.

1. The Permittee must notify EPA in writing at the EPA address listed in Part IV.D within 30 days of becoming aware that, based on credible site-specific information, a discharge from the MS4 owned or operated by the Permittee is causing or contributing to a known or likely violation of water quality standards in the receiving water. Written notification provided under this Part must, at a minimum, identify the source of the site-specific information; describe the location, nature and extent of the known or likely water quality standard violation in the receiving water; and explain the reasons why the MS4 discharge is believed to be causing or contributing to the problem. For on-going or continuing violations, a single written notification to EPA will fulfill this requirement.

2. In the event that EPA determines, based on a notification from the Permittee as provided under Part II.D.1 or through any other means, that a discharge from the MS4 owned or operated by the Permittee is causing or contributing to a violation of water quality standards in a receiving water, EPA will notify the Permittee in writing that an adaptive management response outlined in Part II.D.4 below is required.

3. EPA may elect not to require an adaptive management response from the Permittee if:

a) EPA determines that the violation of water quality standards is already being addressed by a Total Maximum Daily Load (TMDL) implementation plan or other enforceable water quality cleanup plan; or

b) EPA concludes the MS4 contribution to the violation will be eliminated through implementation of other permit requirements, regulatory requirements, or Permittee actions.

4. Adaptive Management Response:

a) Within 60 days of receiving a notification under Part II.D.2, or by an alternative date established by EPA, the Permittee must review its Stormwater Management Program and submit a report to EPA. The Adaptive Management Response Report must include:

- A description of the operational and/or structural BMPs that are currently being implemented at the location to prevent or reduce any pollutants that are causing or contributing to the violation of water quality standards, including a qualitative assessment of the effectiveness of each BMP.
- A description of potential additional operational and/or structural BMPs that will or may be implemented in order to prevent or reduce to the maximum extent practicable any pollutants that are causing or contributing to the violation of water quality standards.
- A description of the potential monitoring or other assessment and evaluation efforts that will or may be implemented to monitor, assess, or evaluate the effectiveness of the additional BMPs.
- A schedule for implementing the additional BMPs including, as appropriate: funding, training, purchasing, construction, monitoring, and other assessment and evaluation components of implementation.

b) EPA will, in writing, acknowledge receipt of the Adaptive Management Response Report within a reasonable time and notify the Permittee when it expects to complete its review of the report. EPA will either approve the additional BMPs and implementation schedule or require the Permittee to modify the report as needed. If modifications are required, EPA will specify a reasonable time frame in which the Permittee must submit and EPA will review the revised report.

c) The Permittee must implement the additional BMPs, pursuant to the schedule approved by EPA, beginning immediately upon receipt of written notification of approval.

d) The Permittee must include with each subsequent Annual Report a summary of the status of implementation and the results of any monitoring, assessment or evaluation efforts conducted during the reporting period. If, based on the information provided under this Part, EPA determines that modification of the BMPs or a specific implementation schedule is necessary EPA will notify the Permittee in accordance with Parts II.E.4, II.E.5 and/or VI.A.

E. Reviewing and Updating the SWMP

1. The Permittee must annually review their SWMP actions and activities as part of the preparation of the Annual Report required in Part IV.C
2. The Permittee may request changes to any SWMP action or activity specified in this permit in accordance with the following procedures:

    a) Changes to delete or replace an action or activity specifically identified in this permit with an alternate action or activity may be requested at any time. Modification requests to EPA must include:

        - An analysis of why the original actions or activity is ineffective, infeasible, or cost prohibitive;
        - Expectations on the effectiveness of the replacement action or activity; and
        - An analysis of why the replacement action or activity is expected to better achieve the permit requirements.

    b) Change requests must be made in writing and signed by the Permittee in accordance with Part VI.E.

3. The Permittee may request EPA review and approval of any existing program or document deemed to be equivalent to a specific SWMP program component required by this permit in accordance with Part II.A.7.
4. Documentation of any of the actions or activities required by this permit must be submitted to EPA upon request.
    a) EPA may review and subsequently notify the Permittee that changes to the SWMP are necessary to:

        - Address discharges from the MS4 that are causing or contributing to adverse water quality impacts;
        - Include more stringent requirements necessary to comply with new federal or state statutory or regulatory requirements; or
        - Include other conditions deemed necessary by EPA to comply with water quality standards, and/or other goals and requirements of the CWA.

    b) If EPA notifies the Permittee that changes to the SWMP are necessary pursuant to Part II.E.4.a, the notification will offer the Permittee an opportunity to propose alternative program changes to meet the objectives of the requested modification. Following this opportunity, the Permittee must implement any required changes according to the schedule set by EPA.
5. Any formal modifications to this permit will be accomplished according to Part VI.A of this permit.

F. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation. The Permittee must implement the actions and activities of the SWMP in all areas which are added or transferred to the Permittee's MS4 (or for which the Permittee becomes responsible for implementation of stormwater quality/quantity controls) as expeditiously as practicable, but not later than one year from the date upon which the new areas were added. A summary of areas added to the Permittee's MS4, and schedules for SWMP implementation, must be documented in the next Annual Report following the transfer.

G. SWMP Resources. The Permittee must provide adequate finances, staff, equipment and other support capabilities to implement the SWMP actions and activities outlined in this permit. Consistent with Part II.A.4.a, the Permittee must provide a summary of estimated SWMP implementation costs in each Annual Report. Provisions herein should not be interpreted to require obligations or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

III. Schedule for Implementation and Compliance. This table summarizes required compliance dates as contained in this permit. The Permittee must complete SWMP actions, and/or submit documentation to EPA, as summarized below. Annual Reports must document interim and completed status of required activities, and include program summary statistics, copies of interim or final documents, etc. relevant to the reporting period.

Table III. Schedule for Implementation and Compliance

Permit Citation	Description of Action	Due Date	Include in the SWMP Document?	Include In Annual Report (AR)?
General Requirements				
II.A.3; IV.C.2	SWMP documentation	1 year from permit effective date	Yes, Update annually	Yes; Submit with each AR
II.A.4	Track SWMP info, costs & statistics	1 year from PED	Update SWMP annually	Submit w/each AR
II.A.7	Submit equivalent documents for EPA review & approval	6 months prior to required	Include EPA approvals in SWMP	
VI.B	Reapply for continued permit coverage	Not later than 180 days prior to permit expiration date		
II.E.1, IV.A.1, IV.C.2	Review SWMP actions for compliance with Permit	Annually		Document compliance in each AR
II.F	Implement SWMP in all newly acquired areas	1 year from date of acquisition		Summarize in subsequent AR
II.G	Summarize SWMP implementation costs	Annually		Summarize costs in each AR
Public Education and Outreach				
II.B.1	Conduct targeted education program; Document audience understanding & behavior adoption	2 years from permit effective date	Document goals, record education activities	Summarize activity in each AR
Public Involvement and Participation				
II.B.2.b	Convene coordination meetings to ensure effective SWMP implementation	6 months from permit effective date	Describe coordination activity	Summarize activity in each AR
II.B.2.c	Make SWMP available to public via website	1 year from permit effective date	Document website in SWMP	Document website in AR
II.B.2.d	Coordinate volunteer activities	At least 1x per year	Maintain log of activities	Summarize activity in AR
Illicit Discharge Detection and Elimination (IDDE)				
II.B.3	Implement comprehensive IDDE program	Not later than 180 days prior to permit expiration date	Describe program in SWMP	Summarize activity in each AR
II.B.3.a	Update & maintain MS4 map of cantonment areas	2 years from permit effective date	Include reference in SWMP	Submit upon request and/or w/ permit renewal application
II.B.3.b	Map the presence of any MS4 in the training area, particularly in Muck Creek watershed	180 days prior to permit expiration date		Submit map with renewal application
II.B.3.d	Detect & address illicit discharges into the MS4 through dry weather screening	30 months from permit effective date	Describe in SWMP	Summarize screening efforts in AR

Table III. Schedule for Implementation and Compliance

Permit Citation	Description of Action	Due Date	Include in the SWMP Document?	Include In Annual Report (AR)?
Illicit Discharge Detection and Elimination (IDDE) continued				
II.B.3.d	Complete field screening of 75% of all MS4 outfalls	180 days prior to permit expiration date	Describe in SWMP	
II.B.3.d	Procedures to characterize illicit discharges	Respond to spills Immediately;& investigate complaints, reports within 7 days		Summarize efforts in AR
II.B.3.d	Procedures for source tracing, and elimination of illicit discharge	Initiate investigation within 21 days; take action to eliminate illicit connection within 45 days		
II.B.3.f	Educate employees businesses and public; publicize hotline/reporting	1 year from permit effective date		Summarize # of calls, follow-up action taken
II.B.3.g	Train responsible staff	2 years from permit effective date		Summarize training in AR
Construction Site Stormwater Runoff Control				
II.B.4	Construction Site Runoff Control Program	Ongoing	Describe in SWMP	
II.B.4.c	Maintain policies/ procedures used to enforce site controls	2 years from permit effective date	List policies and procedures	Summarize actions in AR
II.B.4.d	Maintain list of construction site BMPs to be used		Reference construction BMPs	
II.B.4.e	Include appropriate language in all contracts and requests for proposals		Provide example contract language in SWMP	
II.B.4.f	Conduct preconstruction review	Ongoing	Describe in SWMP	Summarize activity in AR
II.B.4 g	Construction site inspection plan; inspect prioritized sites at least quarterly	6 months from permit effective date	Include site inspection plan in SWMP	Summarize # of sites inspected and
II.B.4.h	Train responsible staff	Ongoing		Summarize in each AR
Stormwater Management for Areas of New Development and Redevelopment				
II.B.5	Manage SW from developed areas& new/redevelopment sites disturbing 5,00 sq feet or more	1 year from permit effective date	Describe in SWMP	Summarize status of required program
II.B.5.i	Develop site inspection program to verify proper installation of permanent SW facilities	14 months from permit effective date	Summarize inspection program in updated SWMP	Summarize inspections & actions beginning in 2nd Year AR
II.B.5.j	Ensure long term operation and maintenance of new permanent SW facilities	3 years from permit effective date	Summarize anticipated annual maintenance activity in SWMP	Summarize activity in AR
II.B.5.k	Train responsible staff	1 year from permit effective date		Summarize training in AR
II.B.5.e, Appendix C	Notify EPA of sites exempted from hydrologic performance standards per Appendix C	Annually		Summarize projects in Annual Report
II.B.5.f, Appendix C	Notify EPA of sites exempted from the hydrologic flow control standard, per Appendix C	Within 15 days of decision to exempt site		

Table III. Schedule for Implementation and Compliance

Permit Citation	Description of Action	Due Date	Include in the SWMP Document?	Include In Annual Report (AR)?
Pollution Prevention and Good Housekeeping for Municipal Operations & Maintenance				
II.B.6	Update and Implement O&M program	2 years from permit effective date	Describe O&M program in SWMP	Yes
II.B.6.a	Maintain SW facilities according to schedule established in permit	2 years from permit effective date	Document standards in SWMP	Yes; document circumstances preventing maintenance
II.B.6.b & c & d	Inspect 95% of permanent SW facilities/conduct spot checks after major storms; Inspect 95% all catch basins	No later than permit expiration date	Document schedules in SWMP document	Document # of facilities/catch basins in 2nd year AR; Summarize activity
II.B.6.g	Train responsible staff	Ongoing	Describe training in SWMP	Summarize training in AR
II.B.6.h	Develop SW pollution prevention plans for equipment maintenance/material storage areas not addressed by other permits	2 years year from permit effective date	Document areas by type/locations in SWMP	Summarize activities in AR
Stormwater Retrofits to Reduce Discharges to Impaired and Degraded Receiving Waters				
II.C	Develop SW Retrofit Plan, including roof downspout disconnection opportunities	3 yearsfrom permit effective date	Summarize program plan in SWMP	Submit Retrofit Plan with 3rd Year Annual Report
II.C.2.f	Initiate or complete retrofits from effective impervious surface of 5 acres cumulative area	No later than permit expiration date		Submit plan with 5th Year AR
Required Response to Violations of Water Quality Standards				
II.D	Notify EPA when a discharge is causing or contributing to a violation of water quality standards	Within 30 days of Permittee knowledge		Summarize in each AR
Monitoring, Recordkeeping, and Reporting Requirements				
IV.A.2, IV.A.8	Develop monitoring and quality assurance plan	1 year from permit effective date	Describe monitoring plan in in SWMP	Submit plan with 1st Year AR
IV.A.5, IV.C.1	Begin sampling stormwater discharge into American Lake	18 months from permit effective date		Submit data in 3nd Year AR, annually thereafter
IV.A.6.a, IV.C.1	Begin water quality sampling in JBLM Canal	1 year from permit effective date		Submit data in 3nd Year AR, annually thereafter
IV.A.6.b, IV.C.1	Begin water quality sampling in Clover and Murray Creeks	1 year from permit effective date		Submit data in 3nd Year AR, annually thereafter
IV.A.7, IV.C.1	Collect two (2) benthic macroinvertebrate samples in Clover Creek / two (2) samples in Murray Creek	180 days prior to permit expiration date		Submit data in 5th Year Annual Report
IV.A.9	Notify EPA regarding Permittee decision to monitor per the permit or participate in the RSMP	120 days from permit effective date		
IV.C.1, IV.C.2, IV.C.3	Submit Monitoring Reports and Annual Reports	Annually, on January 30th of each year beginning in 2015		

IV. Monitoring, Recordkeeping, and Reporting Requirements

A. Monitoring

1. **Compliance Evaluation.** At least once per year, the Permittee must evaluate its compliance with these permit conditions and progress toward achieving the minimum control measures. This evaluation of permit compliance must be documented in each Annual Report required as described in Part IV.C.2.

2. **Monitoring Objectives.** The Permittee must monitor stormwater discharges, surface water quality and stream biology to assess the effectiveness of the SWMP to minimize the impacts from MS4 discharges. The Permittee must conduct monitoring to estimate phosphorus loading from its MS4 discharges into American Lake; characterize water quality discharging through the JBLM Canal; characterize water quality in Clover Creek and Murray Creek; and assess baseline biological conditions in Clover Creek and Murray Creek. Within one year from the effective date of this permit, the Permittee must develop a monitoring plan to address these objectives, including the quality assurance requirements as defined in Part IV.A.8. The monitoring plan must be submitted as part of the 1st year Annual Report.

3. **Representative Sampling.** Samples and measurements taken for the purpose of monitoring must be representative of the monitored activity.

4. **Monitoring Procedures.** Monitoring must be conducted according to test procedures approved under 40 CFR Part 136. Where an approved 40 CFR Part 136 method does not exist, and other test procedures have not been specified, any available method may be used after approval from EPA.

5. **Stormwater Discharge Monitoring.** No later than eighteen (18) months from the effective date of this permit, the Permittee must sample at least quarterly from at least one stormwater outfall discharging to American Lake. This monitoring must include stormwater flow measurements collected using automated or manual sampling methods. Samples must be analyzed for total phosphorus as summarized in Table IV.A. Beginning with the 3rd Year Annual Report, any data collected from the selected stormwater outfall(s) discharging to American Lake must be summarized and reported to EPA annually as part of the corresponding Annual Report. The Permittee may elect to opt out of this monitoring requirement, as described below in Part IV.A.9.

Table IV.A: Stormwater Discharge Monitoring For American Lake

Parameter	Monitoring requirements	
	Sample location[1]	Sample frequency[2]
Flow (cfs)	See below	Quarterly
Total Phosphorus (mg/L)	See below	Quarterly

[1] At least one (1) MS4 outfall discharging into American Lake, location(s) to be selected by Permittee.
[2] Samples must be collected at least quarterly during a storm event sufficient to produce a discharge.

6. **Water Quality Monitoring.**

a) **Water Quality in the JBLM Canal.** No later than one year from the effective date of this permit, the Permittee must begin a water quality monitoring program within the JBLM Canal. Over a period of 24 consecutive months, the Permittee must collect water quality samples at least quarterly, for a total of eight (8) quarterly samples. In addition, the Permittee must also collect at least five (5) individual samples during "high flow" storm events, at a frequency to be determined by the Permittee. This monitoring must include flow measurement(s) using automated or manual sampling methods. All samples collected must be analyzed for the parameters listed in Table IV.B. All monitoring of water quality within the JBLM Canal, comprised of the minimum thirteen (13) sampling events described above, must be completed no later than 180 days prior to the expiration date of the permit. Beginning with the 3rd Year Annual Report, any monitoring data representing water quality discharging through the JBLM Canal must be summarized and reported to EPA annually as part of the corresponding Annual Report.

b) **Water Quality in Clover Creek and Murray Creek.** No later than one year from the effective date of this permit, the Permittee must begin a water quality monitoring program in both Murray Creek and Clover Creek. This monitoring must include flow measurement(s) using automated or manual sampling methods. All samples must be analyzed for the parameters identified in Tables IV.C and IV.D, respectively. Beginning with the 3rd Year Annual Report, any monitoring data representing water quality in Clover Creek and Murray Creeks must be summarized and reported to EPA annually as part of the corresponding Annual Report

Table IV.B: Water Quality Monitoring Requirements for JBLM Canal

Parameter	Monitoring requirements	
	Sample location[1]	Sample frequency[2]
Flow (cfs)	See below	See below
Temperature (C°)	See below	See below
Dissolved Oxygen (mg/L)	See below	See below
pH (s.u.)	See below	See below
Fecal coliform bacteria (cfu/100mL)	See below	See below
Total Nitrogen (mg/L)	See below	See below
Total Phosphorus (mg/L)	See below	See below
Total Suspended Solids (mg/L)	See below	See below
Turbidity (NTU)	See below	See below
Total and Dissolved Copper(µ/L)	See below	See below
Total and Dissolved Zinc(µ/L)	See below	See below
Hardness (mg/L)	See below	See below

[1] Samples must be collected from at least one (1) location within the JBLM Canal, downstream of all MS4 discharges/other flows entering the Canal, and prior to discharge into Puget Sound.
[2] Over a period of twenty four (24) consecutive months, the Permittee must collect samples quarterly, for a minimum of four samples per year, resulting in a minimum total of eight quarterly samples. An additional five (5) individual samples must be collected during "high flow" storm events, at a frequency to be determined by the Permittee.

Table IV.C: Water Quality Monitoring Requirements for Murray Creek

Parameter	Monitoring requirements	
	Sample location[1]	Sample frequency[2]
Flow (cfs)	See below	Quarterly
Temperature (C°)	See below	Quarterly
Dissolved Oxygen (mg/L)	See below	Quarterly
pH (s.u.)	See below	Quarterly
Fecal coliform bacteria (cfu/100mL)	See below	Quarterly
Total Nitrogen (mg/L)	See below	Quarterly
Total Phosphorus (mg/L)	See below	Quarterly
Total Suspended Solids (mg/L)	See below	Quarterly
Turbidity (NTU)	See below	Quarterly
Total and Dissolved Copper(µ/L)	See below	Quarterly
Total and Dissolved Zinc(µ/L)	See below	Quarterly
Hardness (mg/L)	See below	Quarterly

[1] A minimum of one location in Murray Creek, to be selected by the Permittee.
[2] A minimum of four (4) samples must be collected in each calendar year.

Table IV.D: Water Quality Monitoring Requirements for Clover Creek

Parameter	Monitoring requirements	
	Sample location[1]	Sample frequency[2]
Flow (cfs)	See below	Quarterly
Temperature (C°)	See below	Quarterly
Dissolved Oxygen (mg/L)	See below	Quarterly
pH (s.u.)	See below	Quarterly
Fecal coliform bacteria (cfu/100mL)	See below	Quarterly
Total Nitrogen (mg/L)	See below	Quarterly
Total Phosphorus (mg/L)	See below	Quarterly
Total Suspended Solids (mg/L)	See below	Quarterly
Turbidity (NTU)	See below	Quarterly
Total and Dissolved Copper(µ/L)	See below	Quarterly
Total and Dissolved Zinc(µ/L)	See below	Quarterly
Hardness (mg/L)	See below	Quarterly

[1] A minimum of one location in Clover Creek as it exits Permit Area, to be selected by the Permittee.
[2] A minimum of four (4) samples must be collected in each calendar year.

7. **Biological Monitoring.** No later than 180 days prior to the expiration date of this permit, the Permittee must collect at least two (2) benthic macroinvertabrate samples in Murray Creek and at least two (2) benthic macroinvertabrate samples in Clover Creek. One sampling event per waterbody must be conducted between the months August-October within any calendar year of the permit term. Sample locations should be in close proximity to the water quality monitoring locations identified by the Permittee to comply with Part IV.A.6.b. The Permittee must use benthic macroinvertebrate monitoring protocols which are consistent with the Pierce County Watershed Health

Monitoring Project, Thurston County's Water Resources Monitoring Program, and/or other contemporaryWestern Washington benthic macroinvertebrate monitoring programs. Each sample must be analyzed and scored using the Puget Sound Lowlands benthic index of biological integrity (B-IBI), as described at http://pugetsoundstreambenthos.org/SiteMap.aspx. The Permittee may elect to opt out of this monitoring requirement, as described below in Part IV.A.9.

8. Quality Assurance Requirements. The Permittee must develop a quality assurance plan (QAP) for all monitoring required in this Part. The QAP must be developed concurrent with the monitoring plan as described in Part IV.A.2. Any existing QAPs may be modified to meet the requirements of this section. Upon completion of the monitoring plan and QAP, the Permittee must submit the combined document to EPA with the 1st year Annual Report.

a) The QAP must be designed to assist in planning for the collection and analysis of stormwater discharge, water quality and biological/benthic macroinvertebrate samples in support of the permit, and in explaining data anomalies when they occur.

b) Throughout all sample collection and analysis activities, the Permittee must use the EPA-approved QA/QC and chain-of-custody procedures described in the following documents:

- *EPA Requirements for Quality Assurance Project Plans EPA-QA/R-5* (EPA/240/B-01/003, March 2001). A copy of this document can be found electronically at: http://www.epa.gov/quality/qs-docs/r5-final.pdf
- *Guidance for Quality Assurance Project Plans EPA-QA/G-5*, (EPA/600/R-98/018, February, 1998). A copy of this document can be found electronically at: http://www.epa.gov/r10earth/offices/oea/epaqag5.pdf

c) At a minimum, the QAP must reflect the content specified in the EPA documents listed in Part IV.A.8.b, and include the following information:

- Details on the number of samples, type of sample containers, preservation of samples, holding times, analytical methods, analytical detection and quantitation limits for each target compound, type and number of quality assurance field samples, precision and accuracy requirements, sample preparation requirements, sample shipping methods, and laboratory data delivery requirements;
- Map(s) indicating the location of each sampling point;
- Qualification and training of personnel; and
- Name(s), address(es) and telephone number(s) of the laboratories, used by or proposed to be used by the Permittee.

d) The Permittee must amend the QAP whenever there is a modification in sample collection, sample analysis, or other procedure addressed by the QAP.

e) Copies of the QAP must be maintained by the Permittee and made available to EPA upon request.

9. Optional Participation in the Puget Sound Regional Stormwater Management Program (RSMP) Status and Trends Monitoring.

a) The purpose of this part is to allow the Permittee the option to contribute to the Regional Stormwater Management Program (RSMP) Status and Trends Monitoring of small streams and marine nearshore in Puget Sound. The RSMP Status and Trends monitoring is described in Part S.8.b of the Washington Department of Ecology-issued *Western Washington Phase II Municipal Stormwater Permit* (effective August 1, 2013) through other sources.[1] The Permittee may elect to participate in the RSMP Status and Trends Monitoring program in lieu of the monitoring requirements specified in Part IV.B.5 and IV.B.7 of this permit. The Permittee's decision to participate in the RSMP will be considered binding through the duration of the permit term. The Permittee is solely responsible for discussing and arranging its potential in the RSMP with the program organizers prior to the EPA notification deadline in Part IV.A.9.c.

b) This optional "participation in the RSMP" requires the Permittee to make a monetary payment, or series of annual payments, based on a per capita calculation to be assessed by the RSMP organizers in a manner similar to the calculated contributions from other municipal RSMP participants.

c) Not later than 120 days from the effective date of this permit, the Permittee must inform EPA in writing of its decision to either conduct the monitoring described in Parts IV.A.5 and IV.A.7, or to participate in the Puget Sound RSMP. The notification letter must be submitted to the EPA address indicated in Part IV.D.

B. Recordkeeping

1. Retention of Records. The Permittee must retain records and copies of all information (including all monitoring, calibration and maintenance records and all original strip chart recordings for any continuous monitoring instrumentation, copies of all reports required by this permit, a copy of the NPDES permit, and records of all data used to complete the application for this permit) for a period of at least five years from the date of the sample, measurement, report or application, or for the term of this permit, whichever is longer. This period may be extended at the request of the EPA at any time. Records include all information used in the development of the SWMP, all monitoring data, copies of all reports, and all data used in the development of the permit application.

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[1] See *Western Washington Phase II Municipal Stormwater Permit* available online at http://www.ecy.wa.gov/programs/wq/stormwater/municipal/phaseIIww/wwphiipermit.html; and the RSMP website at http://www.ecy.wa.gov/programs/wq/stormwater/municipal/rsmp.html

2. **Availability of Records.** The Permittee must submit the records referred to in Part IV.B.1 to EPA only when such information is requested. The Permittee must retain all records comprising the SWMP required by this permit (including a copy of the permit language and all Annual Reports) at a location accessible to the EPA. The Permittee must make records (including the permit application, Annual Reports and the SWMP document) available to the public if requested to do so in writing pursuant to the Freedom of Information Act. The public must be able to request and view the records during normal business hours, and the Permittee must make all reasonable efforts to comply with such requests. As allowed by the Freedom of Information Act, the Permittee may charge fees for copies of documents provided in response to written requests from the public.

C. Reporting Requirements

1. **Stormwater Discharge, Water Quality and Biological Monitoring Reports.** Beginning two years from the effective date of this permit, and at least once per year thereafter, all available stormwater discharge and water quality monitoring data collected during the prior reporting period(s) must be submitted as part of the corresponding Annual Report. If the Permittee conducts more frequent monitoring than is required by this Permit, the results of such monitoring must also be submitted. All biological monitoring data and corresponding Puget Sound Lowlands I-IBI scores must be submitted as part of the subsequent Annual Report following the sample collection. At a minimum, thisReport must include:
   a) Dates of sample collection and analyses;
   b) Results of analytical samples collected;
   c) Location of sample collection;
   d) Summary analysis of data collected.
2. **Annual Report.** No later than January 30, 2015, and annually thereafter, the Permittee must submit an Annual Report to EPA. The reporting periods and associated due dates for each Annual Report are specified in Table IV.E. Copies of all Annual Reports must be made available to the public, at a minimum, upon written request to the Permittee pursuant to the Freedom of Information Act.

Table IV.E - Annual Report Deadlines

Annual Report	Reporting Period	Due Date
1st Year Annual Report	October 1, 2013–September 30, 2014	January 30, 2015
2nd Year Annual Report	October 1, 2014-September 30, 2015	January 30, 2016
3rd Year Annual Report	October 1, 2015-September 30, 2016	January 30, 2017
4th Year Annual Report	October 1, 2016-September 30, 2017	January 30, 2018
5th Year Annual Report	October 1, 2017-September 30, 2018	January 30, 2019

3. **Contents of the Annual Report.** The following information occurring during the relevant reporting period must be summarized or included within each Annual Report:

   a) An updated SWMP document, as required in Part II.A.3;

   b) A report or assessment of compliance with this permit and progress towards achieving the identified actions and activities for each minimum control measure in Parts II.B and II.C. Status of each program area must be addressed, even if activity has previously been completed or has not yet been implemented;

   c) Results of any information collected and analyzed during the previous 12 month reporting period, including summaries of program costs and descriptions of funding sources, information used to assess the success of the program at improving water quality to the maximum extent practicable, or other relevant information;

   d) Stormwater Discharge, Water Quality and Biological Monitoring Reporting, as required in Part IV.C.1;

   e) A summary of the number and nature of all inspections, formal enforcement actions, and/or other similar activities performed by the Permittee;

   f) A summary of all public and private new development or redevelopment project sites that disturb 5,000 square feet or more of land area commencing during the reporting period, including project name, project location, total acreage of new development or redevelopment, and all documentation related to any project sites exempted by JBLM or its counterparts from the provisions of Part II.B.5 pursuant to Permit Appendix C;

   g) A summary list of any water quality compliance-related enforcement actions received from regulatory agencies other than EPA. Such actions include, but are not limited to, formal warning letters, notices of violation, field citations, or similar actions. This summary should include dates, project synopsis, and actions taken to address the compliance issue(s);

   h) Copies of completed or revised Monitoring & Quality Assurance Plan(s), retrofit plans, education materials, ordinances (or other regulatory mechanisms), equivalent documents or program materials, inventories, guidance materials, maps, or other products produced as required by this permit;

   i) A general summary of the activities the Permittee plans to undertake during the next reporting cycle (including an implementation schedule) for each minimum control measure;

   j) A description and schedule for implementation of additional BMPs that may be necessary, based on monitoring results, to ensure compliance with applicable water quality standards;

   k) Notice if the Permittee is relying on another entity to satisfy any of the permit obligations, if applicable; and

l) A description of the location, size, receiving water, and drainage area of any new MS4 outfall(s) owned or operated by the Permittee added to the system since the previous annual reporting period.

D. Addresses. Reports and other documents to be submitted as required by this permit must be signed and certified in accordance with Part VI.E.

a) If EPA provides the Permittee of an alternative means of submitting reports during the permit term other than the manner described herein, the Permittee may use that alternative reporting mechanism in lieu of this provision.

b) One hard copy and one electronic copy (on CD ROM, or through prearranged transmission by Email as indicated below) of any submittal must be provided the following address:

EPA Region 10: United States Environmental Protection Agency
Region 10
Attention: Municipal Stormwater Program Contact
NPDES Compliance Unit
1200 6th Avenue, Suite 900 (OCE-133)
Seattle, WA 98101

c) Prior to the electronic submittal of any required documents to EPA, the Permittee must contact the EPA Region 10 NPDES MS4 Permit Program Coordinator at (206) 553-6650 or (800) 424-4372, and obtain appropriate Email contact information.

V. Compliance Responsibilities

A. Duty to Comply. The Permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action, for permit termination, revocation and reissuance, or modification, or for denial of a permit renewal application.

B. Penalties for Violations of Permit Conditions

1. **Civil and Administrative Penalties**. Pursuant to 40 CFR Part 19 and the Act, any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed the maximum amounts authorized by Section 309(d) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $37,500 per day for each violation).

2. **Administrative Penalties**. Any person may be assessed an administrative penalty by the Administrator for violating Section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of this Act. Pursuant to 40 CFR Part 19 and the Act, administrative penalties for Class I violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(A) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $16,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed $37,500). Pursuant to 40 CFR Part 19 and the Act, penalties for Class II violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(B) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $16,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed $177,500).

3. **Criminal Penalties.**

   a) **Negligent Violations**. The Act provides that any person who negligently violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment of not more than one year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than $50,000 per day of violation, or by imprisonment of not more than two years, or both.

   b) **Knowing Violations**. Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of $5,000 to $50,000 per day of violation, or imprisonment for not more than three years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than $100,000 per day of violation, or imprisonment of not more than six years, or both.

   c) **Knowing Endangerment**. Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than $500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in Section 309(c)(3)(B)(iii) of the Act, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than $1,000,000 and can be fined up to $2,000,000 for second or subsequent convictions.

d) **False Statements**. The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four years, or both. The Act further provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

C. Need to Halt or Reduce Activity not a Defense. It shall not be a defense for the Permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with this permit.

D. Duty to Mitigate. The Permittee must take all reasonable steps to minimize or prevent any discharge or disposal in violation of this Permit that has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance. The Permittee must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by the Permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

F. Bypass of Treatment Facilities.

1. **Bypass not exceeding limitations**. The Permittee may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs 2 and 3 of this Part.
2. **Notice**.
    a) Anticipated bypass. If the Permittee knows in advance of the need for a bypass, it must submit prior written notice, if possible at least 10 days before the date of the bypass.
    b) Unanticipated bypass. The Permittee must submit notice of an unanticipated bypass as required under Part V.K of this Permit.
3. **Prohibition of bypass.** The intentional bypass of stormwater from all or any portion of a stormwater treatment BMP whenever the design capacity of the treatment BMP is not

exceeded is prohibited, and the Director of the Office of Compliance and Enforcement may take enforcement action against the Permittee for such bypass, unless:

a) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated stormwater, or maintenance during normal dry weather. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of dry weather or preventive maintenance; and

c) The Permittee submitted notices as required under paragraph 2 of this Part.

4. EPA's Director of the Office of Compliance and Enforcement may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph 3.a. of this Part.

G. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the Permittee meets the requirements of G.2 of this Part. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

2. Conditions necessary for a demonstration of upset. To establish the affirmative defense of upset, the Permittee must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

a) An upset occurred and that the Permittee can identify the cause(s) of the upset;

b) The permitted facility was at the time being properly operated;

c) The Permittee submitted notice of the upset as required under Part V.K; and

d) The Permittee complied with any remedial measures required under Part V.D.

3. Burden of proof. In any enforcement proceeding, the Permittee seeking to establish the occurrence of an upset has the burden of proof.

H. Toxic Pollutants. The Permittee must comply with effluent standards or prohibitions established under Section 307(a) of the Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

I. Planned Changes. The Permittee must give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility whenever:

1.The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source as determined in 40 CFR §122.29(b); or

2.The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are not subject to effluent limitations in the permit.

J. Anticipated Noncompliance. The Permittee must give advance notice to the Director of any planned changes in the permitted facility or activity that may result in noncompliance with this permit.

K. Twenty-Four Hour Reporting.

1. The Permittee must report the following occurrences of noncompliance by telephone within 24 hours from the time the Permittee becomes aware of the circumstances:
    a) any discharge to or from the MS4 which could result in noncompliance that endangers health or the environment;
    b) any unanticipated bypass that exceeds any effluent limitation in the permit (See Part V.F);
    c) any upset that exceeds any effluent limitation in the permit (See Part V.G);
2. A written submission must also be provided within five days of the time you become aware of the circumstances. The written submission must contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.
3. The following shall be included as information which must be reported within 24 hours under this paragraph.
    a) Any unanticipated bypass which exceeds any effluent limitation in the permit. (See 40 CFR §122.41(g).)
    b) Any upset which exceeds any effluent limitation in the permit (See 40 CFR 122.41(n)(1).)
4. The Director of the Office of Compliance and Enforcement may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the NPDES Compliance Hotline in Seattle, Washington, by telephone, (206) 553-1846.
5. Reports must be submitted to the addresses in Part IV.D.

L. Other Noncompliance. The Permittee must report all instances of noncompliance, not required to be reported within 24 hours, as part of each Annual Report as required in Part IV.C.2. Noncompliance reports must contain the information listed in Part V.K. of this permit

VI. General Provisions

A. Permit Actions. This permit may be modified, revoked and reissued, or terminated for cause as specified in 40 CFR §§ 122.62, 122.64, or 124.5. The filing of a request by the Permittee for a permit modification, revocation and reissuance, termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

B. Duty to Reapply. If the Permittee intends to continue an activity regulated by this permit after the expiration date of this permit, the Permittee must apply for and obtain a new permit. In accordance with 40 CFR §122.21(d), and unless permission for the application to be submitted at a later date has been granted by the Director, the Permittee must submit a new application at least 180 days before the expiration date of the permit, or in conjunction with the fourth Annual Report. The reapplication package must contain the information required by 40 CFR §122.21(f) which includes: name and mailing address(es) of the Permittee(s) that operate the MS4(s), and names and titles of the primary administrative and technical contacts for the municipal Permittee(s). In addition, the Permittee must identify the identification number of the existing NPDES MS4 permit; any previously unidentified water bodies that receive discharges from the MS4; a summary of any known water quality impacts on the newly identified receiving waters; a description of any changes to the number of applicants; and any changes or modifications to the Stormwater Management Program. The re-application package may incorporate by reference the fourth Annual Report when the reapplication requirements have been addressed within that report.

C. Duty to Provide Information. The Permittee must furnish to the Director, within the time specified in the request, any information that the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The Permittee must also furnish to the Director, upon request, copies of records required to be kept by this permit.

D. Other Information. When the Permittee becomes aware that it failed to submit any relevant facts in a permit application, or that it submitted incorrect information in a permit application or any report to the Director, the Permittee must promptly submit the omitted facts or corrected information.

E. Signatory Requirements. All applications, reports or information submitted to the Director must be signed and certified as follows.

1. All permit applications must be signed as follows:

a) For a corporation: by a responsible corporate officer.

b) or 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.

2. All reports required by the permit and other information requested by the Director must be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:

a) The authorization is made in writing by a person described above;

b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the organization; and

c) The written authorization is submitted to the Director.

3. **Changes to authorization**. If an authorization under Part VI.E.2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part VI.E.2 must be submitted to the Director prior to or together with any reports, information, or applications to be signed by an authorized representative.

4. **Certification.** Any person signing a document under this Part must 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 who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

F. Availability of Reports. In accordance with 40 CFR Part 2, information submitted to EPA pursuant to this permit may be claimed as confidential by the Permittee. In accordance with the Act, permit applications, permits and effluent data are not considered confidential. Any confidentiality claim must be asserted at the time of submission by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice to the Permittee. If a claim is asserted, the information will be treated in accordance with the procedures in 40 CFR Part 2, Subpart B (Public Information) and 41 Fed. Reg. 36902 through 36924 (September 1, 1976), as amended.

G. Inspection and Entry. The Permittee must allow the Director or an authorized representative (including an authorized contractor acting as a representative of the Director), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the Permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

H. Property Rights. The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons or property or invasion of other private rights, nor any infringement of state or local laws or regulations.

I. Transfers. This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the Permittee and incorporate such other requirements as may be necessary under the Act. (See 40 CFR §122.61; in some cases, modification or revocation and reissuance is mandatory.)

J. State/Tribal Environmental Laws

1. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the Permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State/Tribal law or regulation under authority preserved by Section 510 of the Act.
2. No condition of this permit releases the Permittee from any responsibility or requirements under other environmental statutes or regulations.

K. Oil and Hazardous Substance Liability. Nothing in this permit shall be constructed to preclude the institution of any legal action or relieve the Permittee from any responsibilities, liabilities, or penalties to which the Permittee is or may be subject under Section 311 of the CWA or Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

L. Severability. The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to the circumstances, and the remainder of this permit shall not be affected thereby.

VII. Definitions and Acronyms

All definitions contained in Section 502 of the Act and 40 CFR Part 122 apply to this permit and are incorporated herein by reference. For convenience, simplified explanations of some regulatory/statutory definitions have been provided but, in the event of a conflict, the definition found in the statute or regulation takes precedence.

"Administrator" means the Administrator of the EPA, or an authorized representative.

"Air Operations Areas" or AOAs, is defined in the *Aviation Stormwater Design Manual - Managing Wildlife Hazards Near Airports* (December 2008). For the purposes of this Permit, the term AOA means any area of an airport used or intended to be used for landing, takeoff, or surface maneuvering of aircraft. This includes such paved or unpaved areas that are used or intended to be used for the unobstructed movement of aircraft in addition to associated runways, taxiways, or aprons. For the purposes of this permit, the term AOA also includes the following unique subareas as defined in the *Aviation Stormwater Design Manual - Managing Wildlife Hazards Near Airports* (December 2008) and described in this Part: Clearway, Object-Free Area, Runway Protection Zone, Runway Safety Area, and Taxiway Safety Areas. See: http://www.wsdot.wa.gov/aviation/AirportStormwaterGuidanceManual.htm

"AKART" means all known, available and reasonable methods of prevention, control and treatment, and refers to the State of Washington Water Pollution Control Act, Chapter 90.48.010 and 90.48.520 RCW.

"Best Management Practices (BMPs)" means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States and waters of the State. BMPs also include treatment requirements, operating procedures, and practices to control runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. See "stormwater control measure (SCM)."

"Bioretention" is the water quality and water quantity stormwater management practice using the chemical, biological and physical properties of plants, microbes and soils for the removal of pollution from stormwater runoff. Biorentention, for the purpose of this permit, means engineered facilities that store and treat stormwater by passing it through a specified soil profile, and either retain or detain the treated stormwater for flow attenuation. Refer to the 2012 *Stormwater Management Manual for Western Washington,* Chapter 7 of *Volume V – Runoff Treatment BMPs* for Bioretention BMP types and design specifications.

"Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. See 40 CFR §122.41(m)(1)(i).

"Canopy Interception" is the interception of precipitation, by leaves and branches of trees and vegetation that does not reach the soil.

"Clearway," as defined in the *Aviation Stormwater Design Manual - Managing Wildlife Hazards Near Airports* (December 2008), means a defined rectangular area beyond the end of a runway cleared or suitable for use in lieu of runway to satisfy takeoff distance requirements. This is the region of space above an inclined plane that leaves the ground at the end of the runway. See: http://www.wsdot.wa.gov/aviation/AirportStormwaterGuidanceManual.htm

"Construction General Permit or CGP" means the current version of the U.S. Environmental Protection Agency's *NPDES General Permit for Stormwater Discharges from Construction Activities in Washington, Permit No.WAR12-000F.* The permit is posted on EPA's website at *www.epa.gov/npdes/stormwater/cgp.*

"Common Plan of Development" is a contiguous construction project where multiple separate and distinct construction activities may be taking place at different times on different schedules but under one plan. The "plan" is broadly defined as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot; included in this definition are most subdivisions and industrial parks.

"Construction Activity" includes, but is not limited to, clearing, grading, excavation, and other site preparation work related to construction of residential buildings and non-residential buildings, and heavy construction (e.g., highways, streets, bridges, tunnels, pipelines, transmission lines and industrial non-building structures). See "Stormwater Discharge Associated with Construction Activity."

"Control Measure" as used in this permit, refers to any Best Management Practice or other method used to prevent or reduce the discharge of pollutants to waters of the United States and waters of the State.

"Converted vegetation" or converted vegetation areas, means the surfaces on a project site where native vegetation, pasture, scrub/shrub, or unmaintained non-native vegetation (e.g., himalayan blackberry, scotch broom) are converted to lawn or landscaped areas, or where native vegetation is converted to pasture.

"CWA" or "The Act" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended by Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et seq.

"Director" means the Environmental Protection Agency Region 10 Regional Administrator, the Director of the Office of Water and Watersheds, the Director of the Office of Compliance and Enforcement, or an authorized representative.

"Discharge" when used without a qualifier, refers to "discharge of a pollutant" as defined at 40 CFR §122.2.

"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."

"Discharge-related Activities" include: activities which cause, contribute to, or result in stormwater point source pollutant discharges, and measures to control such stormwater discharges, including the siting, construction, and operation of best management practices to control, reduce or prevent stormwater pollution.

"Discharge Monitoring Report or DMR" means the EPA uniform national form, including any subsequent additions, revisions or modification for the reporting of self monitoring results by the Permittee. See 40 CFR §122.2.

"Disconnect" for the purposes of this permit, means the change from a direct discharge into receiving waters to one in which the discharged water flows across a vegetated surface, through a constructed water or wetlands feature, through a vegetated swale, or other attenuation or infiltration device before reaching the receiving water.

"Effective impervious surfaces" are those impervious surfaces that are connected via sheet flow or discrete conveyance to a drainage system. (Impervious surfaces are considered ineffective if: 1) the runoff is dispersed through at least one hundred feet of native vegetation in accordance with BMT T55.30 – "Full Dispersion" as described in Chapter 5 of Volume V of the 2012 *Stormwater Management Manual for Western Washington*; or 2) residential roof runoff is infiltrated in accordance with Downspout Full Infiltration Systems in BMP T5.10A in Volume III –*Hydrologic Analysis and Flow Control BMPs* of the 2012 *Stormwater Management Manual for Western Washington;* or 3) approved continuous runoff modeling methods indicate that the entire runoff file is infiltrated.

"Engineered Infiltration" is an underground device or system designed to accept stormwater and slowly exfiltrates it into the underlying soil. This device or system is designed based on soil tests that define the infiltration rate.

"Erodible or leachable materials" means wastes, chemicals, or other substances that measurably alter the physical or chemical characteristics of runoff when exposed to rainfall. Examples include erodible soils that are stockpiled, uncovered process wastes, manure, fertilizers, oily substances, ashes, kiln dust, and garbage dumpster leakage.

"Erosion" means the process of carrying away soil particles by the action of water.

"Evaporation" means rainfall that is changed or converted into a vapor.

"Evapotranspiration" means the sum of evaporation and transpiration of water from the earth's surface to the atmosphere. It includes evaporation of liquid or solid water plus the transpiration from plants.

"Extended Filtration" is a structural stormwater device which filters stormwater runoff through a soil media and collects it an under drain which slowly releases it after the storm is over.

"EPA" means the Environmental Protection Agency Regional Administrator, the Director of the Office of Water and Watersheds, or an authorized representative.

"Facility or Activity" means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

"Green infrastructure" means runoff management approaches and technologies that utilize, enhance and/or mimic the natural hydrologic cycle processes of infiltration, evapotranspiration and reuse.

"Hard surface" means an impervious surface, a permeable pavement, or a vegetated roof.

"Hydromodification" means changes to the stormwater runoff characteristics of a watershed caused by changes in land use.

"Hyperchlorinated" means water that contains more than 10 mg/Liter chlorine.

"Illicit Connection" means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

"Illicit Discharge" is defined at 40 CFR §122.26(b)(2) and means any discharge to a municipal separate storm sewer that is not entirely composed of stormwater, except discharges authorized under an NPDES permit (other than the NPDES permit for discharges from the MS4) and discharges resulting from fire fighting activities.

"Impaired Water" (or "Water Quality Impaired Water") for purposes of this permit means any water body identified by the State of Washington or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards. Impaired waters include both waters with approved or established Total Maximum Daily Loads (TMDLs), and those for which a TMDL has not yet been approved or established.

"Impervious surface" means a non-vegetated surface area that either prevents or retards the entry of water into the soil mantle as under natural conditions prior to development. "Impervious surface" also means a non-vegetated surface area which causes water to run off the surface in greater quantities (or at an increased rate of flow) than the flow present under natural conditions prior to development. Common impervious surfaces include, but are not limited to: roof tops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads, packed earthen materials, and

oiled, macadam or other surfaces which similarly impede the natural infiltration of stormwater. Open, uncovered retention/detention facilities must be considered impervious surfaces for purposes of runoff modeling.

"Industrial Activity" as used in this permit refers to the eleven categories of industrial activities included in the definition of discharges of stormwater associated with industrial activity at 40 CFR §122.26(b)(14).

"Industrial Stormwater" as used in this permit refers to stormwater runoff from industrial activities, such as those defined in 40 CFR 122.26(b)(14)(i-xi).

"Infiltration" is the process by which stormwater penetrates into soil.

"Low Impact Development" or "LID" means a stormwater and land use management strategy that strives to mimic pre-development hydrologic processes of infiltration, filtration, storage, evaporation,and transpiration by emphasizing conservation, use of onsite natural features, site planning, and distributed stormwater management practices that integrated into a project design.

"LID Best Management Practices" or "LID practices," means the distributed stormwater management practices, integrated into a project design, that emphasize pre-disturbance hydrologic processes of infiltration, filtration, storage, evaporation and transpiration. LID BMPs include, but are not limited to, bioretention/rain gardens, permeable pavements, roof downspout controls, dispersion, soil quality and depth, minimal excavation foundations, vegetated roofs, and water re-use.

"LID Principles" means the land use management strategies that emphasize conservation, use of on-site natural features, and site planning to minimize impervious surfaces, native vegetation loss, and stormwater runoff.

"Major storm event" as used in this permit, refers to rainfall greater than the 24 hour- 10 year-recurrence interval.

"Maintenance" means the repair and maintenance includes activities conducted on currently serviceable structures, facilities, and equipment that involves no expansion or use beyond that previously existing and results in no significant adverse hydrologic impact. It includes those usual activities taken to prevent a decline, lapse, or cessation in the use of structures and systems. Those usual activities may include replacement of dysfunctional facilities, including cases where environmental permits require replacing an existing structure with a different type structure, as long as the functioning characteristics of the original structure are not changed. One example is the replacement of a collapsed, fish blocking, round culvert with a new box culvert under the same span, or width, of roadway. In regard to stormwater facilities, maintenance includes assessment to ensure ongoing proper operation, removal of built up pollutants (i.e. sediments), replacement of failed or failing treatment media, and other actions taken to correct defects as identified in the maintenance standards of Chapter 4, Volume V- *Runoff Treatment BMPs* of the 2012 *Stormwater*

Management Manual for Western Washington. See also Road Pavement Maintenance exemptions in Appendix C of this Permit.

"MEP" or "maximum extent practicable," means the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in stormwater discharges that was established by CWA Section 402(p). EPA's discussion of MEP as it applies to regulated small MS4s is found at 40 CFR §122.34.

"Measurable Goal" means a quantitative measure of progress in implementing a component of a stormwater management program.

"Minimize" means to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practices.

"MS4" means "municipal separate storm sewer system" and is used to refer to a Large, Medium, or Small Municipal Separate Storm Sewer System regulated under the federal NPDES permit program. The term, as used within the context of this permit, refers to separate storm sewer system owned or operated within the permit area by JBLM. See "municipal separate storm sewer" below and definitions at 40 CFR 122.26(b)(18), (19)

"Municipality" means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA.

"Municipal Separate Storm Sewer" is defined at 40 CFR 122.26(b)(8) and 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, stormwater, 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 stormwater; (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.

"Seattle Urbanized Area" means the greater Seattle, Washington, area delineated by the Year 2000 Census by the U.S. Bureau of the Census according to the criteria defined by the Bureau on March 15, 2002 (67 FR 11663) namely, the area consisting of contiguous, densely settled census block groups and census blocks that meet minimum population density requirements, along with adjacent densely settled census blocks that together encompass a population of at least 50,000 people.

"National Pollutant Discharge Elimination System" or "NPDES" means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 402, 318 and 405 of the CWA. The term includes an "approved program" delegated to a State agency.

"Native vegetation" means vegetation comprised of plant species, other than noxious weeds, that are indigenous to the coastal region of the Pacific Northwest and which reasonably could have been expected to naturally occur on the site. Examples include trees such as Douglas Fir, western hemlock, western red cedar, alder, big-leaf maple, and vine maple; shrubs such as willow, elderberry, salmonberry, and salal; and herbaceous plants such as sword fern, foam flower, and fireweed.

"Object-Free Area," as defined in the *Aviation Stormwater Design Manual - Managing Wildlife Hazards Near Airports* (December 2008), means an area on the ground centered on a runway, taxiway, or taxilane centerline provided to enhance the safety of aircraft operations by having the area free of aboveground objects protruding above the Runway Safety Area (RSA, defined below) edge elevation, except for objects that need to be located in the OFA for air navigation or aircraft ground maneuvering purposes. See:
http://www.wsdot.wa.gov/aviation/AirportStormwaterGuidanceManual.htm

"On-site Stormwater Management BMPs" as used in this Permit, means Low Impact Development BMPs or practices.

"Outfall" means a point source (defined below) at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers or pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

"Owner or operator" means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

"Permitting Authority" means U.S. Environmental Protection Agency, or EPA.

"Permeable pavement" means pervious concrete, porous asphalt, permeable pavers or other forms of pervious or porous paving material intended to allow passage of water through the pavement section. It often includes an aggregate base that provides structural support and acts as a stormwater reservoir.

"Pervious Surface" means any surface material that allows stormwater to infiltrate into the ground. Examples include lawn, landscape, pasture, native vegetation areas, and permeable pavements.

"Permeable pavement" or "permeable paving" means surfaces which are designed to accommodate pedestrian, bicycle, and vehicle traffic while allowing infiltration, treatment, and storage of stormwater. General categories of permeable paving systems include: open-graded concrete or hot-

mix asphalt pavement; aggregate or plastic pavers; and plastic grid systems, as discussed in the *Low Impact Development Technical Guidance Manual for Puget Sound* (December 2012).

"Permanent stormwater management controls" see "post-construction stormwater management controls."

"Point Source" means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.

"Pollutant" is defined at 40 CFR §122.2. A partial listing from this definition includes: dredged spoil, solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial or municipal waste.

"Pollutant(s) of concern" includes any pollutant identified as a cause of impairment of any water body that will receive a discharge from a MS4 authorized under this permit.

"Pollution-generating hard surface (PGHS)" means those hard surfaces considered to be a significant source of pollutants in stormwater runoff. See the listing of surfaces under "pollution-generating impervious surface."

"Pollution-generating impervious surface (PGIS)" means those hard surfaces or impervious surfaces considered to be a significant source of pollutants in stormwater runoff. Such surfaces include those which are subject to: vehicular use; industrial activities; or storage of erodible or leachable materials, wastes, or chemicals, and which receive direct rainfall or the run-on or blow-in of rainfall. Metal roofs unless they are coated with an inert, non-leachable material (e.g., baked-on enamel coating); or .roofs that are subject to venting significant amounts of dusts, mists, or fumes from of manufacturing, commercial, or other indoor activities.

"Pollution-generating pervious surface (PGPS)" means any non-impervious surface subject to use vehicle use, industrial activities; or storage of erodible or leachable materials, wastes, or chemicals, and that receive direct rainfall or run-on or blow-in of rainfall, of pesticides and fertilizers or loss of soil. Typical PGPS include permeable pavement subject to vehicular use, lawns and landscaped areas, including golf courses, parks, cemeteries, and sports fields (natural and artificial turf). .

"Post-construction stormwater management controls" or "permanent stormwater management controls" means those controls designed to treat or control runoff on a permanent basis once construction is complete, including stormwater treatment and flow control BMPs /facilities, including detention facilities, bioretention, vegetated roofs, permeable pavements, etc. "Predevelopment hydrologic condition" and/or "predevelopment hydrology" means the combination of runoff, infiltration and evapotranspiration rates and volumes that typically existed on a site before original development on the site, i.e., a natural stable hydrologic condition.

"QA/QC" means quality assurance/quality control.

"QAP" means Quality Assurance Plan, or Quality Assurance Project Plan.

"Rainfall and Rainwater Harvesting" is the collection, conveyance, and storage of rainwater. The scope, method, technologies, system complexity, purpose, and end uses vary from rain barrels for garden irrigation in urban areas, to large-scale collection of rainwater for all domestic uses.

"Rain Garden" means a non-engineered shallow landscaped depression, with compost-amended native soils and adapted plants. The depression is designed to pond and temporarily store stormwater runoff from adjacent areas, and to allow stormwater to pass through the amended soil profile. Refer to the Rain Garden Handbook for Western Washington Homeowners (WSU 2007 or as revised) for rain garden specifications and construction guidance.

"Receiving waters" means bodies of water or surface water systems to which surface runoff is discharged via a point source of stormwater or via sheet flow. Ground water to which surface runoff is directed by infiltration. See also "waters of the state" and "waters of the United States."

"Redevelopment" for the purposes of this permit, means the alteration, renewal or restoration of any developed land or property that results in the land disturbance of 5,000 square feet or more, and that has one of the following characteristics: land that currently has an existing structure, such as buildings or houses; or land that is currently covered with an impervious surface, such as a parking lot or roof; or land that is currently degraded and is covered with sand, gravel, stones, or other non-vegetative covering.

"Regional Administrator" means the Regional Administrator of Region 10 of the EPA, or the authorized representative of the Regional Administrator.

"Regulated Construction Activities" include clearing, grading or excavation that results in a land disturbance of greater than or equal to one acre, or that disturbs less than one acre if part of a larger common plan of development or sale that would disturb one acre or more. See "Stormwater Discharge Associated with Construction Activity."

"Road maintenance" and/or "Repair of Public Streets, Roads and Parking Lots" means repair work on Permittee-owned or Permittee managed streets and parking lots that involves land disturbance including asphalt removal or re- grading of 5,000 square feet or more. This definition excludes the following activities: pot hole and square cut patching; overlaying existing asphalt or concrete pacing with asphalt or concrete without expanding the area of coverage; shoulder grading; reshaping or regrading drainage ditches; crack or chip sealing; resurfacing with in-kind material without expanding the road prism, and vegetative maintenance.

"Runoff"see "stormwater."

"Runoff Reduction Techniques" means the collective assortment of stormwater practices that reduce the volume of stormwater from discharging off site.

"Runway Protection Zone," as defined in the *Aviation Stormwater Design Manual - Managing Wildlife Hazards Near Airports* (December 2008), means an area off the runway end to enhance the protection of people and property on the ground. See: http://www.wsdot.wa.gov/aviation/AirportStormwaterGuidanceManual.htm

"Runway Safety Area," as defined in the *Aviation Stormwater Design Manual - Managing Wildlife Hazards Near Airports* (December 2008), means a defined surface surrounding the runway prepared or suitable for reducing the risk of damage to aircraft in the event of an undershoot, overshoot, or excursion from the runway. See: http://www.wsdot.wa.gov/aviation/AirportStormwaterGuidanceManual.htm

"Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production. See 40 CFR §122.41(m)(1)(ii).

"Sewershed" means, for the purposes of this permit, all the land area that is drained by a network of municipal storm sewer system conveyances to a single point of discharge to a water of the United States

"Significant contributor of pollutants" means any discharge that causes or could cause or contribute to an excursion above any Washington water quality standard.

"Small Municipal Separate Storm Sewer System" is defined at 40 CFR §122.26(b)(16) and refers to all separate storm sewers that are owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, stormwater, 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, but is not defined as "large"' or "medium" municipal separate storm sewer system. This term includes systems similar to separate storm sewer systems in municipalities such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas such as individual buildings.

"Snow management" means the plowing, relocation and collection of snow and ice.

"Soil amendments" are components added *in situ* or native soils to increase the spacing between soil particles so that the soil can absorb and hold more moisture. The amendment of soils changes various other physical, chemical and biological characteristics so that the soils become more effective in maintaining water quality.

"Source control" means stormwater management practices that control stormwater *before* pollutants have been introduced into stormwater; a structure or operation that is intended to prevent pollutants from coming into contact with stormwater through physical separation of areas or careful management of activities that are sources of pollutants. The 2012 *Stormwater Management Manual for Western Washington* separates source control BMPs into two types. *Structural Source Control BMPs* are physical, structural, or mechanical devices, or facilities that are intended to prevent pollutants from entering stormwater. *Operational BMPs* are non-structural practices that prevent or reduce pollutants from entering stormwater. See Volume IV-*Source Control BMPs* of the 2012 *Stormwater Management Manual for Western Washington* for details.

"Storm event" or "measurable storm event" for the purposes of this permit means a precipitation event that results in an actual discharge from the outfall and which follows the preceding measurable storm event by at least 48 hours (2 days).

"Storm water," "stormwater" and "stormwater runoff" as used in this permit means runoff during and following precipitation and snow melt events, including surface runoff and drainage, as defined at 40 CFR §122.26(b)(13). Stormwater means that portion of precipitation that does not naturally percolate into the ground or evaporate, but flows via overland flow, interflow, channels, or pipes into a defined surface water channel or a constructed infiltration facility.

"Stormwater Control Measure" means physical, structural, and/or managerial measures that, when used singly or in combination, reduce the downstream quality and quantity impacts of stormwater. Also, SCM means a permit condition used in place of or in conjunction with effluent limitations to prevent or control the discharge of pollutants. This may include a schedule of activities, prohibition of practices, maintenance procedures, or other management practices. SCMs may include, but are not limited to, treatment requirements; operating procedures; practices to control plant site runoff, spillage, leaks, sludge, or waste disposal; or drainage from raw material storage. See "best management practices (BMPs)."

"Stormwater Discharge Associated with Construction Activity" as used in this permit, refers to a discharge of pollutants in stormwater runoff from areas where soil disturbing activities (*e.g.*, clearing, grading, or excavation), construction materials or equipment storage or maintenance (*e.g.*, fill piles, borrow areas, concrete truck washout, fueling) or other industrial stormwater directly related to the construction process are located. (See 40 CFR §122.26(b)(14)(x) and 40 CFR §122.26(b)(15) for the two regulatory definitions of stormwater associated with construction sites.)

"Stormwater Discharge Associated with Industrial Activity" as used in this permit, refers to the discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw materials storage areas at an industrial activity included in the regulatory definition at 40 CFR §122.26(b)(14).

"Stormwater Facility" means a constructed component of a stormwater drainage system, designed or constructed to perform a particular function or multiple functions. Stormwater facilities include, but are not limited to, pipes, swales, ditches, culverts, street gutters, detention basins, retention basins, constructed wetlands, infiltration devices, catch basins, oil/water separators, sediment

basins, and modular pavement. See also "permananent stormwater management controls" and/or "post-construction stormwaer management controls."

"Stormwater Management Practice" or "Storm Water Management Control" means practices that manage stormwater, including structural and vegetative components of a stormwater system.

"Stormwater Management Program (SWMP)" refers to a comprehensive program to manage the quality of stormwater discharged from the municipal separate storm sewer system.

"Stormwater Pollution Prevention Plan (SWPPP)" means a site specific plan designed to describe the control of soil or other materials to prevent pollutants in stormwater runoff, generally developed for a construction site, or an industrial facility. For the purposes of this permit, a SWPPP means a written document that identifies potential sources of pollution, describes practices to reduce pollutants in stormwater discharges from the site, and identifies procedures that the operator will implement to comply with applicable permit requirements.

"Taxiway Safety Area," as defined in the *Aviation Stormwater Design Manual - Managing Wildlife Hazards Near Airports* (December 2008), means a defined surface alongside the taxiway prepared or suitable for reducing the risk of damage to an aircraft unintentionally departing the taxiway. See: http://www.wsdot.wa.gov/aviation/AirportStormwaterGuidanceManual.htm

"TMDL" means Total Maximum Daily Load, an analysis of pollutant loading to a body of water detailing the sum of the individual waste load allocations for point sources and load allocations for non-point sources and natural background. See 40 CFR §130.2.

"Treatment" means storm water management practices that 'treat' storm water after pollutants have been incorporated into the stormwater.

"Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. See 40 CFR §122.42(n)(1)

"Waters of the State" includes those waters as defined as "waters of the United States" in 40 CFR § 122.2 within the geographic boundaries of Washington State and "waters of the state" as defined in Chapter 90.48 RCW which includes lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and water courses within the jurisdiction of the State of Washington. See also "receiving waters."

"Waters of the United States" means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

2. All interstate waters, including interstate "wetlands";

3. All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

a. Which are or could be used by interstate or foreign travelers for recreational or other purposes;
b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
c. Which are used or could be used for industrial purposes by industries in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under this definition;

5. Tributaries of waters identified in paragraphs 1 through 4 of this definition;

6. The territorial sea; and

7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs 1 through 6 of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds for steam electric generation stations per 40 CFR Part 423) which also meet the criteria of this definition are not waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

"Watershed" is defined as all the land area that is drained by a water body and its tributaries.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Appendix A – Street Waste Disposal (Part II.B.6.d)

Street Waste Solids

Soils generated from maintenance of the MS4 may be reclaimed, recycled or reused when allowed by local codes and ordinances. Soils that are identified as contaminated pursuant to Washington Administrative Code (WAC) Chapter 173-350 shall be disposed at a qualified solid waste disposal facility.

Street Waste Liquids

General Procedures:

Street waste collection should emphasize retention of solids in preference to liquids. Street waste solids are the principal objective in street waste collection and are substantially easier to store and treat than liquids.

Street waste liquids require treatment before their discharge. Street waste liquids usually contain high amounts of suspended and total solids and adsorbed metals. Treatment requirements depend on the discharge location.

Discharges to sanitary sewer and storm sewer systems must be approved by the entity responsible for operation and maintenance of the system. Neither Washington Department of Ecology nor EPA will generally require waste discharge permits for discharge of stormwater decant to sanitary sewers or to stormwater treatment BMPs that are constructed and maintained in accordance with Department of Ecology's 2012 *Stormwater Management Manual for Western Washington.*

For disposal of catch basin decant liquid and water removed from stormwater treatment facilities, EPA recommends the following, in order of preference:

1. **Discharge of catch basin decant liquids to a municipal sanitary sewer connected to a Public Owned Treatment Works (POTW) is the preferred disposal option.** Discharge to a municipal sanitary sewer requires the approval of the sewer authority. Approvals for discharge to a POTW will likely contain pretreatment, quantity and location conditions to protect the POTW.

2. **Discharge of catch basin decant liquids may be allowed into a Basic or Enhanced Stormwater Treatment BMP, if option 1 is not available.** Decant liquid collected from cleaning catch basins and stormwater treatment wet vaults may be discharged back into the storm sewer system under the following conditions:
   - The preferred disposal option of discharge to sanitary sewer is not reasonably available; and

- The discharge is to a Basic or Enhanced Stormwater Treatment Facility as described by Department of Ecology's 2012 *Stormwater Management Manual For Western Washington.* If pretreatment does not remove visible sheen from oils, the treatment facility must be able to prevent the discharge of oils causing a sheen; and

- The discharge is as near to the treatment facility as is practical, to minimize contamination or recontamination of the collection system; and

- The storm sewer system owner/operator has granted approval and has determined that the stormwater treatment facility will accommodate the increased loading. Pretreatment conditions to protect the stormwater treatment BMP may be issued as part of the approval process. Following local pretreatment conditions is a requirement of this permit.

- Flocculants for the pretreatment of catch basin decant liquids must be non-toxic under the circumstances of use and must be approved in advance by EPA Region 10.

The reasonable availability of sanitary sewer discharge will be determined by the Permittee, by evaluating such factors as distance, time of travel, load restrictions, and capacity of the stormwater treatment facility.

3. **Water removed from stormwater ponds, vaults and oversized catch basins may be returned to the storm sewer system.** Stormwater ponds, vaults and oversized catch basins contain substantial amounts of liquid, which hampers the collection of solids and pose problems if the removed waste must be hauled away from the site. Water removed from these facilities may be discharged back into the pond, vault or catch basin provided:

   - Clear water removed from a stormwater treatment structure may be discharged directly to a down gradient cell of a treatment pond or into the storm sewer system.

   - Turbid water may be discharged back into the structure it was removed from if

     - the removed water has been stored in a clean container (eductor truck, Baker tank or other appropriate container used specifically for handling stormwater or clean water); and

     - There will be no discharge from the treatment structure for at least 24 hours. If discharging to a pond, vault or catch basin that is not owned or operated by the Permittee,

   - The discharge must be approved by the storm sewer system owner/operator.

Appendix B - Runoff Treatment Requirements for New Development and Redevelopment Project Sites (Part II.B.5.g)

Project Thresholds

The following projects require the construction of stormwater treatment facilities:

- Projects in which the total area of pollution-generating hard surface (PGHS) is 5,000 square feet or more, or
- Projects in which the total area of pollution-generating pervious surfaces (PGPS) - not including permeable pavements - is three-quarters (3/4) of an acre or more; and from which there will be a surface discharge in a natural or man-made conveyance system from the site.

Treatment-Type Thresholds

1. Oil Control:

Treatment to achieve Oil Control applies to projects that have "high-use sites." High-use sites are those that typically generate high concentrations of oil due to high traffic turnover or the frequent transfer of oil. High-use sites include:

a. An area of a commercial or industrial site subject to an expected average daily traffic (ADT) count equal to or greater than 100 vehicles per 1,000 square feet of gross building area;

b. An area of a commercial or industrial site subject to petroleum storage and transfer in excess of 1,500 gallons per year, not including routinely delivered heating oil;

c. An area of a commercial or industrial site subject to parking, storage or maintenance of 25 or more vehicles that are over 10 tons gross weight (trucks, buses, trains, heavy equipment, etc.);

d. A road intersection with a measured ADT count of 25,000 vehicles or more on the main roadway and 15,000 vehicles or more on any intersecting roadway, excluding projects proposing primarily pedestrian or bicycle use improvements.

2. Phosphorus Treatment:

The requirement to provide phosphorous control is determined by the Department of Ecology (for example, through a waste load allocation as part of an EPA approved Total Maximum Daily Load [TMDL] analysis). There is currently no EPA approved TMDL for American Lake, although it is a water body reported under section 305(b) of the Clean Water Act, and is designated by the State of Washington as not supporting beneficial uses due to phosphorous. The Permittee should consider phosphorus treatment for any

discharges from new development or redevelopment projects that will discharge to American Lake.

3. Enhanced Treatment:

Except where specified under Appendix B4, *Basic Treatment*, enhanced treatment for reduction in dissolved metals is required for the following project sites that 1) discharge directly to freshwaters or conveyance systems tributary to freshwaters designated for aquatic life use or that have an existing aquatic life use; or 2) use infiltration strictly for flow control – not treatment- and the discharge is within ¼ mile of a freshwater designated for aquatic life use or that has an existing aquatic life use:

Industrial project sites,
Commercial project sites,
Multi-family project sites, and
High AADT roads as follows:

- Roads with an AADT of 15,000 or greater unless discharging to a 4th Strahler order stream or larger;

- Roads with an AADT of 30,000 or greater if discharging to a 4th Strahler order stream or larger (as determined using 1:24,000 scale maps to delineate stream order).

Any areas of the above-listed project sites that are identified as being subject to Basic Treatment requirements (below) are not also subject to Enhanced Treatment requirements. For developments with a mix of land use types, the Enhanced Treatment requirement shall apply when the runoff from the areas subject to the Enhanced Treatment requirement comprise 50% or more of the total runoff.

4. Basic Treatment:

Basic Treatment is required for each of the following circumstances:

- Project sites that discharge to the ground, UNLESS:

  1) The soil suitability criteria for infiltration treatment are met; (see Chapter 3 of Volume III-*Hydrologic Analysis and Flow Control BMPs* of the 2012 *Stormwater Management Manual for Western Washingto*n) and alternative pretreatment is provided (see Chapter 6, Volume V-*Runoff Treatment BMPs* of the 2012 *Stormwater Management Manual for Western Washingto*n) or

  2) The project site uses infiltration strictly for flow control – not treatment - and the discharge is within ¼-mile of a phosphorus sensitive lake (use a Phosphorus Treatment facility), or

3) The project site is industrial, commercial, multi-family residential, or a high AADT road (consistent with the Enhanced Treatment-type thresholds listed above) and is within ¼ mile of a fresh water designated for aquatic life use or that has an existing aquatic life use.(use an Enhanced Treatment facility).

- Residential projects not otherwise needing phosphorus control as designated by USEPA, the Department of Ecology, or by the Permittee;

- Project sites discharging directly (or indirectly through a MS4) to Basic Treatment Receiving Waters (Appendix I-C of the 2012 *Western Washington Stormwater Management Manual*)

- Project sites that drain to freshwater that is not designated for aquatic life use, and does not have an existing aquatic life use; and project sites that drain to waters not tributary to waters designated for aquatic use or that have an existing aquatic life use;

- Landscaped areas of industrial, commercial, and multi-family project sites, and parking lots of industrial and commercial project sites that do not involve pollution-generating sources (e.g., industrial activities, customer parking, storage of erodible or leachable material, wastes or chemicals) other than parking of employees' private vehicles. For developments with a mix of land use types, the Basic Treatment requirement shall apply when the runoff from the areas subject to the Basic Treatment requirement comprise 50% or more of the total runoff.

Treatment Facility Sizing

Size all stormwater treatment facilities for the entire area that drains to them, even if some of those areas are not pollution-generating.

Water Quality Design Storm Volume: The volume of runoff predicted from a 24-hour storm with a 6-month return frequency (a.k.a., 6-month, 24-hour storm). Wetpool facilities are sized based upon the volume of runoff predicted through use of the Natural Resource Conservation Service curve number equations in Chapter 2 of Volume III-*Hydrologic Analysis and Flow Control BMPs* of the 2012 *Stormwater Management Manual for Western Washington,* for the 6-month, 24-hour storm. Alternatively, when using an -approved continuous runoff model, the water quality design storm volume shall be equal to the simulated daily volume that represents the upper limit of the range of daily volumes that accounts for 91% of the entire runoff volume over a multi-decade period of record.

Water Quality Design Flow Rate

1. Preceding Detention Facilities or when Detention Facilities are not required:

   The flow rate at or below which 91% of the runoff volume, (as estimated by an approved continuous runoff model) will be treated. Design criteria for treatment facilities are assigned to achieve the applicable performance goal (e.g., 80% TSS removal) at the water quality design flow rate. At a minimum, 91% of the total runoff volume, as estimated by an approved continuous runoff model, must pass through the treatment facility(ies) at or below the approved hydraulic loading rate for the facility(ies).

2. Downstream of Detention Facilities:

   The water quality design flow rate must be the full 2-year release rate from the detention facility.

Treatment Facility Selection, Design, and Maintenance

Stormwater treatment facilities must be:

- Selected in accordance with the process identified in Chapter 4 of Volume I, and Chapter 2 of Volume V-*Runoff Treatment BMPs* of the 2012 *Stormwater Management Manual for Western Washington* ,
- Designed in accordance with the design criteria in Volume V- *Runoff Treatment BMPs* of the 2012 *Stormwater Management Manual for Western Washington*, and
- Maintained in accordance with the maintenance schedule in Volume V- *Runoff Treatment BMPs* of the 2012 *Stormwater Management Manual for Western Washington.*

Additional Requirements

The discharge of untreated stormwater from pollution-generating hard surfaces to ground water must not be authorized by the Permittee, except for the discharge achieved by infiltration or dispersion of runoff through use of On-site Stormwater Management BMPs in accordance with Chapter 5, and Chapter 7, Volume V-*Runoff Treatment BMPs* of the 2012 *Stormwater Management Manual for Western Washington*; or by infiltration through soils meeting the soil suitability criteria in Chapter 3 of Volume III-*Hydrologic Analysis and Flow Control BMPs* of the 2012 *Stormwater Management Manual for Western Washington.*

Appendix C - Exemptions from the New Development and Redevelopment Requirements of Part II.B.5

Unless otherwise indicated in this Appendix the practices described in this Appendix are exempt from the New Development and Redevelopment Requirements of Part II.B.5, even if such practices meet the definition of new development or redevelopment site disturbance thresholds.

1. Forest practices:

Forest practices regulated under Title 222 WAC, except for Class IV General forest practices that are conversions from timber land to other uses, are exempt from the provisions of Part II.B.5.

2. Commercial agriculture:

Commercial agriculture practices involving working the land for production are generally exempt. However, the conversion from timberland to agriculture, and the construction of impervious surfaces are not exempt. *Commercial Agriculture* means those activities conducted on lands defined in Revised Code of Washington (RCW) 84.34.020(2) and activities involved in the production of crops or livestock for commercial trade. An activity ceases to be considered commercial agriculture when the area on which it is conducted is proposed for conversion to a nonagricultural use or has lain idle for more than five years, unless the idle land is registered in a federal or state soils conservation program, or unless the activity is maintenance of irrigation ditches, laterals, canals, or drainage ditches related to an existing and ongoing agricultural activity.

3. Oil and Gas Field Activities or Operations:

Construction of drilling sites, waste management pits, and access roads, as well as construction of transportation and treatment infrastructure such as pipelines natural gas treatment plants, natural gas pipeline compressor stations, and crude oil pumping stations are exempt.

4. Pavement Maintenance:

The following pavement maintenance practices are exempt: pothole and square cut patching, overlaying existing asphalt or concrete pavement with asphalt or concrete without expanding the area of coverage, shoulder grading, reshaping/regrading drainage systems, crack sealing, resurfacing with in-kind material without expanding the road prism, pavement preservation activities that do not expand the road prism, and vegetation maintenance.

The following pavement maintenance practices are not categorically exempt – they are considered redevelopment. The extent to which Part II.B.5 applies is explained for each circumstance.

- *Removing and replacing a paved surface to base course or lower, or repairing the pavement base:* If impervious areas are not expanded, the requirements of Part II.B.5.a through B.5.e apply.

- *Extending the pavement edge without increasing the size of the road prism, or paving graveled shoulders:* These are considered new impervious surfaces and are subject to the requirements of Part II.B.5.

- *Resurfacing by upgrading from dirt to gravel, asphalt, or concrete; upgrading from gravel to asphalt, or concrete; or upgrading from a bituminous surface treatment ("chip seal") to asphalt or concrete*: These are considered new impervious surfaces and are subject to the requirements of Part II.B.5.

5. Underground utility projects:

Underground utility projects that replace the ground surface with in-kind material or materials with similar runoff characteristics are not subject to the requirements of Part II.B.5.

6. Exemptions from the Hydrologic Performance Standard for Onsite Stormwater Management (Part II.B.5.e):

The Permittee may exempt a new development or redevelopment project site from retaining the total volume of runoff calculated to meet the hydrologic performance standard for onsite stormwater management in Part II.B.5.e , provided the Permittee fully documents its determination that compliance with the performance standard is not technically feasible.

The Permittee must keep written records of all exempt project determinations. The following information regarding each exempt project identified during an annual reporting period must be included in the corresponding Annual Report.

- Name, location and identifying project description.
- For projects where the Permittee determines it is technically infeasible to use stormwater management strategies to fully infiltrate, evapotranspirate, and/or harvest and reuse 100% of the runoff volumes calculated to meet the performance standard in Part II.B.5.e, the Permittee must document the reasons for such conclusion.
- The Permittee must use all reasonably available stormwater management techniques. to the maximum extent practicable, and must document both the estimated annual runoff volume that can/will be successfully managed on site and the remaining annual runoff volume for which it is deemed technically infeasible to successfully manage onsite.

Documentation supporting the Permittee's determination of technical infeasibility must include, but is not limited to, reference to the infeasibility criteria for onsite stormwater management practices contained in Volume V- *Runoff Treatment BMPs* of Ecology's 2012 *Stormwater Management Manual for Western Washington*,; and all relevant engineering calculations, geologic reports, and/or hydrologic analysis. Examples of site conditions which may be recognized by the Permittee as preventing management of 100% of the runoff volumes calculated to meet the performance standard in Part II.B.5.e may include, but are not limited to: low soil infiltration capacity; high groundwater; contaminated soils; non-potable water demand is too small to warrant harvest and reuse systems; downgradient erosion; steep slopes and/or slope failure; or flooding.

7. Exemptions from the Hydrologic Performance Requirement for Flow Control (Part II.B.5.f):

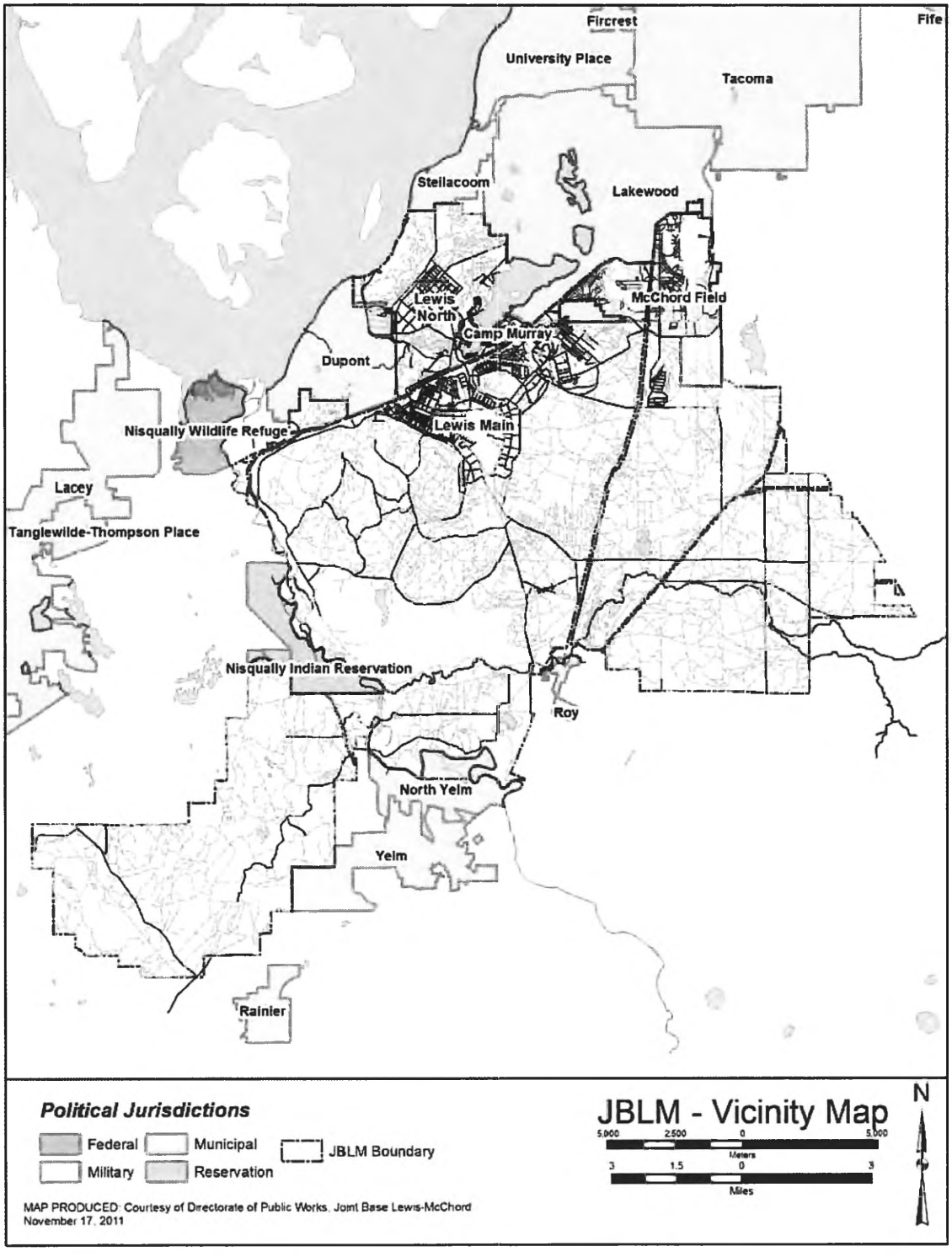
The Permittee may exempt a new development or redevelopment project from managing the total runoff flow volume calculated to meet the hydrologic performance standard in Part II.B.5.f, provided the Permittee fully documents its determination that compliance with the hydrologic performance requirement for flow control cannot be attained due to severe economic project costs.

The Permittee must manage as much of the calculated flow volume as possible, and must keep written records of all such project determinations.

No later than 15 days from the date the Permittee makes a determination that a project should be exempt from the hydrologic performance requirement for flow control due to severe economic costs, the Permittee must provide a written summary of the following information describing each new development and/or redevelopment project site exempted from the flow control requirement. and submit such information to EPA via certified mail and via electronic mail to the EPA Region 10 address listed in Part IV.D of this permit:

- Name, location and identifying project description, including a brief synopsis of the project purpose, and a detailed description of the underlying facts supporting the Permittee's determination.
- For projects where managing the total runoff flow volume calculated to meet the hydrologic performance requirement for flow control in Part II.B.5. f. is deemed by the Permittee to be unattainable due to severe economic costs, the Permittee must document, and quantify that appropriate stormwater control strategies will be deployed to manage as much of the calculated flow volume as possible; the marginal cost of full attainment must be documented along with a justification on why full attainment of the flow control requirement at the site would result in severe economic cost.

Appendix D - Vicinity Map of JBLM Installation



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DOCUMENTS IN SUPPORT OF REBUTTAL COMMENTS OF JOINT TEST CLAIMANTS

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SANTA ANA REGION

ORDER NO. R8-2010-0036, 10-TC-10

Tab 1, Federal and California Cases

Appalachian Power Co. v. EPA (D.C. Cir. 2000) 208 F.3d 1015

Virginia Dept. of Transp. v. U.S. EPA, Civil Action No. 1:12-CV-775 (U.S. District Court, E.D. Va.) (January 3, 2013)

Jacks v. City of Santa Barbara (2017) 3 Cal. 5th 248

Arreola v. County of Monterey (2002) 99 Cal.App.4th 722

Howard Jarvis Taxpayers Association v. City of Salinas (2002) 98 Cal.App.4th 1351

Division of Occupational Safety & Health v. State Bd. Of Control (1987) 189 Cal.App.3d 794

Tab 2, Federal Statutes

33 U.S.C. § 1342

33 U.S.C. § 1362

Tab 3, California Statutes

Evid. Code § 452

Govt. Code § 11515

Tab 4, Administrative Decisions and Orders

Commission on State Mandates, In re Test Claim on: 10-TC-12 and 12-TC-01

TAB 1

Appalachian Power Co. v. EPA

United States Court of Appeals for the District of Columbia Circuit

February 8, 2000, Argued ; April 14, 2000, Decided

No. 98-1512, Consolidated with Nos. 98-1536, 98-1537, 98-1538, 98-1540 & 98-1542

Reporter
208 F.3d 1015 *; 2000 U.S. App. LEXIS 6826 **; 341 U.S. App. D.C. 46; 30 ELR 20560; 50 ERC (BNA) 1449

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS v. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

Prior History: [**1] On Petitions for Review of an Order of the Environmental Protection Agency.

Core Terms

EPA, monitoring, requirements, testing, regulations, permits, emission standards, authorities, Air, applicable requirements, federal standard, rulemaking, emission, promulgated, binding, pollutants, agencies, limitations, frequency, notice, petitioners', revise, amend, procedures, sources, terms, policy statement, noninstrumental, instrumental, one-time

Case Summary

Procedural Posture
Petitioner's sought review of an order of the Environmental Protection Agency, which released a document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs" outlining periodic monitoring of source point emissions subject to Title V of the Clean Air Act Amendments of 1990.

Overview

In consolidated petitions for review, petitioners, electric power companies and trade associations representing the nation's chemical and petroleum industry, challenged the validity of portions of an Environmental Protection Agency (EPA) document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs" (Guidance). The court of appeals set aside the Guidance in its entirety. The court found that provisions of the Guidance directing state permitting authorities to conduct wide-ranging sufficiency reviews and to enhance the monitoring required in individual permits beyond that contained in state or federal emission standards significantly expanded the scope of 40 C.F.R. § 70.6(a)(3)(i)(B). The court held that these provisions should have been subject to the rulemaking procedures required by 42 U.S.C.S. § 7607(d). Accordingly, in view of the intertwined nature of the challenged and unchallenged portions of the Guidance, the court concluded that the Guidance must be set aside in its entirety.

Outcome
Upon petition for review, an Environmental Protection Agency document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs" (Guidance) on finding certain Guidance provisions should have been subject to the rulemaking procedures required under federal law.

LexisNexis® Headnotes

Environmental Law > Air Quality > Operating Permits

Environmental Law > Air Quality > General Overview

HN1[] **Air Quality, Operating Permits**

See 40 C.F.R. § 70.6(a)(3).

Administrative Law > Agency Rulemaking > Informal Rulemaking

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

HN2[] Agency Rulemaking, Informal Rulemaking

Only legislative rules have the force and effect of law. A legislative rule is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act.

Administrative Law > Agency Rulemaking > Negotiated Rulemaking

Governments > Federal Government > Claims By & Against

HN3[] Agency Rulemaking, Negotiated Rulemaking

If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Publication

HN4[] Agency Rulemaking, Informal Rulemaking

5 U.S.C.S. § 552(a)(1)(D) requires publication in the Federal Register of all interpretations of general applicability.

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

HN5[] Agency Rulemaking, Informal Rulemaking

5 U.S.C.S. § 552(a)(2)(B) requires agencies to make available for inspection and copying those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > Agency Rulemaking > Negotiated Rulemaking

Environmental Law > Air Quality > General Overview

HN6[] Rule Application & Interpretation, Binding Effect

Under the Administrative Procedure Act (APA), a rule may consist of part of an agency statement of

general or particular applicability and future effect. 5 U.S.C.S. § 551(4). Interpretative rules and policy statements may be rules within the meaning of the APA and the Clean Air Act, although neither type of rule has to be promulgated through notice and comment rulemaking. See 42 U.S.C.S. § 7607(d)(1), referring to 5 U.S.C.S. § 553(b)(A) & (B).

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

HN7[↓] Agency Rulemaking, Informal Rulemaking

In the administrative setting, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

HN8[↓] Reviewability, Reviewable Agency Action

The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.

Administrative Law > Agency Rulemaking > Negotiated Rulemaking

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

HN9[↓] Agency Rulemaking, Negotiated Rulemaking

An agency may not escape the notice and comment requirements by labeling a major substantive legal addition to a rule a mere interpretation. Courts must still look to whether the interpretation itself carries the force and effect of law, or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe.

Environmental Law > Air Quality > Operating Permits

Environmental Law > Air Quality > General Overview

HN10[↓] Air Quality, Operating Permits

See 42 U.S.C.S. § 7661c(b).

Administrative Law > Agency Rulemaking > Negotiated Rulemaking

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Administrative Law > Agency Rulemaking > General Overview

HN11[↓] Agency Rulemaking, Negotiated Rulemaking

The Environmental Protection Agency cannot amend its regulations without complying with the rulemaking procedures required by 42 U.S.C.S. § 7607(d).

Administrative Law > Judicial

Review > General Overview

Environmental Law > Solid Wastes > Disposal Standards

HN12[↓] Administrative Law, Judicial Review

Partial affirmance of agency action is not an option when there is substantial doubt that the agency would have adopted the severed portion on its own.

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Environmental Law > Air Quality > General Overview

Environmental Law > Air Quality > Operating Permits

HN13[↓] Enforcement, Administrative Proceedings

State permitting authorities therefore may not, on the basis of Environmental Protection Agency's "Periodic Monitoring Guidance for Title V Operating Permits Programs" or 40 C.F.R. § 70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test.

Counsel: Lauren E. Freeman argued the cause for petitioners. With her on the briefs were Henry V. Nickel, Leslie Sue Ritts, Michael H. Levin, Edmund B. Frost, David F. Zoll, Alexandra Dapolito Dunn, John Reese, Charles F. Lettow, Marcilynn A. Burke, L. Burton Davis, William H. Lewis, Michael A. McCord and Ellen Siegler. Michael P. McGovern and Neal J. Cabral entered appearances.

Jon M. Lipshultz, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the briefs were Lois J. Schiffer, Assistant Attorney General, and Gregory B. Foote, Attorney, Environmental Protection Agency.

Judges: Before: WILLIAMS, HENDERSON, and RANDOLPH, Circuit Judges. Opinion for the Court filed by Circuit Judge RANDOLPH.

Opinion by: RANDOLPH

Opinion

[*1017] RANDOLPH, *Circuit Judge*: These consolidated petitions for judicial review, brought by electric power companies, and trade associations representing the nation's chemical and petroleum industry, challenge the validity of portions of an EPA document entitled "Periodic Monitoring Guidance," released in 1998. In the alternative, petitioners seek review of a 1992 EPA rule **[**2]** implementing Title V of the Clean Air Amendments of 1990.

I.

Title V of the 1990 amendments to the Clean Air Act altered the method by which government regulated the private sector to control air pollution. Henceforth, stationary sources of air pollution, or of potential air pollution, must obtain operating permits from State or local authorities administering their EPA-approved implementation plans. The States must submit to EPA for its review all operating permits and proposed and final permits. *See* 42 U.S.C. § 7661d. EPA has 45 days to object; if it does so, "the permitting authority may not issue the permit," *id.* § 7661d(b)(3). [1] Congress instructed EPA to pass regulations establishing the "minimum elements of a permit program to be administered by any air pollution control agency," including "Monitoring and

[1] If the State permitting authority fails to revise the permit to satisfy EPA's objection, EPA shall issue or deny the permit, at which point EPA's action becomes subject to judicial review. *See* 42 U.S.C. § 7661d(c).

reporting requirements." 42 U.S.C. § 7661a(b). Under Title V, the Governor of each State could submit to EPA a permit program by November 15, 1993, to comply with Title V and with whatever regulations EPA had promulgated in the interim. *See* 42 U.S.C. § 7661a(d). This was to be accompanied **[**3]** by a legal opinion from the State's attorney general that the laws of the State contained sufficient authority to authorize the State to implement the program. *Id.* If a State decided not to participate, or if EPA disapproved the State's program, federal sanctions would kick in, including a cut-off of federal highway funds and an EPA takeover of permit-issuing authority within the State. *See Commonwealth of Virginia v. Browner*, 80 F.3d 869, 873-74 (4th Cir. 1996).

HN1[↑] EPA promulgated rules implementing the Title V permit program in 1992. The rules list the items each State permit program must contain, [2] including this one:

> (3) *Monitoring and related record-keeping and reporting requirements.* (i) Each permit shall contain the following requirements **[**4]** with respect to monitoring:
> (A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;
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> (B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring **[*1018]** (which may consist of record-keeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph(a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent **[**5]** with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B) of this section; and
> (C) As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods....

40 C.F.R. § 70.6(a)(3).

The key language--key because this dispute revolves around it--is in the first sentence of § 70.6(a)(3)(i)(B). Permits contain terms and conditions with which the regulated entities must comply. Some of the terms and conditions--in regulatory lingo, "applicable requirements" (*see* § 70.6(a)(3)(i)(B)) [3]--consist of emission limitations and standards, State and federal. Experts in the field know that federal emission standards, such as those issued for hazardous air pollutants and new stationary sources, contain far more than simply limits on the **[**6]** amount of pollutants emitted.

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[2] The list is nicely summarized in DAVID R. WOOLEY, CLEAN AIR ACT HANDBOOK: A PRACTICAL GUIDE TO COMPLIANCE § 5.02[1] (9th ed. 2000).

[3] One EPA official explained:

> Permits must incorporate terms and conditions to assure compliance with all applicable requirements under the Act, including the [state implementation plan], title VI, sections 111 and 112, the sulfur dioxide allowance system and NOx limits under the acid rain program, emission limits applicable to the source, monitoring, recordkeeping and reporting requirements, and any other federally-recognized requirements applicable to the source.

John S. Seitz, Director, Office of Air Quality Planning and Standards, *Developing Approvable State Enabling Legislation Required to Implement Title V*, at p. 4 (Feb. 25, 1993).

Take for instance the following examples drawn at random from the Code of Federal Regulations. The national emission standard for hazardous air pollutants from primary lead smelting is contained in 40 C.F.R. §§ 63.1541-.1550. In addition to emission limits, [4] **[**8]** the operator must comply with detailed and extensive testing requirements **[**7]** contained in § 63.8 of the regulations, and must monitor certain pressure drops daily; make weekly checks to ensure that dust is being removed from hoppers; perform quarterly inspections of fans, and so forth. *Id.* § 63.1547. Or consider the standards of performance for new stationary sources contained in 40 C.F.R. part 60, one of the thickest of the dozen or so volumes EPA commands in the C.F.R. In the "beverage can surface coating industry," those subject to these regulations must--if they use "a capture system and an incinerator"--install some sort of "temperature measurement device," properly calibrated and having a specified accuracy stated in terms of degrees Celsius. 40 C.F.R. § 60.494. [5] Or if the new source is in the rubber tire manufacturing industry, an operator doing a "green tire spraying operation" using organic solvent-based sprays must install "an organics monitoring device used to indicate the concentration level of organic compounds **[*1019]** based on a detection principle such as infrared ..., equipped with a continuous recorder, for the outlet of the carbon bed." *Id.* § 60.544(a)(3).

Typically, EPA delegates to the States its authority to require companies to comply with these federal standards. The States incorporate the federal standards in their implementation plans and, under Title V of the 1990 law, the applicable standards become terms and conditions in permits. States too have their own emissions limitations and standards in their implementation plans, which they need in order to comply with national ambient air quality standards. *See* 40 C.F.R. part 52; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 846, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984); *Union Electric Co. v. EPA*, 427 U.S. 246, 249-50, 49 L. Ed. 2d 474, 96 S. Ct. 2518 (1976); **[**9]** *Commonwealth of Virginia v. EPA*, 323 U.S. App. D.C. 368, 108 F.3d 1397, 1406 (D.C. Cir.), *modified*, 116 F.3d 499 (D.C. Cir. 1997). Petitioners tell us that States may formulate their emission standards not only by limiting the amount of air pollutants, but also by imposing practices, including the monitoring of emissions. [6]

On one thing the parties are in agreement. If an applicable State emission standard contains no monitoring requirement to ensure compliance, EPA's regulation requires the State permitting agency to impose on the stationary source some sort of "periodic monitoring" as a condition in the permit or specify a reasonable frequency for any data collection mandate already specified in the applicable requirement. According **[**10]** to petitioners this sort of gap-filling is all § 70.6(a)(3)(i)(B)--the so-called periodic monitoring rule--requires of State permit programs. By petitioners' lights, if a federal or State emission standard already contains some sort of requirement

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[4] *See* 40 C.F.R. § 63.1543(a):

> No owner or operator of any existing, new, or reconstructed primary lead smelter shall discharge or cause to be discharged into the atmosphere lead compounds in excess of 500 grams of lead per megagram of lead metal produced ... from the aggregation of emissions discharged from the air pollution control devices used to control emissions from the sources [listed].

[5] If the facility does not use a capture system, it must calculate its emission limits using a series of equations provided by EPA. For some idea of the complexity of this exercise, consider that the facility must figure its total volume of coating solids per month using the following equation:

$$L[s] = \sum_{i=1}^{n} L[ci]V[si]$$

40 C.F.R. § 60.493(b)(1)(i)(B). It would serve no useful purpose to explain this or the many other equations in the sequence.

[6] In some instances, States may adopt emission standards or limitations that are more stringent than federal standards. 42 U.S.C. § 7416. States may also adopt more stringent permit requirements. 40 C.F.R. § 70.1(c).

to do testing [7] from time to time, this portion of the standard must be incorporated in the permit, not changed by the State to conform to EPA's imprecise and evolving notion of what constitutes "periodic monitoring." [8] Otherwise, State authorities will wind up amending federal emission standards in individual permits, something not even EPA could do without conducting individual rulemakings to amend the regulations containing the federal standards. And with respect to State standards, the State agency will in effect be revising its implementation plan at EPA's behest, without going through the procedures needed to accomplish this. *See, e.g.,* 42 U.S.C. § 7410(k)(5) & (*l*).

[11]** In a document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs," released in September 1998, EPA took a sharply different view of § 70.6(a)(3) than do petitioners. The "Guidance" was issued over the signature of two EPA officials--the Director of the Office of Regulatory Enforcement, and the Director of the Office of Air Quality Planning and Standards. It is narrative in form, consists of 19 single-spaced, typewritten pages, and is available on EPA's internet web site (www.epa.gov). "Periodic monitoring," the Guidance states, "is required for each emission point at a source subject to title V of the Act that is subject to an applicable requirement, such as a Federal regulation or a SIP emission limitation." PERIODIC MONITORING GUIDANCE FOR TITLE V OPERATING PERMITS PROGRAMS (hereinafter "GUIDANCE") at 5. New source performance standards, and national emission standards for hazardous pollutants, if EPA promulgated the standards after November 15, 1990, the effective date of the **[*1020]** Clean Air Act amendments, are "presumed to have adequate monitoring." *Id.* Also, for "emission units subject to the acid rain requirements," EPA has determined that its "regulations **[**12]** contain sufficient monitoring for the acid rain requirements." *Id.* Outside of these categories and one other, the Guidance states that "periodic monitoring is required ... when the applicable requirement does not require ... monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." *Id.* at 6. How to determine this? Clearly, according to the Guidance, if an "applicable requirement imposes a one-time testing requirement, periodic monitoring is not satisfied ...," presumably because one time is not from time to time, which is what periodic means. *Id.*

II.

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail **[**13]** regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed

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[7] By testing we mean to include instrumental and noninstrumental monitoring as well.

[8] In support of their view, petitioners point to the Title V rule's preamble which states: "If the underlying applicable requirement imposes a requirement to do periodic monitoring or testing ..., the permit must simply incorporate this provision under § 70.6(a)(3)(i)(A)." 57 Fed. Reg. 32,278 (1992).

procedures." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995). [9] The agency may also think there is another advantage--immunizing its lawmaking from judicial review.

[14]** A.

EPA tells us that its Periodic Monitoring Guidance is not subject to judicial review because it is not final, and it is not final because it is not "binding." [10] **[**16]** Brief of Respondent at 30. *See* GUIDANCE at 19. It is worth pausing a minute to consider what is meant by "binding" in this context. HN2[↑] Only "legislative rules" have the force and effect of law. *See* *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 & n.31, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979). A "legislative rule" is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act. [11] If this were all that "binding" meant, EPA's **[*1021]** Periodic Monitoring Guidance could not possibly qualify: it was not the product of notice and comment rulemaking in accordance with the Clean Air Act, 42 U.S.C. § 7607(d), and it has not been published in the Federal Register. [12] But we have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect. *See, e.g.*, *McLouth Steel Prods. Corp. v. Thomas*, 267 U.S. App. D.C. 367, 838 F.2d 1317, 1321 (D.C. Cir. 1988). HN3[↑] If an agency **[**15]** acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding." *See* Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1328-29 (1992), and cases there cited.

[17]** For these reasons, EPA's contention must be that the Periodic Monitoring Guidance is not binding in a practical sense. Even this, however, is not an accurate way of putting the matter. Petitioners are not challenging the Guidance in its entirety. HN6[↑] Under the Administrative Procedure Act, a "rule" may consist of "part of an agency statement of general or particular applicability and future effect...." 5 U.S.C. § 551(4), quoted in full in *supra* note 11; *see* 5 U.S.C. §§ 551(13), 702. "Interpretative rules" and "policy statements" may be rules within the meaning of the

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[9] How much more efficient than, for instance, the sixty rounds of notice and comment rulemaking preceding the final rule in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

[10] Our jurisdiction extends to "any ... nationally applicable ... final action taken by" the EPA "Administrator." 42 U.S.C. § 7607(b)(1). The Guidance issued over the signatures of two high level EPA officials rather than the Administrator. EPA does not, however, contest petitioners' assertion that because "the document was drafted, and reviewed by, high ranking officials in several EPA offices, including EPA's lawyers, there is no reason to doubt the authors' authority to speak for the Agency." Brief of Petitioners at 42. *See* *Her Majesty the Queen v. EPA*, 286 U.S. App. D.C. 171, 912 F.2d 1525, 1531-32 (D.C. Cir. 1990); *Natural Resources Defense Council, Inc. v. Thomas*, 269 U.S. App. D.C. 343, 845 F.2d 1088, 1094 (D.C. Cir. 1988).

[11] We have also used "legislative rule" to refer to rules the agency should have, but did not, promulgate through notice and comment rulemaking. *See, e.g.*, *American Mining Congress v. Department of Labor*, 302 U.S. App. D.C. 38, 995 F.2d 1106, 1110 (D.C. Cir. 1993). In this case, by "rule" we mean the following:

> ... the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency....
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> **5 U.S.C. § 551(4).**

[12] HN4[↑] **5 U.S.C. § 552(a)(1)(D)** requires publication in the Federal Register of all "interpretations of general applicability." HN5[↑] *Compare* **5 U.S.C. § 552(a)(2)(B)**, requiring agencies to make available for inspection and copying "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."

APA and the Clean Air Act, although neither type of "rule" has to be promulgated through notice and comment rulemaking. *See* 42 U.S.C. § 7607(d)(1), referring to 5 U.S.C. § 553(b)(A) & (B). [13] **[**19]** EPA claims, on the one hand, that the Guidance is a policy statement, rather than an interpretative rule, and is not binding. [14] On **[*1022]** the other hand, EPA agrees with petitioners that "the Agency's position on the central legal issue here--the appropriateness of a sufficiency review of all Title V monitoring requirements--indeed is settled. **[**18]** ..." Brief of Respondent at 32. In other words, whatever EPA may think of its Guidance generally, the elements of the Guidance petitioners challenge consist of the agency's settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply.

Of course, an agency's action is not necessarily final merely because it is binding. [15] **[**22]** Judicial orders can be binding; a temporary restraining order, for instance, compels compliance but it does not finally decide the case. **HN7**[↑] In the administrative setting, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process, *Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 92 L. Ed. 568, 68 S. Ct. 431 (1948)--it **[**20]** must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,' *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 27 L. Ed. 2d 203, 91 S. Ct. 203 (1970)." *Bennett v. Spear*, 520 U.S. 154, 178, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997). The first condition is satisfied here. The "Guidance," as issued in September 1998, followed a draft circulated four years earlier and

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[13] We quoted, in *Panhandle Eastern Pipeline Co. v. FERC*, 339 U.S. App. D.C. 94, 198 F.3d 266, 269 (D.C. Cir. 1999), the statement in *Pacific Gas & Electric Co. v. Federal Power Commission*, 164 U.S. App. D.C. 371, 506 F.2d 33, 38 (D.C. Cir. 1974), that a policy statement is not a "rule," apparently within the meaning of 5 U.S.C. § 551(4). Dicta in *Syncor International Corp. v. Shalala*, 326 U.S. App. D.C. 422, 127 F.3d 90, 94 (D.C. Cir. 1997), suggests the same without referring to § 551(4). *See also Hudson v. FAA*, 338 U.S. App. D.C. 194, 192 F.3d 1031 (D.C. Cir. 1999).

On the other hand, in *Batterton v. Marshall*, 208 U.S. App. D.C. 321, 648 F.2d 694, 700 (D.C. Cir. 1980), we interpreted the term "rule" in § 551(4) as "broad enough to include nearly every statement an agency may make...." Quoting this language, we held in *Center for Auto Safety v. National Highway Safety Administration*, 228 U.S. App. D.C. 331, 710 F.2d 842, 846 (D.C. Cir. 1983), that agency policy statements accompanying the withdrawal of a notice of proposed rulemaking fell within the definition of a "rule." A few years later, then-Judge Scalia--citing *Batterton*--wrote for the court that under APA § 551(4), it is "clear" that "the impact of an agency statement upon private parties is relevant only to whether it is the sort of rule that is ... a general statement of policy." *Thomas v. New York*, 256 U.S. App. D.C. 49, 802 F.2d 1443, 1447 n.* (D.C. Cir. 1986). *See also National Tank Truck Carriers, Inc. v. Federal Highway Admin.*, 335 U.S. App. D.C. 166, 170 F.3d 203, 207 n.3 (D.C. Cir. 1999).

There is no need for us to try to reconcile these two lines of authority. Nothing critical turns on whether we initially characterize the Guidance as a "rule."

[14] EPA is under the impression that policy statements can never be "rules" within the meaning of APA **§ 551(4)**: "even if the Guidance were somehow deemed to be a 'rule' (a conclusion that would, in EPA's view, be erroneous due to the non-binding nature of the Guidance), Petitioners' procedural challenge would still fail because the Guidance undoubtedly would be an interpretive (not legislative) rule...." Brief of Respondent at 43-44 n.40. We should note that the Guidance itself states that it "interprets" § 70.6(a)(3) of the regulations. GUIDANCE at 4 n.1.

[15] We add that agency action does not necessarily have binding effect--that is, does not necessarily alter legal rights and obligations--merely because it is final. Denials of petitions for rulemaking, for instance, may be final although no private person is required to do anything. In the past, when this court examined the binding effect of agency action, we did so for the purpose of determining whether the non-legislative rule should have undergone notice and comment rulemaking because it was, in effect, a regulation. *See, e.g., Florida Power & Light Co. v. EPA*, 330 U.S. App. D.C. 344, 145 F.3d 1414, 1418-19 (D.C. Cir. 1998); *American Portland Cement Alliance v. EPA*, 322 U.S. App. D.C. 99, 101 F.3d 772, 776 (D.C. Cir. 1996); *Kennecott Utah Copper Corp. v. Dep't of Interior*, 319 U.S. App. D.C. 128, 88 F.3d 1191, 1207 (D.C. Cir. 1996); *National Solid Waste Mgmt. Ass'n v. EPA*, 276 U.S. App. D.C. 207, 869 F.2d 1526, 1534 (D.C. Cir. 1989).

another, more extensive draft circulated in May 1998. This latter document bore the title "*EPA Draft Final Periodic Monitoring Guidance*." [16] On the question whether States must review their emission standards and the emission standards EPA has promulgated to determine if the standards provide enough monitoring, the Guidance is unequivocal--the State agencies must do so. *See* GUIDANCE at 6-8. On the question whether the States may supersede federal and State standards and insert additional monitoring requirements as terms or conditions of a permit, the Guidance is certain--the State agencies must do so if they **[**21]** believe existing requirements are inadequate, as measured by EPA's multi-factor, case-by-case analysis set forth in the Guidance. *See* GUIDANCE at 7-8.

EPA may think that because the Guidance, in all its particulars, is subject to change, it is not binding and therefore not final action. There are suggestions in its brief to this effect. *See, e.g.,* Brief of Respondent at 3, 33 n.30. But all laws are subject to change. Even that most enduring of documents, the Constitution of the United States, may be amended from time to time. **HN8**[↑] The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment. *See* *McLouth Steel Prods. Corp. v. EPA*, 838 F.2d at 1320.

On the issue whether the challenged portion of the Guidance has legal consequences, EPA points to the concluding paragraph of the document, which contains **[*1023]** a disclaimer: "The policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party." GUIDANCE at 19. This language is boilerplate; since 1991 EPA has been placing it at the **[**23]** end of all its guidance documents. *See* Robert A. Anthony, *supra*, 41 DUKE L.J. at 1361; Peter L. Strauss, Comment, *The Rulemaking Continuum,* 41 DUKE L.J. 1463, 1485 (1992) (referring to EPA's notice as "a charade, intended to keep the proceduralizing courts at bay"). Insofar as the "policies" mentioned in the disclaimer consist of requiring State permitting authorities to search for deficiencies in existing monitoring regulations and replace them through terms and conditions of a permit, "rights" may not be created but "obligations" certainly are-obligations on the part of the State regulators and those they regulate. At any rate, the entire Guidance, from beginning to end--except the last paragraph--reads like a ukase. It commands, it requires, it orders, it dictates. Through the Guidance, EPA has given the States their "marching orders" and EPA expects the States to fall in line, as all have done, save perhaps Florida and Texas. *See* *Natural Resources Defense Council, Inc. v. Thomas*, 269 U.S. App. D.C. 343, 845 F.2d 1088, 1094 (D.C. Cir. 1988); *Community Nutrition Inst. v. Young*, 260 U.S. App. D.C. 294, 818 F.2d 943, 947-48 (D.C. Cir. 1987). **[**24]**

Petitioners tell us, and EPA does not dispute, that many of them are negotiating their Title V permits, that State authorities, with EPA's Guidance in hand, are insisting on continuous opacity monitors [17] for determining compliance with opacity limitations although the applicable "standard specifies EPA Method 9 (a visual observation method) as the compliance method (and, in some cases, already provides for periodic performance of that method)." Brief of Petitioners at 43-44. *See* *Natural Resources Defense Council, Inc. v. EPA*, 306 U.S. App. D.C. 43, 22 F.3d 1125, 1133 (D.C. Cir. 1994).

[25]** The short of the matter is that the Guidance, insofar as relevant here, is final agency action, reflecting a settled agency position which has legal consequences both for State agencies administering their permit programs and for

[16] In the title to the Guidance we have before us, EPA dropped the word "final."

[17] A continuous opacity monitor employs "a calibrated light source that provides for accurate and precise measurement of opacity at all times." *See* Credible Evidence Revisions, 62 Fed. Reg. 8319 (1997). In contrast, "Method 9 requires that a trained visible emissions observer (VEO) view a smoke plume with the sun at a certain angle to the plume" to determine the opacity of the plume released. *Id.*

companies like those represented by petitioners who must obtain Title V permits in order to continue operating. [18]

[26]** B.

As to the validity of the Guidance, petitioners' arguments unfold in the following sequence. First, they contend that the Guidance amended the "periodic monitoring rule" of § 70.6(a)(3)(i)(B). Although the rule only allowed State authorities to fill in gaps, that is, to require periodic monitoring when the applicable State emission standard contained no monitoring requirement, a one-time startup test, or provided no frequency for monitoring, the Guidance applies across the board, charging State authorities with the duty of assessing the sufficiency of all State and federal standards. [19] With the Guidance in **[*1024]** place, regional EPA offices have solid legal grounds for objecting to State-issued permits if the State authorities refuse to bend to EPA's will. Therefore, as petitioners see it, the Guidance is far more than a mere interpretation of the periodic monitoring rule and it is far more than merely a policy statement. In practical effect, it creates a new regime, a new legal system governing permits, and as such it should have been, but was not, promulgated in compliance with notice and comment rulemaking procedures. Petitioners say that if they are wrong about this, if the Guidance **[**27]** represents a valid interpretation of the periodic monitoring rule in § 70.6(a)(3)(i)(B), then the rule itself is invalid. Congress did not authorize EPA to require States, in issuing Title V permits, to make revisions to monitoring requirements in existing federal emission standards.

The case is presented to us in pure abstraction. Neither side cites any specific federal or State emission standard. Although petitioners complain that State officials will revise federal standards promulgated before November 1990, petitioners' briefs identify no specific federal standard potentially subject to revision. Which, if any, federal standards are susceptible to State revision in a permit for lack of periodic monitoring is thus something about which we can only guess. **[**28]** The same is true regarding State emission standards.

Perhaps petitioners should not be faulted. They disagree with EPA's general principle, with the agency's position that it can give State permit officials the authority to substitute new monitoring requirements in place of existing State or federal emission standards already containing some sort of monitoring requirements. The validity of that general principle does not turn on the specifics of any particular emission standard, although its application does. Besides, EPA is currently developing even more detail in far more extensive "guidance" using concrete examples of what would, and would not, constitute "periodic monitoring" in EPA's opinion. *See* Draft--Periodic Monitoring Technical Reference Document (Apr. 30, 1999).

HN9[↑] It is well-established that an agency may not escape the notice and comment requirements (here, of 42 U.S.C. § 7607 (d)) by labeling a major substantive legal addition to a rule a mere interpretation. *See* *Paralyzed Veterans v. D.C. Arena L.P.*, 326 U.S. App. D.C. 25, 117 F.3d 579, 588 (D.C. Cir. 1997); *American Mining Congress v. MSHA*, 302 U.S. App. D.C. 38, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993). **[**29]** "We must still

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[18] EPA also claims that the Guidance is not ripe for review because the court's review would be more focused in the context of a challenge to a particular permit. We think there is nothing to this. Whether EPA properly instructed State authorities to conduct sufficiency reviews of existing State and federal standards and to make those standards more stringent if not enough monitoring was provided will not turn on the specifics of any particular permit. Furthermore, EPA's action is national in scope and Congress clearly intended this court to determine the validity of such EPA actions. *See* 42 U.S.C. § 7607. A challenge to an individual permit would not be heard in this court. (Petitioners contend that only state courts could adjudicate such cases. We express no view about that.)

[19] Petitioners also claim that the Guidance revised EPA's "Compliance Assurance Monitoring" rule, sustained in *Natural Resources Defense Council, Inc. v. EPA*, 338 U.S. App. D.C. 340, 194 F.3d 130 (D.C. Cir. 1999), an argument we find unnecessary to consider.

look to whether the interpretation itself carries the force and effect of law, ... or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe." (citations and internal quotations omitted). *See* Paralyzed Veterans, 117 F.3d at 588. With that in mind, we will deal first with petitioners' claim that the Guidance significantly expanded the scope of the periodic monitoring rule. Section 70.6(a)(3)(i)(B) tells us that "periodic monitoring" must be made part of the permit when the applicable State or federal standard does not provide for "periodic testing or instrumental or noninstrumental monitoring." [20] If "periodic" has its usual meaning, [21] this signifies that any State or federal standard requiring testing from time to time--that is yearly, monthly, weekly, daily, hourly--would be satisfactory. The supplementing authority in § 70.6(a)(3)(i)(B) therefore would not be **[*1025]** triggered; instead, the emission standard would simply be incorporated in the permit, as EPA acknowledged in the rule's preamble, *see supra* note 8. On the other hand, if the State or federal standard contained merely a **[**30]** one-time startup test, specified no frequency for monitoring or provided no compliance method at all, § 70.6(a)(3)(i)(B) would require the State authorities to specify that some testing be performed at regular intervals to give assurance that the company is complying with emission limitations.

So far, our parsing of the language of § 70.6(a)(3)(i)(B) corresponds with petitioners' view that the rule serves only a gap-filling **[**31]** function. If this is what the rule means, there is no doubt that it is much narrower than the Guidance issued in 1998. There, EPA officials stated that regardless whether an emission standard contained a "periodic testing" or monitoring requirement, additional monitoring "may be necessary" if the monitoring in the standard "does not provide the necessary assurance of compliance." [22] *E.g.*, GUIDANCE at 7-8. Petitioners describe that aspect of the Guidance this way: "The Guidance unequivocally directs state permitting authorities, as a minimum element of continued EPA program approval, to conduct wide-ranging sufficiency reviews and upgrade monitoring in nearly all individual permits or permit applications, even where the underlying applicable requirement incorporates 'periodic testing or instrumental or noninstrumental monitoring' in facial compliance with § 70.6(a)(3)(i)(B)." Reply Brief of Petitioners at 13.

[32]** EPA's view of the scope of the Guidance is about the same as petitioners'. But the agency thinks statements in the preamble to its 1992 rule and its responses to comments in the final rulemaking alerted interested onlookers to its current position and show that the Guidance issued in 1998 is no broader than the rule itself. EPA's strongest point is the following statement made in 1992: "To the extent commentators assert that Title V does not authorize EPA to require monitoring beyond that provided for in the applicable requirement, EPA disagrees with the commenters." EPA Response to Comments (hereinafter "RTC") at 6-3. On the face of it, this assertion of statutory

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[20] HN10[↑] EPA identified the source of its authority for § 70.6(a)(3) as 42 U.S.C. § 7661c(b). This provides that EPA "may by rule" set forth methods and procedures "for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance."

[21] Although EPA defined many terms in its regulations governing permits, 40 C.F.R. § 70.2, it provided no definition of "periodic" or of "monitoring."

[22] By measuring the adequacy of monitoring in this manner, EPA's position introduces circularity. The Guidance instructs permitting authorities that monitoring is sufficient if it provides "a reasonable assurance of compliance with requirements applicable to the source." GUIDANCE at 7. But some of the applicable requirements are themselves methods for testing a source's compliance with other standards. For instance, in the case of a requirement to conduct an annual stack test, EPA's methodology suggests that performance of the one-time test would be sufficient as it provides "a reasonable assurance of compliance" with the applicable requirement. The problem is this gives permitting authorities no assistance in evaluating the proper frequency of such tests.

authority may have reflected EPA's claim--which no one now disputes--that if an "applicable requirement" contained a one-time stack test, the federal agency could insist that the State authority insert in the permit a requirement that the test be performed at regular intervals. If that is all the EPA statement signified, it would be entirely consistent with petitioners' interpretation of the final rule. [23]

[33]** In its response to comments and in the preamble to the Title V regulations, EPA promised that if there is "any federally promulgated requirement with insufficient monitoring, EPA will issue a rulemaking to revise such requirement." 57 Fed. Reg. 32,278 (1992); RTC at 6-4. [24] The Guidance, **[*1026]** of course, charts a very different course. Now, it is initially up to the States to identify federal standards with deficient monitoring, doubtless with EPA's input, formal or informal. And it is the State and local agencies that must alter the standards by requiring permittees--such as petitioners--to comply with more stringent monitoring requirements. Needless to say, EPA's approach--delegating to State officials the authority to alter duly promulgated federal standards--raises serious issues, not the least of which is whether EPA possesses the authority it now purports to delegate. One would suppose, and EPA did in 1992, that if federal regulations proved inadequate for one reason or another, EPA would have to conduct a rulemaking to amend them. *See Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1203-04 (D.C. Cir. 1998).

[34]** EPA thinks two other statements in its response to comments alerted everyone that its new rule would set in motion an across-the-board review of the existing monitoring requirements contained in federal and State emission standards. The first of these statements is: "In many cases, the monitoring requirements in the underlying regulation will suffice for assessing compliance." RTC at 6-3. EPA treats the "in many cases" as a qualification. What does this tell the careful reader? Only that sometimes the State or federal emission standard will need to be supplemented. But the critical question is when--when the monitoring in the standard consists only of a one-time test? or when the yearly or monthly or weekly or daily testing specified in the standard is not enough, as determined by State authorities or EPA during the permit process?

The second statement is this:

> The EPA reiterates that permits must be enforceable, and must include periodic monitoring, which might involve the use of, or be based on, appropriate reference test methods.... Where EPA has not provided adequate guidance in regard to source testing or monitoring, permitting authorities are allowed to establish additional **[**35]** requirements, including requirements concerning the degree and frequency of source testing on a case-by-case basis, as necessary to assure compliance with Part 70 [Title V] permit terms or conditions. However, in no case may such frequency be less stringent than any frequency required by an underlying applicable requirement.

Id. at 6-5. If "periodic monitoring" means testing from time to time, the first sentence in this passage hardly advances EPA's current position. And the second sentence seems set against it. Only when "EPA has not provided adequate guidance in regard to source testing or monitoring," may State authorities provide additional monitoring. So what

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[23] According to EPA's response to comments:

> Examples of situations where Section 70.6(a)(3)(i)(B) would apply include a SIP provision which contains a reference test method but no testing obligation, or a NSPS which requires only a one time stack test on startup. Any Federal standards promulgated pursuant to the Act amendments of 1990 are presumed to contain sufficient monitoring and, therefore, only Section 70.6(a)(3)(i)(A) applies.

RTC at 6-4.

[24] Later in its response to comments, EPA repeated this promise: "... EPA will revise federal regulations that need additional specification of test methods, including specification of frequency and degree of testing." RTC at 6-5.

is "adequate guidance"? Once again the only concrete example EPA gave in 1992 was a one-time stack test, which rather makes petitioners' point.

The short of the matter is that the regulatory history EPA offers fails to demonstrate that § 70.6(a)(3)(i)(B) initially had the broad scope the Guidance now ascribes to it. Nothing on the face of the regulation or in EPA's commentary at the time said anything about giving State authorities a roving commission to pore over existing State and federal standards, to decide **[**36]** which are deficient, and to use the permit system to amend, supplement, alter or expand the extent and frequency of testing already provided. In fact, EPA's promise in the 1992 rulemaking--that if federal standards were found to be inadequate in terms of monitoring it would open rulemaking proceedings--is flatly against EPA's current position. (EPA makes no attempt to square this promise with the argument it makes today.)

Furthermore, we attach significance to EPA's recognition, in its 1992 permit regulations, that "Title V does not impose substantive new requirements," 40 C.F.R. **[*1027]** § 70.1(b). Test methods and the frequency of testing for compliance with emission limitations are surely "substantive" requirements; they impose duties and obligations on those who are regulated. Federal testing requirements contained in emissions standards are promulgated after notice and comment rulemaking. Testing requirements in emission standards in State standards are presumably adopted by the State's legislature or administrative agency, and approved by EPA as part of the State's implementation plan. We have recognized before that changing the method of measuring compliance with an emission limitation **[**37]** can affect the stringency of the limitation itself. *Portland Cement Ass'n v. Ruckelshaus*, 158 U.S. App. D.C. 308, 486 F.2d 375, 396-97 (D.C. Cir. 1973), *discussed in Clean Air Implementation Project v. EPA*, 150 F.3d at 1203. In addition, monitoring imposes costs. Petitioners represent that a single stack test can "cost tens of thousands of dollars, and take a day or more to complete," which is why "stack testing is limited to once or twice a year (at most)." Brief of Petitioners at 22 n.75. If a State agency, acting under EPA's direction in the Guidance, devised a permit condition increasing a company's stack test obligation (as set forth in a State or federal standard) from once a year to once a month, no one could seriously maintain that this was something other than a substantive change. [25]

[38]** There is still another problem with EPA's position. Although its Guidance goes to great lengths to explain what is meant by the words "periodic monitoring," it almost completely neglects a critical first step. On the face of § 70.6(a)(3)(i)(B), "periodic monitoring" is required if and only if "the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of record-keeping designed to serve as monitoring)." While the Guidance is quick to say that all Title V permits must contain "periodic monitoring," it never explains what constitutes "periodic testing" or what constitutes "instrumental or noninstrumental monitoring." Instead, throughout the Guidance, EPA either yokes these three items together, or treats the terms as synonymous, without saying why. Yet if "periodic testing" and "instrumental or noninstrumental monitoring" mean the same thing as "periodic monitoring," there is no accounting for why § 70.6(a)(3)(i)(B) was written as it was. The regulation could simply have said "periodic monitoring" is required for all permits, period. [26]

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[25] The Guidance, at p. 8, provides a six-point bullet point list for permit-writers, making clear that EPA expects them to engage in an intricate regulatory trade off (often on a unit-by-unit basis), assessing the costs and benefits of available technologies for the particular pollutant. This six-part list has mutated into a complex flow chart in the Draft Periodic Monitoring Technical Reference Document, and is reprinted as an Addendum to this opinion.

[26] EPA argues that our opinion in *Natural Resources Defense Council, Inc. v. EPA*, 338 U.S. App. D.C. 340, 194 F.3d 130, 135-36 (D.C. Cir. 1999), reflects an understanding of § 70.6(a)(3) "nearly

[39]** **[*1028]** In sum, we are convinced that elements of the Guidance-those elements petitioners challenge--significantly broadened the 1992 rule. The more expansive reading of the rule, unveiled in the Guidance, cannot stand. **HN11**[↑] In directing State permitting authorities to conduct wide-ranging sufficiency reviews and to enhance the monitoring required in individual permits beyond that contained in State or federal emission standards even when those standards demand some sort of periodic testing, EPA has in effect amended § 70.6(a)(3)(i)(B). This it cannot legally do without complying with the rulemaking procedures required by 42 U.S.C. § 7607(d). [27] *See Alaska Professional Hunters Ass'n v. FAA*, 336 U.S. App. D.C. 197, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 174 F.3d 166, 176-78 (3d Cir. 1999); *Paralyzed Veterans*, 117 F.3d at 585-86.

[40]** For the reasons stated, we find setting aside EPA's Guidance to be the appropriate remedy. Though petitioners challenge only portions of the Guidance, **HN12**[↑] partial affirmance is not an option when, as here, "there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis County Solid Waste Management v. EPA*, 323 U.S. App. D.C. 425, 108 F.3d 1454, 1458 (D.C. Cir. 1997) (quoting *North Carolina v. FERC*, 235 U.S. App. D.C. 28, 730 F.2d 790, 795-96 (D.C. Cir. 1984)). In view of the intertwined nature of the challenged and unchallenged portions of the Guidance, the Guidance must be set aside in its entirety. *See* 42 U.S.C. § 7607. **HN13**[↑] State permitting authorities therefore may not, on the basis of EPA's Guidance or 40 C.F.R. § 70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test.

So ordered.

[SEE ADDENDUM IN ORIGINAL]

[Addendum not available electronically] **[**41]**

End of Document

identical" to that contained in the Guidance. Supplemental Brief of Respondent at 4. The opinion stated:

> The 1990 Clean Air Act Amendments did not mandate that EPA fit all enhanced monitoring under one rule and EPA has reasonably illustrated how its enhanced monitoring program, when considered in its entirety, complies with § 114(a)(3). Specifically, EPA demonstrated that many of the major stationary sources exempt from CAM are subject to other specific rules, and if they are not, they are subject to the two residual rules: (1) "[The permit shall contain] periodic monitoring sufficient to yield reliable data ... that are representative of the source's compliance with the permit...." 40 C.F.R. § 70.6(a)(3)(i)(B); (2) "All part 70 permits shall contain the following elements with respect to compliance: (1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, [and] monitoring ... requirements sufficient to assure compliance with the terms and conditions of the permit." *Id.* § 70.6(c)(1).

Id. The bracketed portion of the quotation reads out of subsection (B) the conditions that "periodic monitoring" is required only when "the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of record-keeping designed to serve as monitoring)." When that clause is reinserted, it becomes clear that the quotation does not speak to the situation of permits which already provide for periodic testing, addressed in 40 C.F.R. § 70.6(a)(3)(i)(A).

[27] Unless EPA certifies that the amendments to the Title V rule would not "have a significant economic impact on a substantial number of small entities," **5 U.S.C. § 605(b)**, it must also comply with the various procedural requirements of the Small Business Regulatory Enforcement Fairness Act, **5 U.S.C. §§ 601-612.**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

VIRGINIA DEPARTMENT OF TRANSPORTATION, ET AL, Plaintiffs, -v- UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL, Defendants.	Civil Action No. 1:12-CV-775

Memorandum Opinion

Before the Court is the Plaintiffs' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The Defendants opposed the motion, and the Plaintiffs replied. The Court heard oral arguments on December 14, 2012 and now issues this memorandum opinion and accompanying order granting the Plaintiffs' motion.

Background

The Clean Water Act, 33 U.S.C. § 1251 et seq., establishes the basic structure for regulating discharge of pollutants into the waters of the United States, and provides certain mechanisms to improve and maintain the quality of surface waters.

One such mechanism is the requirement that states identify "designated uses" for each body of water within their borders, as well as "water quality criteria" sufficient to support those uses. 33 U.S.C. § 1313(c)(2)(A). The Environmental Protection Agency ("EPA") evaluates the uses and criteria developed by the states, and either approves them or else proposes and

promulgates its own set of standards. § 1313(c)(3).

Once the standards are in place, each state is required to maintain a list—also subject to approval or modification by EPA—of its waterbodies that are "impaired" because they do not meet their respective water quality criteria. 33 U.S.C. § 1313(d)(1)(A). For each waterbody on the impaired list, the state is required to establish a set of total maximum daily loads ("TMDLs") sufficient to bring the body back into compliance with its water quality criteria. § 1313(d)(1)(C). Each TMDL establishes the maximum amount of a pollutant that may be added to the waterbody daily from all sources (runoff, point sources, etc.). EPA is required to publish a list of pollutants suitable for maximum daily load measurement, § 1314(a)(2)(D), and it has determined that *all* pollutants are suitable for TMDLs, *see* Total Maximum Daily Loads Under Clean Water Act, 43 Fed. Reg. 60,662. Therefore, any pollutant that falls within the relatively broad definition of "pollutant" set forth in § 1362(6) may be regulated via TMDL. EPA can approve or modify as it sees fit TMDLs proposed by the states. § 1313(d)(2).

Here the state in question is Virginia, and the waterbody is a 25-mile long tributary of the Potomac River, located in Fairfax County, called Accotink Creek. The creek has been the subject of litigation in the past that is not relevant to this matter except the result: EPA was required to set TMDLs for Accotink Creek once Virginia failed to do so by a certain date. Specifically, the creek had been identified as having "benthic impairments," which is to say the community of organisms that live on or near the bottom of the creek were not as numerous or healthy as they should be. EPA was to set appropriate TMDLs to improve the health of the benthic community in Accotink Creek.

On April 18, 2011, EPA established a TMDL for Accotink Creek which limited the flow rate of stormwater into Accotink Creek to 681.8 ft^3/acre-day. The TMDL was designed to

regulate the amount of sediment in the Accotink, because EPA believed sediment was a primary cause of the benthic impairment. Both parties agree that sediment is a pollutant, and that stormwater is not. EPA refers to stormwater flow rate as a "surrogate" for sediment.

The Plaintiffs are now challenging the TMDL on multiple grounds, but presently before the Court is a single issue: Does the Clean Water Act authorize the EPA to regulate the level of a pollutant in Accotink Creek by establishing a TMDL for the flow of a nonpollutant into the creek?

Analysis

I. Standard of Review

Count I of the complaint, at issue here, is brought under the Administrative Procedures Act. *See* Comp. ¶ 169. The APA "confines judicial review of executive branch decisions to the administrative record of proceedings before the pertinent agency." *Shipbuilders Council of Am. V. U.S. Dept. of Homeland Sec.*, 770 F. Supp. 2d 793, 802 (E.D. Va. 2011). As such, the district court "sits as an appellate tribunal," and APA claims can be resolved equally well in the context of Rule 12 or Rule 56. *Univ. Med. Ctr. Of S. Nev. V. Shalala*, 173 F.3d 438, 441 n. 3 (D.C. Cir. 1999).

Because Count I presents a question of statutory interpretation, the Court reviews EPA's decision using the two-step analysis set forth in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). For a given question of statutory interpretation, the first step under *Chevron* is to determine whether Congress addressed the "precise question at issue." 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter . . . ." *Id.* If the Court cannot find that Congress has squarely addressed the question, the Court must move to Chevron's second step. In

the second step of statutory construction under *Chevron*, the Court must determine whether the agency's interpretation of the statute is "permissible." *Id.* at 843. The agency's construction is permissible if it is reasonable, but it need not be what the Court considers the *best* or *most reasonable* construction. *See id.* at 845. The Court is not to simply impose its own construction on the statute, but instead it gives deference to any reasonable statutory construction by the agency. *Id.* at 843.

II. Chevron Step One

Whether statutory ambiguity exists so that the issue cannot be settled at *Chevron's* first step is for the Court to decide, and the Court "owe[s] the agency no deference on the existence of ambiguity." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005). The Court begins the inquiry by "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. As always, the analysis begins with the text of the statute. *Nat'l Elec. Mfrs. Ass'n v. U.S. Dept't of Energy*, 654 F.3d 496, 504 (4th Cir. 2011).

The text of the statute that requires states to establish their own TMDLs, 33 U.S.C. § 1313(d)(1)(C), is:

> Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, **the total maximum daily load, for those pollutants which the Administrator identifies** under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. (emphasis added)

The next subsection, § 1313(d)(2), grants EPA the authority to set TMDLs when the state

has not done so adequately. "Pollutant" is a statutorily defined term. 33 U.S.C. § 1362(6).

The Court sees no ambiguity in the wording of this statute. EPA is charged with establishing TMDLs for the appropriate pollutants; that does not give them authority to regulate nonpollutants. The parties agree that sediment is a pollutant under 33 U.S.C. § 1362(6), and stormwater is not. Then how does EPA claim jurisdiction over setting TMDLs for stormwater?

EPA frames the stormwater TMDL as a surrogate. EPA's research apparently indicates that the "[sediment] load in Accotink Creek is a function of the amount of stormwater runoff generated within the watershed." Def. Opp. at 8. And EPA believes that framing the TMDL in terms of stormwater flow rate is superior to simply expressing it in terms of maximum sediment load.

The DC Circuit has considered and rejected a similar attempt by EPA to take liberties with the way Congress intended it to express its TMDLs. In *Friends of the Earth, Inc. v. Env. Protection Agency*, EPA had promulgated TMDLs for the Anacostia River that expressed the maximum load of certain pollutants in terms of annual and seasonal amounts. 446 F.3d 140, 143 (D.C. Cir. 2006). The court found that expressing a TMDL in terms of annual or seasonal maximums was not allowed, because the statute granted authority only for daily loads. *Id.* at 148. The court reached its conclusion even though EPA apparently made a strong argument that expressing TMDLs in terms of annual or seasonal loads was an effective and reasonable approach. *See id.* Presumably a daily load could have been derived by simply dividing the annual load by 365, yet the court still required expression in the terms dictated by Congress.

Here too, EPA hopes to express a TMDL in terms other than those contemplated by the statute, arguing that such an expression is the most effective method. But, as *Friends of the Earth* illustrates, EPA may not regulate something over which it has no statutorily granted power—

annual loads or nonpollutants—as a proxy for something over which it *is* granted power—daily loads or pollutants.

EPA's argument that its surrogate approach should be allowed because the statute does not specifically forbid it fails. EPA is not explicitly forbidden from establishing total maximum *annual* loads any more than they are explicitly barred from establishing TMDLs for nonpollutants. The question is whether the statute grants the agency the authority it is claiming, not whether the statute explicitly withholds that authority. And in this case, as in *Friends of the Earth*, the statute simply does not grant EPA the authority it claims.

The dicta in *Weyerhaeuser Co. v. Costle* is not as helpful to EPA's case as it would like. 590 F.2d 1011, 1022 n.6 (D.C. Cir. 1978). It is true that the court said in a footnote "[i]t is well recognized that EPA can use pollution parameters that are not harmful in themselves, but act as indicators of harm." *Id.* But in that case, the non-harmful pollution parameters the EPA sought to regulate were components of the effluent commonly discharged from paper mills, *id.* at 1022, making them effluents themselves. And power to regulate effluents is expressly granted to the EPA in the relevant statutory section. *See* 33 U.S.C. § 1314(b).

EPA would like to create the impression that Congress has given it loose rein to determine exactly what it could and could not regulate. On page 16 of its opposition to this motion, EPA points out that "Congress authorized EPA to determine which pollutants were suitable for TMDL calculation and measurement." (Internal quotes removed). While this may be true, EPA glosses over the fact that 33 U.S.C. § 1314(a)(2)(D) only gives EPA the power to regulate pollutants as that term is defined—by Congress—elsewhere in the statute. And, as discussed above, sediment is a pollutant for these purposes, but stormwater is not.

In a similar vein, EPA regulations which imply that the agency has discretion to set the

TMDL as it sees fit do not bear on the question now before the Court. EPA has promulgated a regulation allowing TMDLs to be "expressed in terms of either mass per time, toxicity, or other appropriate measure," 40 C.F.R. § 130.2(i), and another that allows TMDLs to be expressed as a "property of pollution," 50 Fed. Reg. 1774, 1776 (Jan. 11, 1985). But, EPA citing these regulations to demonstrate that the surrogate TMDL approach is permissible is mere bootstrapping. To the extent the regulations allow EPA to set TMDLs for nonpollutants, they exceed the statutory authority of EPA.

The plain language of the statute trumps all, but legislative history also supports Plaintiffs' argument. Congress's intent to limit EPA's discretion in this context is evidenced by the committee record cited by Plaintiffs, which has also been used by the Ninth Circuit, in which Senator Randolph, Chairman of the Senate committee that amended the act in 1972, explained, "We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives [for] administrators to follow." Pl. Mot. 7, *citing Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1072 (9th Cir. 2011). Congress created a statutory scheme that included a precise definition of the word "pollutant," and then gave EPA authority to set TMDLs for those pollutants. Senator Randolph's comments strongly imply that Congress did not intend anything more or less than what is written in the statute.

The Court considers the language of 33 U.S.C. § 1313(d)(1)(C) to be unambiguous. Congress has spoken directly on the question at issue, and its answer is that EPA's authority does not extend to establishing TMDLs for nonpollutants as surrogates for pollutants. The legislative history of the CWA is consistent with this reading. Therefore, this Court finds EPA's interpretation of § 1313 and the related provisions to be impermissibly broad based on analysis

under the first step of *Chevron* analysis.

III. Chevron Step Two

Because the Court considers Congress's intent to be clear and unambiguously expressed by the language of the statute, it need not move to the second step of *Chevron* analysis. But the Court notes that there is substantial reason to believe EPA's motives go beyond "permissible gap-filling."

Page 9 of EPA's opposition says, "stormwater flow rates as a surrogate would more effectively address the process by which sediment impairs aquatic life in Accontink Creek." If the sediment levels in Accotink Creek have become dangerously high, what better way to address the problem than by limiting the amount of sediment permitted in the creek? If sediment level is truly "a function of" the amount of stormwater runoff, as EPA claims, then the TMDL could just as easily be expressed in terms of sediment load.

In fact, the Board of Supervisors of Fairfax County argued at the December 14th hearing (without objection from EPA) that EPA has approved 3,700 TMDLs for sediment nationwide, and in Virginia has addressed 111 benthic impairments with TMDLs. None of them regulated the flow rate of stormwater. By comparison, EPA has tried out its novel approach of regulating sediment via flow in only four instances nationwide, and all four attempts were challenged in court. One has settled, the other three are still pending.

The Court suspects that the decision to regulate stormwater flow as a surrogate for sediment load would not constitute a permissible construction of § 1313(d)(1)(C), even given the deference due at *Chevron's* second step. This is especially likely because EPA is attempting to increase the extent of its own authority via flow TMDLs, which courts must examine carefully.

See Brown & Williamson Tobacco Corp. v. Food & Drug Admin., 153 F.3d 155, 161-62 (4th Cir. 1998). EPA's attempt to set TMDLs for nonpollutants probably goes beyond "permissible gap-filling" and is instead an impermissible construction of the statute.

Conclusion

The language of § 1313(d)(1)(C) is clear. EPA is authorized to set TMDLs to regulate pollutants, and pollutants are carefully defined. Stormwater runoff is not a pollutant, so EPA is not authorized to regulate it via TMDL. Claiming that the stormwater maximum load is a surrogate for sediment, which is a pollutant and therefore regulable, does not bring stormwater within the ambit of EPA's TMDL authority. Whatever reason EPA has for thinking that a stormwater flow rate TMDL is a better way of limiting sediment load than a sediment load TMDL, EPA cannot be allowed to exceed its clearly limited statutory authority. For these reasons, the Plaintiffs' motion for Rule 12(c) judgment on the pleadings on Count I of their complaint is granted.

January 3, 2013
Alexandria, Virginia

/s/ LOG
Liam O'Grady
United States District Judge

Jacks v. City of Santa Barbara

Supreme Court of California

June 29, 2017, Filed

S225589

Reporter

3 Cal. 5th 248 *; 397 P.3d 210 **; 219 Cal. Rptr. 3d 859 ***; 2017 Cal. LEXIS 4769 ****; 2017 WL 2805638

ROLLAND JACKS et al., Plaintiffs and Appellants, v. CITY OF SANTA BARBARA, Defendant and Respondent.

Subsequent History: Reported at Jacks v. City of Santa Barbara, 2017 Cal. LEXIS 5545 (Cal., June 29, 2017)

Rehearing denied by Jacks v. City of Santa Barbara, 2017 Cal. LEXIS 6402 (Cal., Aug. 16, 2017)

Prior History: [****1] Superior Court of Santa Barbara County, No. 1383959, Thomas Pearce Anderle, Judge. Court of Appeal, Second Appellate District, Division Six, No. B253474.

Jacks v. City of Santa Barbara, 234 Cal. App. 4th 925, 184 Cal. Rptr. 3d 539, 2015 Cal. App. LEXIS 178 (Cal. App. 2d Dist., Feb. 26, 2015)

Core Terms

customers, franchise, franchise fee, surcharge, charges, taxes, electricity, Ordinance, City's, purposes, ratepayers, local government, value of the franchise, voter approval, negotiations, costs, reasonable relation, courts, rates, requires, incidence, gross receipts, italics, voters, municipality, payor, collected, services, parties, bills

Case Summary

Overview

HOLDINGS: [1]-In a case in which plaintiffs challenged a city's imposition of a 1 percent surcharge on an electric utility's gross receipts from the sale of electricity within the city, the Supreme Court held that to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred; [2]-Liberally construed, the first amended complaint and the stipulated facts adequately alleged the basis for a claim that the surcharge bore no reasonable relationship to the value of the franchise, and was therefore a tax requiring voter approval under Proposition 218; accordingly, the trial court erred in granting judgment on the pleadings to the city; [3]-However, the facts on which plaintiffs relied in seeking summary adjudication did not establish their claim that the surcharge was a tax.

Outcome

Judgment of court of appeal affirmed in part and reversed in part; case remanded with directions.

LexisNexis® Headnotes

Governments > Local Governments > Finance

HN1[] **Local Governments, Finance**

A charge imposed in exchange for franchise rights is a valid fee rather than a tax only if the amount of the charge is reasonably related to the value of the franchise.

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real Property Taxes > Assessment & Valuation

Governments > State & Territorial Governments > Finance

Governments > State & Territorial Governments > Legislatures

HN2[] Local Governments, Finance

State voters have imposed various limitations upon the authority of state and local governments to impose taxes and fees. Proposition 13, which was adopted in 1978, set the assessed value of real property as the full cash value on the owner's 1975-1976 tax bill, limited increases in the assessed value to 2 percent per year unless there was a change in ownership, and limited the rate of taxation on real property to 1 percent of its assessed value. Cal. Const., art. XIII A, §§ 1, 2. In addition, to prevent tax savings related to real property from being offset by increases in state and local taxes, Proposition 13 required approval by two-thirds of the members of the legislature in order to increase state taxes, and required approval by two-thirds of the local electors of a city, county, or special district in order for such a local entity to impose special taxes. Cal. Const., art. XIII A, §§ 3, 4.

Governments > Local Governments > Finance

HN3[] Local Governments, Finance

The term "special taxes" in Cal. Const., art. XIII A, § 4, means taxes which are levied for a specific purpose. In addition, a "special tax" does not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes. Gov. Code, § 50076.

Governments > Local Governments > Finance

HN4[] Local Governments, Finance

Proposition 62, which added a new article to the California Government Code, Gov. Code, §§ 53720-53730, requires that all new local taxes be approved by a vote of the local electorate.

Governments > Local Governments > Charters

Governments > Local Governments > Finance

HN5[] Local Governments, Charters

Proposition 218 amended the California Constitution to add voter approval requirements for general and special taxes, thereby binding charter jurisdictions. Cal. Const., art. XIII C, §§ 1, 2.

Evidence > Burdens of Proof > Allocation

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real Property Taxes > Assessment & Valuation

HN6[] Burdens of Proof, Allocation

Proposition 13 was not intended to limit traditional benefit assessments. It requires an agency proposing an assessment on property to determine the proportionate special benefit to be derived by each parcel subject to the assessment; to support the assessment with an engineer's report; to give written notice to each parcel owner of the amount of the proposed assessment and the basis of the calculation; and to provide each owner with a ballot to vote in favor of or against the proposed assessment. It also requires the agency to hold a public hearing, and bars imposition of the assessment if a majority of parcel owners within the assessment area submit ballots in opposition to the assessment, with each ballot weighted based on the proposed financial obligation of the affected parcel.

In the event legal action is brought contesting an assessment, the agency has the burden to establish that the burdened properties receive a special benefit and the assessment is proportional to the benefits conferred. Cal. Const., art. XIII D, §§ 2, subd. (b).

Constitutional Law > State Constitutional Operation

Evidence > Burdens of Proof > Allocation

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real Property Taxes > Assessment & Valuation

HN7[] Constitutional Law, State Constitutional Operation

Proposition 26 amended the California Constitution to provide that for purposes of article XIII C, which addresses voter approval of local taxes, "tax" means any levy, charge, or exaction of any kind imposed by a local government, Cal. Const., art. XIII C, § 1, subd. (e), except (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost, (2) a charge for a specific government service or product provided directly to the payor and not provided to those not charged, which does not exceed its reasonable cost, (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders, (4) charges for access to or use, purchase, rental, or lease of local government property, (5) fines for violations of law, (6) charges imposed as a condition of developing property, and (7) property-related assessments and fees as allowed under article XIII D. The local government bears the burden of establishing the exceptions. Cal. Const., art. XIII C, § 1, subd. (e).

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real Property Taxes > Assessment & Valuation

HN8[] Local Governments, Finance

If an assessment for improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive. But if the assessment exceeds the actual cost of the improvement, the exaction is a tax and not an assessment. With respect to costs, Proposition 13's goal of providing effective property tax relief is promoted rather than subverted by shifting costs to those who generate the costs. However, if the charges exceed the reasonable cost of the activity on which they are based, the charges are levied for unrelated revenue purposes, and are therefore taxes.

Governments > Local Governments > Finance

HN9[] Local Governments, Finance

Restricting allowable fees to the reasonable cost or value of the activity with which the charges are associated serves Proposition 13's purpose of limiting taxes. If a state or local governmental agency were allowed to impose charges in excess of the special benefit received by the payor or the cost associated with the payor's activities, the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees. Therefore, to the extent charges exceed the rationale underlying the charges, they are taxes.

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Finance

HN10[] Public Improvements, Bridges & Roads

A franchise to use public streets or rights-of-way is a form of property, and a franchise fee is the purchase price of the franchise. Historically, franchise fees have not been considered taxes. Nothing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses. Cal. Const., arts. XIII A, § 3, subd. (b)(4), XIII C. This understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests is confirmed by Proposition 26, the purpose of which was to reinforce the voter approval requirements set forth in Propositions 13 and 218. Although Proposition 26 strengthened restrictions on taxation by expansively defining "tax" as any levy, charge, or exaction of any kind imposed by a local government, Cal. Const., art. XIII C, § 1, subd. (e), it provided an exception for a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property. Art. XIII C, § 1, subd. (e)(4).

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Finance

HN11[] **Public Improvements, Bridges & Roads**

The Broughton Act's provision that a franchise fee be based on the receipts from the use, operation, or possession of the franchise results in a complicated calculation of franchise fees. Usually, some portion of a utility's rights-of-way are on private property or property outside the jurisdiction of the city or county granting the franchise, and the utility's gross receipts attributable to a particular franchise must be reduced in proportion to the utility's rights-of-way that are not within the franchise agreement. In addition, because gross receipts arise from all of a utility's operative property, such as equipment and warehouses, the portion of gross receipts attributable to property other than the franchise must be excluded from the calculation of the franchise fee. Finally, if a utility also provides service under a constitutional franchise - for example, where it provides artificial light under a constitutional franchise in the same area in which it provides electricity under a franchise agreement entered pursuant to the Broughton Act - the franchise fee applies only to the gross receipts from the provision of services under the nonconstitutional franchise.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Utility Companies > Rates

HN12[] **Public Utility Commissions, Authorities & Powers**

The California Public Utilities Commission sets the rates of a publicly regulated utility to permit the utility to recover its costs and expenses in providing its service, and to receive a fair return on the value of the property it uses in providing its service. Among a utility's costs and expenses are government fees and taxes.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Utility Companies > Rates

HN13[] **Public Utility Commissions, Authorities & Powers**

The California Public Utilities Commission has established a procedure by which utilities may obtain approval to impose disproportionate charges on ratepayers within the jurisdiction that imposed the charges. When a local government imposes

taxes or fees which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory, a utility may file an advice letter seeking approval to charge local government fee surcharges. Such surcharges shall be included as a separate item or items to bills rendered to applicable customers. Each surcharge shall be identified as being derived from the local governmental entity responsible for it.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Local Governments > Finance

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN14[] Standards of Review, De Novo Review

Whether a charge is a tax or a fee is a question of law for the appellate courts to decide on independent review of the facts.

Governments > Local Governments > Finance

Governments > Legislation > Interpretation

HN15[] Local Governments, Finance

The provisions of Proposition 218 shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Finance

HN16[] Public Improvements, Bridges & Roads

Sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes. But to constitute compensation for the value received, the fees must reflect a reasonable estimate of the value of the franchise.

Governments > Local Governments > Finance

HN17[] Local Governments, Finance

In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. In determining whether a charge is a tax or a fee, a court looks to whether the primary purpose of a charge was to generate revenue. In contrast, a fee paid for an interest in government property is compensation for the use or purchase of a government asset rather than compensation for a cost. Consequently, the revenue generated by the fee is available for whatever purposes the government chooses rather than tied to a public cost. The aspect of the transaction that distinguishes the charge from a tax is the receipt of value in exchange for the payment.

Governments > Local Governments > Finance

HN18[] Local Governments, Finance

A franchise fee must be based on the value of the franchise conveyed in order to come within the rationale for its imposition without approval of the voters. Its value may be based on bona fide negotiations concerning the property's value, as well as other indicia of worth. Consistent with the principles that govern other fees, to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN19[] **Standards of Review, De Novo Review**

A motion for judgment on the pleadings presents the question of whether the plaintiff's complaint states facts sufficient to constitute a cause of action against the defendant. The trial court generally considers only the allegations of the complaint, but may also consider matters that are subject to judicial notice. Moreover, the allegations must be liberally construed with a view to attaining substantial justice among the parties. The court's primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory. An appellate court independently reviews a trial court's order on such a motion.

Headnotes/Syllabus

Summary

[*248] CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiffs filed a class action complaint challenging a city's imposition of a 1 percent surcharge on an electric utility's gross receipts from the sale of electricity within the city. The utility transferred the revenues from the surcharge to the city. The city contended this separate charge was the fee paid by the utility for the privilege of using city property in connection with the delivery of electricity. The superior court granted the city's motion for judgment on the pleadings, concluding that the surcharge was not a tax and therefore was not subject to the voter approval requirements of Prop. 218. (Superior Court of Santa Barbara County, No. 1383959, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B253474, reversed the trial court's judgment, holding that the surcharge was a tax, and therefore required approval under Prop. 218.

The Supreme Court affirmed the judgment of the Court of Appeal to the extent it reversed the trial court's grant of the city's motion for judgment on the pleadings, reversed the judgment to the extent the Court of Appeal directed the trial court to grant plaintiffs' motion for summary adjudication, and remanded the case with directions. The court held that to constitute a valid franchise fee under Prop. 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred. Liberally construed, the first amended complaint and the stipulated facts adequately alleged the basis for a claim that the surcharge bore no reasonable relationship to the value of the franchise, and was therefore a tax requiring voter approval under Prop. 218. Accordingly, the trial court erred in granting judgment on the pleadings to the city. However, the facts on which plaintiffs relied in seeking summary adjudication did not establish their claim that the surcharge was a tax. (Opinion by Cantil-Sakauye, C. J., with Werdegar, Corrigan, Liu, Cuéllar, and Krueger, JJ., concurring. Dissenting opinion by Chin, J. (see p. 274).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Municipalities § 96—Franchise Fee—Tax—Reasonable Relationship—Value of Franchise.

A charge imposed in exchange for franchise rights is a valid fee rather than a tax only if the amount of the charge is reasonably related to the value of the franchise.

CA(2)[] **(2)**

Taxation § 1—Constitutional Limitations—Voter Approval—Special Taxes.

State voters have imposed various limitations upon the authority of state and local governments to impose taxes and fees. Prop. 13, which was adopted in 1978, set the assessed value of real property as the full cash value on the owner's 1975–1976 tax bill, limited increases in the assessed value to 2 percent per year unless there was a change in ownership, and limited the rate of taxation on real property to 1 percent of its assessed value (Cal. Const., art. XIII A, §§ 1, 2). In addition, to prevent tax savings related to real property from being offset by increases in state and local taxes, Prop. 13 required approval by two-thirds of the members of the Legislature in order to increase state taxes, and required approval by two-thirds of the local electors of a city, county, or special district in order for such a local entity to impose special taxes (Cal. Const., art. XIII A, §§ 3, 4).

CA(3)[] (3)

Municipalities § 34—Fiscal Affairs—Special Taxes—Reasonable Cost.

The term "special taxes" in Cal. Const., art. XIII A, § 4, means taxes which are levied for a specific purpose. In addition, a "special tax" does not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes (Gov. Code, § 50076).

CA(4)[] (4)

Municipalities § 34—Fiscal Affairs—New Taxes—Voter Approval.

Prop. 62 requires that all new local taxes be approved by a vote of the local electorate.

CA(5)[] (5)

Municipalities § 34—Fiscal Affairs—General and Special Taxes—Voter Approval—Charter Jurisdictions.

Prop. 218 amended the California Constitution to add voter approval requirements for general and special taxes, thereby binding charter jurisdictions (Cal. Const., art. XIII C, §§ 1, 2).

CA(6)[] (6)

Taxation § 1—Assessment on Property—Special Benefit.

Prop. 13 was not intended to limit traditional benefit assessments. It requires an agency proposing an assessment on property to determine the proportionate special benefit to be derived by each parcel subject to the **[*250]** assessment; to support the assessment with an engineer's report; to give written notice to each parcel owner of the amount of the proposed assessment and the basis of the calculation; and to provide each owner with a ballot to vote in favor of or against the proposed assessment. It also requires the agency to hold a public hearing, and bars imposition of the assessment if a majority of parcel owners within the assessment area submit ballots in opposition to the assessment, with each ballot weighted based on the proposed financial obligation of the affected parcel. In the event legal action is brought contesting an assessment, the agency has the burden to establish that the burdened properties receive a special benefit and the assessment is proportional to the benefits conferred (Cal. Const., art. XIII D, §§ 2, subd. (b), 4).

CA(7)[] (7)

Municipalities § 34—Fiscal Affairs—Local Taxes—Voter Approval—Specific Benefit—Reasonable Cost.

Prop. 26 amended the California Constitution to

provide that for purposes of article XIII C, which addresses voter approval of local taxes, "tax" means any levy, charge, or exaction of any kind imposed by a local government (Cal. Const., art. XIII C, § 1, subd. (e)), except (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost, (2) a charge for a specific government service or product provided directly to the payor and not provided to those not charged, which does not exceed its reasonable cost, (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders, (4) charges for access to or use, purchase, rental, or lease of local government property, (5) fines for violations of law, (6) charges imposed as a condition of developing property, and (7) property-related assessments and fees as allowed under article XIII D. The local government bears the burden of establishing the exceptions (Cal. Const., art. XIII C, § 1, subd. (e)).

CA(8)[] (8)

Taxation § 1—Assessment on Property—Special Benefit—Reasonable Cost.

If an assessment for improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive. But if the assessment exceeds the actual cost of the improvement, the exaction is a tax and not an assessment. With respect to costs, Prop. 13's goal of providing effective property tax relief is promoted rather than subverted by shifting costs to those who generate the costs. However, if the charges exceed the reasonable cost of the activity on which they are based, the charges are levied for unrelated revenue purposes, and are therefore taxes.

CA(9)[] (9)

Taxation § 1—Special Benefit—Reasonable Cost—Payor's Activities.

Restricting allowable fees to the reasonable cost or value of the activity [*251] with which the charges are associated serves Prop. 13's purpose of limiting taxes. If a state or local governmental agency were allowed to impose charges in excess of the special benefit received by the payor or the cost associated with the payor's activities, the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees. Therefore, to the extent charges exceed the rationale underlying the charges, they are taxes.

CA(10)[] (10)

Municipalities § 96—Franchise Fee—Use of Rights-of-way.

A franchise to use public streets or rights-of-way is a form of property, and a franchise fee is the purchase price of the franchise. Historically, franchise fees have not been considered taxes. Nothing in Prop. 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses (Cal. Const., arts. XIII A, § 3, subd. (b)(4), XIII C). This understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests is confirmed by Prop. 26, the purpose of which was to reinforce the voter approval requirements set forth in Props. 13 and 218. Although Prop. 26 strengthened restrictions on taxation by expansively defining "tax" as any levy, charge, or exaction of any kind imposed by a local government (Cal. Const., art. XIII C, § 1, subd. (e)), it provided an exception for a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property (Art. XIII C, § 1, subd. (e)(4)).

CA(11)[] (11)

Municipalities § 96—Franchise Fee—Calculation—Gross Receipts.

The Broughton Act's (Pub. Util. Code, § 6001 et seq.) provision that a franchise fee be based on the receipts from the use, operation, or possession of the franchise results in a complicated calculation of franchise fees. Usually, some portion of a utility's rights-of-way are on private property or property outside the jurisdiction of the city or county granting the franchise, and the utility's gross receipts attributable to a particular franchise must be reduced in proportion to the utility's rights-of-way that are not within the franchise agreement. In addition, because gross receipts arise from all of a utility's operative property, such as equipment and warehouses, the portion of gross receipts attributable to property other than the franchise must be excluded from the calculation of the franchise fee. Finally, if a utility also provides service under a constitutional franchise—for example, where it provides artificial light under a constitutional franchise in the same area in which it provides electricity under a franchise agreement entered pursuant to the Broughton Act—the franchise fee applies only to the gross receipts from the provision of services under the nonconstitutional franchise.

CA(12)[] (12)

Public Utilities § 9—Public Utilities Commission—Rates—Costs and Expenses.

The Public Utilities Commission sets the rates of a publicly regulated utility to permit the utility to recover its costs and expenses in providing its service, and to receive a fair return on the value of the property it uses in providing its service. Among a utility's costs and expenses are government fees and taxes.

CA(13)[] (13)

Public Utilities § 9—Public Utilities Commission—Rates—Surcharge.

The Public Utilities Commission has established a procedure by which utilities may obtain approval to impose disproportionate charges on ratepayers within the jurisdiction that imposed the charges. When a local government imposes taxes or fees which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory, a utility may file an advice letter seeking approval to charge local government fee surcharges. Such surcharges must be included as a separate item or items to bills rendered to applicable customers. Each surcharge must be identified as being derived from the local governmental entity responsible for it.

CA(14)[] (14)

Municipalities § 34—Fiscal Affairs—Taxes—Proposition 218—Liberal Construction.

The provisions of Prop. 218 must be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

CA(15)[] (15)

Municipalities § 96—Franchise Fee—Use of Rights-of-way—Value of Franchise.

Sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes. But to constitute compensation for the value received, the fees must reflect a reasonable estimate of the value of the franchise.

CA(16)[] (16)

Municipalities § 34—Fiscal Affairs—Taxes—Revenue Purposes—Fee.

In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. In determining whether a charge is a tax or a fee, a court looks to whether the

primary purpose of a charge was to generate revenue. In contrast, a fee paid for an interest in government property is compensation for the use or purchase of a government asset rather than compensation for a cost. Consequently, the revenue generated by the fee is available for whatever purposes the government chooses rather than tied to a public cost. The aspect of the transaction that distinguishes the charge from a tax is the receipt of value in exchange for the payment.

CA(17)[] (17)

Municipalities § 96—Franchise Fee—Tax—Voter Approval—Reasonable Relationship—Value of Franchise.

A franchise fee must be based on the value of the franchise conveyed in order to come within the rationale for its imposition without approval of the voters. Its value may be based on bona fide negotiations concerning the property's value, as well as other indicia of worth. Consistent with the principles that govern other fees, to constitute a valid franchise fee under Prop. 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred.

CA(18)[] (18)

Municipalities § 34—Fiscal Affairs—Tax—Surcharge—Sale of Electricity—Reasonable Relationship—Value of Franchise—Voter Approval.

In a case in which plaintiffs challenged a city's imposition of a 1 percent surcharge on an electric utility's gross receipts from the sale of electricity within the city, the first amended complaint and the stipulated facts adequately alleged the basis for a claim that the surcharge bore no reasonable relationship to the value of the franchise, and was therefore a tax requiring voter approval under Prop. 218. Accordingly, the trial court erred in granting judgment on the pleadings to the city.

[Cal. Forms of Pleading and Practice (2017) ch. 540, Taxes and Assessments, § 540.131; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 1.]

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Judges: Opinion by Cantil-Sakauye, C. J., with Werdegar, Corrigan, Liu, Cuéllar, and Kruger, JJ., concurring. Dissenting Opinion by Chin, J.

Opinion by: Cantil-Sakauye

Opinion

[*254]

[212] [***862] CANTIL-SAKAUYE, C. J.**—Pursuant to an agreement between Southern California Edison (SCE) and defendant City of Santa Barbara (the City), SCE includes on its electricity **[****2]** bills to customers within the City a separate charge equal to 1 percent of SCE's gross receipts from the sale of electricity within the City, and transfers the revenues to the City. The City contends this separate charge, together with

another charge equal to 1 percent of SCE's gross receipts that SCE includes in its electricity rates, is the fee paid by SCE for the privilege of using City property in connection with the delivery of electricity. Plaintiffs Rolland **[**213]** Jacks and Rove Enterprises, Inc., contend the 1 percent charge that is separately stated on electricity bills is not compensation for the privilege of using City property, but is instead a tax imposed without voter approval, in violation of Proposition 218. (Cal. Const., art. XIII C, § 2, added by Prop. 218.)

As we explain below, the right to use public streets or rights-of-way is a property interest, and Proposition 218 does not limit the authority of government to sell or lease its property and spend the compensation it receives for whatever purposes it chooses. Therefore, charges that constitute compensation for the use of government property are not subject to Proposition 218's voter approval requirements. To constitute compensation for a property **[****3]** interest, however, the amount of the charge must bear a reasonable relationship to the value of the property interest; to the extent the charge exceeds any reasonable value of the interest, it is a tax and therefore requires voter approval.

The litigation below did not address whether the charges bear a reasonable relationship to the value of the property interests. Therefore, we affirm the judgment of the Court of Appeal to the extent it reversed the trial court's grant of the City's motion for judgment on the pleadings, but we reverse the Court of Appeal's order that the trial court grant summary adjudication to plaintiffs.

[***863] I. FACTS

The parties stipulated to the following facts in the trial court. Beginning in 1959, the City and SCE entered into a series of franchise agreements granting SCE the privilege to construct and use equipment along, over, and under the City's streets to distribute electricity. [1] At issue in this case is an agreement **[*255]** the City and SCE began negotiating in 1994, when their 1984 agreement was about to expire. The 1984 agreement required SCE to pay to the City a fee equal to 1 percent of the gross annual receipts from SCE's sale of electricity within the City in **[****4]** exchange for the franchise granted by the City. During the course of extended negotiations regarding a new agreement, the City and SCE extended the terms of the 1984 agreement five times, from September 1995 to December 1999.

In the negotiations for a long-term agreement, the City pursued a fee equal to 2 percent of SCE's gross annual receipts from the sale of electricity within the City. At some point in the negotiations, SCE proposed that it would remit to the City as a franchise fee 2 percent of its gross receipts if the Public Utilities Commission (PUC) consented to SCE's inclusion of the additional 1 percent as a surcharge on its bills to customers. Based on SCE's proposal, the City and SCE tentatively agreed to a 30-year agreement that included the provisions for payment of 2 percent of gross receipts. Following notice and a hearing, the City Council of Santa Barbara adopted the agreement as City Ordinance No. 5135 on December 7, 1999, with a term beginning on January 1, 2000 (the 1999 agreement). The ordinance was not submitted to the voters for their approval.

The 1999 agreement divides its 30-year period into two terms. The first two years **[****5]** were the "initial term," during which SCE was required to pay the City an "initial term fee" equal to 1 percent of its gross receipts from the sale of electricity

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[1] A franchise is a privilege granted by the government to a particular individual or entity rather than to all as a common right. A utility franchise is a privilege to use public streets or rights-of-way in connection with the utility's provision of services to residents within the governmental entity's jurisdiction. (***Spring Valley W. W. v. Schottler* (1882) 62 Cal. 69, 106–108**; ***Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949 [257 Cal.Rptr. 615]** (*Santa Barbara County Taxpayer Assn.*); 12 McQuillin, The Law of Municipal Corporations (3d ed. 2017) § 34.2, p. 15.)

within the City. The subsequent 28 years are the "extension term," during which SCE is to pay the additional 1 percent charge on its gross receipts, denominated the "recovery portion," for a total "extension term fee" of 2 percent of SCE's gross receipts from the sale of electricity within the City. At issue in this case is the recovery portion, which we, like the parties, refer to as the surcharge.

[214]** The agreement required SCE to apply to the PUC by April 1, 2001, for approval to include the surcharge on its bills to ratepayers within the City, and to use its best efforts to obtain PUC approval by April 1, 2002. Approval was to be sought in accordance with the PUC's "Re Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities." (*Investigation on the Commission's Own Motion To Establish Guidelines for the Equitable Treatment of Revenue-producing Mechanisms Imposed by Local Government Entities on Public Utilities* (1989) 32 Cal.P.U.C.2d 60, 63 **[****6]** (*PUC Investigation*).) The agreement further provided that, in **[***864]** the event the PUC did not give its approval by the end of the initial term, either party could terminate the agreement. Thereafter, **[*256]** the City agreed to delay the time within which SCE was required to seek approval from the PUC, but SCE eventually obtained PUC approval, and began billing its customers within the City for the full extension term fee in November 2005.

The agreement provided that half of the revenues generated by the surcharge were to be allocated to the City's general fund and half to a City undergrounding projects fund. In November 2009, however, the City Council decided to reallocate the revenues from the surcharge, directing that all of the funds be placed in the City's general fund without any limitation on the use of these funds.

In 2011, plaintiffs filed a class action complaint challenging the surcharge. In their first amended complaint, they alleged the surcharge was an illegal tax under Proposition 218, which requires voter approval for all local taxes. (Cal. Const., art. XIII C.) Plaintiffs sought refunds of the charges collected, as well as declaratory relief and injunctive relief requiring the City to discontinue collection **[****7]** of the surcharge.

On cross-motions for summary adjudication and the City's motion for summary judgment, the trial court ruled that a franchise fee is not a tax under Proposition 218. Its ruling was based largely on *Santa Barbara County Taxpayer Assn., supra*, 209 Cal.App.3d 940, which held that franchise fees are not "proceeds of taxes" for purposes of calculating limits on state and local appropriations under article XIII B of the California Constitution. Notwithstanding this ruling, the trial court denied the motions, based on its view that Proposition 26, which was approved by the voters in 2010, retroactively altered the definition of a tax under Proposition 218 to encompass franchise fees. Therefore, the court concluded, the City had failed to establish that the surcharge did not violate Proposition 218 during the period *after* Proposition 26 was adopted in 2010.

Thereafter, the City moved for judgment on the pleadings, contending that Proposition 26 does not apply retroactively to the surcharge. The trial court agreed, citing *Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195 [159 Cal. Rptr. 3d 424], which held that Proposition 26 does not apply retroactively. Based on its earlier conclusion that the surcharge, as a franchise fee, was not a tax under Proposition 218 (see *Santa Barbara County Taxpayer Assn., supra*, 209 Cal.App.3d 940), and its additional conclusion that a franchise fee, as negotiated compensation, need **[****8]** not be based on the government's costs, the trial court ruled that the surcharge was not subject to the voter approval requirements of Proposition 218. Therefore, it granted the City's motion for judgment on the pleadings.
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The Court of Appeal reversed the judgment. It

looked to our opinion in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 [64 Cal. Rptr. 2d 447, 937 P.2d 1350] (*Sinclair Paint*), which considered whether a charge imposed by the state on those engaged in the stream of commerce of lead-containing products was a tax or a fee under Proposition 13, an earlier voter initiative that requires voter approval of various taxes. (Cal. Const., art. XIII A.) Noting that our analysis in *Sinclair Paint* focused on whether the primary **[***865]** purpose of the charge was to raise revenue or to regulate those charged, the Court of Appeal considered whether the primary purpose of the surcharge is to raise revenue or to compensate the City for allowing SCE to use its streets **[**215]** and rights-of-way. Based on its conclusion that the surcharge's "primary purpose is for the City to raise revenue from electricity users for general spending purposes rather than for SCE to obtain the right-of-way to provide electricity," the Court of Appeal held that the surcharge is a tax, and therefore requires voter approval under **[****9]** Proposition 218. (Cal. Const., art. XIII C, § 2, subd. (b).)

We granted review to address whether the surcharge is a tax subject to Proposition 218's voter approval requirement, or a fee that may be imposed by the City without voter consent.

II. DISCUSSION

CA(1)[↑] **(1)** Over the past four decades, California voters have repeatedly expanded voter approval requirements for the imposition of taxes and assessments. These voter initiatives have not, however, required voter approval of certain charges related to a special benefit received by the payor or certain costs associated with an activity of the payor. Whether the surcharge required voter approval hinges on whether it is a valid charge under the principles that exclude certain charges from voter approval requirements. Our evaluation of this issue begins with a review of four voter initiatives that require voter approval of taxes, and the legal principles underlying the exclusion of certain charges from the initiatives' requirements. We then describe the historical characteristics of franchise fees, the Legislature's history of regulating the calculation of franchise fees, and the PUC's requirements concerning the imposition of franchise fees that exceed the average charges imposed by other **[****10]** local governments in the utility's service area. Finally, we analyze whether the surcharge is a valid franchise fee or a tax, and we hold that HN1[↑] a charge imposed in exchange for franchise rights is a valid fee rather than a tax only if the amount of the charge is reasonably related to the value of the franchise. **[*258]**

A. *Restrictions on Taxes and Other Charges*

1. *Voter Initiatives*

CA(2)[↑] **(2)** Beginning in 1978, HN2[↑] state voters have imposed various limitations upon the authority of state and local governments to impose taxes and fees. Proposition 13, which was adopted that year, set the assessed value of real property as the "full cash value" on the owner's 1975–1976 tax bill, limited increases in the assessed value to 2 percent per year unless there was a change in ownership, and limited the rate of taxation on real property to 1 percent of its assessed value. (Cal. Const., art. XIII A, §§ 1, 2.) In addition, to prevent tax savings related to real property from being offset by increases in state and local taxes, Proposition 13 required approval by two-thirds of the members of the Legislature in order to increase state taxes, and required approval by two-thirds of the local electors of a city, county, or special district in order for such **[****11]** a local entity to impose special taxes. (Cal. Const., art. XIII A, §§ 3, 4; *Sinclair Paint, supra*, 15 Cal.4th at p. 872; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231 [149 Cal. Rptr. 239, 583 P.2d 1281] (*Amador Valley*).)

CA(3)[↑] **(3)** Proposition 13 did not define "special taxes," but this court addressed the initiative's **[***866]** restrictions on such taxes in

two early cases. In *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197 [182 Cal. Rptr. 324, 643 P.2d 941], we held that the requirement that "special districts" obtain two-thirds voter approval for special taxes applied only to those special districts empowered to levy property taxes. (*Id.* at p. 207.) In *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47 [184 Cal. Rptr. 713, 648 P.2d 935] (*Farrell*), "we construe[d] HN3[↑] the term 'special taxes' in section 4 [of article XIII A] to mean taxes which are levied for a specific purpose." (*Id.* at p. 57.) In addition, the Legislature provided that "'special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." (Gov. Code, § 50076.)

CA(4)[↑] **(4)** Thereafter, in 1986, the voters approved HN4[↑] Proposition 62, which "added a new article to the Government Code (§§ 53720–53730) requiring **[**216]** that all new local taxes be approved by a vote of the local electorate." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 231 [45 Cal. Rptr. 2d 207, 902 P.2d 225], fn. omitted.) The initiative embraced the definition of special taxes set forth in *Farrell*, *supra*, 32 Cal.3d 47 (Gov. Code, § 53721; see *Guardino*, at p. 232), but applied its voter approval requirements to any district rather than only to special districts, and defined "district" **[****12]** broadly. (Gov. Code, § 53720, subd. (b) ["'district' means an agency of the state, formed ... for the local performance of governmental **[*259]** or proprietary functions within limited boundaries"].) By the time Proposition 62 was proposed, courts as well as the Legislature had recognized that various fees were not taxes for purposes of Proposition 13 (see *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227 [211 Cal. Rptr. 567]; *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656 [166 Cal. Rptr. 674]), but Proposition 62 was silent with respect to the imposition of fees.

CA(5)[↑] **(5)** Next, in 1996, state voters approved Proposition 218, known as the "Right to Vote on Taxes Act." (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 835 [102 Cal. Rptr. 2d 719, 14 P.3d 930] (*Apartment Assn.*).) Proposition 218 addressed two principal concerns. First, it was not clear whether Proposition 62, which enacted statutory provisions, bound charter jurisdictions. [2] (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, 390–391 [15 Cal. Rptr. 3d 457].) Therefore, HN5[↑] Proposition 218 amended the Constitution to add voter approval requirements for general and special taxes, thereby binding charter jurisdictions. (Cal. Const., art. XIII C, §§ 1, 2.)

CA(6)[↑] **(6)** Second, HN6[↑] Proposition 13 was "not intended to limit 'traditional' benefit assessments." (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 141 [14 Cal. Rptr. 2d 159, 841 P.2d 144] (*Knox*) [upholding property-based assessments for public landscaping and lighting improvements].) Proposition 218 **[***867]** was adopted in part to address *Knox*'s holding. (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 284 [109 Cal. Rptr. 3d 620, 231 P.3d 350].) It requires an agency proposing an assessment on property to determine the proportionate special **[****13]** benefit to be derived by each parcel subject to the assessment; to support the assessment with an engineer's report; to give written notice to each parcel owner of the amount of the proposed assessment and the basis of the calculation; and to provide each owner with a ballot to vote in favor of or against the proposed assessment. It also requires the agency to hold a public hearing, and bars imposition of the assessment if a majority of parcel

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[2] "For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question." (Cal. Const., art. XI, § 3, subd. (a).) County charters "supersede ... all laws inconsistent therewith" (*ibid.*), and city charters supersede all inconsistent laws "with respect to municipal affairs." (*Id.*, § 5, subd. (a); see ***Johnson v. Bradley* (1992) 4 Cal.4th 389, 394–400 [14 Cal. Rptr. 2d 470, 841 P.2d 990].)**

owners within the assessment area submit ballots in opposition to the assessment, with each ballot weighted based on the proposed financial obligation of the affected parcel. In the event legal action is brought contesting an assessment, the agency has the burden to establish that the burdened properties receive a **[*260]** special benefit and the assessment is proportional to the benefits conferred. (Cal. Const., art. XIII D, §§ 2, subd. (b), 4; see *Apartment Assn., supra*, 24 Cal.4th 830.) [3]

[217]** CA(7)[↑] **(7)** Most recently, in 2010, after the charge at issue in this case was adopted, state voters approved Proposition 26. HN7[↑] That measure amended the Constitution to provide that for purposes of article XIII C, which addresses voter approval of local taxes, " 'tax' means any levy, charge, or exaction of any kind imposed by a local government" (Cal. Const., art. XIII C, § 1, subd. (e)), *except **[****14]*** (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost, (2) a charge for a specific government service or product provided directly to the payor and not provided to those not charged, which does not exceed its reasonable cost, (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders, (4) charges for access to or use, purchase, rental, or lease of local government property, (5) fines for violations of law, (6) charges imposed as a condition of developing property, and (7) property-related assessments and fees as allowed under article XIII D. The local government bears the burden of establishing the exceptions. (Cal. Const., art. XIII C, § 1, subd. (e).) [4]

2. *Characteristics of Valid Fees*

As noted above, following the enactment of Proposition 13, the Legislature and courts viewed various fees as outside the **[***868]** scope of the initiative. (Gov. Code, § 50076; *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 736–737 [4 Cal. Rptr. 2d 601] (*Evans*), and cases cited therein.) In *Sinclair Paint, supra*, 15 Cal.4th 866, we summarized three categories of charges that are fees rather than taxes, and therefore are not subject to the voter approval requirements of Proposition **[****15]** 13. First, special assessments may be imposed "in amounts reasonably reflecting the value of the benefits conferred by improvements." (*Sinclair Paint*, at p. 874.) Second, development fees, which are **[*261]** charged for building permits and other privileges, are not considered taxes "if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer." (*Id.* at p. 875.) Third, regulatory fees are imposed under the police power to pay for the reasonable cost of regulatory activities. (*Id.* at pp. 875–876.)

CA(8)[↑] **(8)** The commonality among these categories of charges is the relationship between the charge imposed and a benefit or cost related to the payor. With respect to charges for benefits received, we explained in *Knox, supra*, 4 Cal.4th 132, that HN8[↑] "if an assessment for ... improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive." (*Id.* at p. 142; see *Evans, supra*, 3 Cal.App.4th at p. 738 [when a "discrete group is specially benefitted

[3] Proposition 218 also imposed restrictions on the imposition of fees and charges for property-related services, such as sewer and water services, but provided that "fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership." (Cal. Const., art. XIII D, § 3, subd. (b); *id.*, § 6; see ***Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443 [79 Cal. Rptr. 3d 312, 187 P.3d 37].)** Based on its conclusion that the charges imposed by the 1999 agreement are compensation for the franchise rights conveyed to SCE, the trial court further concluded the charges are for the provision of electrical service, and therefore are not imposed as an incident of property ownership. Plaintiffs do not contend on appeal that the surcharge is a property-related fee.

[4] Plaintiffs and the City both view Proposition 26 as confirming their view of the law before Proposition 26 was enacted, but no party contends that it applies to the charges in this case, which were imposed prior to the enactment of Proposition 26.

... [, t]he public should not be required to finance an expenditure through taxation which benefits only a small segment of the population"].) But "if the assessment exceeds the actual cost of the improvement, the exaction is a [****16] tax and not an assessment." (*Knox*, at p. 142, fn. 15.) With respect to costs, we explained in *Sinclair Paint, supra*, 15 Cal.4th 866, 879, that Proposition 13's goal of providing effective property tax relief is promoted rather than subverted by shifting costs to those who generate the costs. (See *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148 [250 Cal. Rptr. 420].) However, if the charges exceed the reasonable cost of the activity on which they are based, the charges are levied for unrelated revenue purposes, and are therefore taxes. (*Sinclair Paint*, at pp. 874, 881.)

CA(9)[↑] **(9)** In sum, HN9[↑] restricting allowable fees to the reasonable cost or value of the activity with which the charges are associated serves [**218] Proposition 13's purpose of limiting taxes. (See *Amador Valley, supra*, 22 Cal.3d at p. 231 [Prop. 13's restrictions on real property taxes "could be withdrawn or depleted by additional or increased state or local levies of other than property taxes"].) If a state or local governmental agency were allowed to impose charges in excess of the special benefit received by the payor or the cost associated with the payor's activities, the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees. Therefore, to the extent charges exceed the rationale underlying the charges, they are taxes.

Although *Sinclair Paint, supra*, 15 Cal.4th 866, focused on restrictions imposed by Proposition 13, its analysis [****17] of the characteristics of fees that may be imposed without voter approval remains sound. According [***869] to Proposition 218's findings and declarations, "Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to *excessive* tax, assessment, fee [*262] and charge increases that ... frustrate the purposes of voter approval for tax increases ... ." (Prop. 218, § 2, reprinted at Historical Notes, 2B West's Ann. Cal. Const. (2013) foll. art. XIII C, § 1, p. 363, italics added.) As relevant here, this finding reflects a concern with excessive fees, not fees in general. In addition, although Proposition 218 imposed additional restrictions on the imposition of assessments, that initiative did not impose additional restrictions on other fees. (Cal. Const., arts. XIII C, §§ 1, 2, XIII D, § 4.) Finally, *Sinclair Paint*'s understanding of fees as charges reasonably related to specific costs or benefits is reflected in Proposition 26, which exempted from its expansive definition of tax (1) charges imposed for a specific benefit or privilege which do not exceed its reasonable cost, (2) charges for a specific government service or product provided which do not exceed [****18] its reasonable cost, and (3) charges for reasonable regulatory costs related to specified regulatory activities. [5] (Cal. Const., art. XIII C, § 1, subd. (e).)

To determine how franchise fees fit within these principles, we next consider the nature of franchise fees. We also describe the regulatory framework related to their calculation and imposition.

B. *Franchise Fees*

1. *Nature of Franchise Fees*

HN10[↑] CA(10)[↑] **(10)** A franchise to use public streets or rights-of-way is a form of property (*Stockton Gas etc. Co. v. San Joaquin Co.* (1905) 148 Cal. 313, 319 [83 P. 54]), and a franchise fee is the purchase price of the franchise. (*City & Co. of S. F. v. Market St. Ry. Co.* (1937) 9 Cal.2d 743, 749 [73 P.2d 234].) Historically, franchise fees have not been considered taxes. (See *County of Tulare v. City of Dinuba* (1922) 188 Cal. 664, 670 [206 P.

[5] Proposition 26's description of valid charges based on regulatory costs does not mirror our discussion of such costs in ***Sinclair Paint, supra*, 15 Cal.4th 866.** (See Cal. Const., art. XIII C, § 1, subd. (e)(3).) We express no opinion on the breadth of the regulatory costs that Proposition 26 allows to be imposed without voter approval.

983] [franchise fee based on gross receipts of utility is not a tax]; *City & Co. of S. F. v. Market St. Ry. Co., supra*, 9 Cal.2d at p. 749 [payments for franchises are not taxes]; *Santa Barbara County Taxpayer Assn., supra*, 209 Cal.App.3d 940, 949–950 [franchise fees are not proceeds of taxes].) Nothing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses. (See Cal. Const., arts. XIII A, § 3, subd. (b)(4), XIII C.)

This understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests is confirmed by Proposition 26, the **[*263]** purpose of which was to *reinforce* the voter approval requirements set forth in **[****19]** Propositions 13 and 218. (Prop. 26, § 1, subd. (f), Historical Notes, reprinted at 2B West's Ann. Cal. Const., *supra*, foll. art. XIII A, § 3, p. 297 [""to ensure the effectiveness of these constitutional limitations, [Proposition 26] defines a "tax" ... so that neither the Legislature nor local governments can circumvent these restrictions on **[**219]** increasing taxes by simply defining new or expanded taxes as "fees""].) Although Proposition 26 **[***870]** strengthened restrictions on taxation by expansively defining "tax" as "any levy, charge, or exaction of any kind imposed by a local government" (Cal. Const., art. XIII C, § 1, subd. (e)), it provided an exception for "[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." (*Id.*, subd. (e)(4).) [6]

2. Laws Governing the Calculation of Franchise Fees

The Legislature has taken several approaches to the issue of the amount of compensation to be paid to local jurisdictions in exchange for rights-of-way over the jurisdictions' land relating to the provision of services such as electricity. As described more fully below, it initially barred the imposition of franchise fees due to perceived abuses by local governments. Thereafter, it authorized local agencies to grant franchises, **[****20]** and established two formulas with which to calculate franchise fees. These formulas do not bind charter jurisdictions, such as the City, but they provide helpful background to the PUC's regulation of charges imposed on ratepayers.

The California Constitution as adopted in 1879 provided that "[i]n any city where there are no public works owned and controlled by the municipality for the supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose ... , shall ... have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof." (Cal. Const., former art. XI, § 19.) The provision was intended to prevent a municipality from creating a monopoly within its jurisdiction by imposing burdens on parties who wanted to compete with an existing private utility. Although **[****21]** cities could not impose franchise fees on these "constitutional franchises," they were authorized to tax a franchise on the basis that a franchise constitutes real property within the city. (*Stockton Gas etc. Co. v. San Joaquin [*264] Co., supra*, 148 Cal. at pp. 315–321; *City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167 [1171, 99 Cal. Rptr. 2d 198].) In 1911, this constitutional provision was replaced with a provision that authorized the private establishment of public works for providing services such as light, water, and power "upon such conditions and under such regulations as the municipality may prescribe under its organic law." (Sen. Const. Amend. No.

[6] We are concerned only with the validity of the surcharge under Proposition 218. Proposition 26's exception from its definition of "tax" with respect to local government property is not before us. (See Cal. Const., art. XIII C, § 1, subd. (e)(4).)

49, Stats. 1911 (1911 Reg. Sess.) res. ch. 67, p. 2180.) The constitutional amendment did not impair rights under existing constitutional franchises. (*Russell v. Sebastian* (1914) 233 U.S. 195, 210 [58 L.Ed. 912, 34 S.Ct. 517].)

In the meantime, in 1905, the Legislature enacted the Broughton Act (Pub. Util. Code, § 6001 et seq.), which authorized cities and counties to enter franchise agreements for the provision of electricity and various other services not encompassed by the constitutional restrictions **[***871]** on franchise fees. (Stats. 1905, ch. 578, p. 777; *County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1691, 1694–1695 [60 Cal. Rptr. 2d 187] (*County of Alameda*).) The legislation provided that when an application for a franchise was received by a city or county, the governing body was to advertise for bids and award the franchise to the highest bidder. The successful bidder was **[****22]** required to pay, in addition to the amount bid, 2 percent of the gross annual receipts from the "use, operation or possession" of the franchise after the first five years of the term of the franchise agreement had passed. (Stats. 1905, ch. 578, §§ 2–3, pp. 777–778.)

HN11[↑] CA(11)[↑] **(11)** The Broughton Act's provision that the fee be based on the receipts from the use, operation or possession of the franchise results in a complicated calculation of franchise **[**220]** fees. Usually, some portion of a utility's rights-of-way are on private property or property outside the jurisdiction of the city or county granting the franchise, and the utility's gross receipts attributable to a particular franchise must be reduced in proportion to the utility's rights-of-way that are not within the franchise agreement. (*County of Tulare v. City of Dinuba, supra*, 188 Cal. at pp. 673–676.) In addition, because gross receipts arise from all of a utility's operative property, such as equipment and warehouses, the portion of gross receipts attributable to property other than the franchise must be excluded from the calculation of the franchise fee. (*County of L. A. v. Southern etc. Gas Co.* (1954) 42 Cal.2d 129, 133–134 [266 P.2d 27].) Finally, if a utility also provides service under a constitutional franchise—for example, where it provides artificial light under a constitutional franchise **[****23]** in the same area in which it provides electricity under a franchise agreement entered pursuant to the Broughton Act—the franchise fee applies only to the gross receipts from the provision of services under the nonconstitutional franchise. (*Oakland v. Great Western Power Co.* (1921) 186 Cal. 570, 578–583 [200 P. 395].)

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In 1937, apparently due in part to the complexity involved in calculating franchise fees under the Broughton Act, the Legislature enacted an alternative scheme by which cities could grant franchises for the transmission of electricity and gas. [7] (Stats. 1937, ch. 650, p. 1781; see Pub. Util. Code, § 6201 et seq. (1937 Act); *County of Alameda, supra*, 51 Cal.App.4th at pp. 1695–1696.) Instead of a bidding process, the 1937 Act requires only a public hearing before the local government that will decide whether to grant an application for a franchise, at which objections to the granting of the franchise may be made. (Pub. Util. Code, §§ 6232–6234.) In addition, although the 1937 Act reiterates the Broughton Act formula for calculating franchise fees, it also provides an alternative formula: "this payment shall be not less than 1 percent of the applicant's gross annual receipts derived from the sale within the limits of the municipality of the utility service for which the franchise is awarded." (Pub. Util. Code, § 6231, subd. (c).) [8] According to a review of that year's

[7] In 1971, the Legislature amended the act to provide that "municipality includes counties." (Pub. Util. Code, § 6201.5.) In addition, the Act has been extended to franchises for the transmission of oil and oil products, and the transmission of water. (Pub. Util Code, § 6202.)

[8] The 1937 Act includes a second alternative formula if the franchise is "complementary to a franchise derived under" the California Constitution. In that circumstance, the alternative payment is "one-half of 1 percent of the applicant's gross annual receipts from the sale of electricity within the limits of the municipality under both the electric franchises." (Pub. Util. Code, § 6231, subd. (c).)

legislation, the new franchise [****24] [***872] system was "expected to bring more adequate returns to cities, while lessening disputes concerning amounts to be paid." (David, *The Work of the 1937 California Legislature: Municipal Matters* (1937–1938) 11 S.Cal. L.Rev. 97, 107.)

As noted above, these statutory provisions do not bind jurisdictions governed by a charter, such as the City, but charter jurisdictions are free to follow the procedures set forth in the 1937 Act. (Pub. Util. Code, § 6205.) [9] However, the 1937 Act's provisions "relating to the payment of a percentage of gross receipts shall not be construed as a declaration of legislative judgment as to the proper compensation to be paid a chartered municipality for the right to exercise franchise privileges therein." (Pub. Util. Code, § 6205.) We explain below that although a charter jurisdiction's franchise fees are not limited by these statutory formulas, the PUC has concluded that it is not fair or reasonable to allow a utility to recoup from all of its utility customers charges imposed by a jurisdiction whose charges exceed the average amount of charges imposed by other local governments. Therefore, the PUC has established a procedure by which a utility may [**221] obtain approval [*266] to impose a surcharge on the bills of only those customers within the particular [****25] jurisdiction that imposes higher-than-average charges.

3. *PUC Scrutiny of Utility Charges*

HN12[↑] CA(12)[↑] **(12)** The PUC sets the rates of a publicly regulated utility to permit the utility to recover its costs and expenses in providing its service, and to receive a fair return on the value of the property it uses in providing its service. (*Southern Cal. Gas Co. v. Public Utilities Com.* (1979) 23 Cal.3d 470, 474–476 [153 Cal. Rptr. 10, 591 P.2d 34].) Among a utility's costs and expenses are government fees and taxes. Historically, "fees and taxes imposed upon the utility itself by the various governmental entities within the utility's service territory ... tended to average out, with the total derived from each taxing jurisdiction tending to be approximately equal. Therefore, rather than impose a special billing procedure upon utilities to account for the small differences historically involved, the [PUC] ... permitted a utility to simply average them and allowed them to be 'buried' in the rate structure applicable to the entire system." (*PUC Investigation, supra*, 32 Cal.P.U.C.2d at p. 63.) As voters restricted the taxing authority of local governments, however, some local jurisdictions increased the charges they imposed in connection with the provision of utility services. "As the number and increasing amounts of these local revenue-producing mechanisms [****26] began to multiply, the [PUC] became concerned that averaging these costs among all ratepayers would create inequities among ratepayers." (*Ibid.*)

CA(13)[↑] **(13)** In response to this concern, HN13[↑] the PUC established a procedure by which utilities may obtain approval to impose disproportionate charges on ratepayers within the jurisdiction that imposed the charges. [***873] (*PUC Investigation, supra*, 32 Cal.P.U.C.2d at pp. 62, 69.) When a local government imposes taxes or fees "which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory," a utility may file an advice letter seeking approval to charge "local government fee surcharges." (*Id.* at p. 73.) Such surcharges "shall be included as a separate item or items to bills rendered to applicable customers. Each surcharge shall be identified as being derived from the local governmental entity responsible for it." (*Ibid.*)

The purpose of the PUC's procedure concerning local government fee surcharges is to ensure that utility rates are just, reasonable, and

[9] The trial court ruled that as a charter jurisdiction, the City is not subject to general laws concerning franchises. (See ***Southern Pacific Pipe Lines, Inc. v. City of Long Beach* (1988) 204 Cal.App.3d 660, 667–670 [251 Cal. Rptr. 411]** [except where the nature of the utility services reflects a matter of statewide concern, the granting of franchises is a municipal affair].) Plaintiffs do not challenge that conclusion.

nondiscriminatory. (*PUC Investigation, supra*, 32 Cal.P.U.C.2d at p. 69; see Pub. Util. Code, §§ 451 [all public utility charges shall be just and reasonable], 453 [no public utility shall discriminate], 728 [if PUC **[****27]** finds rates are unreasonable or discriminatory, it shall order just and reasonable rates].) "Basic rates ... are those designed to recoup a utility's costs incurred to serve all its customers." **[*267]** (*PUC Investigation, supra*, 32 Cal.P.U.C.2d at p. 69.) If disproportionate taxes and fees are incorporated into all customers' basic rates, "some of these ratepayers would be subsidizing others but are not themselves benefiting from such increased taxes or fees." (*Ibid.*)

The PUC's decision does not concern the validity of any charges imposed by local government. The PUC explained that it "[did] not dispute or seek to dispute the authority or right of any local governmental entity to impose or levy any form of tax or fee upon utility customers or the utility itself, which that local entity, as a matter of general or judicial decision, has jurisdiction to impose, levy, or increase. Any issue relating to such local authority is a matter for the Superior Court, not this Commission." (*PUC Investigation, supra*, 32 Cal.P.U.C.2d at p. 69.)

C. *Validity of the Surcharge*

1. *Relationship Between Franchise Rights and Franchise Fees*

CA(14)[↑] **(14)** Plaintiffs contend the surcharge is a tax rather than a fee under Proposition 218, and therefore requires voter approval. HN14[↑] Whether a charge is a tax or a fee **[****28]** "is a question of law for the appellate courts to decide on independent review of the facts." (*Sinclair Paint, supra*, 15 Cal.4th at p. 874.) In resolving this issue, HN15[↑] the provisions of Proposition 218 "shall be liberally construed to effectuate **[**222]** its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5, reprinted at Historical Notes, *supra*, 2B West's Ann. Cal. Const., foll. Art. XIII C, § 1, at p. 363; see *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority, supra*, 44 Cal.4th at pp. 446, 448 [express purpose of Prop. 218 was to limit methods of exacting revenue from taxpayers; its provisions are to be liberally construed].)

CA(15)[↑] **(15)** As explained earlier, a franchise is a form of property, and a franchise fee is the price paid for the franchise. Moreover, historically, franchise fees have not been considered taxes, and nothing in Proposition 218 reflects an intention to treat amounts paid in exchange for property interests as taxes. Finally, like the receipt by a discrete group of a special benefit from the government, the receipt of an **[***874]** interest in public property justifies the imposition of a charge on the recipient to compensate the public for the value received. Therefore, HN16[↑] sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes. But as explained below, to constitute compensation for the value **[****29]** received, the fees must reflect a reasonable estimate of the value of the franchise.

Each of the categories of valid fees we recognized in *Sinclair Paint, supra*, 15 Cal.4th 866, was restricted to an amount that had a reasonable relationship **[*268]** to the benefit or cost on which it was based. We observed that special assessments were allowed "in amounts reasonably reflecting the value of the benefits conferred" (*id.* at p. 874), development fees were allowed "if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer" (*id.* at p. 875), and regulatory fees were allowed where the fees reflected bear a "reasonable relationship to the social or economic 'burdens' that [the payor's] operations generated" (*id.* at p. 876; see *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375 [228 Cal. Rptr. 726, 721 P.2d 1111]). To the extent fees exceed a reasonable amount in relation to the benefits or costs underlying their imposition, they are taxes. (*Sinclair Paint*, at p. 881; *Knox, supra*, 4 Cal.4th at p. 142, fn. 15.)

CA(16)[↑] **(16)** In the course of our analysis, we observed that, HN17[↑] "[i]n general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted," and we looked to whether the primary purpose of a charge was to generate revenue. (*Sinclair Paint, supra*, 15 Cal.4th at p. 874; see *id.* at pp. 879–880.) The issue of whether the funds generated by the types of fees **[****30]** considered in *Sinclair Paint* were used primarily for revenue purposes was relevant because the fees were related to an expenditure by the government or a cost borne by the public. More particularly, in connection with special assessments, the government seeks to recoup the costs of the program that results in a special benefit to particular properties, and in connection with development fees and regulatory fees, the government seeks to offset costs borne by the government or the public as a result of the payee's activities.

In contrast, a fee paid for an interest in government property is compensation for the use or purchase of a government *asset* rather than compensation for a cost. Consequently, the revenue generated by the fee is available for whatever purposes the government chooses rather than tied to a public cost. The aspect of the transaction that distinguishes the charge from a tax is the receipt of value in exchange for the payment. (See *Sinclair Paint*, 15 Cal.4th at p. 874 [contrasting taxes from charges imposed in return for a special benefit or privilege]; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 1, p. 25 ["in taxation, ... no compensation is given to the taxpayer except by way of governmental **[****31]** protection and other general benefits"].)

Plaintiffs observe, however, that SCE customers pay the surcharge, but SCE receives the franchise rights; therefore, they contend, the ratepayers do not receive any value in exchange for their **[***875]** payment of the **[**223]** charge. As noted above, publicly regulated utilities are allowed to recover their costs and expenses by passing them on to their ratepayers. Among the charges included in the rates charged to customers within the City is the initial 1 percent of **[*269]** gross receipts paid in exchange for franchise rights, yet plaintiffs do not contend that this initial 1 percent is a tax because ratepayers do not receive the franchise rights. The fact that the surcharge is placed on customers' bills pursuant to the franchise agreement rather than a unilateral decision by SCE does not alter the substance of the surcharge; like the initial 1 percent charge, it is a payment made in exchange for a property interest that is needed to provide electricity to City residents. [10] Because a publicly regulated utility is a conduit through which government charges are ultimately imposed on ratepayers, we would be placing form over substance if we precluded the City from establishing **[****32]** that the surcharge bears a reasonable relationship to the value of the property interest it conveyed to SCE because the City expressed in its ordinance what was implicit—that once the PUC gave its approval, SCE would place the surcharge on the bills of customers within the City.

Although *Sinclair Paint*'s consideration of the purposes to which revenues will be put is not relevant in the context of transfers of public property interests, its broader focus on the relationship between a charge and the rationale underlying the charge provides guidance in evaluating whether the surcharge is a tax. Just as the amount of fees imposed to compensate for the expense of providing government services or the cost to the public associated with a payer's activities must bear a reasonable relationship to the costs and benefits that justify their imposition, fees imposed in exchange for a property interest must bear a reasonable relationship to the value received

[10] As explained above, the division of the charge into two parts, with one included in the rates paid by customers and the other separately stated on the bill, was driven by the PUC's effort to ensure that a local government's higher-than-average charges are not unfairly imposed on ratepayers outside of the local government's jurisdiction; this division of the charges is unrelated to the character or validity of the charges.

from the government. To the extent a franchise fee exceeds any reasonable value of the franchise, the excessive portion of the fee does not come within the rationale that justifies the imposition of fees without voter approval. Therefore, the [****33] excessive portion is a tax. If this were not the rule, franchise fees would become a vehicle for generating revenue independent of the purpose of the fees. In light of the PUC's investigation of local governments' attempts to produce revenue through charges imposed on public utilities, this concern is more than merely speculative. (See *PUC Investigation, supra*, 32 Cal.P.U.C.2d 60.)

We recognize that determining the value of a franchise may present difficulties. Unlike the cost of providing a government improvement or program, which may be calculated based on the expense of the personnel and materials used to perform the service or regulation, the value of property may vary greatly, depending on market forces and negotiations. Where a utility has an incentive to negotiate a lower fee, the negotiated fee may reflect the [*270] value of the franchise rights, just as the negotiated rent paid by the lessor of a publicly owned building reflects its market value, despite the fact that a different lessor might have negotiated a different rental rate. In the absence of bona fide negotiations, [***876] however, or in addition to such negotiations, an agency may look to other indicia of value to establish a reasonable value of franchise rights. [11]

CA(17)[↑] **(17)** In [****34] sum, HN18[↑] a franchise fee must be based on the value of the franchise conveyed in order to come within the rationale for its imposition without approval of the voters. Its value may be based on bona fide negotiations concerning the property's value, as well as other indicia of worth. Consistent with the principles that govern other fees, we hold that to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred. [**224] (See *Sinclair Paint, supra*, 15 Cal.4th at pp. 874–876.)

2. *The City's Alternative Theories To Support the Surcharge*

We find the City's remaining arguments in defense of the surcharge to be without merit.

The City contends that the surcharge is not a tax imposed on ratepayers because it is a burden SCE voluntarily assumed. The terms of the 1999 agreement belie the contention that SCE assumed a burden to pay the surcharge. The 1999 agreement states that SCE "shall collect" the surcharge from all SCE customers within the City, and the collection shall be based on electricity consumption. Arguably, these provisions are ambiguous as to whether the mandatory language imposes a duty to collect the surcharge, or imposes a [****35] duty, *if* it collects the surcharge, to apply it to all customers within the City based on consumption. However, the next paragraph of the 1999 agreement refers to "[t]he conditions precedent to *the obligation of* [*SCE*] *under this Section 5 to levy, collect, and deliver* to City the [surcharge]." In addition, the parties stipulated that "[t]he SCE assessments, collections and remittance of the [surcharge] were required by Santa Barbara Ordinance 5135." Finally, as noted above, public utilities are allowed to pass along to their customers expenses the utilities incur in producing their services, and SCE could terminate the 1999 agreement if the PUC did not agree to the inclusion of the surcharge on customers' bills. Thus, it does not appear that SCE assumed any burden to pay the surcharge from its assets.

We also reject the City's contention that imposition of the surcharge on customers is the result of a decision by SCE and the PUC. As discussed [*271] above, the purpose of the PUC's involvement in the process was to ensure that higher-than-average fees were not imposed on customers who reside outside the City. The fact that

[11] The parties' briefs do not consider the means by which franchise rights might be valued. We leave this issue to be addressed by expert opinion and subsequent case law.

the 1999 agreement required SCE to seek the approval of the PUC to include the charge on [****36] customers' bills, and allowed either party to terminate the agreement if the PUC's approval was not obtained, reflects that SCE was not willing to assume the burden of paying the surcharge, and that both parties to the agreement understood that the charge would be collected from ratepayers. These conclusions are confirmed by the parties' negotiations, which reflect that SCE was willing only to collect the charge from its customers and remit the revenue to the City. Finally, the City stipulated that the parties reached their [***877] agreement on the condition that the surcharge would become payable only if SCE obtained the PUC's consent to include the surcharge as a customer surcharge. In sum, the City and SCE agreed that SCE would impose the surcharge on customers and remit the revenues to the City.

In a similar vein, the City contends we should look to a revenue measure's legal incidence—who is required to pay the revenues—rather than its economic incidence—who bears the economic burden of the measure. The City's contention is based on its view that SCE bears the legal incidence of the charges and, therefore, the charges are not a tax on the ratepayers. In support of its theory, the City [****37] cites case law holding that nonresidents do not have taxpayer standing under Code of Civil Procedure section 526a to challenge a jurisdiction's actions based on their payment of taxes within the jurisdiction. (See *Cornelius v. Los Angeles County etc. Authority* (1996) 49 Cal.App.4th 1761, 1777–1778 [57 Cal. Rptr. 2d 618] [plaintiff who did not live in Los Angeles County was denied taxpayer standing to challenge a county affirmative action program based in part on payment of sales and gasoline taxes in Los Angeles County]; *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1048 [17 Cal. Rptr. 2d 400] [plaintiffs who did not live within a city were denied taxpayer standing to challenge a redevelopment plan based on the payment of sales taxes in the city].) These cases would support an argument that individuals who live outside the City do not have taxpayer standing to challenge the surcharge, but they do not provide guidance concerning what constitutes a tax under various voter initiatives restricting taxation.

In any event, all that the City ultimately contends in this regard is that the [**225] economic incidence of a charge does not determine whether it is a tax. We agree. Valid fees do not become taxes simply because their cost is passed on to the ratepayers. As our discussion above reflects, the determination of whether a charge that is nominally a franchise fee constitutes a tax depends on whether it is [****38] reasonably related to the value of the franchise rights.
[*272]

Finally, the City asserts that the negotiated value of the franchise is entitled to deference because the City's adoption of the 1999 agreement was a legislative act and because charter jurisdictions have broad discretion to enter franchise agreements. (See Gov. Code, § 50335 [the legislative body of a local agency may grant utility easements "upon such terms and conditions as the parties thereto may agree"].) The record does not adequately disclose the negotiations that occurred with respect to the value of the franchise, and we are therefore unable to evaluate what deference, if any, might be due.

III. THE JUDGMENT OF THE COURT OF APPEAL

As noted above, the Court of Appeal concluded that the surcharge's primary purpose was to raise revenue for general spending purposes rather than to compensate the City for the rights-of-way. Therefore, it held, the surcharge is a tax, and requires voter approval under Proposition 218. Based on these conclusions, it reversed the trial court's grant of the City's motion for judgment on the pleadings, and "directed the trial court to grant [plaintiffs'] motion for summary adjudication because the City imposed the [****39] 1% surcharge without complying with Proposition

218." As explained below, we agree that the judgment on the pleadings must be reversed, **[***878]** but we conclude that plaintiffs did not establish a right to summary adjudication.

HN19[↑] A motion for judgment on the pleadings presents the question of whether "the plaintiff's complaint state[s] facts sufficient to constitute a cause of action against the defendant." (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 145 [44 Cal. Rptr. 2d 441, 900 P.2d 690].) The trial court generally considers only the allegations of the complaint, but may also consider matters that are subject to judicial notice. (*Id.* at p. 146.) "'Moreover, the allegations must be liberally construed with a view to attaining substantial justice among the parties.' [Citation.] 'Our primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory.'" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1232 [44 Cal. Rptr. 2d 352, 900 P.2d 601].) "An appellate court independently reviews a trial court's order on such a motion." (*Smiley, supra*, at p. 146.)

CA(18)[↑] **(18)** The first amended complaint alleges that the surcharge is not a franchise fee, but is instead a tax that requires voter approval under Proposition 218. In addition, with the parties' consent, the trial court took judicial notice of the written stipulation of facts submitted in connection **[****40]** with the motions for summary adjudication and summary judgment, and a second stipulation of facts submitted in connection with the City's motion for judgment on the pleadings. As described above, the stipulated facts reflect that the City and SCE agreed to double the amount to be paid for the privilege of using the rights-of-way and to pass these charges on to the **[*273]** ratepayers, but they do not address the relationship, if any, between the surcharge and the value of the franchise. Liberally construed, the first amended complaint and the stipulated facts adequately allege the basis for a claim that the surcharge bears no reasonable relationship to the value of the franchise, and is therefore a tax requiring voter approval under Proposition 218. Accordingly, the trial court erred in granting judgment on the pleadings to the City.

Next we consider the Court of Appeal's direction to the trial court to grant plaintiffs' motion for summary adjudication. A plaintiff moving for summary adjudication with respect to a claim must establish each element of the claim. The burden then shifts to the defendant to demonstrate a triable issue of fact exists as to the claim. (Code Civ. Proc., § 437c, subd. (p)(1).) Like a ruling on a motion **[****41]** for judgment on the pleadings, a ruling on a motion for summary adjudication is reviewed de novo. (*Kendall v. Walker* (2009) **[**226]** 181 Cal.App.4th 584, 591 [104 Cal. Rptr. 3d 262].)

Plaintiffs sought summary adjudication of the allegation that the surcharge is a tax. (Code Civ. Proc., § 437c, subd. (f).) They asserted that the tests set forth in *Sinclair Paint, supra*, 15 Cal.4th 866, remain good law, but like the Court of Appeal, they drew from *Sinclair Paint* the principle that if the primary purpose of a charge is to raise revenue, the charge is a tax. Plaintiffs also challenged the surcharge on the ground that it was not based on a determination that there was a reasonable relationship between the charge and any costs borne by the City. In response, the City noted that *Sinclair Paint, supra*, 15 Cal.4th 866, **[***879]** addressed the distinction between regulatory fees and taxes. The City relied instead on *Santa Barbara County Taxpayer Assn., supra*, 209 Cal.App.3d 940, which held that franchise fees are not "proceeds of taxes" for purposes of calculating limits on state and local appropriations under article XIII B of the California Constitution. The trial court concluded that "[b]ecause the measure of compensation [for a franchise] is a matter of contractual negotiation, the amount of the franchise fee need not be based on costs."

Although plaintiffs' allegations and the stipulated facts adequately allege the basis for a contention that the surcharge bears no reasonable relationship

to the value [****42] of the franchise, plaintiffs' motion for summary adjudication did not *establish* this contention. As explained in our discussion of franchise fees, cities are free to sell or lease their property, and the fact that a franchise fee is collected for the purpose of generating revenue does not establish that the compensation paid for the property interests is a tax. In addition, in contrast to fees imposed for the purpose of recouping the costs of government services or programs, which are limited to the reasonable costs of the services or programs, franchise fees are not based on the costs incurred in affording a [*274] utility access to rights-of-way. Therefore, the facts on which plaintiffs relied in seeking summary adjudication did not establish their claim that the surcharge is a tax.

IV. DISPOSITION

We affirm the judgment of the Court of Appeal to the extent it reversed the trial court's judgment, and we reverse the judgment to the extent it directed the trial court to grant plaintiffs' motion for summary adjudication. The case is remanded to the Court of Appeal with directions to remand the matter to the trial court for further proceedings consistent with this opinion.

Cantil-Sakauye, C. J., [****43] Werdegar, J., Corrigan, J., Liu, J., Cuéllar, J., and Kruger, J., concurred.

Dissent by: Chin

Dissent

CHIN, J., Dissenting.—Since 1970, the City of Santa Barbara (the City) has imposed "a tax" on those using electricity in the City. Since 1977, the amount of the tax has been "six percent (6%) of the charges made for" energy use. (Santa Barbara Mun. Code, § 4.24.030.) In 1999, the City, in order to raise revenues for general governmental purposes, passed an ordinance—City Ordinance No. 5135 (the Ordinance)—separately requiring those receiving electricity within the City from Southern California Edison (SCE) to pay *an additional* 1 percent of the amount of their electrical bill. I conclude that this additional charge constitutes a tax that the City imposed in violation of the voter approval requirements of article XIII C of the California Constitution, as adopted by the voters at the November 5, 1996 General Election through passage of Proposition 218 (Proposition 218). The City's arguments to the contrary are unpersuasive.

The majority agrees that most of the City's arguments fail, but it largely agrees [***880] with the City that the charge is a "valid franchise fee ... rather than a tax." (Maj. [**227] opn., *ante*, at p. 257.) Putting its own gloss on the City's argument—a gloss the City expressly [****44] rejects—the majority concludes that the charge is a valid franchise fee to the extent it "bear[s] a reasonable relationship to," as alternatively phrased, "the value of the property interests transferred" (maj. opn., *ante*, at p. 270), "the value of the franchise conveyed" (*ibid.*), or "the value of the franchise rights" (*id.* at p. 271).

There is a fundamental problem with this approach: The electricity users upon whom the City imposes the charge, and who actually pay it, do not receive the franchise, any franchise rights, or any property interests. The Ordinance grants those valuable rights and interests *only to SCE*, the electricity supplier. Because the Ordinance requires SCE's customers to pay for rights and interests the City has granted to SCE, the charge does not [*275] constitute a "franchise fee" for purposes of the rule that "franchise fees [are not] considered taxes." (Maj. opn., *ante*, at p. 262.) In reality, it is just an increase in the City's user tax, which the City *calls* a franchise fee. It thus constitutes *precisely* what the voters adopted article XIII C of the California Constitution to preclude: a "tax increase[] disguised via euphemistic relabeling as 'fees,' 'charges,' or 'assessments.'" (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839 [102 Cal. Rptr. 2d 719, 14 P.3d

930].) Consistent with our *duty*, as established **[****45]** by the voters themselves, to "liberally construe[]" article XIII C of the California Constitution "to effectuate [the] purpose[] of limiting local government revenue and enhancing taxpayer consent" (Prop. 218, § 5, reprinted at 1 Stats. 1996, p. A-299), I conclude that the charge is invalid because the City imposed it on SCE's customers without voter approval.

The majority cites no support for its conclusion that a charge imposed on and paid by someone who is granted nothing in return is not tax as to that person so long as *someone else* receives franchise rights for the payment. Indeed, as I explain below, the majority's analysis is inconsistent with our case law. And the line the majority draws between a valid franchise fee and a tax—whether the amount of the charge to a utility's customers bears a reasonable relationship to the value the entity receives—is problematic in many ways and renders long-standing statutory provisions regarding utility franchises vulnerable to constitutional challenge. For all of these reasons, I dissent.

I. Factual and Legal Background

In 1887, SCE's predecessor, the Santa Barbara Electric Company, began supplying electricity in the City. In 1959, the City, pursuant to an agreement with SCE, adopted Ordinance **[****46]** No. 2728 granting SCE a 25-year franchise to use public property to transmit and distribute electricity. The ordinance required SCE to pay the City 2 percent of its "gross annual receipts ... arising from the use, operation or possession of [the] franchise," with a minimum payment of one-half percent of SCE's "gross annual receipts derived ... from the sale of electricity within the [City's] limits ... under both" the franchise being granted by the ordinance and SCE's separate and preexisting "constitutional franchise." The ordinance specified that the City was granting the franchise "under and in accordance with the provisions of **[***881]** [the] Franchise Act of 1937." [1]

In 1985, after the 1959 franchise expired, the City, pursuant to another agreement with SCE, adopted Ordinance No. 4312 granting SCE a 10-year **[*276]** franchise to use public property to transmit and distribute electricity. "[A]s compensation," the ordinance required SCE to pay to the City 2 percent of its "annual gross receipts ... arising from the use, operation or possession of th[e] franchise," with a minimum payment of 1 percent of SCE's "annual gross receipts derived ... from the sale of electricity within the limits of [the] **[****47]** City under both" the franchise being granted by the ordinance and SCE's separate and preexisting "constitutional franchise." **[**228]** The 1985 ordinance also required SCE to "collect for [the] City any utility users tax imposed by [the] City." This provision reflected the City's imposition in 1970 of "a tax" on "every person in" the City using electricity in the City. (Santa Barbara Ord. No. 3436.) The amount of the tax was initially three percent "of the charges made for" use of electricity. (*Ibid.*) In 1977, the City doubled the tax to 6 percent. (Santa Barbara Ord. No. 3927, amending Santa Barbara Mun. Code, § 4.24.030; see Santa Barbara Ord. No. 4289 (1984), amending Santa Barbara Mun. Code, tit. 4.)

The year after the City doubled its electricity users tax, California voters passed Proposition 13. As the majority notes, Proposition 13 amended our Constitution to limit increases in the assessed value of real property to 2 percent per year (absent a change in ownership) and to limit the rate of taxation on real property to 1 percent of its assessed value. (Maj. opn., *ante*, at p. 258.) In order to prevent these tax savings from being offset by increases in state and local taxes, Proposition 13 also amended **[****48]** our Constitution to require approval by two-thirds of the local electors of a

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[1] Charter cities are not required to apply the Franchise Act of 1937 (the 1937 Act) (Pub. Util. Code, § 6201 et seq.), but may voluntarily follow its provisions. (Pub. Util. Code, § 6205; all further unlabeled statutory references are to the Public Utilities Code.)

city, county, or special district in order for such a local entity to impose or raise special taxes. (Maj. opn., *ante*, at p. 258.) Since the voters enacted these limits on the City's taxing powers, the City has not *formally* increased the percentage of its electricity users tax.

However, in 1999, the City informally and effectively increased this tax by passing the Ordinance, which codified a new franchise agreement with SCE and required users of electricity within the City to pay an additional 1 percent of their electrical bill. According to the parties' stipulated facts, this charge began as a proposal from "City staff," "[d]uring the negotiations for the new franchise agreement," to "increase[] [the] annual 'franchise fee'" from 1 percent of SCE's gross receipts for electricity sold within the City—the amount under the expiring agreement—to 2 percent. "City staff" proposed the increase in order "to raise additional revenues for the City for general City governmental purposes." "After a period of negotiations," SCE said it would agree "to remit to the City a two percent ... franchise fee provided that the City **[****49]** agreed that the increase in the franchise fee would be payable to the City only if the California Public Utilities Commission ... consented to SCE's request that it be allowed to include the additional 1% amount as a customer surcharge on the bills of SCE to its customers in the City." City **[***882]** staff and SCE **[*277]** reached agreement "[o]n that basis" and the City Council later adopted the tentative agreement as Ordinance No. 5135 (Dec. 7, 1999).

The Ordinance granted SCE a franchise to use public property to construct and operate an electric transmission system. It provided for an: "'Initial Term'" of three years—January 1, 2000, through December 31, 2002—and set the payment for that term at 1 percent of SCE's "Gross Annual Receipts." (Ord., §§ 3.A, 5.) The Ordinance also provided for an "'Extension Term'" beginning 60 days after the Public Utilities Commission (PUC) approved an "Extension Term Fee" and ending December 31, 2029. (Ord., § 3.B.) The total Extension Term Fee was 2 percent of SCE's Gross Annual Receipts, and comprised two elements: (1) the 1 percent Initial Term Fee; and (2) a 1 percent "Recovery Portion." (Ord., § 5.B.) Like the City's electricity users tax, the Recovery Portion **[****50]** was to be collected from "all electric utility customers served by [SCE] within the boundaries of the City" and was "based on consumption or use of electricity." (*Ibid.*) SCE's "obligation" was "to levy" the Recovery Portion on its customers, "collect" this payment from its customers, and "deliver" the collected amount "to [the] City." (Ord., § 5.C.) In other words, according to the parties' stipulated facts, the Ordinance "obligate[d]" all persons in the City receiving electricity from SCE "to pay" the Recovery Portion, and "require[d] [SCE] to collect" the Recovery Portion "from" its City customers "and remit [it] to" the City. The Ordinance made PUC approval of the Extension Term Fee a "condition[] precedent to" SCE's "obligation ... to levy, collect, and deliver to [the] City the Recovery Portion." [2] **[**229]** If that approval was not obtained by the end of the Initial Term—December 31, 2002—the franchise would "continue on a year to year basis at the Initial Term Fee"—1 percent of gross revenues—until terminated by either party upon written notice.

In April 2001, the City and **[****51]** SCE agreed to delay for up to two years the filing with the PUC of a request for approval of the Extension Term Fee. In December 2004, almost three years later, the City directed SCE to submit the request. During that period, the only compensation SCE paid the

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[2] A utility may, "at its discretion," request permission from the PUC to set forth separate charges on certain of their customers' bills when a local governmental entity imposes upon the utility "[f]ranchise, general business license, or special taxes and/or fees ... [that] in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory." (*Re Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities* (1989) 32 Cal.P.U.C.2d 60, 73.)

City for the franchise was the Initial Term Fee. SCE eventually submitted the request on March 30, 2005, asking for approval "to bill and collect from its customers within the City ... a 1.0% electric franchise surcharge to be remitted to the City by SCE as a pass-through fee, pursuant to SCE's new franchise agreement with the City." The request explained that the new franchise **[*278]** agreement "expressly provides for the additional amount to be surcharged to SCE's customers within the City," and requires PUC approval "in order for SCE to bill and collect the additional franchise surcharge for the City." The request also explained that, upon the PUC's approval, SCE would "bill and collect the surcharge revenues and pass through the revenues directly to the City." **[***883]** On April 20, 2005, the PUC granted SCE's request.

In November 2005, SCE began billing the Recovery Portion to, and collecting it from, customers in the City, and remitting **[****52]** those revenues in their entirety to the City. At first, the City apportioned the revenues in accordance with the Ordinance, i.e., half to the City's general fund and half to a City undergrounding projects fund. In November 2009, the City directed that all revenues from the Recovery Portion be placed in its general fund without any limitation on use.

II. Discussion

Plaintiffs Rolland Jacks and Rove Enterprises, Inc., claim that the City, by imposing the Recovery Portion through adoption of the Ordinance, violated article XIII C of the California Constitution. As here relevant, article XIII C provides that "local government[s]" may not "impose ... any general tax ... until that tax is submitted to the electorate and approved by a majority vote" (Cal. Const., art. XIII C, § 2, subd. (b)), and may not "impose ... any special tax ... until that tax is submitted to the electorate and approved by a two-thirds vote" (*id.*, § 2, subd. (d)). Plaintiffs argue that the Recovery Portion is a tax within the meaning of these provisions and that the City violated article XIII C by imposing it without voter approval.

In opposition to this argument, the City focuses heavily on the word "impose" in California Constitution, article XIII C's provisions, asserting that the Recovery Portion was not "imposed" *by the City* on anyone. According **[****53]** to the City, the Recovery Portion is, as to SCE, a "voluntary" payment to which SCE, a "sophisticated, commercial entit[y] with substantial market power," "willingly agreed" in order "to obtain use of valuable public rights of way in its for-profit business." As to SCE's customers, SCE and/or the PUC "imposed" the Recovery Portion, and the City "played no part in" the decisions of those entities.

The majority correctly rejects these arguments, explaining that the terms of the agreement and the Ordinance require that the Recovery Portion "be collected from" SCE's customers and impose on SCE only an obligation "to collect the charge from its customers and remit the revenue to the City." (Maj. opn., *ante*, at p. 271.) Indeed, the City's arguments necessarily fail in light of its stipulation that "[p]ursuant to City Ordinance [No.] 5135, all **[*279]** persons in the City receiving electricity from SCE *are obligated to pay* the 1% Recovery Portion." (Italics added.)

In a related argument, the City asserts that the Recovery Portion is not "imposed" **[**230]** on SCE's customers because its "legal incidence"—i.e., the "legal duty to pay it"—"is on SCE." According to the City, that SCE's customers in fact "ultimately bear[]" the Recovery **[****54]** Portion's "economic burden" is irrelevant because, under the law, "whether a charge is a tax is determined by its legal incidence."

The City is correct to focus on the Recovery Portion's legal incidence, but its argument fails because, under the Ordinance, both the legal incidence and the economic burden of the Recovery Portion fall on SCE's customers, not on SCE. The rule in California is that where the government *mandates* payment of a charge by one party, and imposes a duty on some other party to collect the

payment and remit it to the government, the legal incidence of the charge falls, not on the party **[***884]** collecting the payment—who acts merely as the government's collection agent or conduit—but on the party from whom the payment is, by law, collected. (*Western States Bankcard Assn. v. City and County of San Francisco* (1977) 19 Cal.3d 208, 217 [137 Cal. Rptr. 183, 561 P.2d 273] (*Western States*) [tax ordinances lacked "mandatory pass-on provisions" that would "shift the legal incidence of the tax"]; *Bunker Hill Associates v. City of Los Angeles* (1982) 137 Cal.App.3d 79, 87 [186 Cal. Rptr. 719] ["'the legal incidence of a tax does not necessarily fall on the party who acts as conduit by forwarding collected taxes to the state,'" and charge imposed on tenants, that lessors were legally required to collect and transmit to the government, was not a tax on lessors]; *Occidental Life Ins. Co. v. State Bd. of Equalization* (1982) 135 Cal.App.3d 845, 850 [185 Cal. Rptr. 779] (*Occidental Life*) [whether "'pass **[****55]** on'" of charge is "mandatory" is "legally significant" in determining who bears the charge's "legal incidence"].) Consistent with this rule, in *City of Modesto v. Modesto Irrigation Dist.* (1973) 34 Cal.App.3d 504, 506 [110 Cal. Rptr. 111], the court held that a monthly charge imposed by the City of Modesto for use of water, gas, electricity, and telephone service, "paid by the service user (the consumer), but ... collected by the service supplier," was "a tax against the utility user, not the utility supplier."

Under these principles, the legal incidence of the Recovery Portion falls on SCE's customers, not, as the City asserts, on SCE. As noted above, the City has stipulated that SCE's customers "are obligated to pay" the Recovery Portion "[p]ursuant to City Ordinance [No.] 5135," and that SCE's duty under the Ordinance is "to collect" the Recovery Portion "from all SCE electricity users in the City and remit those funds to the City." The terms of the Ordinance and the representations in SCE's application for PUC approval, **[*280]** as set forth above, fully support this stipulation. On this record, it is clear that the Ordinance mandates payment of the Recovery Portion by SCE's customers and makes SCE the City's collection agent and conduit regarding this payment. Accordingly, the legal incidence **[****56]** of the Recovery Portion is on SCE's customers.

The City's final argument is that the Recovery Portion is a "franchise fee"—i.e., "a bargained-for price for use of the City's rights of way in SCE's search for profits"—and that under California case law, a franchise fee "is not a tax." The majority essentially agrees with the City. "Historically," the majority begins, "franchise fees have not been considered" by California courts to be "taxes," and "[n]othing in Proposition 218 reflects an intent to change" this rule. (Maj. opn., *ante*, at p. 262.) Putting its own gloss on the City's argument, the majority then concludes that the Recovery Portion is a "franchise fee" and not a tax insofar as its amount "is reasonably related to the value of the franchise." (Maj. opn., *ante*, at p. 257.) "To the extent [it] exceeds any reasonable value of the franchise," it "is a tax" rather than a "franchise fee," because "the excessive portion ... does not come within the rationale that justifies the imposition of fees without voter approval." (*Id.* at p. 269.)

Whether a charge constitutes a "tax" for purposes of the Constitution "is a question of law for the appellate courts to decide on independent review of the facts." **[****57]** (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874 [64 Cal. Rptr. 2d 447, 937 P.2d 1350].) **[***885]** In answering this question, we **[**231]** should not, as the majority appears to do, rely on the circumstance that the charge is "nominally a franchise fee." (Maj. opn., *ante*, at p. 271.) In determining whether a charge is a tax, courts "are not bound by what the parties may have called the liability" (*Bank of America v. State Bd. of Equal.* (1962) 209 Cal.App.2d 780, 801 [26 Cal. Rptr. 348] (*Bank of America*)), and are "not to be guided by labels" (*Beamer v. Franchise Tax Board* (1977) 19 Cal.3d 467, 475 [138 Cal. Rptr. 199, 563 P.2d 238]) or "bare legislative assertion" (*Flynn v. San Francisco*

(1941) 18 Cal.2d 210, 215 [115 P.2d 3]). Instead, their "task is to determine the[] true nature" of the charge (*Beamer v. Franchise Tax Board*, *supra*, at p. 475), based on "'its incidents'" and "'the natural and legal effect of the language employed in'" the enactment (*Ainsworth v. Bryant* (1949) 34 Cal.2d 465, 473 [211 P.2d 564]). This general principle is especially applicable here for two reasons: (1) Proposition 218's "main concern" was "perhaps" the "euphemistic relabeling" of taxes "as 'fees,' 'charges,' or 'assessments'" (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles*, *supra*, 24 Cal.4th at p. 839), and (2) Proposition 218 expressly required courts to "liberally construe[]" article XIII C "to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent" (Prop. 218, § 5, reprinted at 1 Stats. 1996, p. A-299).
[*281]

Given the City's argument, the question here is whether the Recovery Portion, in light of its incidents, constitutes the type of charge we have declared **[****58]** to be a franchise fee instead of a tax. One of our earliest decisions to discuss this type of charge is *County of Tulare v. City of Dinuba* (1922) 188 Cal. 664 [206 P. 983] (*Tulare*). There, we held that the annual payment imposed by the Broughton Act (§ 6001 et seq.) on the successful bidder for a franchise to provide electricity—2 percent of gross annual receipts from the use, operation or possession of the franchise—is "neither a tax nor a license." (*Tulare*, at p. 670.) Instead, it is a "charge" that "the holder of the franchise undertakes to pay as part of the consideration for the privilege of using the avenues and highways occupied by the public utility .... [¶] It is purely a matter of contract. ... [I]t is a matter of option with the applicant whether he will accept the franchise on those terms. His obligation to pay is not imposed by law but by his acceptance of the franchise." (*Ibid.*)

Tulare makes clear that the Recovery Portion, irrespective of its relationship to the value of the franchise SCE received, is not a franchise fee for purposes of the rule that a franchise fee is not a tax. As explained above, the Recovery Portion is not a charge that "the holder of the franchise"—SCE—"undert[ook] to pay." (*Tulare*, *supra*, 188 Cal. at p. 670.) Indeed, as the majority correctly states, the terms **[****59]** of the Ordinance "belie" this characterization, establishing instead that SCE did not "assume[] a burden to pay" the Recovery Portion. (Maj. opn., *ante*, at p. 270.) And the City's factual stipulation that the Ordinance "obligated" SCE's customers "to pay" the Recovery Portion conclusively establishes that *their* "obligation to pay" the Recovery Portion was, in fact, "imposed by law," not by *their* "acceptance of the franchise." (*Tulare*, at p. 670.) Indeed, SCE's customers did not receive a franchise, which, as the majority explains, "is a privilege granted by the **[***886]** government to a particular individual or entity rather than to all as a common right." (Maj. opn., *ante*, at p. 254, fn. 1.) The Ordinance granted them no legal right to make any use of the City's property or to conduct a franchise for supplying electricity. In short, the Recovery Portion simply lacks the incidents of a franchise fee for purposes of the rule that franchise fees are not taxes. "To call it a fee" rather than a tax is simply "a transparent evasion." (*Fatjo v. Pfister* (1897) 117 Cal. 83, 85 [48 P. 1012].)

Although the majority recognizes the principles underlying the rule that franchise fees are not taxes, it fails to apply them. The majority observes that "a franchise fee is the **[****60]** purchase price of the franchise" (maj. opn., *ante*, at p. 262), but it does not explain how the Recovery Portion, which the City has imposed on **[**232]** someone *other than the purchaser* of the franchise, meets this test. The majority explains that "sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes" because "the receipt of an interest in public property justifies the imposition of a charge *on the recipient* to compensate the public for the value received." (*Id.* at p. 267, italics added.) **[*282]** But the Recovery Portion is not imposed "on the recipient" of the interest in public property. (*Ibid.*) The majority explains that

"restrictions on taxation do not encompass amounts *paid in exchange for* property interests" (*id.* at p. 262, italics added), and that what "distinguishes" a valid charge "from a tax is the receipt of value *in exchange for the payment*" (*id.* at p. 268, italics added). But SCE's customers do not receive any property interest or value "in exchange for" paying the Recovery Portion. (*Ibid.*) In short, the Recovery Portion lacks the "historical characteristics of franchise fees" that the majority identifies from our decisions. (*Id.* at p. 257.) It therefore **[****61]** does not, to use the majority's own words, "come within the rationale that justifies" (*id.* at p. 269) the rule that franchise fees are not taxes.

According to the majority, in determining whether the Recovery Portion is a franchise fee rather than a tax, it is irrelevant that SCE's customers "pay the surcharge" while "SCE receives the franchise rights," that SCE's customers "do not receive any value in exchange for their payment," and that the City is requiring SCE's customers "to compensate the City for *the utility's* use of public property." (See maj. opn., *ante*, at pp. 268–269, italics added.) The stated basis for this view is that "publicly regulated utilities are allowed to recover their costs and expenses by passing them on to their ratepayers," and are therefore merely "conduit[s] through which government charges are ultimately imposed on ratepayers." (*Ibid.*) Given this circumstance, the majority reasons, it makes no difference that the Recovery Portion is an obligation the City imposes directly on SCE's customers, instead of a contractual obligation of SCE that SCE "unilateral[ly]" decides to pass on to its customers. (*Id.* at p. 269.) The City, the majority asserts, should not be "precluded" from showing that the Recovery Portion **[****62]** bears a reasonable relationship to the value of the property interest it conveyed to SCE merely because the Ordinance *expressly mandates* what would have been "implicit" had SCE agreed to pay the Recovery Portion itself—"that once the PUC gave its approval, **[***887]** SCE would place the surcharge on the bills of customers within the City." (*Ibid.*)

For a number of reasons, I disagree. First, the majority's view is inconsistent with our case law, which, as explained above, establishes that a franchise fee—as distinguished from a tax—is a "charge [that] *the holder of the franchise undertakes to pay*," i.e., an "obligation to pay" that is "purely a matter of contract" and that is "imposed" on the payor "not ... by law but by *his* acceptance of the franchise." (*Tulare, supra*, 188 Cal. at p. 670, italics added.) As also explained above, the Recovery Portion is *not* a charge that "the holder of the franchise undert[ook] to pay," and it *is* imposed by the City on SCE's customers "by law" instead of by *their* "acceptance of [any] franchise." (*Ibid.*) The majority cites no authority for its conclusion that a **[*283]** charge imposed by law on one person to pay for *someone else's* right to use public property in a business is a franchise fee rather than a tax. **[****63]** [3]

[233]** Second, the majority fails to explain why SCE's purported unfettered ability to pass on to customers charges it contractually agrees to pay means that whether the charge is a tax *on its customers* depends on the value of the franchise *to SCE*. Had SCE contractually agreed to pay the Recovery Portion itself, it could *not* assert that the charge was a tax to the extent it exceeds the value of the franchise rights. As we have explained, because a municipality's power to permit utilities to

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[3] According to the majority, by adding a definition of "tax" to California Constitution, article XIII C and excepting from that definition "'[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property,'" Proposition 26, approved by voters at the November 2, 2010 General Election, "confirmed" that "restrictions on taxation do not encompass amounts paid in exchange for property interests." (Maj. opn., *ante*, at p. 263.) As the majority elsewhere acknowledges, Proposition 26 is not at issue here because "no party contends that it applies to the charges in this case." (Maj. opn., *ante*, at p. 260, fn. 4.) Moreover, nothing in Proposition 26 indicates that a charge imposed on one party for *someone else's* use of government property comes within the exception the majority quotes. To the extent the majority's analysis suggests otherwise, it is dictum. Nor does anything in Proposition 26 support the majority's rule that payments for the privilege to use public property *are* taxes to the extent they exceed "the value of the franchise conveyed." (Maj. opn., *ante*, at p. 270.)

use public property "on such terms as are satisfactory to it" includes the power to "'require the payment of such compensation as seems proper,'" courts do not "question whether or not the amount charged is a reasonable charge." (*Sunset Tel. and Tel. Co. v. Pasadena* (1911) 161 Cal. 265, 285 [118 P. 796] (*Sunset*).) And if, as the majority asserts, the utility in this scenario is merely "a conduit through which government charges are ultimately imposed on ratepayers" (maj. opn., *ante*, at p. 269), then there is no logical reason why the value of the benefit *to the utility* would be the proper measure of whether the charge is a tax *as to the utility's customers*. Nor is there any logical reason for making this the test where, as here, a municipality imposes **[****64]** the charge directly on those customers.

Indeed, the majority's conclusion in this regard is inconsistent with its own discussion of the very case law on which it principally relies. As the majority explains, our prior decisions identify "categories of charges" that constitute valid "fees rather **[***888]** than taxes" for purposes of applying Proposition 13. (Maj. opn., *ante*, at p. 260.) "The commonality among these categories," the majority states, "is the relationship between the charge imposed and a benefit ... *to the payor*." (*Id.* at p. 261, italics added.) For example, the majority observes, "we [have] explained ... that 'if an assessment for ... improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit *they receive*.'" (*Ibid.*, italics added.) Under these cases, the majority states, a purported fee is a tax for **[*284]** purposes of Proposition 13 to the extent it exceeds "the special benefit received *by the payor*." (Maj. opn., *ante*, at p. 261, italics added.)

A closer look at our assessment decisions reveals that a nexus between the benefit conferred and the person *paying the charge* is a prerequisite to concluding that the charge is not a tax. As we explained **[****65]** over 100 years ago, "the compensating benefit to the property owner" on whom the government imposes a charge for an improvement "is the warrant, and the sole warrant, for" finding that the charge is a valid assessment rather than a tax. (*Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, 30 [148 P. 217].) Thus, "if we are not able to say that the owner for the specific charge imposed is compensated by the increased value of the property, then most manifestly we have a special tax." (*Ibid.*) In other words, an assessment levied upon property owners "without regard to the benefit actually accruing *to them* by means of the improvement, is a tax." (*Creighton v. Manson* (1865) 27 Cal. 613, 627, italics added.) The majority purports to reaffirm and follow these decisions insofar as they set forth "the characteristics of fees that may be imposed without voter approval" (maj. opn., *ante*, at p. 261), but it then eliminates the *principal* characteristic it itself identifies: "the relationship between the charge imposed and a benefit ... *to the payor*" (*ibid.*, italics added). [4]

The charge the majority here says is a valid fee differs in another significant respect **[**234]** from the charges we have previously held to be permissible fees instead of taxes: the **[****66]** measure of what is permissible. As the majority observes, as to all of the charges for benefits we have dealt with in prior cases, we have held that they are "taxes" to the extent they "exceed the reasonable *cost* of the activity on which they are based." (Maj. opn., *ante*, at p. 261, italics added.) This is true even of property assessments; although a given property may be assessed based on the proportionate share of the benefit it receives from a government improvement, the assessment is a valid fee rather than a tax only to the extent it does not exceed the proportionate *cost* of the improvement

[4] The majority's analysis is likewise out of step with decisions from other jurisdictions holding that, to constitute a valid fee instead of a tax, a charge must be "based on a special benefit conferred *on the person paying the fee*." (*Home Builders Assn. v. West Des Moines* (Iowa 2002) 644 N.W.2d 339, 347, italics added; see *American Council of Life Insurers v. DC Health* (D.C. Cir. 2016) 815 F.3d 17, 19 [whether charge is a fee or a tax depends on whether there is a "match between the sum paid and the ... benefit provided, *as seen from the payers' perspective*" (italics added)].)

to the government. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 142, fn. 15 [14 Cal. Rptr. 2d 159, 841 P.2d 144].) In other words, "an assessment [***889] is not measured by the precise amount of special benefits enjoyed by the assessed property," but "reflects costs allocated according to relative benefit received." (*Town of Tiburon v. Bonander* (2009) 180 [*285] Cal.App.4th 1057, 1081 [103 Cal. Rptr. 3d 485].) Thus, "an assessment exceeding the cost of the improvement, so as to furnish revenue to the city" constitutes a tax. (*City of Los Angeles v. Offner* (1961) 55 Cal.2d 103, 109 [10 Cal. Rptr. 470, 358 P.2d 926].) Consistent with these common law principles, Proposition 218 amended the state Constitution to provide that "[n]o assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel." (Cal. Const., art. XIII D, § 4, subd. (a).) Thus, [****67] were a city, in order to raise revenue for general purposes, to impose a charge to recover the amount by which the benefit conferred by a government improvement exceeds the cost, the charge would be a tax.

The majority here affords different treatment to the general revenue-raising measure at issue. It holds that cost is irrelevant, and that a charge labeled a "franchise fee" becomes a tax as to a utility's customers only to the extent the charge exceeds "the value" to the utility of "the property interests transferred" (maj. opn., *ante*, at p. 270), "the value of the franchise conveyed" (*ibid.*), or "the value of the franchise rights" (*id.* at pp. 270–271). Contrary to the majority's analysis, our prior decisions clearly do *not* provide support for the line the majority draws between a valid fee and a tax, or for its conclusion that the method the City used here to raise money for general purposes is, uniquely, not a tax. And because there is no existing authority for the majority's newly minted approach, the majority is incorrect that focusing on the fact the Recovery Portion is directly imposed by the City on SCE's customers "preclude[s]" the City from doing something it otherwise could, i.e., proving the charge [****68] is a fee rather than a tax by "establishing that [it] bears a reasonable relationship to the value of the property interest it conveyed to SCE." (*Id.* at p. 269.)

Third, there is no factual or legal basis for the majority's assumption that a utility, through price increases, *necessarily* can and will pass on to its customers charges it is legally required to pay. With respect to the sales tax, we have observed that a retailer "may choose simply to absorb the sales tax" imposed by statute instead of passing it on to its customers. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1103 [171 Cal. Rptr. 3d 189, 324 P.3d 50].) A utility could make a similar business decision with respect to higher payments it has become contractually obligated to pay in exchange for its right to operate; it could, for reasons related to the marketplace, simply decline to pass the increase on to its customers.

Moreover, in order to pass charges on to customers through a price increase, a utility would have to apply for and obtain approval from the PUC. Under our Constitution, the PUC has both the power and the duty to "fix rates" for California public utilities (Cal. Const., art. XII, § 6), such that the [*286] charges they demand for service are "just and reasonable" (§ 451; see *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 792 [3 Cal. Rptr. 3d 703, 74 P.3d 795]). This constitutional power, we have observed, [****69] includes the "power to prevent a utility from passing on to the ratepayers unreasonable costs for materials and services." (*Pac. Tel. & Tel. Co. v. Public Utilities Com.* (1950) 34 Cal.2d 822, 826 [215 P.2d 441] (*Pac. Tel.*).) [***890] We have also [**235] observed that where "the safeguards provided by arms-length bargaining are absent," the PUC, in exercising its constitutional power, has "been vigilant to protect the rate-payers from excessive rates reflecting excessive payments." (*Ibid.*)

In one especially relevant example of its exercise of this power, the PUC disallowed, for purposes of a requested rate increase, contractual payments a utility made to its controlling parent company for

various services. (*Pac. Tel.*, *supra*, 34 Cal.2d at p. 825.) The contract between the two entities specified that the amount of the payment was 1 percent of the utility's gross receipts. (*Ibid.*) In disallowing these payments as a basis for a rate increase, the PUC reasoned that the utility "exercise[d] no real, untrammeled and independent judgment in its negotiations" with its parent company and that "arms-length bargaining" between the two entities was "not, in fact, engaged in, although ... in some instances" they had "made [an attempt] to simulate the same." (Dec. No. 42529 (1949) 48 Cal.P.U.C. 461, 470.) The PUC further reasoned that the formula for the amount **[****70]** of the payments—a "percentage of gross revenues"—was "a false measuring rod": it was "totally unrealistic and [bore] no rational relationship to the reasonable cost of services rendered, reflect[ed] no causal or proximate connection or relationship between payments made thereunder and reasonable value of the services rendered and [was] neither supported by law, logic nor elementary common sense." (*Id.* at p. 472.) The utility's "payment of these excessive amounts," the PUC concluded, did not support the utility's request for a rate increase. (*Ibid.*)

Nothing would preclude the PUC from finding, for similar reasons, that it would not be just and reasonable for a utility, having agreed to pay a city double what it had paid for many years as compensation for using public property, to raise its rates in order to recoup from customers the doubled cost to which it agreed. Nor would anything preclude the PUC from finding that where the utility's duty to pay the increase was expressly made contingent on the utility's ability to recoup the expense from its customers, the increase was not "based on bona fide negotiations." (Maj. opn., *ante*, at p. 270.) Indeed, the majority rightly questions whether "the negotiations" **[****71]** here, which placed responsibility for paying the Recovery Portion on SCE's ratepayers and imposed no financial responsibility for that charge on SCE, reasonably reflect "the value" of what SCE received from the City. (*Id.* at p. 271.) And where the payment is set as a percentage of a utility's gross annual receipts, the PUC could also find that the formula is "a false measuring rod," i.e., it "bears **[*287]** no rational relationship to" the value of what the utility is receiving. (Dec. No. 42529, *supra*, 48 Cal.P.U.C. at p. 472.) In short, had SCE agreed to pay the Recovery Portion and then applied for a rate increase to pass on the charge to its customers, the PUC could have "disallow[ed] expenditures that it [found] unreasonable, thus insuring that any excessive costs [would] be met from [SCE's] profits. The effect of the payments on rates and services [would have been] no greater than in any other case where the [PUC] and management disagree on the reasonableness of an expenditure, and the management concludes that it is good business judgment to make such payments from its profits despite the fact that it cannot recoup them from its rate payers." (*Pac. Tel.*, *supra*, 34 Cal.2d at p. 832.) **[***891]** The majority ignores this precedent in assuming that **[****72]** a utility, through rate increases, necessarily can pass on to its customers any and all charges it has agreed to pay.

Indeed, the facts in the record indicate that SCE and the City did not share the majority's assumption. As the majority explains, the record shows "that SCE was not willing to assume the burden of paying" the additional 1 percent the City demanded, and "was willing only to collect the charge from its customers and remit the revenue to the City." (Maj. opn., *ante*, at p. 271.) It is for this reason that the agreement and the Ordinance provided that "the charge would be collected from ratepayers" and "would become payable only if SCE obtained the PUC's consent to include the surcharge as a customer surcharge." (Maj. opn., *ante*, at p. 271.) Moreover, as explained **[**236]** above, although the agreement required SCE to *obtain* PUC approval by December 31, 2002, SCE and the City agreed not even to *apply* for PUC approval until over two years later, in March 2005. According to a letter from the City to SCE, the delay was "[b]ased" in part "upon the tremendous uncertainty associated with the end of the [California] deregulation transition period ... and the volatility and

uncertainty of rates." Were it true, as the [****73] majority assumes, that SCE necessarily could have passed on the Recovery Portion to its customers, there would have been no reason for SCE to have refused legal responsibility for the proposed charge, for SCE and the City to have made the Recovery Portion contingent on "the PUC's consent to include the surcharge as a customer surcharge" (maj. opn., *ante*, at p. 271), or for SCE and the City to have delayed submission of the application for PUC approval. In other words, as plaintiffs assert, the facts in the record indicate that, unlike the majority, SCE and the City did not consider the PUC to be "a mere rubber stamp of financial burdens" SCE and the City "might try to impose upon utility users."

Fourth, the majority's approach, in addition to being inconsistent with our case law, is fundamentally inconsistent with Proposition 218's purpose. The majority, partially quoting the first two sentences of Proposition 218's findings and declarations, suggests that the voters were "concern[ed] with excessive fees, not fees in general." (Maj. opn., *ante*, at p. 262.) But the [*288] majority ignores the very next sentence of the findings and declarations: "This measure protects taxpayers by limiting the methods by [****74] which local governments exact revenue from taxpayers without their consent." (Prop. 218, § 2, reprinted at 1 Stats. 1996, p. A-295.) Proposition 218 expressly provided that article XIII C "shall be liberally construed to effectuate" this goal, i.e., "limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5, reprinted at Historical Notes, 2B West's Ann. Cal. Const. (2013), foll. Art. XIII C, § 1, at p. 363.) The majority also ignores the ballot arguments in favor of Proposition 218, which (1) warned that "politicians [had] created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees,'" and (2) stated that "Proposition 218 guarantees your right to vote on local tax increases—even when they are called something else, like 'assessments' or 'fees' and imposed on homeowners." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 218, p. 76.) The record here shows that the City imposed the Recovery Portion on SCE's customers in order to raise revenue for [***892] general governmental purposes. The charge clearly constitutes one of the "'revenue-producing mechanisms'" that, as the majority explains, local governments [****75] adopted because "voters restricted [their] taxing authority." (Maj. opn., *ante*, at p. 266.) By holding that the City may raise revenue from SCE's consumers by calling the charge a franchise fee, even though those paying the fee receive no franchise, the majority sanctions this obvious evasion of Proposition 218 and allows the City to use the utility as a middleman for what is a tax disguised as a fee, in derogation of Proposition 218's express purpose and liberal construction clause.

Fifth, the majority's concern about the *possible* treatment of charges passed on to ratepayers by a utility's "unilateral decision" does not justify its refusal to recognize the significance under our case law of the fact that SCE's customers do not receive franchise rights in exchange for paying the Recovery Portion, and its focus instead on the value of those rights to an entity that is not paying for them. (Maj. opn., *ante*, at p. 269.) Initially, the facts of this case do not present that scenario, and holding here that the Recovery Portion is a tax rather than a franchise fee because SCE's customers receive no franchise rights in return for their payment would not preclude ratepayers from arguing *in a [****76] future case* that we should *expand* California Constitution, article XIII C's reach to franchise charges that a utility, having contractually agreed to pay, unilaterally decides to pass on to its customers. The majority's concern about this scenario does not justify its *contraction* of article XIII C so as to make it inapplicable where it clearly does and should apply: direct [**237] government imposition of a charge on those who receive nothing in return.

In any event, the majority's analysis is contrary to decades of California case law establishing that, for

purposes of determining whether a charge is a tax or a fee as to the payor, charges passed on to the payor by the unilateral **[*289]** and discretionary decision of some third party are, in fact, different from charges legally imposed on the payor by the government. (E.g. *Western States*, *supra*, 19 Cal.3d at pp. 217–218; *Western L. Co. v. State Bd. of Equalization* (1938) 11 Cal.2d 156, 162–164 [78 P.2d 731] (*Western L.*).) The majority simply ignores these cases in reasoning that the two types of charges must be treated the same. (Maj. opn., *ante*, at p. 269.)

Indeed, the effect of the majority's approach is to allow claims that this long-standing and unbroken line of precedent precludes. Under that precedent, a charge that is not imposed by the government on the payor—either directly or by inclusion of a **[****77]** *mandatory* pass-on provision—and that is passed on to the payor by the unilateral and discretionary decision of some third party, is not a tax, even if it is "implicit" (maj. opn., *ante*, at p. 269) that the third party on whom the charge is imposed will pass it on to the payor. Notably, in *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 927 [26 Cal. Rptr. 3d 153], the court applied this principle to hold that a charge the City of Fresno had imposed on a utility, and that the utility had passed on to its customers, was not "a tax *on utilities consumers*" within the meaning of California Constitution article XIII C. The court explained that "[a]n exaction imposed on any particular ratepayer in an amount established in the discretion of the utility ... is not an exercise of the city's taxing power." (*Howard Jarvis*, at p. 927.) **[***893]** Applying this principle, it held that the charge at issue was "not a tax upon consumers of utilities" because the legislation establishing it placed "the 'levy' directly upon the utility" and did "not require[]" the utility "to recover the ... fee from ratepayers in any particular manner." (*Ibid.*) [5]

Courts applying the federal Constitution's prohibition on state taxation of the federal government have used the same analysis specifically with respect to so-called utility **[****78]** franchise fees. In *U.S. v. City of Leavenworth, Kan.* (D.Kan. 1977) 443 F.Supp. 274, 280–281, a city ordinance provided that an electrical **[*290]** utility would pay, as a franchise fee, "'three percent (3%) of its gross revenue from the sale of electric energy to all customers within city limits, and the utility in turn billed its customers 'a three percent franchise fee.' The United States, as a purchaser of electricity from the utility, argued that the fee it had been charged constituted 'an impermissible tax upon the federal government.' (*Id.* at p. 281.) The court rejected the argument because the ordinance imposed '[l]egal liability for payment of the exaction' on the utility and 'contain[ed] no provisions for collection directly from' the utility's customers and 'no requirement that [the utility] pass on to' its customers 'all or any part of the financial burden of the franchise fee.'" (*Id.* at p. 282.)

Following this decision, in *U.S. v. State of Md.* (D.Md. 1979) 471 F.Supp. 1030, 1032, another federal court rejected the claim of **[**238]** the United States, again as a purchaser of electricity, that an environmental surcharge the State of Maryland had imposed was a constitutionally invalid tax on the federal government. Although agreeing that the surcharge was a tax—i.e., "an 'enforced contribution to provide for the support of

[5] See ***Western States*, *supra*, 19 Cal.3d at page 217** (charge imposed on nonprofit corporation providing services to banks, that was "recoup[ed]" from banks "by raising" fees, was not a tax on the banks because local ordinance imposing the charge did not "requir[e]" that it "be passed on" to customers); ***Western L.*, *supra*, 11 Cal.2d at page 163** (state sales tax is not a tax on consumers even though retailers pass it on to consumers, because tax statute laid "the tax solely on the retailer"); ***Occidental Life*, *supra*, 135 Cal.App.3d at page 849** (sales tax on retailer is a tax on purchasers from whom retailer recoups the charge only if it "'*must*,'" "'by its terms,'" "'be passed on to the purchaser'"); ***Rio Grande Oil Co. v. Los Angeles* (1935) 6 Cal.App.2d 200, 201 [44 P.2d 451]** (charge on sale of gasoline is a tax as to the seller, but not as to the consumer, even though statute allows sellers to add the charge to the sale process and "'in effect collect the tax from the consumer'"); see also ***Bank of America*, *supra*, 209 Cal.App.2d at pages 792–793** (bank's statutory liability for use tax on checks it sold to customers, which by statute was imposed upon the purchaser rather than the seller, was not a tax on the bank).

[the] government'" (*id.* at p. 1036)—the court **[****79]** denied relief because the surcharge was not a tax *on the federal government* (*id.* at pp. 1037–1041). By statute, the court first reasoned, the surcharge was "directly imposed on the electric companies" and was their "'direct obligation.'" (*Id.* at p. 1038.) As to whether the surcharge was a tax on customers of the electric companies, the determinative factor, the court explained, was whether the law "*required* [the companies] to pass [the charge] on to their customers for payment." (*Ibid.*, italics added.) The surcharge was not a tax on the federal government, the court then held, because the utilities, although "[authorized] ... to pass [it] on to their customers" (*id.* at p. 1039), were "not required" by law to do so (*id.* at p. 1038.) Notably, in reaching this conclusion, the **[***894]** court both followed the Kansas franchise fee decision discussed above and distinguished a Minnesota decision holding that "a franchise fee imposed" upon a gas company by a city *was* an unconstitutional tax "as applied to purchases of natural gas by an agency of the United States ... because the city *required* the utility to add the franchise tax to its rates." (*Id.* at p. 1040, italics added.)

This long-standing and consistent precedent from both California and elsewhere no doubt explains why, as the majority **[****80]** notes, "plaintiffs do not contend" in this case that the Initial Term Fee "is a tax" that was imposed in violation of the state Constitution. (Maj. opn., *ante*, at p. 269.) However, under the majority's holding that charges passed on by utilities are the same, for tax purposes, as charges imposed directly on ratepayers, plaintiffs now can, and surely will, make this argument. Indeed, the majority expressly states that the differences between the Initial Term Fee and the Recovery **[*291]** Portion are "unrelated to the character or validity" of these charges. (Maj. opn., *ante*, at p. 269, fn. 10.) Thus, plaintiffs may now allege that even the Initial Term Fee is a tax because it is passed on to them through SCE's rates and it exceeds the value of the franchise rights SCE received. [6]

In the same way, the majority's holding renders both the Broughton Act and the 1937 Act vulnerable to constitutional challenge. Notwithstanding our holding almost 100 years ago that the fees utilities must pay under the Broughton Act are *not* taxes under the state Constitution (*Tulare*, *supra*, 188 Cal. at p. 670), under the majority's holding, both these payments and similar payments required by the 1937 Act are invalid taxes to the extent **[****81]** they are passed on by utilities to customers through rates and they exceed the value of the franchise rights conveyed. Notably, nothing suggests that these statutorily established charges reflect the value of a franchise. Moreover, the majority's holding that the Constitution *requires* courts to determine the value of a franchise would seem to render the 1937 Act unconstitutional insofar as it provides that "[n]o franchise granted under this chapter shall ever be given any value before any court ... in any proceeding of any character in excess of the cost to the grantee of the necessary publication and any other sum paid by it to the municipality therefor at the time of acquisition." (§ 6263.)

Finally, as a practical matter, the majority's approach is problematic in a number of ways. The majority mentions one: the inherent "difficulties" in "determining the value of a franchise." (Maj. opn., *ante*, at p. 269.) The majority references several factors it says may bear on value: "market forces" and **[**239]** "bona fide negotiations." (*Id.* at pp. 269–270.) It suggests there may be "other indicia of value" (*id.* at p. 270), but it declines to offer any

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[6] According to the majority, the Ordinance's treatment of the Recovery Portion "was driven by the PUC's effort to ensure that a local government's higher-than-average charges are not unfairly imposed on ratepayers outside of the local government's jurisdiction." (Maj. opn., *ante*, at p. 269, fn. 10.) As far as the record discloses, this is true only in the sense that the separate billing procedure the PUC permits, but does not require, utilities to employ enabled the City *to use SCE* to collect the additional 1 percent—which is a disguised tax—only from the City's taxpayers, and not from those who do not pay taxes to the City.

guidance as to what those other indicia might be, instead "leav[ing] th[e] issue to be ad [***895] dressed [****82] by expert opinion and subsequent case law" (*id.* at p. 270, fn. 11). But as we noted over 100 years ago, "[t]here are few subjects on which witnesses are more likely to differ than that of the value of property, and few are more difficult of satisfactory determination." (*O'Hara v. Wattson* (1916) 172 Cal. 525, 528 [157 P. 608].) We also long ago recognized that "the value of franchises may be as various as the objects for which they exist, and the methods by which they are employed, and may change with every moment of time." (*San Jose Gas Co. v. January* (1881) 57 Cal. 614, 616.) There are also uncertainties [*292] regarding the other side of the majority's equation, i.e., the amount of the payment. As we have recognized, a utility's annual receipts are "a most indefinite," "elusive," and "uncertain quantity" that is "dependent upon many conditions." (*Thompson v. Board of Supervisors* (1896) 111 Cal. 553, 558 [44 P. 230].) Moreover, the total compensation the Ordinance requires for granting the franchise is *2* percent of SCE's "Gross Annual Receipts." Given the majority's view that all costs are necessarily passed along to customers, this entire 2 percent—not just the one percent Recovery Portion—will have to be considered in determining the amount of the charge and whether it bears a "reasonable relationship" to "value." (Maj. opn., *ante*, at p. 254.) And even were it possible to determine [****83] with any certainty the value of the franchise and the amount of the charge, the majority fails to explain what constitutes a "reasonable relationship" between these amounts. (*Ibid.*) Presumably, exact correspondence is unnecessary, but what is necessary, the majority does not say. As we have explained, "the question whether a contract" that impacts a utility's rates and services "is reasonable is one on which, except in clear cases, there is bound to be conflicting evidence and considerable leeway for conflicting opinions." (*Pac. Tel., supra*, 34 Cal.2d at p. 828.)

Perhaps to justify its failure to offer any real guidance on this admittedly "difficult[]" issue (maj. opn., *ante*, at p. 269), the majority notes that "[t]he parties' briefs do not consider the means by which franchise rights might be valued." (*Id.* at p. 270, fn. 11.) But there is a simple explanation for this silence: Neither party has suggested that the value of the franchise should even be a consideration in determining whether the Recovery Portion is a tax or a fee. On the contrary, upon the court's inquiry at oral argument, the City expressly disclaimed this approach. It asserted that, as to fees voluntarily negotiated for the use of government property, courts should not be concerned [****84] about whether the fee is reasonably related to the benefits, and should not second-guess what a utility is willing to pay for its use of public property. Nor, the City argued, are courts well positioned to second-guess the economic decisions of other branches of government. The City also noted, like the majority, the inherent difficulties of making this kind of determination, asking rhetorically, "what's the fair and rational rate of a parking meter," or "to rent a duck boat on the lake at the county fairgrounds," or "to rent a meeting room at the community center?" Bringing the question back to the facts of this case, the City rightly asked, "What are the limits of [a municipality's] ability to monetize its rights of way?" Instead, the City urges us to follow "well settled" law by focusing on the "legal incidence" of the Recovery Portion, "i.e., who has a legal duty to pay it." This test, the City asserts, is "logical" [***896] and "predictable," is "within the competence of courts to distinguish fees from taxes," and "better serves the needs of courts and the society they serve."
[*293]

I agree with the City. Indeed, regarding the City's comment about monetizing its rights of way, we have explained, [****85] as noted above, that a municipality's power to permit utilities to use public property "on such terms as are satisfactory to it" includes the power to "'require the payment of such compensation as seems proper,'" and that courts therefore do not "question whether or not the amount charged is a reasonable charge." (*Sunset*,

supra, 161 Cal. at p. 285.) It is for these reasons, among others, **[**240]** that I focus my analysis, as our precedent directs, on the legal incidence of the Recovery Portion, and do not endorse a vague, unprecedented, unworkable, and standardless test that requires courts to determine the extent to which a charge "bear[s] a reasonable relationship to the value of the property interests transferred" (maj. opn., *ante*, at p. 270), "the value of the franchise conveyed" (*ibid.*), or "the value of the franchise rights" (*id.* at p. 271).

There are myriad other ways in which the majority's approach—determining whether the amount of the charge bears a reasonable relationship to the value of the franchise conveyed—is problematic. It essentially requires courts to determine the adequacy of consideration, in contravention of the well-established "'general contract principle that courts should *not* inquire into the adequacy of consideration.'" **[****86]** (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 679 [254 Cal. Rptr. 211, 765 P.2d 373], italics added; see *Whelan v. Swain* (1901) 132 Cal. 389, 391 [64 P. 560] ["'The law does not weigh the *quantum* of the consideration'"].) The majority's approach also essentially transfers responsibility for determining the reasonableness of a utility's rates from the PUC to the courts, thus usurping the PUC's *constitutional* power and duty to "fix [utility] rates" (Cal. Const., art. XII, § 6) and supplanting the PUC's far superior ability, relative to courts, to review the reasonableness of rates (*Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1183 [233 Cal. Rptr. 22, 729 P.2d 186] ["judicial review of rates is not comparable to regulation by the P.U.C."]; *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 159–160 [161 Cal. Rptr. 172, 604 P.2d 566] ["PUC maintains an expert, independent staff to investigate rate requests" and "renders an independent decision on each record that it examines," whereas courts "must limit ... review to the rates established by the involved utility and must depend upon the expert testimony presented by the parties"]; *Sale v. Railroad Commission* (1940) 15 Cal.2d 612, 617–618 [104 P.2d 38]).

Given these difficulties and the lack of authority for the majority's approach, I disagree with the majority's conclusion that the Recovery Portion is not a tax unless it exceeds the reasonable value of the franchise. Instead, based on long-standing precedent, the purpose of Proposition 218 to limit local government revenue and enhance taxpayer consent, and the command **[*294]** that we liberally **[****87]** construe California Constitution, article XIII C to effectuate this purpose, I conclude that the Recovery Portion is a tax that the City may not impose without voter approval. I therefore dissent.

End of Document

Arreola v. County of Monterey

Court of Appeal of California, Sixth Appellate District

June 25, 2002, Decided ; June 25, 2002, Filed

No. H021339.

Reporter

99 Cal. App. 4th 722 *; 122 Cal. Rptr. 2d 38 **; 2002 Cal. App. LEXIS 4319 ***; 2002 Cal. Daily Op. Service 5668; 2002 Daily Journal DAR 7131

JAMES ARREOLA et al., Plaintiffs and Respondents, v. COUNTY OF MONTEREY et al., Defendants and Appellants. [And five other cases. *]

Subsequent History: Order Modifying Opinion and Denying Petition for Rehearing July 23, 2002, Reported at: 2002 Cal. App. LEXIS 4423.

Review Denied September 18, 2002, Reported at: 2002 Cal. LEXIS 6194.

Prior History: Superior Court of Monterey County. Super. Ct. Nos. 105661, 106592, 106782, 106829, 107040 and 107041. Robert A. O'Farrell, Judge.

Disposition: The judgment is affirmed.

Core Terms

Counties, flooding, channel, highway, trial court, drainage, plaintiffs', levee, storm, river, inverse condemnation, deliberate, flood control, entity, cases, flood control project, public improvement, public entity, statement of decision, landowners, built, floodwater, vegetation, freeboard, damages, flows, factors, Fish, private property, obstruction

Case Summary

Procedural Posture

About 300 plaintiff businesses and individual were involved in six complaints filed against defendants, state, counties, and water agencies, over a flood. The Monterey County Superior Court (California) consolidated the matters and found the counties and agencies negligent, and, along with the state, liable for inverse condemnation, dangerous condition of public property, and nuisance. The state, counties, and agencies appealed.

Overview

A river formed the counties' border and was in a flood plain. A federal flood control act authorized construction of a project which local agencies would later maintain. Levees were built. Vegetation and sandbars were mechanically cleared from 1949 till 1972 when the state fish and game department demanded protection of the riparian habitat. Herbicides and other methods were used to try to clear the channel but it became more clogged and more costly to clear. The state built a highway embankment downriver. A 1995 flood overtopped the levee and it gave way. The appellate court found that the trial court properly assessed the reasonableness of the counties' policy to let the channel deteriorate. In the context of inverse condemnation, "maintenance" of the project was a species of "construction." Reasons for the counties' policy choices were irrelevant to the determination that their conduct was deliberate. The state was strictly liable for its conduct. Plaintiffs were not expected to have taken measures to protect their land from the downstream embankment obstruction. The state had a duty to avoid

* Baeza v. County of Monterey (No. 106592); Calcote v. County of Monterey (No. 106782); Clint Miller Farms, Inc. v. County of Monterey (No. 106829); Phoenix Assurance Co. v. County of Monterey (No. 107040); Allendale Mutual Ins. Co. v. County of Monterey (No. 107041).

obstructing floodwater regardless of the flood's cause. Flooding was foreseeable.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Real Property Law > Eminent Domain Proceedings > General Overview

HN1[↓] Real Property Law, Eminent Domain Proceedings

See Cal. Const. art. I, § 19.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > Inverse Condemnation > Remedies

HN2[↓] Special Proceedings, Eminent Domain Proceedings

When a public use results in damage to private property without having been preceded by just compensation, the property owner may proceed against the public entity to recover it. Such a cause of action is denominated "inverse condemnation."

Governments > Public Improvements > Sanitation & Water

Torts > Public Entity Liability > Liability > General Overview

HN3[↓] Public Improvements, Sanitation & Water

Where a public agency's design, construction, or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction, or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the project's purpose is to contain the "common enemy" of floodwaters. The public entity is not immune from suit, but neither is it strictly liable.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > Sanitation & Water

Real Property Law > Eminent Domain Proceedings > General Overview

Civil Procedure > ... > Eminent Domain Proceedings > Pleadings > General Overview

HN4[↓] Special Proceedings, Eminent Domain Proceedings

In California, the privilege to discharge surface water into a natural watercourse (the natural watercourse rule) is a conditional privilege, subject to the Belair v. Riverside County Flood Control District rule of reasonableness. To determine reasonableness in such a case, a trial court must consider: (1) the overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over other beneficiaries of the

project or is peculiar only to the plaintiff. Thus, in matters involving flood control projects, the public entity will be liable in inverse condemnation if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiffs' property, and the unreasonable aspect of the improvement is a substantial cause of damage.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN5[↓] Relief From Judgments, Motions for New Trials

See Cal. Civ. Proc. Code § 662.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN6[↓] Special Proceedings, Eminent Domain Proceedings

To be subject to liability in inverse condemnation, the governmental action at issue must relate to the "public use" element of Cal. Const. art. I, § 19. "Public use" is the threshold requirement. The destruction or damaging of property is sufficiently connected with "public use" as required by the constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement. A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particular plan or manner of maintenance. The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Public Improvements > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN7[↓] Special Proceedings, Eminent Domain Proceedings

The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged. That is why simple negligence cannot support the constitutional claim. This is not to say that the later characterization of a public agency's deliberate action as negligence automatically removes the action from the scope of the constitutional requirement for just compensation. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > ... > Elements > Just Compensation > Property Valuation

Real Property Law > Eminent Domain Proceedings > General Overview

HN8[⬇] Special Proceedings, Eminent Domain Proceedings

Inadequate maintenance can support liability in inverse condemnation.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN9[⬇] Special Proceedings, Eminent Domain Proceedings

In order to prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action -- or inaction -- in the face of that known risk.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN10[⬇] Standards of Review, Substantial Evidence

In reviewing the sufficiency of the evidence to support the findings of a trial court, an appellate court considers the evidence in the light most favorable to the winning party, giving them the benefit of every reasonable inference and resolving conflicts in support of the judgment.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > Sanitation & Water

Torts > ... > Elements > Causation > Concurrent Causation

Governments > Local Governments > Claims By & Against

HN11[⬇] Special Proceedings, Eminent Domain Proceedings

In order to establish a causal connection between a public improvement and a plaintiff's damages, there must be a showing of a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury. Where independently generated forces not induced by the public flood control improvement -- such as a rainstorm -- contribute to the injury, proximate cause is established where the public improvement constitutes a substantial concurring cause of the injury, that is, where the injury occurred in substantial part because the improvement failed to function as it was intended. The public improvement would cease to be a substantial contributing factor, however, where it could be shown that the damage would have occurred even if the project had operated perfectly, that is, where the storm exceeded the project's design capacity. A project's capacity, therefore, bears upon the element of causation. This is true whether in considering inverse condemnation claims or tort causes of action.

Governments > Public Improvements > Sanitation & Water

Torts > ... > Elements > Causation > Concurrent Causation

HN12[↓] Public Improvements, Sanitation & Water

To the extent that a public project contributes to an injury, then it remains a concurring cause. Like any other determination of causation, it must be made on the facts of each case.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Scientific Evidence > General Overview

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

HN13[↓] Testimony, Expert Witnesses

Evidence of scientific techniques that have not proven reliable and generally accepted by others in the field is not admissible as evidence. This rule does not apply to the personal opinions of an expert.

Civil Procedure > Trials > General Overview

HN14[↓] Civil Procedure, Trials

A tentative decision is not binding on a court and the court may instruct a party to prepare a proposed statement of decision. Cal. R. Ct. 232(a), (c). The rules provide ample opportunity for all parties to make proposals as to the content of the statement of decision or to raise objections to a proposed statement. Cal. R. Ct. 232(b), (d).

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Inverse Condemnation > Defenses

Torts > Strict Liability > Abnormally Dangerous Activities > Types of Activities

Governments > Public Improvements > Sanitation & Water

Real Property Law > Eminent Domain Proceedings > General Overview

HN15[↓] Special Proceedings, Eminent Domain Proceedings

A public entity is liable for inverse condemnation regardless of the reasonableness of its conduct. But a rule of reasonableness, rather than the extremes of strict liability or immunity, is appropriate in cases involving flood control projects.

Governments > Public Improvements > Sanitation & Water

Real Property Law > Water Rights > Riparian Rights

HN16[↓] Public Improvements, Sanitation & Water

Under the "natural watercourse" rule, a riparian landowner has a privilege to drain surface water into a natural watercourse, regardless of the effect of that drainage on downstream landowners. Because a public agency, like any riparian property owner, engages in a privileged activity when it drains surface water into a natural watercourse or makes alterations to the watercourse, Cal. Const. art. I, § 19, mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners.

Governments > Public Improvements > Sanitation & Water

Torts > Strict Liability > Abnormally Dangerous Activities > Types of Activities

HN17[↓] Public Improvements, Sanitation & Water

Diversion of a watercourse is not subject to a common law privilege like the common enemy doctrine or the natural watercourse rule. Resolution of flood control cases involves a balancing of the public interest in encouraging flood control projects with the potential private harm they could cause. A public agency would not be strictly liable for damage resulting from a failed flood control project, whether or not the offending conduct would have been privileged under traditional water law doctrine. Instead, a rule of reasonableness was to apply.

Torts > ... > Elements > Duty > Foreseeability of Harm

Torts > ... > Elements > Duty > General Overview

HN18[↓] Duty, Foreseeability of Harm

Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. In California, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. Duty is usually determined based upon a number of considerations. The foreseeability of a particular kind of harm is one of the most crucial of those. Cal. Gov't Code § 835. The question of whether a duty exists is one of law. A court's task in determining duty is to evaluate generally whether the conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed.

Real Property Law > Water Rights > Riparian Rights

Torts > Premises & Property Liability > General Premises Liability > General Overview

HN19[↓] Water Rights, Riparian Rights

Under ordinary rules applicable to riparian landowners, both upper and lower riparian landowners have a duty to avoid altering the natural system of drainage in any way that would increase the burden on the other. Traditionally, a lower landowner that obstructs a natural watercourse is liable for damages that result from the obstruction. The rule applies even if the damaging flow in the obstructed watercourse is seasonal floodwater.

Torts > Products Liability > Types of Defects > Design Defects

Torts > Negligence > Defenses > General Overview

Torts > Public Entity Liability > Immunities > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN20[↓] Types of Defects, Design Defects

A public entity is liable for negligently creating a dangerous condition of public property or for failing to cure a dangerous condition of which it has notice. Cal. Gov't Code § 835(a). However, the entity is immune from such liability if the injury was caused by a public improvement that was constructed pursuant to a plan or design approved in advance by the entity if there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or (b) a reasonable legislative body or other body or employee could have approved the plan or design. Cal. Gov't Code § 830.6. A public entity claiming design immunity must plead and prove three essential elements: (1) a causal relationship between the plan and the accident; (2) discretionary

approval of the plan prior to construction; and (3) substantial evidence supporting the reasonableness of the design. Resolution of the third element is a matter for the court, not the jury. The task for the trial court is to apply the deferential substantial evidence standard to determine whether any reasonable state official could have approved the challenged design. If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN21[] Standards of Review, Substantial Evidence

In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN22[] Judgment as Matter of Law, Directed Verdicts

A ruling or decision, itself correct in law, will not be disturbed on appeal merely because it was given for a wrong reason.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Appellate Review

Real Property Law > Inverse Condemnation > Defenses

Torts > ... > Elements > Causation > Intervening Causation

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Torts > ... > Elements > Causation > Causation in Fact

HN23[] Eminent Domain Proceedings, Appellate Review

Under traditional negligence analysis, an intervening force is one that actively operates to produce harm after the defendant's negligent act or omission has been committed. A defendant's conduct is superseded as a legal cause of an injury if, among other things, the intervening force is highly unusual or extraordinary, not reasonably likely to happen and, therefore, not foreseeable. Similar considerations may apply in the context of inverse condemnation. A defendant has the burden to prove the affirmative defense of superseding cause, that is, that the intervening event is so highly unusual or extraordinary that it was unforeseeable. The question is usually one for the trier of fact. However, where the facts upon which a defendant bases its claim are materially undisputed, an appellate court applies independent review.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN24[] Special Proceedings, Eminent Domain Proceedings

Having the power and the duty to act and failure to do so, in the face of a known risk, is sufficient to support liability under Cal. Const. art. I, § 19. A public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that proximately caused injury to private property. So long as plaintiffs can show substantial participation, it is immaterial which sovereign holds title or has the responsibility for operation of a project.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN25[⬇] Special Proceedings, Eminent Domain Proceedings

In cases where there is no dispute concerning the public character of an improvement, substantial participation does not necessarily mean actively participating in the project, but may include the situation where the public entity has deliberately chosen to do nothing. For example, a public entity is liable in inverse condemnation for damage resulting from broken water pipes when the entity responsible for the pipes has deliberately failed to maintain them. Of course, the entity must have the ability to control the aspect of the public improvement at issue in order to be charged with deliberate conduct.

Torts > Public Entity Liability > Liability > General Overview

HN26[⬇] Public Entity Liability, Liability

In tort cases, in identifying a defendant with whom control resides, location of the power to correct the dangerous condition is an aid. The ability to remedy the risk also tends to support a contention that the entity is responsible for it. Where the public entity's relationship to the dangerous property is not clear, aid may be sought by inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN27[⬇] Special Proceedings, Eminent Domain Proceedings

A public entity is a proper defendant in a claim for inverse condemnation if it has the power to control or direct the aspect of the public improvement that is alleged to have caused the injury. The basis for liability in such a case is that in the exercise of its governmental power the entity either failed to appreciate the probability that the project would result in some damage to private property, or that it took the calculated risk that damage would result.

Governments > Local Governments > Employees & Officials

HN28[⬇] Local Governments, Employees & Officials

Monterey County, California employees are considered ex officio employees of the Monterey County Water Resources Agency (MCWRA) and are required to perform the same duties for MCWRA that they perform for Monterey. Cal. Water Code App. § 52-16 (former Cal. Water Code App. §§ 52-2, 52-8).

Torts > Public Entity
Liability > Liability > General Overview

HN29[↓] Public Entity Liability, Liability

Common governing boards do not invariably indicate county control, but certainly that fact is relevant to the inquiry of whether an agency is under county control.

Real Property Law > Eminent Domain
Proceedings > General Overview

HN30[↓] Real Property Law, Eminent Domain Proceedings

An owner of private property ought not to contribute more than his or her proper share to a public undertaking.

Headnotes/Syllabus

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

Individuals who had suffered property damage brought an action against the state, a county and its flood control and water conservation district, and a second county and its water resources agency, seeking damages in inverse condemnation, and tort damages for nuisance, dangerous condition of public property, and negligence, arising from flood damage caused when a river levee project failed during a heavy rainstorm and the flood waters were further obstructed by a state highway. Plaintiffs alleged that the flooding occurred due to reduced water capacity in the levee project channel, caused by the failure of the county defendants to keep that channel clear, and that the state defendant failed to design the highway with adequate provision for flooding. The jury found all defendants liable on the tort claims, and the court found all defendants liable on the inverse condemnation claims and entered a judgment for plaintiffs. (Superior Court of Monterey County, Nos. 105661, 106592, 106782, 106829, 107040 and 107041, Robert A. O'Farrell, Judge.)

The Court of Appeal affirmed. The court held that the trial court properly found the county defendants were liable to plaintiffs in inverse condemnation based on their failure to properly maintain the levee project, since their knowing failure to clear the project channel, in the face of repeated warnings and complaints, was not mere negligent execution of a reasonable maintenance plan, but rather a long-term failure to mitigate a known danger. The court held that the trial court did not err in defining the levee project's water capacity, and that substantial expert evidence supported the jury's finding, pertinent to plaintiffs' tort claims against the county defendants, that peak flows during the storm did not exceed the project's design capacity. The court held that the trial court did not err in finding the state defendant liable in inverse condemnation based on its unreasonable design of the highway, which failed to account for a foreseeable flood, and that design immunity (Gov. Code, § 830.6) failed to provide this defendant with a defense to plaintiffs' tort claims. The court held that both the county defendant and its water resources agency were properly found liable to plaintiffs, since the county was directly, and not derivatively, liable. (Opinion by Premo, Acting P. J., with Elia and Wunderlich, JJ., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1)[↓] (1)

Appellate Review § 145—Scope of Review—Questions of Law and Fact.

--When arguments on appeal are related to facts

that are materially undisputed, the appellate court independently reviews the trial court's findings and conclusions.

CA(2)[⬇] (2)

Eminent Domain § 132—Inverse Condemnation—Nature and Purpose of Action—Against Public Entity—Policy—Limitations on Claim.

--When a public use results in damage to private property without having been preceded by just compensation, the property owner may bring an inverse condemnation action against the public entity to recover it. The fundamental policy for the constitutional requirement of just compensation (Cal. Const., art. I, § 19) is based on a consideration of whether the owner of the damaged property if uncompensated would contribute more than his or her proper share to the public undertaking. Any actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable whether foreseeable or not. The only limits to a claim are that (1) the injuries must be physical injuries of real property, and (2) the injuries must have been proximately caused by the public improvement as deliberately constructed and planned.

CA(3)[⬇] (3)

Waters § 93—Protection Against Surface Waters—Public Improvements—Common Enemy Doctrine—Natural Watercourse Rule—Immunity Limited by Rule of Reasonableness.

--In certain circumstances particular to water law, a landowner has a right to inflict damages upon the property of others for the purpose of protecting his or her own property. These circumstances include the erection of flood control measures (the common enemy doctrine) and the discharge of surface water into a natural watercourse (the natural watercourse rule). However, a public entity is not immunized from liability under these rules, but rather is subject to a rule of reasonableness. When a public agency's design, construction, or maintenance of a flood control project poses an unreasonable risk of harm to the plaintiffs, and the unreasonable aspect of the improvement is a substantial cause of the damage, the plaintiffs may recover regardless of the fact that the project's purpose is to contain the common enemy of floodwaters. The public entity is not immune from suit, but neither is it strictly liable. A public entity's privilege to discharge surface water into a natural watercourse is also a conditional privilege, subject to a rule of reasonableness.

CA(4)[⬇] (4)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability in Inverse Condemnation—Rule of Reasonableness—Determination of Reasonableness.

--In matters involving flood control projects, a public entity will be liable in inverse condemnation if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiff, and the unreasonable aspect of the improvement is a substantial cause of the damage. To determine reasonableness, a trial court must consider the following factors: (1) the overall public purpose being served by the improvement project, (2) the degree to which the plaintiff's loss is offset by reciprocal benefits, (3) the availability to the public entity of feasible alternatives with lower risks, (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities, (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership, and (6) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff.

CA(5)[⬇] (5)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability: Eminent Domain § 132—

Inverse Condemnation—Trial Court's Determination of Reasonableness.

--In an inverse condemnation action against two counties, a county flood control and water conservation district, and a county water resources agency, by individuals who had suffered property damage when a river levee project failed during a heavy rainstorm, the trial court properly analyzed the reasonableness of defendants' actions in finding they were liable to plaintiffs. The court balanced the public need for flood control against the gravity of the harm caused by the unnecessary damage to plaintiffs' property in finding that defendants acted unreasonably. In so doing, the court properly considered (1) the overall public purpose being served by the improvement project, (2) the degree to which plaintiffs' loss was offset by reciprocal benefits, (3) the availability to the public entity of feasible alternatives with lower risks, (4) the severity of plaintiffs' damage in relation to risk-bearing capabilities, (5) the extent to which damage of the kind plaintiffs sustained was generally considered as a normal risk of land ownership, and (6) the degree to which similar damage was distributed at large over other beneficiaries of the project or was peculiar only to plaintiffs. Based on these considerations, the court found that defendants' long-standing negligent operation of the project served no legitimate purpose, that feasible alternatives were available, and that the flood would not have occurred had defendants properly maintained the project.

CA(6a)[] (6a) CA(6b)[] (6b) CA(6c)[] (6c)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability: Eminent Domain § 132—Inverse Condemnation—Liability Based on Improper Maintenance of Public Project.

--In an inverse condemnation action against two counties, a county flood control and water conservation district, and a county water resources agency, by individuals who had suffered property damage when a river levee project failed during a heavy rainstorm, the trial court did not err in basing defendants' liability on their failure to properly maintain the project. Inadequate maintenance can support a finding of a public entity's liability in inverse condemnation. The deliberateness required for inverse condemnation liability is satisfied by a finding that the public improvement, as designed, constructed, and maintained, presented an inherent risk of danger to private property and the inherent risk materialized and caused damage. In this case, the trial court expressly found that the manner in which the levee project channel was maintained for over 20 years was a deliberate policy. Further, substantial evidence supported the trial court's finding that defendants' maintenance plan was unreasonable and deliberate. Defendants' knowing failure to clear the project channel, in the face of repeated warnings and complaints, was not mere negligent execution of a reasonable maintenance plan, but rather a long-term failure to mitigate a known danger.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 1057.]

CA(7)[] (7)

Eminent Domain § 132—Inverse Condemnation—Liability of Public Entity—Relation to Public Use—Whether Negligence Can Support Claim.

--To be subject to liability in inverse condemnation, the governmental action at issue must relate to the public use element of Cal. Const., art. I, § 19. The destruction or damaging of property is sufficiently connected with public use if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement. A public entity's maintenance of a public improvement constitutes the constitutionally required public use, so long as the entity deliberately acts to undertake the particular plan or manner of maintenance. The necessary finding is that the wrongful act be part of

the deliberate design, construction, or maintenance of the public improvement. The fundamental justification is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged. Simple negligence cannot support a constitutional claim. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed.

CA(8)[⬇] (8)

Appellate Review § 155—Scope of Review—Sufficiency of Evidence—Inferences.

--In reviewing the sufficiency of the evidence to support the findings of the trial court, the appellate court considers the evidence in the light most favorable to the prevailing parties, giving them the benefit of every reasonable inference and resolving conflicts in support of the judgment.

CA(9a)[⬇] (9a) CA(9b)[⬇] (9b)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability—Design Capacity of Levee—Water Capacity Plus Freeboard.

--In an action against two counties, a county flood control and water conservation district, and a county water resources agency, by individuals who sought damages in inverse condemnation and tort damages arising from damage to plaintiffs' property that resulted from the failure of a river levee project during a heavy rainstorm, the trial court did not err in defining the project's water capacity, and substantial expert evidence supported the jury's finding that peak flows during the storm did not exceed that capacity. When an independently generated force, such as a rainstorm, contributes to the injury, proximate cause is established when the injury occurred in substantial part because the public improvement failed to function as it was intended. Causation is not established, however, when the storm exceeds the project's design capacity. In this case, it would have been improper to fail to include the three-foot freeboard, which was the distance from the top of the levee to the surface of the water at maximum capacity, within the design capacity, since the extra room the freeboard was intended to provide was eliminated by defendants' ineffective maintenance. Thus, it was appropriate to permit the finder of fact to decide if the flood occasioned by the rainstorm exceeded the protection the project was intended to provide, including the freeboard, which was part of that protection.

CA(10)[⬇] (10)

Appellate Review § 41—Presenting and Preserving Questions in Trial Court—Witnesses—Objection to Expert Evidence.

--When a party fails to make a record of its objection to expert evidence at trial, that party fails to preserve the issue for appeal.

[See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394.]

CA(11)[⬇] (11)

Evidence § 81—Opinion Evidence—Expert Witnesses.

--Evidence of scientific techniques that have not proven reliable and generally accepted by others in the field is not admissible as evidence. However, this rule does not apply to the personal opinions of an expert.

CA(12a)[⬇] (12a) CA(12b)[⬇] (12b)

Waters § 96—Protection Against Floodwaters—State's Liability for Design of Highway Embankment That Captured Floodwaters: Government Tort Liability § 9.2—Dangerous Condition of Public Property.

--In an action against the state by individuals who sought damages in inverse condemnation and tort damages arising from damage to plaintiffs' property from floodwaters that were obstructed by a state highway, the trial court did not err in finding defendant liable based on its design of the highway, which provided for a raised embankment that acted to dam the floodwaters. Public policy does not necessarily require a reasonableness calculus in all contexts in which a trial court determines the inverse condemnation liability of a public entity. In this case, public policy favored strict liability rather than reasonableness, since defendant was bound not to obstruct the flow of water from plaintiffs' upstream land. Further, defendant had a duty to avoid obstructing escaping floodwater, regardless of the cause of the flood. The traditional rule applicable to riparian landowners, according to which both upstream and downstream landowners have a duty to avoid altering the natural system of drainage in any way that would increase the burden on the other, was applicable to defendant. Further, the harm that resulted was unquestionably foreseeable, since the state's highway planning manual required that a highway's drainage structures be able to accommodate a 100-year storm, and defendant was aware that the levee project on the same floodplain as the highway would not accommodate such a storm.

CA(13)[] (13)

Negligence § 92—Actions—Questions of Law and Fact—Duty of Care.

--The question of whether a duty exists is one of law. The court's task in determining duty is to evaluate generally whether the conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. All persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. Duty is usually determined based upon a number of considerations; foreseeability of a particular kind of harm is one of the most crucial.

CA(14a)[] (14a) CA(14b)[] (14b) CA(14c)[] (14c) CA(14d)[] (14d)

Government Tort Liability § 10—Grounds for Relief—Defense of Design Immunity—Required Showing—Reasonableness of Design: Nuisances § 9—Liability of Public Entities.

--In an action against the state by individuals who sought tort damages arising from damage to plaintiffs' property from floodwaters that were obstructed by a state highway, the trial court did not err in denying defendant's motion for a directed verdict based on design immunity (Gov. Code, § 830.6). Defendant failed to present evidence of a basis upon which a reasonable state official could have approved the highway design. The culverts installed through the highway embankment were not designed to accommodate floodwater. Defendant knew that the river levee project that was located in the same floodplain as the highway could not accommodate a 100-year storm, that flooding was foreseeable, and that the drainage design should have taken that into account. Defendant did not offer any evidence indicating that a reasonable public employee would have approved a design that did not take flooding into account. Further, the failure of the river levee project in a heavy rainstorm, which caused the flood, was not a superseding cause that extinguished defendant's liability, since the flooding was foreseeable. Thus, the flooding, whether caused by the levee failure or a 100-year storm, was not so extraordinary an event that defendant should have been relieved of liability.

CA(15)[] (15)

Government Tort Liability § 10—Grounds for Relief—Defense of Design Immunity—Required

Showing—Reasonableness of Design—Trial Court Determination.

--A public entity is immune from liability for a dangerous condition of public property under Gov. Code, § 830.6, if the injury was caused by a public improvement that was constructed pursuant to a plan or design approved in advance by the entity, and the entity can plead or prove three essential elements: (1) a causal relationship between the plan and the accident, (2) discretionary approval of the plan prior to construction, and (3) substantial evidence supporting the reasonableness of the design. Resolution of the reasonableness of the design is a matter for the court, not the jury. The rationale behind design immunity is to prevent a jury from reweighing the same factors considered by the governmental entity that approved the design. The trial court must apply the deferential substantial evidence standard to determine whether any reasonable state official could have approved the challenged design. If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective. In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence.

CA(16)[⬇] (16)

Appellate Review § 135—Scope of Review—Presumptions—Where Ruling Correct, but Reasoning Not.

--A ruling or decision that is correct in law will not be disturbed on appeal merely because it was issued by the trial court for the wrong reason.

CA(17)[⬇] (17)

Negligence § 19—Actions—Trial—Questions of Law and Fact—Proximate Cause—Superseding Cause: Eminent Domain § 131—Inverse Condemnation—Defense.

--Under traditional negligence analysis, an intervening force is one that actively operates to produce harm after the defendant's negligent act or omission has been committed. A defendant's conduct is superseded as a legal cause of an injury if, among other things, the intervening force is highly unusual or extraordinary, not reasonably likely to happen, and, therefore, not foreseeable. Similar considerations may apply in the context of inverse condemnation. The defendant has the burden to prove the affirmative defense of superseding cause, that is, that the intervening event is so highly unusual or extraordinary that it was unforeseeable. The question is usually one for the trier of fact. However, when the facts are materially undisputed, the appellate court applies its independent review.

[See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 975.]

CA(18)[⬇] (18)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability: Eminent Domain § 132—Inverse Condemnation—Concurrent Liability of County and County Water Resources Agency.

--In an action against a county and the county water resources agency by individuals who sought damages in inverse condemnation and tort damages arising from damage to plaintiffs' property that resulted from the failure of a river levee project during a heavy rainstorm, both defendants were properly found liable to plaintiffs. The record was clear that the judgment against the county was based on its direct liability. In an inverse condemnation action, so long as the plaintiffs can show a public entity's substantial participation in a public project that proximately caused injury, it is immaterial which entity had the ultimate responsibility for operation of the project. The basis for liability is that the public entity had the power to control or direct the aspect of the improvement that is alleged to have caused the injury. In this case, the county expressly assumed responsibility

for the project's operation and maintenance, and also exercised control by virtue of its financial control of the agency. In addition, the county board of supervisors was aware of the project's maintenance needs, and of the risk of flooding it posed. In failing to expend funds on the project, the county took the risk that plaintiffs would be harmed. Therefore, it was proper to require the county to bear its share of plaintiffs' loss.

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Judges: (Opinion by Premo, Acting P. J., with Elia and Wunderlich, JJ., concurring.)

Opinion by: Premo

Opinion

PREMO, Acting P. [*730] J.

[44]** Defendants, County of Santa Cruz, Santa Cruz County Flood Control and Water Conservation District (collectively Santa Cruz), Monterey County Water Resources Agency (MCWRA), and County of Monterey (Monterey), were found liable in tort and inverse condemnation for extensive damage caused when the Pajaro River Levee Project (the Project) failed during a heavy rainstorm in 1995. Defendant State of California (State) was also found liable in tort and inverse condemnation for damage caused when Highway 1 obstructed the path of the floodwater on its way to the sea. For reasons we shall explain, we affirm.

[*731] A. INTRODUCTION

This action commenced with the filing of six different complaints on behalf of approximately 300 plaintiffs. The essence of plaintiffs' claims against Santa Cruz, MCWRA, and Monterey was that their failure to keep the Project channel clear diminished its capacity and ultimately caused a levee to fail during the storm. As against State, plaintiffs alleged that the drainage culverts under Highway 1 were too small to drain the flood and the resultant damming effect caused higher flood levels and destructive ponding of the floodwater.

[*3]** The individual matters were consolidated, and the liability and damages phases were bifurcated for trial. The tort causes **[**45]** of action were tried to a jury. The inverse condemnation claims were simultaneously tried to the court. The jury found all defendants liable for dangerous condition of public property and nuisance. The counties and the water agencies were also found liable for negligence, and, with the exception of Monterey, for violation of mandatory duty. The trial court found all defendants liable on the inverse condemnation claims.

In order to obtain review of the liability issues prior to trial of the damages phase the parties selected Tony's Auto Center as a representative plaintiff and stipulated to damages as to that plaintiff only. Judgment in favor of Tony's Auto Center was filed January 6, 2000. The county and water agency defendants jointly moved for a new trial and that motion was denied. All defendants filed timely

notice of appeal. [1]

[***4] B. FACTS

1. *The Project*

The Pajaro River is formed by the union of several smaller tributaries in the Counties of San Benito and Santa Clara. It flows through Chittenden Pass in the Santa Cruz Mountains and emerges into the Pajaro Valley, eventually emptying into Monterey Bay. The river forms the border between the Counties of Santa Cruz on the north and Monterey on the south. The Pajaro Valley is an historic floodplain. Today, most of the valley is devoted to agriculture. Its two population centers are the City of Watsonville on the Santa Cruz side of the river, and the small town of Pajaro just across the river from Watsonville on the Monterey side.

[*732] The federal Flood Control Act of 1944 (Pub.L. No. 78-534, ch. 665 (Dec. 22, 1944) 58 Stat. 887) authorized the United States Army Corps of Engineers (the Corps) to construct the Project upon receipt of assurances from the responsible local agencies that they would, among other things, operate and maintain the Project as the Corps required. The California Water Resources Act authorized the State's portion of the project and directed the four affected counties (Santa Clara, San Benito, Santa Cruz, and Monterey) to give the required written [***5] assurances. (Stats. 1945, ch. 1514, p. 2827.) Before the counties took any action, the California Legislature created the Monterey County Flood Control and Water Conservation District, and the new district replaced Monterey for purposes of the Water Resources Act. (Stats. 1947, ch. 699, §§ 2, 4, p. 1739.) MCWRA succeeded to the responsibilities of the Monterey County Flood Control and Water Conservation District in 1990. (Stats. 1990, ch. 1159, p. 4831.)

In 1947, the three counties and Monterey County Flood Control and Water Conservation District signed a resolution giving the assurances required by the federal Flood Control Act. Shortly thereafter, Monterey joined the other three counties in executing an indemnity agreement under which each county accepted responsibility for the portion of the Project located within its borders, and guaranteed as to each other the assurances that had been given to the Corps.

2. *Maintenance of the Project*

The Project design consisted primarily of clearing the river channel and constructing earthen levees along both sides of the river, beginning near Murphy's Crossing [**46] east of Watsonville and extending westward to the mouth of the river. The [***6] Corps completed the Project in 1949 and transferred responsibility for its maintenance to the local interests. The Corps provided an "Operation and Maintenance Manual" to guide maintenance efforts. One goal of maintenance was to maintain the Project's capacity. Federal regulations, which were incorporated into the manual, specified that the channel be kept clear of shoals, weeds and wild growth. (See 33 C.F.R. § 208.10(g)(1) (2001).) Vegetation and shoals in the channel decrease its capacity. Therefore, it was important to keep the channel clear in order to maintain the capacity it was intended to have.

The Corps had designed the Project to have a capacity of 19,000 cubic feet per second (c.f.s.). The Corps' 1946 "Definite Project Report" stated that the Project would be built to "contain a two-per-cent-chance flood within a 3-foot freeboard." The "freeboard" to which the report refers is the distance from the top of the levee to the surface of the water at the level the project [*733] is designed to carry. Freeboard is included as a safety feature. It provides additional capacity to take care of unforeseen factors, although it is not intended to contain water for long periods [***7] of time. The Corps' report explained: "The channel capacity will be 19,000 c.f.s. above the mouth of Corralitos Creek [the point at which the Project failed in 1995

[1] Although appeal is taken only from the judgment in favor of the single representative plaintiff, our decision is applicable to the entire action. The following discussion refers to "plaintiffs" as a reflection of that practical reality.

[2] . . . ."2 The Corps' documents pointed out that by encroaching on the freeboard the Project would hold 23,000 c.f.s. at the pertinent location and still have one foot of freeboard remaining. That means that the Project was designed to contain 19,000 c.f.s. at the point at which the Project ultimately failed, and, if unaccounted factors had not diminished the channel's capacity, there would still be room to safely carry, at least for a short period of time, an additional 4,000 c.f.s.

From 1949 until 1972, the vegetation and sandbars were removed with a tractor and a bulldozer. The effectiveness of these channel clearing efforts was demonstrated by the Project's performance during two storms in the 1950's. In a 1955 storm, the **[***8]** Chittenden [3] gauge reported flows of 24,000 c.f.s. Even with such a high flow there remained over two feet of freeboard near the point where the levee failed in 1995. In 1958 the Project contained flows of 23,500 c.f.s., although with slightly less freeboard remaining.

The continuous mechanized clearing of the channel stopped around 1972. The California Department of Fish and Game (Fish and Game) had demanded a halt to mechanical clearing of the channel in order to protect the riparian habitat. In an apparent attempt to conform to both the demands of Fish and Game and the Corps' Project maintenance **[***9]** requirements, Santa Cruz began using herbicides to kill the vegetation in the channel. Without regular mechanized clearing, however, vegetation and sandbars built up, impeding the flow of winter runoff. As the Project deteriorated, it reverted more and more to riparian habitat, which in turn encouraged the claim of Fish and Game to jurisdiction over the Project. Although Fish and **[**47]** Game had procedures by which the local agencies could appeal the department's decisions, the local agencies never appealed.

In addition to Fish and Game, local environmental interests made thorough maintenance of the channel more challenging by actively supporting efforts to preserve the river's habitat. In 1976, Supervisor Gary Patton wrote **[*734]** to the Legislature on behalf of the Santa Cruz County Board of Supervisors to support Fish and Game policies and to encourage strong legislation to protect river habitat and regulate streambed alteration. In 1977, Santa Cruz adopted an ordinance designed to "preserve, protect and restore riparian corridors." In 1980, the county fish and game commission was given authority to restore fishery habitat in the Pajaro River, and to review public works projects **[***10]** that involved any alteration of the streambed or of streamside vegetation.

As the channel became more clogged, thorough clearing became more expensive. The passage of Proposition 13 in 1978 made funding more of a problem in general so that through the 1980's the Santa Cruz County Department of Public Works did not have funds to remove trees and other vegetation in the channel. MCWRA [4] had no significant funds to participate in channel clearing efforts, and since 1974 had concentrated almost exclusively on levee maintenance. Although Supervisor Marc Del Piero asked his colleagues several times to approve allocations to MCWRA from Monterey's general fund, with one minor exception, he was never successful.

The presence of vegetation and sandbars within the channel proliferated and posed an acknowledged risk of flooding. By 1977 **[***11]** area farmers had become concerned about the lack of mechanized clearing and expressed their concerns to supervisors in both counties. Watsonville officials wrote to the

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[2] Corralitos Creek is also known as Salsipuedes Creek. It joins the Pajaro River just east of the City of Watsonville.

[3] The Chittenden gauge, which is located on the river several miles east of the Project, continuously measures the depth of the water. Hydrologists periodically measure the width and velocity of the stream. By graphing the periodic measurements they can estimate the volume of the discharge at any given depth. The data from the Chittenden gauge is used to estimate the water flow further down the river in the Project channel.

[4] Unless the context requires a distinction, we shall hereafter refer to MCWRA and its predecessor, Monterey County Flood Control and Water Conservation District, simply as MCWRA.

Santa Cruz County Department of Public Works in 1985, 1987 and 1988, asking that something be done. The agencies responsible for Project maintenance were also worried about the condition of the channel. By 1988, Joseph Madruga, chief engineer for MCWRA, had come to the conclusion that vegetation and sandbars in the channel had reduced its capacity by at least 50 percent. John Fantham, director of the Santa Cruz County Department of Public Works, had recognized the risk of flooding as early as 1983. Later, both agencies acknowledged that the 1995 flood was due in substantial part to the failure to clear the channel.

Meanwhile, the Corps had been performing inspections of the Project about twice a year. Although the Corps issued only one notice that the Project was in an unacceptable condition, the majority of the semiannual evaluations expressed concern that dense vegetation in the channel posed a serious constriction on the flow. Many of the Corps' evaluations included notice to both the MCWRA board and the Santa **[***12]** Cruz County Board of **[*735]** Supervisors that lack of maintenance could disqualify the Project for future federal assistance in the event of a flood. The Corps actually did temporarily disqualify the Project for that reason in 1992.

By 1988, the issue had come to the attention of Congressman Leon Panetta. Congressman Panetta convened the Pajaro River Task Force to determine what was to be done about the conflicting concerns of flood control and habitat restoration. The task force was made up of representatives **[**48]** from all the responsible and affected agencies, Fish and Game, and the Corps. Supervisor Del Piero and Mr. Madruga represented the Monterey interests. Mr. Fantham and Supervisor Robley Levy represented Santa Cruz. After over two years of work, the task force produced the "Pajaro River Corridor Management Plan," which called for the hand clearing of vegetation. Both Mr. Fantham and Mr. Madruga felt that the plan was inadequate, and would do no more than maintain the status quo. Mr. Madruga voiced his objection at the task force meeting and in a letter to Mr. Fantham in which he advocated a program of thinning and removal of selected vegetation using heavy equipment. **[***13]** According to Mr. Madruga, this was the "only method that can accomplish the flood protection necessary to protect the citizens of the Pajaro Valley at a reasonable cost and in a reasonable time frame." Notwithstanding these reservations, the task force unanimously approved the plan in October 1991, although there is no evidence it was ever formally adopted by the agencies charged with implementing it.

Finally, beginning in the early 1990's, the agencies on both sides of the river began more aggressive efforts to clear the channel. In 1991, at the urging of Supervisor Del Piero, MCWRA applied for a permit to use a backhoe and bulldozer to clear the channel. Fish and Game issued the permit, but limited its permission to hand clearing and then later halted the work. In 1993, at the invitation of area farmers, then Director of Fish and Game, Boyd Gibbons toured the Project. Gibbons was sufficiently concerned with the condition of the channel that he instructed his staff to work with the counties to get the necessary work done as soon as possible. Thereafter, Santa Cruz obtained permits to do some mechanized clearing of the channel. However, the work that was done was not enough to entirely **[***14]** clear the vegetation and sediment that had been allowed to collect over the preceding 20 years.

3. *Highway 1*

Highway 1 runs north to south and crosses the Pajaro River at the lower end of the Pajaro Valley, west of Watsonville. State began planning the construction of the subject portion of the highway in the 1950's. At the time, **[*736]** Highway 1 ran through Watsonville. The new section was to bypass the city. The bypass required the construction of a new bridge over the river and an earthen embankment elevating the highway at the south end of the bridge. Trafton Road today runs under Highway 1 on the southern side of the river.

Before State built the bypass, water passed through this area along a path in the vicinity of Trafton Road. The planned embankment would obstruct the existing drainage in that area. To compensate, State needed to design a drainage system for the embankment.

Investigation, design and construction of the embankment continued through the late 1960's. State's design criteria required that drainage through embankments be able to discharge a 100-year flood without causing water to back up over adjacent private property. State's engineers explained that this **[***15]** criterion did not require the drainage system in this case to accommodate flows escaping from the Project channel. According to State, the drainage needed only to pass rainwater runoff from a 700-acre area immediately adjacent to the highway. Using those guidelines, State engineers approved plans for two 48-inch culverts that could accommodate 98 c.f.s. The design documents showed that this design actually anticipated that "[s]hallow flooding on peak flow **[**49]** can be expected for some distance outside the [right of way]."

4. *The Flood*

The Project protected the valley for over 45 years until the storm of March 1995. On the night of March 10-11, 1995, the river overtopped the levee on the Monterey side, upriver from its junction with Corralitos (Salsipuedes) Creek. The resultant rush of water over the levee eroded the back side of the levee and it gave way, inundating the surrounding valley.

The vegetation and sediment that had been allowed to accumulate in the channel caused the river flow to be higher than it would have been had it been properly cleared. On the night of the storm, the maximum flow at the Chittenden gauge was estimated to have been 21,300 c.f.s. Plaintiffs' **[***16]** expert, Dr. Robert Curry, testified that in his opinion the 21,300 c.f.s. overestimated the flow because it did not take into account a number of factors taking place within the channel or downriver from the gauge. According to Dr. Curry, these factors served to reduce the actual flow at the break site to 16,000 to 18,500 c.f.s., most likely around 17,500 c.f.s.

When the levee failed, the floodwaters ran onto the historically flooded valley floor until they reached the Highway 1 embankment. The Highway 1 culverts were quickly overwhelmed, so that the water backed up on the east **[*737]** side of the highway, flooding more acreage than it otherwise would have flooded, and standing in many places for an extended period of time. The standing water exacerbated the flood damage because it caused the deposition of vast amounts of destructive sediment, all of which had to be removed when the floodwaters finally receded.

C. DISCUSSION

1. *Summary of Issues and Scope of Review*

The two counties and their related water agencies contend: (1) the trial court did not make the determination of unreasonableness that is necessary to support inverse condemnation liability, (2) inverse condemnation **[***17]** liability may not be based on shoddy maintenance of a public improvement, (3) the trial court used an erroneous definition of the Project's "design capacity," (4) there was insufficient evidence to support a finding that the Project did not perform within its capacity, and (5) the trial court erred in adopting the plaintiffs' proposed statement of decision.

MCWRA separately contends that the trial court erred in failing to apportion among the defendants the damages of the single plaintiff, Tony's Auto Center. Since MCWRA stipulated to the judgment in the form it was entered, MCWRA is estopped to complain of error, if any there was. (*Hasson v. Ford Motor Co.* (1982) 32 Cal. 3d 388, 420 [185 Cal. Rptr. 654, 650 P.2d 1171].)

State contends: (1) the trial court applied an improper standard of unreasonableness in ruling on the inverse condemnation claim, (2) State could not be liable in tort because it had no duty to protect

plaintiffs from failure of the Project, (3) State is immune from tort liability under Government Code section 830.6 (design immunity), and (4) the breach of the levee was a superseding cause.

Monterey argues separately that it is not liable because it did not have any responsibility for the Project.

CA(1)[↑] **(1)** Except where noted, defendants' arguments relate to facts that are materially undisputed. We therefore apply our independent review. (*Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 799, [35 Cal. Rptr. 2d 418, 883 P.2d 960].)

2. *Inverse Condemnation--Legal Background*

CA(2)[↑] **(2)** HN1[↑] "Private property may be taken or damaged **[***18]** for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." (Cal. Const., art. I, § 19, hereafter article I, section 19.) HN2[↑] When a **[**50]** public use results in damage to private property without having been preceded by just compensation, the property owner may proceed against the public entity to recover it. Such a cause of action is denominated "inverse condemnation." (*Breidert v. Southern Pac. Co.* (1964) 61 Cal. 2d 659, 663, fn. 1, [39 Cal. Rptr. 903, 394 P.2d 719].)

[*738] Early inverse condemnation cases presumed that article I, section 19 (then § 14) merely provided an exception to the general rule of governmental immunity and that a public entity could only be liable in inverse condemnation if a private party could be held liable for the same injury. (*Archer v. City of Los Angeles* (1941) 19 Cal. 2d 19, 24, [119 P.2d 1] (*Archer*).) *Albers v. County of Los Angeles* (1965) 62 Cal. 2d 250, [42 Cal. Rptr. 89, 398 P.2d 129] (*Albers*) explained that the constitutional provision actually provided a broader basis for governmental liability. *Albers* confirmed that the **[***19]** fundamental policy basis for the constitutional requirement of just compensation is a consideration of " 'whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' " (*Id.* at p. 262.) According to *Albers*, "any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed is compensable under [article I, section 19] of our Constitution whether foreseeable or not." (*Id.* at pp. 263-264.) The only limits to the claim were that (1) the injuries must be physical injuries of real property, and (2) the injuries must have been proximately caused by the public improvement as deliberately constructed and planned. (*Holtz v. Superior Court* (1970) 3 Cal. 3d 296, 304, [90 Cal. Rptr. 345, 475 P.2d 441] (*Holtz*).)

CA(3)[↑] **(3)** Although *Albers* had held that the inverse condemnation plaintiff was entitled to compensation without regard to fault, *Albers* left open two exceptions to that rule--the *Gray* exception, which is not pertinent here, and the *Archer* exception. (*Albers*, *supra*, 62 Cal. 2d at p. 263, **[***20]** and see *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 163 P. 1024; *Archer*, *supra*, 19 Cal. 2d at p. 24.) In brief, the so-called *Archer* exception involved the circumstances, peculiar to water law, in which a landowner had a right to inflict damage upon the property of others for the purpose of protecting his or her own property. Such circumstances included the erection of flood control measures (the common enemy doctrine) and the discharge of surface water into a natural watercourse (the natural watercourse rule). Under private water law analysis, these rules immunized the landowner from liability for resulting damage to downstream property. (See *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal. 3d 550, 563-564, [253 Cal. Rptr. 693, 764 P.2d 1070] (*Belair*); *Archer*, *supra*, 19 Cal. 2d at pp. 24-26; *Locklin v. City of Lafayette* (1994) 7 Cal. 4th 327, 350, [27 Cal. Rptr. 2d 613, 867 P.2d 724] (*Locklin*).) Presumably, under the *Archer* exception, a public entity would be completely immune from liability if the entity's conduct were of the type that would have been immune under these water law principles.

Like this [***21] case, *Belair* involved flood damage that occurred after a levee failed. *Belair* modified *Albers* and adopted a rule of reasonableness to be [*739] applied in the context of flood control litigation. *Belair* determined that application of the *Albers* rule of strict liability would discourage needed flood control projects by making the entity the insurer of the property the project was designed to protect. (*Belair*, *supra*, 47 Cal. 3d at p. 565 [**51] .) On the other hand, to apply the *Archer* exception would unfairly burden the private landowner by requiring the landowner to bear a disproportionate share of the damage caused by failure of the public project. To balance these conflicting concerns *Belair* held: HN3[↑] "[W]here the public agency's design, construction or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the projects purpose is to contain the 'common enemy' of floodwaters." (*Ibid.*) Under *Belair*, the public entity is not immune from suit, but neither [***22] is it strictly liable.

Belair left open the question of how to determine reasonableness in the inverse condemnation context. That question was answered in *Locklin*. The *Locklin* plaintiffs had alleged that increased runoff from creek side public works caused erosion damage to their property downstream. *Locklin* held that HN4[↑] the privilege to discharge surface water into a natural watercourse (the natural watercourse rule) was a conditional privilege, subject to the *Belair* rule of reasonableness. CA(4)[↑] (4) *Locklin* explained that to determine reasonableness in such a case, the trial court must consider what are now commonly referred to as the "*Locklin* factors." THEY ARE: "(1) [t]he overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at [***23] large over other beneficiaries of the project or is peculiar only to the plaintiff." (*Locklin*, *supra*, 7 Cal. 4th at pp. 368-369.)

Thus, in matters involving flood control projects, or in circumstances such as those before the court in *Locklin*, the public entity will be liable in inverse condemnation if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiff's property, and the unreasonable aspect of the improvement is a substantial cause of damage. In those circumstances, unreasonableness is determined by balancing the factors set forth in *Locklin*.

[*740] 3. *Counties' Issues* [5]

a. *The Trial Court Properly Balanced the "Locklin Factors."*

CA(5)[↑] (5) Counties contend [***24] that the trial court did not analyze the reasonableness of their actions according to the requirements of *Locklin*. The plaintiffs' proposed statement of decision referred specifically to the six *Locklin* factors and the trial court's consideration of each of them. The trial court acknowledged that the balancing analysis in the proposed statement of decision was correct, but felt that the discussion was not necessary for a statement of decision and had it stricken. The trial court instead stated, "The Court has balanced the public need for flood control against the gravity of the harm caused by the unnecessary damage to the plaintiffs' property, and finds that the County defendants acted unreasonably. *See* [**52] *Belair*, 47 Cal.3d at

[5] In this section we address the issues raised in briefs filed by Santa Cruz and MCWRA. Monterey joins the arguments raised in both briefs. To simplify our discussion, we shall refer in this section to both counties and their related water agencies as "Counties."

[pp.] 566-67, [253 Cal. Rptr. 693, 764 P.2d 1070]."

Counties brought the absence of the *Locklin* factors to the trial court's attention in connection with the hearing on the motion for new trial. Plaintiffs, therefore, moved to amend the statement of decision to include the previously stricken analysis. In response, the court ruled, "In fact, I did make those findings. And the reason for deleting them from the proposed statement was a disposition for brevity. I think they were there. **[***25]** I did consider them. I will grant the motion to insert them back into the statement of decision of the court for clarity." As permitted by Code of Civil Procedure section 662, [6] the trial court amended the statement of decision to include the *Locklin* analysis. We reproduce that portion in the margin. [7]

[*26]** Counties now argue that the trial court came to a final decision without the necessary balancing and then merely plugged the hole by inserting the **[*741]** previously stricken language into the statement of decision. We will not second-guess the trial court's subjective reasoning. The trial court specifically stated that it had considered the factors and made the findings. The statement of decision that is before us includes the appropriate analysis and we have no reason to reject it.

Counties also contend that the reasonableness calculus must be made as of the time the public entity is making the decision to approve the project, and that the trial court incorrectly focused on conduct that took place after adoption of the federal maintenance regulations. This contention **[**53]** confuses the purpose of the balancing analysis. The balancing analysis required by *Locklin* applies to the public entities' action that results in the injury. In *Belair, supra*, 47 Cal. 3d 550, it was the design of the levee system that resulted in the injury so that the reasonableness of the design would have been the proper consideration. Here, the trial court applied the analysis to the Counties' long-standing policy of allowing the Project **[***27]** channel to deteriorate. (See fn. 7, *ante*.) As we explain in more detail in the following section, it was that long-standing policy that caused the damage. We find that the trial court appropriately assessed the reasonableness of that policy according to the factors set forth in *Locklin, supra*, 7 Cal. 4th at page 369. (See *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal. 4th 432, 454, [63 Cal. Rptr. 2d 89, 935 P.2d 796] (*Bunch II*).)

b. *Inadequate Project Maintenance Supports Inverse Condemnation Liability.*

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[6] Code of Civil Procedure section 662 reads in pertinent part: HN5[↑] "In ruling on [a new trial] motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues . . . ."

[7] "The court considered each of the following factors in making its determination that the Counties acted unreasonably when the public benefit is balanced against the private damage: (i) The overall public purpose being served by the improvement project; (ii) the degree to which the plaintiffs' loss is offset by reciprocal benefits; (iii) the availability to the public entities of feasible alternatives with lower risks; (iv) the severity of the plaintiffs' damage in relation to risk-bearing capabilities; (v) the extent to which damage of the kind the plaintiffs sustained is generally considered as a normal risk of land ownership; and (vi) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiffs. The Court finds that the efforts of the Counties to prevent foreseeable damage to plaintiffs were not reasonable in light of the potential for damage posed by the Counties' conduct, the cost to the Counties of reasonable measures to avoid such damage, and the availability of and the cost to the plaintiffs of means of protecting their property from damage. [P] The Court's determination is supported by the following: First, the 'purpose' of the improvement project involved--a flood control project--militates strongly in favor of liability in light of the enormous 'damage potential of a defective flood control project.' Second, the longstanding negligent operation of a flood control project, such as is documented here, serves no legitimate purpose, nor does it promote any 'reciprocal benefit' which offsets or justifies the damage that was caused by the failure of the Project. Third, 'feasible alternatives' which would have prevented the March 1995 floods were available to the defendants--i.e., continuous maintenance of the Project, including the type of maintenance that was in fact performed through the early 1970's. Fourth, the damage inflicted upon the populace of the Pajaro Valley as a result of the March 1995 flood was in fact 'enormous.' Finally, these damages were not a 'normal risk' of land ownership or of the sort that any of the intended 'beneficiaries' of the Project should be expected to bear. On the contrary, the flood of March 1995 would not have occurred had the Counties maintained the Project in the manner required by law."

CA(6a)[↑] **(6a)** Counties next contend that the trial court incorrectly based liability upon a finding of negligence, which is not the type of government action to which inverse condemnation applies. Counties also contend that the Corps' prescribed maintenance was the only "plan" of maintenance Counties ever adopted and that there is insufficient evidence to support a contrary finding. We find no merit in either contention.

[*742] CA(7)[↑] (7) HN6[↑] To be subject to liability in inverse condemnation, the governmental action at issue must relate to the "public use" element of article I, section 19. "Public use" is the threshold requirement. (Cal. Const., art. I, § 19.) "The destruction or damaging **[***28]** of property is sufficiently connected with 'public use' as required by the Constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement." (*House v. L. A. County Flood Control Dist.* (1944) 25 Cal. 2d 384, 396, [153 P.2d 950] (conc. opn. of Traynor, J.).) A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particular plan or manner of maintenance. (*Bauer v. County of Ventura* (1955) 45 Cal. 2d 276, 284-285, [289 P.2d 1] (*Bauer*).)

The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement. HN7[↑] "The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged." (*Yee v. City of Sausalito* (1983) 141 Cal. App. 3d 917, 920, [190 Cal. Rptr. 595], disapproved on other grounds in *Bunch II, supra*, 15 Cal. 4th **[***29]** at pp. 447-451.) That is why simple negligence cannot support the constitutional claim. For example, in *Hayashi v. Alameda County Flood Control* (1959) 167 Cal. App. 2d 584, [334 P.2d 1048] the appellate court held that the plaintiffs had not stated a cause of action for inverse condemnation because, although the defendant's failure to repair a levee within 10 to 21 days was negligence, it was not "a deliberate plan with regard to the construction of public works." (*Id.* at pp. 590-592.) That is not to say that the later characterization of a public agency's deliberate action as negligence automatically removes the action from the scope of the constitutional requirement for just compensation. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed. (See Van Alstyne, **[**54]** *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 489-490 (Van Alstyne).)

The leading case on the issue is *Bauer*. In *Bauer*, a drainage ditch ran along the downhill border of the plaintiffs' property. As originally constructed, any overflow **[***30]** from the ditch would have run downhill and away from the plaintiffs' property. As time went on, the downhill side of the ditch was built up higher and higher with dirt and debris so that when the ditch later overflowed, it flooded the plaintiffs' land. The county argued that the change in the ditch was a result of its maintenance and negligent maintenance was not the "public use" to which inverse condemnation liability **[*743]** would attach. The Supreme Court disagreed, explaining: "The rather obscure line between the concepts of 'construction' and 'maintenance' is disclosed by any attempt to define them in mutually exclusive terms and to characterize the raising of a bank of an existing ditch as one or the other. If the 'maintenance' consists of an alteration of the ditch by raising one of the banks, then in a material sense 'maintenance' becomes a species of 'construction.' Had the bank been raised during the original construction it would have been part of the over-all project and hence within the rule . . . . The defendants' argument that damage from maintenance is beyond the purview of [article I,] section [19] invites an artificial distinction which would turn simply upon the passage of time **[***31]** between the original construction and

the subsequent alteration and must therefore be rejected." (*Bauer, supra,* 45 Cal. 2d at p. 285.)

CA(6b)[↑] **(6b)** Other cases have also found that HN8[↑] inadequate maintenance can support liability in inverse condemnation. Two such cases involved damage to property caused by broken water pipes that the public entities had failed to properly maintain. (*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal. App. 3d 683, 696-698, [194 Cal. Rptr. 582] (*McMahan's*), disapproved on other grounds, *Bunch II, supra,* 15 Cal. 4th at pp. 447-451; *Pacific Bell v. City of San Diego* (2000) 81 Cal. App. 4th 596, [96 Cal. Rptr. 2d 897] (*Pacific Bell*).) In both *McMahan's* and *Pacific Bell* the defendants argued that the city's negligent maintenance of its water system was not the type of deliberate government action that could support liability in inverse condemnation. (*McMahan's, supra,* 146 Cal. App. 3d at p. 693; *Pacific Bell, supra,* 81 Cal. App. 4th at p. 607.) In neither case had the city affirmatively passed a resolution or otherwise enacted a plan that was facially inadequate. But in both cases the city knew that **[***32]** the maintenance program being applied to its water system was inadequate and did not take action to remedy the inadequacy. In *Pacific Bell*, the city repeatedly denied requests for water rate increases to fund repair and replacement of the water system. (*Pacific Bell, supra,* 81 Cal. App. 4th at p. 607.) In *McMahan's*, the city did not accelerate its program of water main replacement in spite of a water rate study showing that such a program was necessary to prevent a continued deterioration of the system. (*McMahan's, supra,* 146 Cal. App. 3d at p. 695.)

The *Pacific Bell* court found that the deliberateness required for inverse condemnation liability was satisfied by a finding that the public improvement, as designed, constructed and maintained, presented an inherent risk of danger to private property and the inherent risk materialized and caused damage. (*Pacific Bell, supra,* 81 Cal. App. 4th at p. 607; and see *House v. L.A. County Flood Control Dist., supra,* 25 Cal. 2d at p. 396.) The **[**55]** court pointed out that the damage to private property that resulted from such an inherent **[*744]** risk was a direct cost of the public improvement. In **[***33]** *Pacific Bell*, the city could have incurred the cost in advance by monitoring and replacing the system before a failure caused damage. When it chose not to do so, article I, section 19 required that the cost be absorbed by the taxpayers as a whole, and not by the individual landowner. (*Pacific Bell, supra,* 81 Cal. App. 4th at pp. 607-608, citing *Holtz, supra,* 3 Cal. 3d at pp. 310-311.)

The *McMahan's* court used the same rationale to reject the defendant's contention that its conduct could only be characterized as negligence. Relying on *Bauer, supra,* 45 Cal. 2d 276, *McMahan's* determined that "whether the City's program of water main installation and replacement is characterized as 'construction' or 'maintenance,' the fact remains that it was inadequate and contributed to the break due to corrosion of the [broken] main. The City's knowledge of the limited life of such mains and failure to adequately guard against such breaks caused by corrosion is as much a 'deliberate' act as existed in *Albers, supra,* 62 Cal. 2d 250." (*McMahan's, supra,* 146 Cal. App. 3d at p. 696.)

We conclude that HN9[↑] in order to prove the type of governmental conduct that will support liability **[***34]** in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action--or inaction--in the face of that known risk.

i. *The Trial Court Found That Counties Adopted an Unreasonable Plan.*

During trial, neither side raised the issue of deliberate action. The heart of plaintiffs' case was that Counties had failed to maintain the project as required by the Corps, allowing silt and vegetation to build up and diminish the capacity of the Project. Counties defended by attempting to show, among other things, that their conduct was reasonable in light of regulatory and fiscal restrictions. The trial court's statement of decision referred to the litany

of maintenance deficiencies and concluded, "[T]he evidence is persuasive that the County defendants did not act reasonably with regard to their maintenance obligation. Moreover the trial record refuted the Counties' arguments that they acted reasonably in light of regulatory impediments and funding limitations. The Counties' maintenance duties required that certain necessary steps be taken to effectively keep the channel clear. If those 'necessary steps' **[***35]** required greater efforts in the face of funding and regulatory obstructions, then a reasonable course of conduct required a more aggressive approach to overcoming these claimed impediments."

About three months after the statement of decision was filed, the Third District Court of Appeal filed **[*745]** *Paterno v. State of California* (1999) 74 Cal. App. 4th 68, [87 Cal. Rptr. 2d 754] (*Paterno*). *Paterno*, like this case, was an appeal from a judgment for the plaintiff on an inverse condemnation claim arising from a broken levee. The *Paterno* court held that the trial court's statement of decision was deficient because it based liability "almost entirely on the violation of standards for levee maintenance, in other words, *departures from the lawful plan*, rather than on an unreasonable plan." (*Id.* at p. 90.) The appellate court reversed and remanded the case for retrial, noting that Paterno would have to identify upon what plans he relied and then prove **[**56]** that the plan caused his injury. (*Id.* at p. 91, [87 Cal. Rptr. 2d 754].)

After judgment was entered in favor of the test plaintiff in this case, Counties filed a new trial motion. (Code Civ. Proc., § 657 **[***36]** .) Relying upon *Paterno*, they argued that the trial court's decision was against law because the court had based liability on negligent maintenance, not on adoption of an unreasonable plan of maintenance. The trial court denied the new trial motion, but amended the statement of decision to include the finding: "[T]he maintenance deficiencies which the Court's Statement of Decision summarized all resulted from plans or policies which defendants adopted and implemented over a twenty-year period." Thus, the trial court's statement of decision, as amended, found that Counties had adopted and implemented unreasonable plans or policies by failing, over a 20-year period, to take a more aggressive approach to maintenance of the Project.

Paterno does not affect our conclusion. In *Paterno*, the appellate court determined that the trial court had adopted the view that unreasonable conduct, as required by *Belair*, meant ordinary negligence, and therefore, that the trial court had not made the necessary finding. (*Paterno*, *supra*, 74 Cal. App. 4th at pp. 86, 88.) Unlike the trial court in *Paterno,* the trial court in this case expressly found that the manner **[***37]** in which the channel was maintained for over 20 years was a deliberate policy of the local public agencies responsible for the Project. Such a determination is a finding of the deliberate government action necessary for inverse condemnation liability.

ii. *There Is Substantial Evidence of an Unreasonable Plan of Maintenance.*

Counties insist that the only evidence of a "plan" of maintenance was the Corps' maintenance requirements. **CA(8)**[↑] **(8)** **HN10**[↑] In reviewing the sufficiency of the evidence to support the findings of the trial court, we apply the basic principle of appellate practice and consider the evidence in the light most favorable to the plaintiffs, giving them the benefit of every reasonable inference and resolving conflicts in support of the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal. 3d 1130, 1133, [275 Cal. Rptr. 797, 800 P.2d 1227].)

[*746] **CA(6c)**[↑] **(6c)** The record is replete with evidence to support the finding that Counties' maintenance of the Project was conducted pursuant to Counties' deliberate policies. Counties were aware of the maintenance program being applied to the Project and knew that the buildup of vegetation and sand bars diminished the protection the Project **[***38]** was intended to provide. Area

farmers, Watsonville officials, and the highest ranking people in both Counties' water agencies alerted county officials to the risk of flooding and to that which needed to be done to remedy the problem. In spite of that knowledge, Counties did not take any action to correct the situation until 1991 or later. Instead, Counties allowed Fish and Game regulations and perceived funding limitations to drive the actual program of maintenance. Thus, Counties' knowing failure to clear the Project channel, in the face of repeated warnings and complaints was not mere negligent execution of the Corps' reasonable plan of maintenance. The "plan" was the long-term failure to mitigate a known danger. That failure persisted for 20 years.

MCWRA argues that it was only Santa Cruz that affirmatively supported the Fish and Game policies of habitat restoration and, therefore, any unreasonable plan or policy of maintenance should be attributable to Santa Cruz, alone. We disagree. It is not necessary to find that **[**57]** Counties expressly endorsed or enacted a contrary policy in order to find that the actual maintenance of the Project was conducted pursuant to deliberate governmental **[***39]** action. It is sufficient that Counties were aware of the risk of failing to adequately clear the channel and chose to tolerate that risk. The reason for the choice is irrelevant to the determination that the action was deliberate. MCWRA indisputably had the obligation, knew the risk, and did not act. Moreover, MCWRA made other, deliberate policy decisions relating to Project maintenance. Among other things, MCWRA's Assistant General Manager and Chief Engineer testified that he had regularly been successful in preventing Fish and Game from interfering with his use of mechanized equipment to maintain other flood control projects in his jurisdiction, and that he chose not to challenge Fish and Game decisions in connection with the Project because he feared jeopardizing the department's cooperation with future permit applications.

Counties also argue that the Corps' semiannual evaluations, which, with one exception, never found Project maintenance to be categorically unacceptable, show that Counties' actual maintenance program was reasonable. The Corps' evaluations are not dispositive. Since the Corps' declaration of unacceptability would have cut off Corps assistance in the event of an emergency, we may **[***40]** infer that such declarations were made only sparingly. Moreover, it is undisputed that the Corps regularly pointed out the problem of vegetation growing in the channel, and that the water agency personnel believed that the maintenance program did not conform to Corps requirements and that it compromised the Project's capacity.

[*747] In sum, the record demonstrates that Counties' policy makers made explicit and deliberate decisions with unfortunate but inevitable results. Knowing that failure to properly maintain the Project channel posed a significant risk of flooding, Counties nevertheless permitted the channel to deteriorate over a long period of years by failing to take effective action to overcome the fiscal, regulatory, and environmental impediments to keeping the Project channel clear. This is sufficient evidence to support the trial court's finding of a deliberate and unreasonable plan of maintenance.

c. *The Trial Court Did Not Err in Defining "Design Capacity."*

CA(9a)[↑] **(9a)** Counties argued at trial that they could not be liable if the storm had generated more water than the Project had been designed to handle. Counties' evidence was that the peak flow during the storm was 21,300 c. **[***41]** f.s. and the Project's capacity was only 19,000 c.f.s. Plaintiffs' evidence was that the peak flow was somewhere between 16,000 c.f.s. and 18,500 c.f.s., but in any event, less than 19,000 c.f.s. Plaintiffs also argued that by considering the freeboard built into the Project's design, the Project's functional capacity was something more than 19,000 c.f.s. At the close of trial, the court defined the Project's capacity as "19,000 c.f.s. with 3 feet of freeboard." Counties

now argue that this definition was erroneous and affects both the inverse condemnation and tort results.

Counties insist that design capacity is a question of law to be determined from the design documents, and that the trial court was obligated to define capacity as 19,000 c.f.s. *within*, not *with*, three feet of freeboard. As we understand the argument, the Corps' Definite Project Report uses "within" and that means that the capacity was 19,000 c.f.s. and no more. By changing "within" to "with," the finder of fact was incorrectly allowed to add the freeboard to the design capacity, which in this **[**58]** case would increase the total capacity to 23,000 c.f.s. [8] The definition was appropriate if it was correct in law **[***42]** and supported by the evidence. (Code Civ. Proc., §§ 607a, 609; and see *LeMons v. Regents of University of California* (1978) 21 Cal. 3d 869, 875, [148 Cal. Rptr. 355, 582 P.2d 946], and *Hyatt v. Sierra Boat Co.* (1978) 79 Cal. App. 3d 325, 335, [145 Cal. Rptr. 47].) We find that it was.

The concept of "design capacity" comes from the *Belair* case. The appellate court in *Belair* had decided that because the plaintiffs' land had been historically subject to flooding, the levee failure **[***43]** could not be the proximate **[*748]** cause of the damage because it had not increased that historical risk. (*Belair*, *supra*, 47 Cal. 3d at p. 558.) The Supreme Court disagreed. *Belair* determined that a flood control project serves the public good by preventing damage that would otherwise be expected to occur in the normal course of events. The flood control project could be a concurring cause of flood damage because adjoining landowners rely on the protection it was built to provide. However, as *Belair* acknowledged, the flood control project could only be a concurring cause if the flood was one the Project was designed to accommodate.

Specifically, *Belair* held: "Thus, **HN11**[↑] in order to establish a causal connection between the public improvement and the plaintiff's damages, there must be a showing of ' "a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury." [Citations.]' (*Souza v. Silver Development Co.* [(1985)] 164 Cal. App. 3d [165] at p. 171, fn. omitted.) Where independently generated forces not induced by the public flood control improvement--such as a rainstorm--contribute **[***44]** to the injury, proximate cause is established where the public improvement constitutes a *substantial concurring cause of the injury*, i.e., where the injury occurred in substantial part because the improvement failed to function as it was intended. The public improvement would cease to be a substantial contributing factor, however, where it could be shown that the damage would have occurred even if the project had operated perfectly, i.e., where the storm exceeded the project's design capacity." (*Belair*, *supra*, 47 Cal. 3d at pp. 559-560.)

A project's capacity, therefore, bears upon the element of causation. This is true whether we are considering the inverse condemnation claims or the tort causes of action. Counties understandably focus on the dictum in the latter half of *Belair*'s discussion quoted above, in which the court posits, by way of example, that if a storm exceeded the project's "design capacity" the project would no longer be a substantial factor in causing the damage. By narrowing the focus to the phrase "design capacity," Counties have constructed the argument that the relevant level of protection the Project was designed to provide is the single number **[***45]** linked to the term "design capacity" in the Corps' Definite Project Report. According to Counties, freeboard does not count.

In our view, *Belair* did not intend the bright-line

[8] Plaintiffs argue that Counties have waived objection to the court's use of the word "with" by affirmatively acquiescing to its use below. Although we agree that Counties did not object below to the use of the word "with" versus "within," the record as a whole makes it quite clear that Counties consistently urged a definition of design capacity that would exclude consideration of freeboard. We will, therefore, treat the merits of the issue.

rule Counties seek to apply. Such a rule is inconsistent with traditional **[**59]** concepts of causation, and would not advance the just compensation requirement of the Constitution. That is especially true on the facts of this case. As the *Belair* court stated, the issue is whether there is a " ' "substantial" cause-and-effect relationship **[*749]** [between the public project and the injury] which excludes the probability that other forces *alone* produced the injury.' (Van Alstyne, *supra*, 20 Hastings L.J. at p. 436, italics added.)" (*Belair, supra*, 47 Cal. 3d at p. 559.) HN12[↑] To the extent that the public project contributes to the injury, then it remains a concurring cause. Like any other determination of causation, it must be made on the facts of each case. (*Ballard v. Uribe* (1986) 41 Cal. 3d 564, 572, fn. 6, [224 Cal. Rptr. 664, 715 P.2d 624].)

Keeping in mind that the issue is one of causation, we find that it would have been improper to cut off Counties' liability, **[***46]** as a matter of law, at the Project's design capacity of 19,000 c.f.s. because there was evidence to show that the Project was able to hold more than that. The Corps' documents specified that the freeboard could be encroached to allow the Project to carry 23,000 c.f.s. at the point in the channel where the breach ultimately occurred. That means that, with 19,000 c.f.s. in the channel, unless something had occurred to diminish capacity, there would still be room for an additional 4,000 c.f.s. Of significance in this case is the evidence that the extra room the freeboard was intended to provide was eliminated by Counties' ineffective maintenance. For these reasons, it was appropriate to permit the finder of fact to decide if the flood exceeded the protection the Project was intended to provide by permitting a finding that the freeboard was part of that protection. This is the definition the trial court gave. Accordingly, there was no error.

d. *There Was Substantial Evidence to Support the Findings of Liability.*

Counties next argue that there was insufficient evidence to support a finding that flows exceeded Project capacity. Applying the deferential standard of substantial evidence **[***47]** review, we find no merit to the argument. (*In re Marriage of Arceneaux, supra*, 51 Cal. 3d at p. 1133.)

The trial court found that if properly maintained the Project would have "safely conveyed well over 21,000 c.f.s. without overtopping." The jury was not asked to make a finding of capacity. The jury found only that peak flows did not exceed the design capacity of the Project. Even if we assume the jury chose 19,000 c.f.s. as the relevant capacity, there was sufficient evidence to support a finding that the flood did not exceed that. Plaintiffs' expert, Dr. Robert Curry, is a geologist with a specialty in geomorphology. He estimated that the range of likely flows at the site of the Project failure was 16,000 c.f.s. to 18,500 c.f.s., most likely around 17,500 c.f.s. Counties argue that Dr. Curry's scientific techniques were not proven reliable or generally accepted by others in his field, and his opinions should not have been **[*750]** admitted. CA(10)[↑] **(10)** Counties did not make a record of their objection below and, therefore, have not preserved the issue for appeal. CA(11)[↑] **(11)** (See fn. 9.) (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal. 3d 180, 184, fn. 1, [151 Cal. Rptr. 837, 588 P.2d 1261]; and **[***48]** see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444-445.) [9] CA(9b)[↑] **(9b)** Dr. **[**60]** Curry's testimony provides substantial evidence to support a finding that the peak flows did not exceed

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[9] Having reviewed the evidence in detail, we find that the objection, had it been recorded, would have properly been overruled. HN13[↑] Evidence of scientific techniques that have not proven reliable and generally accepted by others in the field is not admissible as evidence. (***People v. Kelly* (1976) 17 Cal. 3d 24, [130 Cal. Rptr. 144, 549 P.2d 1240].**) The *Kelly* rule does not apply to the personal opinions of an expert. (***People v. McDonald* (1984) 37 Cal. 3d 351, 372-373, [208 Cal. Rptr. 236, 690 P.2d 709]; *Wilson v. Phillips* (1999) 73 Cal. App. 4th 250, 254-256, [86 Cal. Rptr. 2d 204].**) Counties' challenge to Dr. Curry's testimony is that he "theorized" and "hypothesized" about the factors that he believed affected the level of the flood. Counties' objection relates only to the credibility of his opinion, and thus was not subject to exclusion under the *Kelly* rule.

19,000 c.f.s.

[*49]** e. *The Parties Are Expected to Draft the Statement of Decision.*

Counties finally challenge the trial court's statement of decision on the ground it reflects plaintiffs' reasoning, analysis and decision and not that of the trial court. Counties acknowledge there is no authority for their challenge, but argue that in this case the statement of decision was so plainly a rehashing of plaintiffs' closing argument that it simply cannot reflect the trial court's decision. According to Counties, it is hard to believe that the trial judge agreed so wholeheartedly with the other side.

The California Rules of Court provide that **HN14**[↑] the tentative decision is not binding on the court and that the court may instruct a party to prepare a proposed statement of decision. (Cal. Rules of Court, rule 232(a) & (c).) The rules provide ample opportunity for all parties to make proposals as to the content of the statement of decision or to raise objections to a proposed statement. (Cal. Rules of Court, rule 232(b) & (d).) Those procedures were followed here, and we can find no basis in the record or in law to warrant further comment on the issue.

4. *State's Issues*

a. *State's Liability [***50] for Inverse Condemnation Does Not Require a Showing of Unreasonableness.*

CA(12a)[↑] **(12a)** The trial court's statement of decision refers to State's liability in a single paragraph: "The State of California, Department of Transportation, acted unreasonably in its design and construction of Highway 1 where it **[*751]** crosses the Pajaro River flood plain. [State] failed to follow its own manual's design criteria for that section of highway. This failure resulted in a dangerous condition of public property. The raised highway embankment functioned as a dam that caused some properties to suffer flood damage and others to be damaged more severely than they would have if the highway design had allowed proper drainage." State contends that the trial court did not use the proper measure of reasonableness in finding State liable, and that State's actions were reasonable in any event. Plaintiffs argue, among other things, that the rule of reasonableness does not apply to State. According to plaintiffs, State is strictly liable and the trial court's application of a reasonableness analysis was unnecessary. We agree with plaintiffs.

The rule of reasonableness was developed in a series of cases beginning with *Belair* **[***51]** . The general rule is that **HN15**[↑] a public entity is liable for inverse condemnation regardless of the reasonableness of its conduct. (*Albers, supra,* 62 Cal. 2d at pp. 263-264.) *Belair* modified the general rule when it decided that a rule of reasonableness, rather than the extremes of strict liability or immunity, was appropriate in cases involving flood control projects. (*Belair, supra,* 47 Cal. 3d at p. 565.) *Locklin* applied *Belair*'s rule of reasonableness where the defendants were alleged to have drained surface water into a natural watercourse, increasing the volume and velocity of the **[**61]** watercourse, and causing erosion of plaintiffs' downstream property. (*Locklin, supra,* 7 Cal. 4th at p. 337.) **HN16**[↑] Under the "natural watercourse" rule, a riparian landowner had a privilege to drain surface water into a natural watercourse, regardless of the effect of that drainage on downstream landowners. (*Id.* at pp. 346-347.) Like *Belair*, *Locklin* declined to impose strict liability, and held: "Because a public agency, like any riparian property owner, engages in a privileged activity when it drains surface water into a natural watercourse or makes alterations to the watercourse, **[***52]** article I, section 19 of the California Constitution mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners." (*Id.* at p. 367.)

Both *Belair* and *Locklin* applied the reasonableness rule to conduct that was at one time privileged

under traditional water law principles. Predictably, the plaintiffs in the next case argued that conduct that had not been so privileged was subject to the general rule of strict liability. (*Bunch II, supra*, 15 Cal. 4th 432.) *Bunch II*, like *Belair*, involved the failure of a flood control project. However, in *Bunch II* the injury was caused by the defendants' having diverted and rechanneled a natural watercourse. HN17[↑] Diversion of a watercourse was not subject to a common law privilege like the common enemy doctrine or the natural watercourse rule. *Bunch II* confirmed that resolution of flood control cases involved a balancing of the public interest in encouraging flood control projects with the potential private harm they **[*752]** could cause. *Bunch II* held that the public agency would not be strictly liable for damage resulting from a failed **[***53]** flood control project, whether or not the offending conduct would have been privileged under traditional water law doctrine. Instead, a rule of reasonableness was to apply. (*Id.* at p. 451)

Although these three cases suggest a trend toward incorporating reasonableness into the inverse condemnation analysis, that trend does not extend to State's conduct in this case because of the public policy considerations to which the reasonableness requirement is tethered. The 1969 article by Professor Van Alstyne provides some insight. (Van Alstyne, *supra*, 20 Hastings L.J. 431.) Van Alstyne noted that the state of inverse condemnation law at the time was very unpredictable due to the courts' application of a variety of conflicting legal principles. Van Alstyne encouraged the courts to abandon reliance upon private law principles and to apply principles of public policy to all inverse condemnation claims arising from unintended physical damage to private property. According to Van Alstyne, public policy does not necessarily require a reasonableness calculus in all contexts. For example, in cases of environmental pollution, a rule of strict liability might provide **[***54]** incentive for the development of antipollution programs. (*Id.* at p. 503.) On the other hand, in what Van Alstyne termed "water damage" cases, a rule that balanced the conflicting concerns of public benefit and private harm would better serve the public in the long run. (*Id.* at p. 502.).

Our Supreme Court adopted the balancing analysis suggested by Van Alstyne in the *Belair*, *Bunch II*, and *Locklin* cases. In *Locklin*, the offending conduct (discharge of surface water into a natural watercourse) would have been privileged under traditional water law principles. The corresponding burden of that privilege fell on the downstream landowners who had to take steps to protect their land from such **[**62]** upstream discharges or suffer the consequences. (*Locklin, supra*, 7 Cal. 4th at pp. 351-352, [27 Cal. Rptr. 2d 613, 867 P.2d 724].) Therefore, since the watercourse naturally subjected the downstream property to flooding and erosion, it would have been unfair to apply a strict liability analysis to public entity landowners upstream. The decisive constitutional consideration of ensuring equitable allocation of the cost of the public undertaking was best advanced in such **[***55]** a case by requiring the downstream owner to show that the public agency had exceeded its privilege by acting unreasonably. (*Id.* at p. 367.)

Policy considerations also favored application of a reasonableness analysis in *Belair* and *Bunch II*, which were both flood control cases. In *Belair* and *Bunch II,* the public improvement had been erected to protect the land that was ultimately injured when the project failed. The project's purpose, to protect private property from the flooding that it could otherwise expect to **[*753]** suffer periodically, was an important policy reason to apply the balancing analysis. Without requiring the plaintiff to make a showing of unreasonableness, the public agency that built or operated the project would become the guarantor of the land it had undertaken to protect.

An appellate opinion decided after *Belair*, *Bunch II*, and *Locklin* illustrates a situation where public policy favored strict liability rather than reasonableness. (*Akins v. State of California* (1998) 61 Cal. App. 4th 1, [71 Cal. Rptr. 2d 314].) In *Akins* the defendants had intentionally diverted

floodwater onto the plaintiffs' lands for the purpose of protecting **[***56]** other property from flooding. There was no evidence that the project was erected to protect the plaintiffs' property or that the plaintiffs' property had historically been subject to flooding. Since the public improvement involved flood control, *Belair* and *Bunch II* arguably mandated application of a reasonableness analysis. However, the appellate court found that the reasonableness standard did not apply, reasoning that regardless of the importance of flood control, "[u]sing private property not historically subject to flooding as a retention basin to provide flood protection to other property exacts from those owners whose properties are flooded a contribution in excess of their proper share to the public undertaking. We see no reason to put such property owners to the task of proving the governmental entities acted unreasonably in order for the owners to recover in inverse condemnation." (*Id.* at p. 29.)

The policy reasons for applying a rule of reasonableness in *Belair*, *Bunch II*, and *Locklin* do not apply in this case. The conduct of which plaintiffs complain is that State caused Highway 1 to obstruct the path of the floodwater. Such conduct was not **[***57]** privileged under traditional water law precepts. (*Los Angeles C. Assn v. Los Angeles* (1894) 103 Cal. 461, 467-468, [37 P. 375]; *Conniff v. San Francisco* (1885) 67 Cal. 45, [7 P. 41].) Therefore, State does not enjoy a conditional privilege as it would under the facts of *Locklin*, and plaintiffs' property would not have been subject to a corresponding burden. In fact, the reverse is true. It is plaintiffs, as the upstream owners, who likely would have had a privilege in this case. And State, as the downstream owner, was bound not to obstruct the flow of water from the plaintiffs' upstream land. (*Locklin*, *supra*, 7 Cal. 4th at p. 350; and see *Smith v. City of Los Angeles* (1944) 66 Cal. App. 2d 562, 572, [153 P.2d 69].) Therefore, the consideration that controlled the result in *Locklin* (fair apportionment of the loss) is not present here because plaintiffs would not have been expected to take measures **[**63]** to protect their land from a downstream obstruction like the Highway 1 embankment.

The policy reasons for applying reasonableness in *Belair* and *Bunch II* are not present here, either. Highway 1 was not a flood control project **[***58]** and was **[*754]** not built to protect the plaintiffs' land. The damming effect of the highway created a risk to which those properties would not have been subject if the highway had not been built. The public benefit of the highway extends well beyond the landowners in the Pajaro Valley. While the same may be said of a flood control project, such a project directly benefits the owners of the land in the floodplain, and only indirectly benefits the public as whole. Highway 1, on the other hand, benefits the traveling public as a whole. The owners of the adjacent lands derive no greater benefit from the highway than any other member of the public.

"[T]he underlying purpose of our constitutional provision in inverse--as well as ordinary--condemnation is 'to distribute throughout the community the loss inflicted upon the individual . . . .' " (*Holtz, supra*, 3 Cal. 3d at p. 303.) State, in furtherance of the larger public purpose (transportation) has caused injury to a discrete group of private landowners. Those landowners received no more benefit from State's project than did any other user of the State highway system. Plaintiffs ought not to be required to prove unreasonableness **[***59]** in order to recover just compensation for their damage. We hold, therefore, that *Belair*'s rule of reasonableness does not apply to State in this case. In light of our holding, the trial court was not required to undertake the reasonableness analysis required by *Locklin.* The court's conclusion that State's conduct was unreasonable was unnecessary to its determination that State is liable in inverse condemnation, but does not affect its correctness.

b. *State Had a Duty to Avoid Obstructing the Floodplain.*

The jury found State liable for nuisance and for maintaining a dangerous condition of public

property. (Civ. Code, § 3479; Gov. Code, § 835.) State argues that it cannot be liable for these torts because it does not have a duty to protect plaintiffs' property from the failure of a flood control project over which it had no control. State assumes that plaintiffs' claim is premised upon the theory that State should have designed its drainage anticipating that the Project would fail. State misses the point. Plaintiffs do not allege that State is responsible for the failure of the Project or the resulting flood. Plaintiffs allege **[***60]** only that State is responsible for that portion of the damage that can be attributed to the highway's obstruction of the floodplain. Whether the flood occurred because the Project failed to function as intended, or because the rainstorm exceeded the Project's capacity, plaintiffs' claim against State would be the same. As we interpret plaintiffs' position, State had a duty to avoid obstructing escaping floodwater, regardless of the cause of the flood.

CA(13)[↑] (13) HN18[↑] "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be **[*755]** imposed for damage done." (*Tarasoff v. Regents of University of California* (1976) 17 Cal. 3d 425, 434, [131 Cal. Rptr. 14, 551 P.2d 334].) In California, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. (*Rowland v. Christian* (1968) 69 Cal. 2d 108, 112, [70 Cal. Rptr. 97, 443 P.2d 561].) Duty is usually determined based upon a number of **[**64]** considerations. The foreseeability of a particular kind of harm is one of the most crucial of those. (See *Dillon v. Legg* (1968) 68 Cal. 2d 728, 739, [69 Cal. Rptr. 72, 441 P.2d 912]; **[***61]** Gov. Code, § 835.)

The question of whether a duty exists is one of law. The court's task in determining duty is to evaluate generally whether the conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. (*Ballard v. Uribe*, *supra*, 41 Cal. 3d at p. 573, fn. 6.) **CA(12b)[↑] (12b) HN19[↑]** Under ordinary rules applicable to riparian landowners, both upper and lower riparian landowners have a duty to avoid altering the natural system of drainage in any way that would increase the burden on the other. (*Locklin*, *supra*, 7 Cal. 4th at pp. 337, 354-356; *Keys v. Romley* (1966) 64 Cal. 2d 396, 409, [50 Cal. Rptr. 273, 412 P.2d 529].) Traditionally, a lower landowner that obstructs a natural watercourse is liable for damages that result from the obstruction. (*Mitchell v. City of Santa Barbara* (1941) 48 Cal. App. 2d 568, 571, [120 P.2d 131].) The rule applies even if the damaging flow in the obstructed watercourse is seasonal floodwater. (*Ibid.*) This common law allocation of duty is appropriate here.

The harm of which plaintiffs complain is that the highway obstruction caused **[***62]** the floodwater to rise higher and stand on the land longer than it would have done if unobstructed. This harm was unquestionably foreseeable. State's "1989/90 Training Course Manual" POINTS OUT: "A primary cause of flooding in highway and bridge construction is the blocking of a normal drainage flow pattern. Construction of fills, drainage structures and appurtenant structures such as retaining walls all have the potential for blocking the normal flow of drainage water and thus causing flooding. The blocked flow does not necessarily have to be a watercourse; blockage of an existing flood plain may result in flooding of previously untouched areas. [P] In either case, watercourse or flood plain, blockage will result in liability for any damages arising from consequent flooding."

In fact, the harm that State's project ultimately caused was actually foreseen before the highway bypass was ever built. State designed the drainage culverts around 1960. The 1960 design documents presumed that peak flows would result in shallow flooding "for some distance outside the [right of way]." According to State's engineers, these peak flows were **[*756]** presumed to consist only of rainwater runoff from **[***63]** the surrounding area, not floodwater. Thus, even in the absence of a flood, State's design presumed that some water

would back up behind the highway during the heaviest rains.

State's "Design Planning Manual" required that its highway drainage structures be able to accommodate a 100-year storm. In 1963, the Corps reported that a 100-year storm was expected to generate flows within the Project channel of 43,500 c.f.s., a significantly greater volume than it had previously estimated. State concedes that it was aware of the Corps' 1963 estimate of the size of a 100-year storm, and that it knew there was no chance the Project, as it then existed, could contain that volume. Thus, State was aware before it began building the highway bypass in the late 1960's that in the event of a 100-year storm, flooding was virtually certain to occur.

State argues that it had no duty to consider the possibility of a flood because in its correspondence with State engineers the Corps told State that it should assume a Project expansion was going forward. This assurance, however, did not have any bearing on the drainage design or whether **[**65]** that design should consider the risk of flooding. The acknowledged **[***64]** purpose of the Corps' assurance was to assist State's engineers in designing the bridge. In light of the information it received from the Corps, State designed its bridge over the river so that the Corps could make improvements under the bridge without the need to revise the bridge structure. Those improvements were, at best, years away. (And, so far as we can ascertain from the record, no such improvements were ever made.)

It is undisputed, therefore, that when State built the highway bypass in the late 1960's it knew that the Project would not contain a 100-year storm and that no enlargement of the Project had been approved or commenced at that point. A 100-year storm was just as likely to occur in 1970 as it was at any later time. Having built an embankment across the historic floodplain, State also must have known that its embankment would block the flow of floodwater unless it designed the drainage to accommodate a flood.

State cannot avoid liability for the 1995 flood because the Project failed rather than because the storm overwhelmed it. State was expected to design its drainage for a 100-year storm. Since a flood was almost certain to occur in the event of a **[***65]** 100-year storm, State, as a downstream riparian landowner, had a duty to design the highway bypass to avoid obstructing the geologic floodplain. Therefore, it does not matter that the storm that generated the flood in this case was of a lesser magnitude and should have been contained by the Project. State had a duty to anticipate the consequences of a 100-year storm and design accordingly.

[*757] c. Government Code Section 830.6*Government Code* Section 830.6 *Is Not a Defense.*

CA(14a)[↑] (14a) At the close of all the evidence State moved for a directed verdict on the basis of Government Code section 830.6, design immunity. The trial court denied the motion and the jury ultimately found State liable for a dangerous condition of public property and nuisance. State contends the court erred in denying its directed verdict motion. We disagree.

CA(15)[↑] (15) HN20[↑] A public entity is liable for negligently creating a dangerous condition of public property or for failing to cure a dangerous condition of which it has notice. (Gov. Code, § 835, subd. (a).) However, the entity is immune from such liability if the injury was caused by a public improvement that was constructed pursuant to a **[***66]** plan or design approved in advance by the entity if "there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design . . . or (b) a reasonable legislative body or other body or employee could have approved the plan or design." (Gov. Code, § 830.6.) "The rationale behind design immunity is to prevent a jury from reweighing the same factors considered by the governmental entity which approved the design." (*Bane v. State of*

California (1989) 208 Cal. App. 3d 860, 866, [256 Cal. Rptr. 468].) A public entity claiming design immunity must plead and prove three essential elements: " '(1) [a] causal relationship between the plan and the accident; (2) discretionary approval of the plan prior to construction; [and] (3) substantial evidence supporting the reasonableness of the design.' [Citation.]" (*Higgins v. State of California* (1997) 54 Cal. App. 4th 177, 185, [62 Cal. Rptr. 2d 459].)

The elements of causation and approval are not contested. The focus of State's challenge is the third element of the design immunity defense, substantial evidence of the reasonableness of the culvert design. **[***67]** Government Code section 830.6 **[**66]** makes the resolution of this element a matter for the court, not the jury. (*Cornette v. Department of Transportation* (2001) 26 Cal. 4th 63, 66, [109 Cal. Rptr. 2d 1, 26 P.3d 332].) The task for the trial court is to apply the deferential substantial evidence standard to determine whether any reasonable State official could have approved the challenged design. (*Morfin v. State of California* (1993) 12 Cal. App. 4th 812, 815, [15 Cal. Rptr. 2d 861].) If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective. (*Higgins v. State of California*, *supra*, 54 Cal. App. 4th at p. 185.) **HN21**[↑] In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence. (*People v. Bassett* (1968) 69 Cal. 2d 122, 139, [70 Cal. Rptr. 193, 443 P.2d 777]; *Grenier v. City of Irwindale* (1997) 57 Cal. App. 4th 931, 940, [67 Cal. Rptr. 2d 454].) **CA(14b)**[↑] **(14b)** Keeping that standard in mind, we review the evidence to determine whether **[*758]** there is a basis upon which a reasonable State official could have approved the culvert design.

State installed **[***68]** two 48-inch culverts through the embankment on the southern side of the bridge it built over the Pajaro River. There is no dispute that the culverts were not designed to accommodate floodwater. They were designed to accommodate only the rainwater runoff from the adjacent 700 acres. The span beneath the bridge itself provided plenty of clearance for highwater flows down the river channel. However, if the water escaped the channel, it would follow the contour of the floodplain toward the embankment at the southern end of the bridge. The floodwater would have to pass through whatever drainage was installed in the new embankment in order to reach the sea. Plaintiffs point out that since State knew before it built the Highway 1 bypass that the Project could not accommodate more than about 26,000 c.f.s., and that a 100-year storm would generate flows well above that, flooding was foreseeable and the drainage design should have taken it into account. [10]

[*69]** State's expert, Steve Price, testified that the culverts conformed to the requirements of State's Design Planning Manual and the design itself was "reasonable." He stated that it was not in conformance with the best engineering practices to design the drainage for Project failure and that State did not evaluate the Corps' projects at the time the drainage in this case was installed. Plaintiff's expert, Dr. Curry, had testified that the actual Pajaro River watershed consisted of 1,100 square miles. Price testified, however, that it was appropriate to consider only the 700 acres in calculating runoff because "[t]here are other drainage systems and facilities that are taking care of that water."

State's engineer, Lance Gorman, testified that a reasonable drainage design would accommodate flooding only if the river had not incorporated man-made flood control improvements. According to both Price and Gorman, because there was an existing flood control project, the highway drainage

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[10] Plaintiffs also claim that the culverts' gradient flowed upriver rather than down, the opposite of the way they were designed. Arguably, this defect could also defeat the design immunity defense. (***Cameron v. State of California* (1972) 7 Cal. 3d 318, 326, [102 Cal. Rptr. 305, 497 P.2d 777]**.) In light of our conclusion that there is insufficient evidence to support the reasonableness of the design, we need not reach this issue.

design did not have to consider floodwater. Gorman testified that State worked only within its own area and that it would expect the Corps to provide for flooding, noting that State had expected the Corps to improve **[***70]** the Project to accommodate **[**67]** a 100-year storm. Another reason State never considered flooding, according to Gorman, was that it had never been asked to do so.

[*759] The chronology of the State's project is significant. The Corps' flood control project was built in 1949 and, according to Gorman, up until at least 1958 it was reasonable to presume it would hold a 100-year flood. The Highway 1 drainage was designed in 1959 and revised in 1960. In June 1963, the Corps published its "Interim Report," showing that it expected a 100-year storm would generate 43,500 c.f.s. This volume greatly exceeded the Project's capacity. Nevertheless, in September 1963, State engineers approved the 1960 drainage design without reconsidering it in light of the Corps' Interim Report. Mr. Gorman conceded that by 1964, given the Corps' reevaluation of a 100-year storm, it would have been "questionable" to continue to assume the Project would hold such a flood. Thus, according to State's own engineer it "probably would have been better" to design for the Corps' new analysis.

The purpose of the design immunity statute is to avoid having the finders of fact "reweighing the same factors considered by the governmental **[***71]** entity which approved the design." (*Bane v. State of California, supra,* 208 Cal. App. 3d at p. 866.) Since State's engineers never took flooding into consideration, it is questionable whether the immunity applies at all. Presuming that it does, we find that State has not offered substantial evidence of reasonableness.

Although State offered evidence that its original design was reasonable, we are troubled by the conclusory nature of that evidence. State's engineers testified that the design was reasonable, but the only foundation offered for their conclusion was the presumption that someone or something else would take care of flooding. Such evidence lacks the solid value necessary to constitute substantial evidence. Moreover, State effectively concedes that under the circumstances that existed at the time the design was approved in 1963, it was no longer reasonable to rely on the Project to contain a 100-year flood. The unreasonableness of the design is further demonstrated by the design documents themselves, which in 1960 presumed that peak flows would cause some shallow flooding. Logic tells us that once it was determined that a 100-year storm was certain to **[***72]** overtop the Project, more extensive flooding would occur. Under these circumstances, we find that State has not offered any substantial evidence upon the basis of which a reasonable public employee could have approved a design that did not take flooding into account.

The trial court's ruling on State's motion for a directed verdict suggests that the court incorrectly intended to allow the jury to determine the reasonableness of the design. It is clear from the record, however, that the jury was not asked to make that determination. **CA(16)[↑] (16) HN22[↑]** A ruling or decision, itself **[*760]** correct in law, will not be disturbed on appeal merely because it was given for a wrong reason. (*D' Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 18-19, [112 Cal. Rptr. 786, 520 P.2d 10].) **CA(14c)[↑] (14c)** Because our independent examination of the record leads us to conclude that State had not offered substantial evidence of the reasonableness of the drainage design, the trial court did not err in denying State's motion for directed verdict.

d. *Failure of the Project Was Not a Superseding Cause.*

State argues that the breach of the levee was an intervening force that was so extraordinary that it operates as **[***73]** a **[**68]** superseding cause of plaintiffs' injury, cutting off its own liability on all claims. **CA(17)[↑] (17) HN23[↑]** Under

traditional negligence analysis, an intervening force is one that actively operates to produce harm after the defendant's negligent act or omission has been committed. (Rest.2d Torts, § 441, subd. (1), p. 465.) A defendant's conduct is superseded as a legal cause of an injury if, among other things, the intervening force is highly unusual or extraordinary, not reasonably likely to happen and, therefore, not foreseeable. (Rest.2d Torts, § 442, subds. (b) & (c), p. 467; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 975, p. 366; *Akins v. County of Sonoma* (1967) 67 Cal. 2d 185, 199, [60 Cal. Rptr. 499, 430 P.2d 57].) Similar considerations may apply in the context of inverse condemnation. (*Belair, supra,* 47 Cal. 3d at pp. 559-560.) The defendant has the burden to prove the affirmative defense of superseding cause, that is, that the intervening event is so highly unusual or extraordinary that it was unforeseeable. (*Maupin v. Widling* (1987) 192 Cal. App. 3d 568, 578, [237 Cal. Rptr. 521].) The question is usually one for the trier of fact. **[***74]** (*Ballard v. Uribe, supra,* 41 Cal. 3d at p. 572, fn. 6.) However, since the facts upon which State bases its claim are materially undisputed, we apply our independent review. (*Ghirardo v. Antonioli, supra,* 8 Cal. 4th at p. 799.)

CA(14d)[↑] (14d) State argues that the chain of causation between State's project and the harm that plaintiffs sustained is broken by the extraordinary volume of floodwater flowing from the breach of the levee. Other than to note that the 1995 event was the first time its culverts had been overwhelmed, State does not explain in what way the flooding was not foreseeable, and has not carried its burden on this issue. On the other hand, we find ample evidence that flooding was within the scope of human foresight. The Highway 1 bypass was built across a floodplain. State knew at the time it built the culverts that the Project channel could not hold a 100-year storm so that in the event of a 100-year storm, flooding was almost certain to occur. And a 100-year storm was, indisputably, foreseeable. Thus, the flooding, whether caused by the failure of the levee or by the size of the storm, was not so extraordinary an event that State should **[***75]** be relieved of its liability.

[*761] 5. *Monterey Liability*

a. *Monterey's Liability Is Not Derivative.*

CA(18)[↑] (18) Monterey attacks the judgment against it on the ground that the trial court disregarded the separateness of Monterey and MCWRA and incorrectly determined that Monterey could be derivatively liable for MCWRA's inadequate maintenance of the Project. We reject this argument because the record is clear that the judgment against Monterey was based on Monterey's direct liability.

The jury received no instruction on vicarious liability, nor was the verdict form drafted to accommodate a vicarious liability theory. The special verdict identified each of the defendants separately, and the jury apportioned damages separately, assigning 30 percent to MCWRA and 23 percent to Monterey. The trial court expressly found that "Monterey County, while a separate legal entity from [MCWRA], concurrently exercised dominion and control over the Project," and concluded that Monterey and MCWRA were "jointly responsible." Therefore, both finders of fact determined that Monterey's liability was joint or concurrent, but not derivative.

[69]** b. *Monterey Substantially Participated in the Project.*

[*76]** Monterey contends that since it did not do anything about the maintenance of the Project channel, and because, it claims, it had no authority to do anything, it cannot be liable for inverse condemnation. We find that Monterey **HN24[↑]** had the power and the duty to act and that its failure to do so, in the face of a known risk, is sufficient to support liability under article I, section 19.

A public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that proximately caused injury to private property. (

Wildensten v. East Bay Regional Park Dist. (1991) 231 Cal. App. 3d 976, 979-980, [283 Cal. Rptr. 13].) So long as the plaintiffs can show substantial participation, it is immaterial "which sovereign holds title or has the responsibility for operation of the project." (*Stoney Creek Orchards v. State of California* (1970) 12 Cal. App. 3d 903, 907, [91 Cal. Rptr. 139].)

In the majority of cases that apply the substantial participation test, the public entity has defended an inverse condemnation claim on the grounds that the **[***77]** improvement was private, not public. There is no dispute here that **[*762]** the Project was a public project. Thus, the holding in these cases is not directly applicable. However, the rationale is instructive. One such case is *Frustuck v. City of Fairfax* (1963) 212 Cal. App. 2d 345, [28 Cal. Rptr. 357] (*Frustuck*). In that case the city approved a subdivision and drainage plans for private property upstream from the plaintiffs' property. The subdivision increased runoff that ultimately harmed the plaintiff's property. The appellate court agreed that the harm had been caused by the drainage system's upstream diversion of water and that the city, in approving the plans for the subdivision, had substantially participated in that diversion. The court explained, "The liability of the City is not necessarily predicated upon the doing by it of the actual physical act of diversion. The basis of liability is its failure, in the exercise of its governmental power, to appreciate the probability that the drainage system from [the private subdivision] to the Frustuck property, functioning as deliberately conceived, and as altered and maintained by the diversion of waters from their normal channels, **[***78]** would result in some damage to private property." (*Id.* at p. 362; accord, *Sheffet v. County of Los Angeles* (1970) 3 Cal. App. 3d 720, 734-735, [84 Cal. Rptr. 11].)

HN25[↑] In cases where there is no dispute concerning the public character of an improvement, substantial participation does not necessarily mean actively participating in the project, as Monterey contends, but may include the situation where the public entity has deliberately chosen to do nothing. For example, a public entity is liable in inverse condemnation for damage resulting from broken water pipes when the entity responsible for the pipes has deliberately failed to maintain them. (McMahan's, supra, 146 Cal. App. 3d 683; *Pacific Bell, supra,* 81 Cal. App. 4th 596.) Of course, the entity must have the ability to control the aspect of the public improvement at issue in order to be charged with deliberate conduct. HN26[↑] In tort cases, it has been held, "in identifying the defendant with whom control resides, location of the power to correct the dangerous condition is an aid." (*Low v. City of Sacramento* (1970) 7 Cal. App. 3d 826, 832, [87 Cal. Rptr. 173].) **[***79]** The ability to remedy the risk also tends to support a contention that the entity is responsible for it. "Where the public entity's relationship to the dangerous **[**70]** property is not clear, aid may be sought by inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition . . . ." (*Id.* at pp. 833-834; accord, *Fuller v. State of California* (1975) 51 Cal. App. 3d 926, 946-948, [125 Cal. Rptr. 586].)

The rule we draw from these cases is that HN27[↑] a public entity is a proper defendant in a claim for inverse condemnation if it has the power to control or direct the aspect of the public improvement that is alleged to have caused the injury. The basis for liability in such a case is that in the exercise of its governmental power the entity either failed to appreciate the probability that **[*763]** the project would result in some damage to private property, or that it took the calculated risk that damage would result. (See *Frustuck, supra,* 212 Cal. App. 2d at p. 362.)

Returning to the instant matter, although Monterey contends that it had no obligation or any power to control the **[***80]** Project maintenance, the contention does not withstand scrutiny. In December 1947, Monterey entered into an indemnity agreement with Santa Cruz, San Benito and Santa Clara Counties. Just two months before

Monterey executed that agreement, MCWRA's predecessor, the Monterey County Flood Control and Water Conservation District, had given its assurance to the federal government that it, along with the other local interests, would maintain and operate the Project as the Corps required. This assurance is the "resolution marked Exhibit 'A' " in the following excerpt from the indemnity agreement that Monterey executed: "each County assumes to itself the sole obligation and responsibility occasioned by the adoption of the resolution marked Exhibit 'A,' for that portion of the project which is to be constructed within it's [*sic*] boundaries and being bound to each other County to hold them and each of them harmless and free from any liability or obligation arising by reason of the adoption of the resolution marked Exhibit 'A' as to that portion of said project within it's [*sic*] own boundaries; *meaning that each County will take care of the assurances given and obligations incurred* **[***81]** *by reason of the resolution marked Exhibit 'A' insofar as they relate to that part of the project being constructed within it's* [*sic*] *boundaries.*" [11] (Italics added.) The plain language of this agreement supports the conclusion that Monterey assumed responsibility for the Project's operation and maintenance.

In practice, Monterey did exercise control over the Project by virtue of its financial control over MCWRA. Monterey and MCWRA and its predecessor district have always shared a common board of supervisors and common boundaries. [12] **HN28**[↑] County **[***82]** employees are considered ex officio employees of MCWRA and are required to perform the same duties for MCWRA that they perform for Monterey. (Stats. 1990, ch. 1159, § 16, p. 4841, West's Ann. Wat.--Appen., *supra*, § 52-16; Stats. 1947, ch. 699, §§ 2, 7, 8, pp. 1739, 1744 [repealed], West's Ann. Wat.--Appen., former §§ 52-2, 52-7, 52-8. **[**71]** Although Monterey and MCWRA are **[*764]** separate entities, the fact that they had governing boards, employees, and boundaries in common is relevant to the analysis. **HN29**[↑] "[C]ommon governing boards do not invariably indicate county control, but certainly that fact is relevant to the inquiry." (*Rider v. County of San Diego* (1991) 1 Cal. 4th 1, 12, [2 Cal. Rptr. 2d 490, 820 P.2d 1000] (*Rider I*).) Here, we find it significant because of the financial connection between the two entities.

Monterey financial statements reported MCWRA financial activity as if MCWRA was a part **[***83]** of the county. The statements expressly state that they do not report the financial activity of those agencies over which Monterey cannot impose its will or with which Monterey does not share a financial benefit, burden relationship. By implication, the inclusion of MCWRA on Monterey's financial statements means that Monterey itself considers that it is able to impose its will on MCWRA, and that there does exist a financial benefit, burden relationship between Monterey and MCWRA.

Further evidence of Monterey's control is the fact that MCWRA never had a revenue source, independent of the county's financial resources, that was sufficient to fulfill its promise to operate and maintain the Project. At least since 1974 MCWRA had entirely neglected the Project channel in favor of maintaining the levees because there was not enough money to do both. The main reason funding was so limited was that MCWRA's funding for the Project came from "Zone 1," the geographical area directly served by the Project. Zone 1 consists largely of agricultural land and the little town of Pajaro. Since the geographical area is relatively small and the town of Pajaro is economically disadvantaged, the revenue **[***84]** -generating

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[11] Monterey argues in its opening brief that its execution of the indemnity agreement was probably a mistake, and that the water district should have executed it instead. Although Monterey insisted throughout the proceedings below that it was an improper defendant, it never argued that it might have executed the agreement by mistake. There is no direct evidence in the record to support this argument, and we decline to consider it for the first time on appeal.

[12] Although MCWRA is also governed by an appointed board of directors, that board did not come into being until the 1990 Water Resources Act. (Stats. 1991, ch. 1130, §§ 5, 10, pp. 5440, 5442, West's Ann. Wat.--Appen. (1999 ed.) §§ 52-48, 52-53.)

potential of Zone 1 is and always has been very limited. Therefore, the only way MCWRA could have afforded to undertake the needed maintenance of the Project was to depend upon assistance from the county.

There is no dispute that Monterey's board of supervisors was aware of the maintenance needs of the Project, and the risk of flooding that it posed. From time to time, the board allocated money from its general fund for other programs and projects undertaken by MCWRA. Although Supervisor Del Piero, who represented the district that included Zone 1, attempted several times during the 1970's and 1980's to have Monterey's board make allocations to augment MCWRA's Zone 1 funding, he was, for the most part, unsuccessful.

Monterey cites *Galli v. State of California* (1979) 98 Cal. App. 3d 662, [159 Cal. Rptr. 721] (*Galli*) in support of its contention that an entity cannot substantially participate if it has done nothing. In *Galli*, the local levee maintenance district was liable in tort and inverse condemnation for flood **[*765]** damage resulting from the failure of a levee. The plaintiffs argued that State should also be liable because it had substantially participated **[***85]** in the levee maintenance. The plaintiffs based their argument primarily upon the assertion that the levee was part of a comprehensive water resource development system under the general control of State and State knew that the levee had maintenance problems. (*Id.* at p. 688.) The appellate court rejected the plaintiffs' argument on the ground, among others, that the levee in question was a nonproject levee. A nonproject levee was not required to be maintained to State or federal standards and was not inspected by State, and, consequently, was not under the general control of State as far as its maintenance was concerned. For that **[**72]** reason, State's knowledge of the maintenance problems was not enough to establish substantial participation. (*Id.* at pp. 681, 688.) *Galli* is distinguishable because, as we have explained, Monterey's actual knowledge of the maintenance problems was coupled with its actual ability to control Project maintenance. [13]

[*86]** Monterey argues that it never had any obligation to maintain the Project or any obligation to fund MCWRA to do so. The Supreme Court rejected a similar argument long ago in *Shea v. City of San Bernardino* (1936) 7 Cal. 2d 688, [62 P.2d 365]. In that case the city argued that it was powerless to fix a dangerous condition that existed in a railroad crossing because the Railroad Commission had exclusive jurisdiction over its right of way. The Supreme Court held "the improvement of streets within the boundaries of a city is an affair in which the city is vitally interested. The governing board and officers of the municipality in dealing with such an affair may not complacently declare that they were powerless over a long period of years to take any steps to remedy a defective and dangerous condition that existed in one of the principal streets of the city." (*Id.* at p. 693.) The court's rationale in that individual personal injury matter applies with even greater force where the risk threatens an injury such as that which occurred here.

The constitutional basis for all takings jurisprudence supports a finding of liability in these circumstances. That is, **[***87]** HN30[↑] the owner of private property ought not to contribute more than his or her proper share to the public undertaking. The purpose of article I, section 19 is to distribute throughout the community the loss that would otherwise fall upon the individual. (*Holtz, supra*, 3 Cal. 3d at p. 303.) If Monterey had chosen to fund maintenance efforts to the degree that Mr. Madruga and Supervisor Del Piero determined was necessary, the **[*766]** flood would not have occurred. In failing to expend funds on the Project, Monterey benefited the ultimate recipients of those

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[13] Monterey also cites ***Rider I, supra*, 1 Cal. 4th 1, *Vanoni v. County of Sonoma* (1974) 40 Cal. App. 3d 743, [115 Cal. Rptr. 485]**, and ***Rider v. County of San Diego* (1992) 11 Cal. App. 4th 1410, [14 Cal. Rptr. 2d 885]**. These cases involved certain constitutional taxing and debt limitation requirements and were decided on facts vastly different than those before us. We find them inapposite.

funds and took the risk that plaintiffs would be harmed as a result. Therefore, it is proper now to require the county to bear its share of the loss these plaintiffs incurred.

D. DISPOSITION

The judgment is affirmed.

Elia, J., and Wunderlich, J., concurred.

A petition for a rehearing was denied July 23, 2002, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied September 18, 2002. George, C. J., and Baxter, J., did not participate therein.

Howard Jarvis Taxpayers Ass'n v. City of Salinas

Court of Appeal of California, Sixth Appellate District

June 3, 2002, Decided

No. H022665.

Reporter

98 Cal. App. 4th 1351 *; 121 Cal. Rptr. 2d 228 **; 2002 Cal. App. LEXIS 4198 ***; 2002 Cal. Daily Op. Service 4853; 2002 Daily Journal DAR 6161

HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Plaintiffs and Appellants, v. CITY OF SALINAS et al., Defendants and Respondents.

Subsequent History: [*1]** Rehearing Denied July 2, 2002.

Review Denied August 28, 2002, Reported at: 2002 Cal. LEXIS 5938.

Prior History: Superior Court of Monterey County. Super. Ct. No. M45873. Richard M. Silver, Judge.

Disposition: The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Core Terms

storm drain, sewer, storm water, property-related, facilities, parcel, surface, runoff, sanitary, storm, property owner, services, voter, industrial waste, surface water, water service, sewer system, drainage, storm drainage system, drainage system, sewer service, city council, proportional, impervious, pollutants, ordinance, carries, defines

Case Summary

Procedural Posture

Plaintiff taxpayers filed a complaint under Cal. Code Civ. Proc. § 863 to determine the validity of a storm drainage fee imposed by defendant city. The Monterey County Superior Court (California) ruled that the fee did not violate Cal. Const. art. XIIID, § 6. The taxpayers appealed.

Overview

The city adopted ordinances and a resolution imposing a storm water management utility fee that was imposed on the owners of every developed parcel of land within the city. The storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it was discharged into natural bodies of water. The appellate court found that: (1) Cal. Const. art. XIIID, § 6, required the city to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of the affected area because the fee was not exempt as a water service; and (2) the trial court therefore erred in ruling that Salinas, Cal., Ordinance 2350, 2351, and Salinas, Cal., Resolution 17019 were valid exercises of authority by the city council.

Outcome

The judgment of the superior court was reversed.

LexisNexis® Headnotes

Governments > State & Territorial Governments > Elections

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN1[] State & Territorial Governments, Elections

The Right to Vote On Taxes Act, Cal. Const. art. XIIID, § 6, requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. Cal. Const. art. XIIID, § 6 (a)(2).

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN2[] State & Local Taxes, Real Property Taxes

See Cal. Const. XIIID, § 6(c).

Communications Law > Overview & Legal Concepts > Ownership > General Overview

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN3[] Overview & Legal Concepts, Ownership

Cal. Const. art. XIIID, § 2(e), defines a "fee" under the article as a levy imposed upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

Communications Law > Overview & Legal Concepts > Ownership > General Overview

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN4[] Overview & Legal Concepts, Ownership

A "property-related service" is a public service having a direct relationship to property ownership. Cal. Const. art. XIIID, § 2(h).

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN5[] State & Local Taxes, Real Property Taxes

Salinas, Cal., Resolution 17019 plainly establishes a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the city. The resolution expressly states that each owner and occupier of a developed lot or parcel of real property within the city, is served by the city's storm drainage facilities and burdens the system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property should therefore pay for the improvement, operation and maintenance of such facilities. Accordingly, the resolution makes the fee applicable to each and every developed parcel of land within the city.

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN6[] State & Local Taxes, Real Property Taxes

Cal. Proposition 218, § 5, specifically states that the provisions of the Right to Vote On Taxes Act, Cal. Const. art. XIIID, § 6, shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Governments > Legislation > Interpretation

HN7[] Legislation, Interpretation

The appellate court is obligated to construe constitutional amendments in accordance with the

natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

Tax Law > ... > Personal Property Taxes > Exemptions > General Overview

HN8[↓] Personal Property Taxes, Exemptions

The exception in Cal. Const. art. XIIID, § 6(c), applies to fees for sewer, water, and refuse collection services.

Governments > Legislation > Interpretation

HN9[↓] Legislation, Interpretation

The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

Governments > Legislation > Interpretation

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN10[↓] Legislation, Interpretation

Exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage.

Governments > Legislation > Interpretation

HN11[↓] Legislation, Interpretation

Cal. Gov't Code § 53750 is enacted to explain some of the terms used in Cal. Const. art. XIIIC, XIIID, and defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

Headnotes/Syllabus

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

A taxpayers association filed an action against a city alleging that a storm drainage fee, which was imposed by the city for the management of storm water runoff from the impervious areas of each parcel in the city, was a property-related fee that required voter approval under Prop. 218 (Cal. Const., art. XIII D, § 6, subd. (c)). The trial court entered judgment for the city, finding that the fee was not property related and that it was exempt from the voter-approval requirement because it was related to sewer and water services. (Superior Court of Monterey County, No. M45873, Richard M. Silver, Judge.)

The Court of Appeal reversed. The court held that the fee was property related and subject to the voter approval requirement. The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property-related. (Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1a)[↓] (1a) CA(1b)[↓] (1b)

Drains and Sewers § 3—Fees and Assessments—Storm Drain Fee—Application of Voter Approval Requirement for Property-related Fees: Property Taxes § 7.8—Special Taxes.

--A storm water management fee resolution established a property-related fee for a property-related service, the management of storm water runoff from the impervious areas of each parcel in the city, and thus required voter approval under Prop. 218 (Cal. Const., art. XIII D, § 6, subd. (c)). The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property related. The fee did not come within the exception related to sewer and water services. Giving the constitutional provision the required liberal construction, and applying the principle that exceptions to a general rule of an enactment must be strictly construed, "sewer services" must be given its narrower, more common meaning applicable to sanitary sewerage, thus excluding storm drainage. Also, the average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants and discharges it.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 109C.]

CA(2)[↓] (2)

Constitutional Law § 12—Construction—Ordinary Language—Amendments.

--Courts are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

Counsel: Timothy J. Morgan; Jonathan M. Coupal and Timothy A. Bittle for Plaintiffs and Appellants.

James C. Sanchez, City Attorney; Richards, Watson & Gershon, Mitchell E. Abbott and Patrick K. Bobko for Defendants and Respondents.

Judges: Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.

Opinion by: Elia

Opinion

[*1352] [229] ELIA, J.**

In this "reverse validation" action, plaintiff taxpayers challenged a storm drainage fee imposed by the City of Salinas. Plaintiffs contended that the fee was a "property-related" fee requiring voter approval, pursuant to California Constitution, article XIII D, section 6, subdivision (c), which was added by the passage of Proposition 218. The trial court ruled that the fee did not violate this provision because (1) it was not a property-related fee **[*1353]** and (2) it met the exemption **[***2]** for fees for sewer and water services. We disagree with the trial court's conclusion and therefore reverse the order.

BACKGROUND

In an effort to comply with the 1987 amendments to the federal Clean Water Act (33 U.S.C. § 1251 et seq.; 40 C.F.R. § 122.26(a) et seq. (2001)), the Salinas City Council took measures to reduce or eliminate pollutants contained in storm water, which was channeled in a drainage system separate from the sanitary and industrial waste systems. On June 1, 1999, the city council enacted two ordinances to fund and maintain the compliance program. These measures, ordinance Nos. 2350 and 2351, added former chapters 29 and 29A, respectively, to the Salinas City Code. Former section 29A-3 allowed the city council to adopt a

resolution imposing a "Storm Water Management Utility fee" to finance the improvement of storm and surface water management facilities. The fee would be imposed on "users of the storm water drainage system."

On July 20, 1999, the city council adopted resolution No. 17019, which established rates for the storm and surface water management system. The resolution specifically states: "There is hereby imposed on each **[***3]** and every developed parcel of land within the City, and the owners and occupiers thereof, jointly and severally, a storm drainage fee." The fee was to be paid annually to the City "by the owner or occupier of each and every developed parcel in the City who shall be presumed to be the primary utility rate payer . . . ." The amount of the fee was to be calculated according to the degree to which the property contributed runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of "impervious area" [1] on that parcel.

[*4] [**230]** Undeveloped parcels--those that had not been altered from their natural state--were not subject to the storm drainage fee. In addition, developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services.

[*1354] On September 15, 1999, plaintiffs filed a complaint under Code of Civil Procedure section 863 to determine the validity of the fee. [2] Plaintiffs alleged that this was a property-related fee that violated article XIII D, section 6, subdivision (c), of the California Constitution because it had not been approved by a majority vote of the affected property owners or a two-thirds vote of the residents in the affected area. The trial court, however, found this provision to be inapplicable on two grounds: (1) the fee was not "property related" and (2) it was exempt from the voter-approval requirement because it was "related to" sewer and water services.

[*5]** *DISCUSSION*

Article XIII D was added to the California Constitution in the November 1996 election with the passage of Proposition 218, the Right to Vote on Taxes Act. Section 6 of article XIII D [3] **HN1**[↑] requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. (§ 6, subd. (a)(2).) The provision at issue is section 6, subdivision (c) (hereafter section 6(c)), **HN2**[↑] which states, in relevant part: "Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area."

HN3[↑] Section 2 **[***6]** defines a "fee" under this article as a levy imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (§ 2, subd. (e).) **HN4**[↑] A "property-related service" is "a public service having a direct relationship to property ownership." (§ 2, subd. (h).) **CA(1a)**[↑] **(1a)** The City maintains that the storm drainage fee is not a property-related fee, but a "user fee" which the property owner can avoid

[1] "Impervious Area," according to resolution No. 17019, is "any part of any developed parcel of land that has been modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall. This includes any hard surface area which either prevents or retards the entry of water into the soil mantle as it entered under natural conditions pre-existent to development, and/or a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions pre-existent to development."

[2] Plaintiffs are the Howard Jarvis Taxpayers Association, the Monterey Peninsula Taxpayers Association, and two resident property owners.

[3] All further unspecified section references are to article XIII D of the California Constitution.

simply by maintaining a storm water management facility on the property. Because it is possible to own property without being subject to the fee, the City argues this is not a fee imposed "as an incident of property ownership" or "for a property-related service" within the meaning of section 2.

We cannot agree with the City's position. Resolution No. 17019 HN5[↑] plainly established a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the [*1355] City. The resolution [**231] expressly stated that "each owner and occupier of a developed lot or parcel of real property within the City, is served by the City's storm drainage facilities" and burdens the [***7] system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property "should therefore pay for the improvement, operation and maintenance of such facilities." Accordingly, the resolution makes the fee applicable to "*each and every developed parcel* of land within the City." (Italics added.) This is not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, as the City suggests. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal. 4th 830, 838 [102 Cal. Rptr. 2d 719, 14 P.3d 930] [art. XIII D inapplicable to inspection fee imposed on private landlords; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal. App. 4th 79 [101 Cal. Rptr. 2d 905] [water usage rates are not within the scope of art. XIII D].)

The "Proportional Reduction" clause on which the City relies does not alter the nature of the fee as property related. [4] A property owner's operation of a private storm drain system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee [***8] nonetheless is a fee for a public service having a direct relationship to the ownership of developed property. The City's characterization of the proportional reduction as a simple "opt-out" arrangement is misleading, as it suggests the property owner can avoid the fee altogether by declining the service. Furthermore, the reduction is not proportional to the amount of services requested or used by the occupant, but on the physical properties of the parcel. Thus, a parcel with a large "impervious area" (driveway, patio, roof) would be charged more than one consisting of mostly rain-absorbing soil. Single-family residences are assumed to contain, on average, a certain amount of impervious area and are charged $ 18.66 based on that assumption.

Proposition 218 HN6[↑] specifically stated that "[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local [***9] government revenue and enhancing taxpayer consent." (Prop. 218, § 5; reprinted at Historical Notes, 2A West's Ann. Cal.Const. (2002 supp.) foll. art. XIII C, p. 38 [hereafter Historical Notes].) CA(2)[↑] (2) HN7[↑] We are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers--in this case, the voters of California--in a manner that effectuates their purpose in adopting the law. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 244-245 [149 Cal. Rptr. 239, 583 P.2d 1281]; *Arden Carmichael, Inc. v. County of Sacramento* (2000) 93 Cal. App. 4th 507, 514-515 [113 Cal. Rptr. 2d 248]; *Board of Supervisors v. Lonergan* (1980) 27 Cal. 3d 855, 863 [167 [*1356] Cal. Rptr. 820, 616 P.2d 802].) CA(1b)[↑] (1b) To interpret the storm drainage fee as a use-based charge would contravene one of the stated objectives of Proposition 218 by "frustrat[ing] the purposes of voter approval for tax increases." (Prop. 218, § 2.) We must conclude, therefore, that the storm drainage fee "burden[s] landowners *as landowners*," and is therefore subject [***10] to the voter-approval requirements of article XIII D unless an exception applies. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles,*

[4] According to the public works director, proportional reductions were not anticipated to apply to a large number of people.

supra, 24 Cal. 4th at p. 842.)

[232]** *EXCEPTION FOR "SEWER" OR "WATER" SERVICE*

As an alternative ground for its decision, the trial court found that the storm drainage fee was "clearly a fee related to 'sewer' and 'water' services." **HN8**[↑] The exception in section 6(c) applies to fees "for sewer, water, and refuse collection services." Thus, the question we must next address is whether the storm drainage fee was a charge *for* sewer service or water service.

The parties diverge in their views as to whether the reach of California Constitution, article XIII D, section 6(c) extends to a storm drainage system as well as a sanitary or industrial waste sewer system. The City urges that we rely on the "commonly accepted" meaning of "sewer," noting the broad dictionary definition of this word. [5] **[***11]** The City also points to Public Utilities Code section 230.5 and the Salinas City Code, which describe storm drains as a type of sewer. [6]

Plaintiffs "do not disagree that storm water is carried off in storm sewers," but they argue that we must look beyond mere definitions of "sewer" to examine the legal meaning in context. Plaintiffs note that the storm water management system here is distinct from the sanitary sewer system and the industrial waste management system. Plaintiffs' position echoes that of the **[*1357]** Attorney General, who observed that several California **[***12]** statutes differentiate between management of storm drainage and sewerage systems. [7] (81 Ops.Cal.Atty.Gen. 104, 106 (1998).) Relying extensively on the Attorney General's opinion, plaintiffs urge application of a different rule of construction than the plain-meaning rule; they invoke the maxim that "if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted." (*In re Marquis D.* (1995) 38 Cal. App. 4th 1813, 1827 [46 Cal. Rptr. 2d 198].) Thus, while section 5, which addresses assessment procedures, refers to exceptions specifically **[**233]** for "*sewers*, water, flood control, [and] *drainage systems*" (italics added), the exceptions listed in section 6(c) pertain only to "sewer, water, and refuse collection services." Consequently, in plaintiffs' view, the voters must have intended to exclude drainage systems from the list of exceptions to the voter-approval requirement.

[*13]** The statutory construction principles invoked by both parties do not assist us. The maxim proffered by plaintiffs, "although useful at times, is no more than a rule of reasonable inference" and cannot control over the lawmakers' intent. (

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[5] Webster's Third New International Dictionary, for example, defines "sewer" as "1: a ditch or surface drain 2: an artificial usu. subterranean conduit to carry off water and waste matter (as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works)." (Webster's 3d New Internat. Dict. (1993) p. 2081.) The American Heritage Dictionary also denotes the function of "carrying off sewage or rainwater." (American Heritage College Dict. (3d ed. 1997) p. 1248.) On the other hand, the Random House Dictionary of the English Language (2d ed. 1987) page 1754, does not mention storm or rainwater in defining "sewer" as "an artificial conduit, usually underground, for carrying off waste water and refuse, as in a town or city."

[6] Public Utilities Code section 230.5 defines "Sewer system" to encompass all property connected with "sewage collection, treatment, or disposition for sanitary or drainage purposes, including . . . all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters." Salinas City Code section 36-2, subdivision (31) defines "storm drain" as "a sewer which carries storm and surface waters and drainage, but which excludes sewage and industrial wastes other than runoff water."

[7] For example, Government Code section 63010 specifies "storm sewers" in delimiting the scope of " '[d]rainage,' " while separately identifying the facilities and equipment used for " '[s]ewage collection and treatment.' " (Gov. Code, § 63010, subd. (q)(3), (10).) Government Code section 53750, part of the Proposition 218 Omnibus Implementation Act, explains that for purposes of articles XIII C and article XIII D " '[d]rainage system' " means "any system of public improvements that is intended to provide for erosion control, landslide abatement, or for other types of water drainage." Health and Safety Code section 5471 sets forth government power to collect fees for "services and facilities . . . in connection with its water, sanitation, storm drainage, or sewerage system."

California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal. 4th 342, 350 [45 Cal. Rptr. 2d 279, 902 P.2d 297]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal. 4th 985, 991 [73 Cal. Rptr. 2d 682, 953 P.2d 858].) On the other hand, invoking the plain-meaning rule only begs the question of whether the term "sewer services" was intended to encompass the more specific sewerage with which most voters would be expected to be familiar, or all types of systems that use sewers, including storm drainage and industrial waste. HN9[↑] The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

We conclude that the term "sewer services" is ambiguous in the context of both section 6(c) and Proposition 218 as a whole. We must keep in mind, however, the voters' **[***14]** intent that the constitutional provision be construed liberally to curb the rise in "excessive" taxes, assessments, and fees exacted **[*1358]** by local governments without taxpayer consent. (Prop. 218, §§ 2, 5; reprinted at Historical Notes, *supra*, p. 38.) Accordingly, we are compelled to resort to the principle that HN10[↑] exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage. [8] (Cf. *Estate of Banerjee* (1978) 21 Cal. 3d 527, 540 [147 Cal. Rptr. 157, 580 P.2d 657]; *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal. App. 4th 1005 [20 Cal. Rptr. 2d 658].)

The City itself treats storm drainage differently **[***15]** from its other sewer systems. The stated purpose of ordinance No. 2350 was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways. According to John Fair, the public works director, the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water. [9] **[***16]** The Salinas City Code contains requirements **[**234]** addressed specifically to the management of storm water runoff. [10] (See, e.g., Salinas City Code, §§ 31-802.2, 29-15.)

For similar reasons we cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." Government Code section 53750, HN11[↑] enacted to explain some of the terms used in articles XIII C and XIII D, defines " '[w]ater' " as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of **[*1359]** the affected area. The trial court therefore **[***17]** erred in ruling that ordinance

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[8] Sanitary sewerage carries "putrescible waste" from residences and businesses and discharges it into the sanitary sewer line for treatment by the Monterey Regional Water Pollution Control Agency. (Salinas City Code, § 36-2, subd. (26).)

[9] Resolution No. 17019 defined "Storm Drainage Facilities" as "the storm and surface water sewer drainage systems comprised [*sic*] of storm water control facilities and any other natural features [that] store, control, treat and/or convey surface and storm water. The Storm Drainage Facilities shall include all natural and man-made elements used to convey storm water from the first point of impact with the surface of the earth to a suitable receiving body of water or location internal or external to the boundaries of the City. . . ." The "storm drainage system" was defined to include pipes, culverts, streets and gutters, "storm water sewers," ditches, streams, and ponds. (See also Salinas City Code, former § 29-3, subd. (l) [defining "storm drainage system"].)

[10] Storm water under ordinance No. 2350 includes "stormwater runoff, snowmelt runoff, and surface runoff and drainage." (Salinas City Code, former § 29-3, subd. (dd).)

Nos. 2350 and 2351 and Resolution No. 17019 were valid exercises of authority by the city council.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Premo, Acting P. J., and Mihara, J., concurred.

A petition for a rehearing was denied July 2, 2002, and respondents' petition for review by the Supreme Court was denied August 28, 2002.

Div. of Occupational Safety & Health v. State Bd. of Control

Court of Appeal of California, Third Appellate District

February 19, 1987

No. C000006

Reporter

189 Cal. App. 3d 794 *; 234 Cal. Rptr. 661 **; 1987 Cal. App. LEXIS 1410 ***; 1987 OSHD (CCH) P27,921

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH, Plaintiff and Respondent, v. STATE BOARD OF CONTROL, Defendant and Respondent; ARCADE FIRE DISTRICT, Real Party in Interest and Appellant

Subsequent History: [***1] A Petition for a Rehearing was Denied March 17, 1987.

Prior History: Superior Court of Sacramento County, No. 299306, Roger K. Warren, Judge.

Disposition: The order granting the Division's petition for a writ of mandate is affirmed.

Core Terms

regulation, costs, executive order, reimbursable, mandated, occupational safety, levels, costs mandated, local agency, requires, standby, atmosphere, implements, increases, costs incurred, federal mandate, state-mandated, firefighting, subdivisions, federal government, state regulation, confined space, increased cost, respiratory, interprets, Appeals, service level, local fire, companies, districts

Case Summary

Procedural Posture

Defendant board found that Cal. Admin. Code, tit. 8, § 5144 (g), which imposed higher safety standards, created a reimbursable state mandated cost; therefore defendant approved appellant fire district's reimbursement claim. Plaintiff division sought review of defendant's decision by mandamus and the Superior Court of Sacramento County (California), granted the writ. Appellant then filed a writ of mandamus challenging the trial court's decision.

Overview

Appellant fire district filed a claim with defendant board asserting that Cal. Admin. Code, tit. 8, § 5144 (g) (Regulation), imposed additional manpower requirements upon it and other local fire protection districts and therefore it was entitled to state reimbursement under former Cal. Rev. & Tax. Code § 2231. Defendant board held that the Regulation created a reimbursable state mandated cost and approved appellant's reimbursement claim. Plaintiff division sought review of defendant's decision, by mandamus and the trial court granted its request. Appellant petitioned the court for a peremptory writ of mandate directing defendant's decision to be set aside. On appeal, the court applied the substantial evidence standard of review and affirmed the trial court's decision. The court held that since plaintiff was not required to promulgate the Regulation in order to comply with federal law, the exemption for federally mandated costs did apply. The court further found that the regulation did not mandate an increase in appellant's fire protection costs, and therefore the trial court did not err when it directed defendant to vacate its decision.

Outcome

The court affirmed the trial court's decision granting defendant board's petition for a writ mandamus. The court held that the regulation, which raised safety requirements, did not create a reimbursable interest, because the regulation did

not mandate an increase in appellant's fire protection costs.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > State & Local Taxes > Tax Law > State & Local Taxes

HN1[] Tax, State & Local Taxes

See Cal. Rev. & Tax. Code § 2207.

Governments > Legislation > Types of Statutes

HN2[] Legislation, Types of Statutes

Cal. Admin. Code, tit. 8, § 5144 (g), requires only two persons to be on the job when atmospheres immediately hazardous to life or health are encountered -- one person to stand by in a location unaffected by likely incidents and the other to encounter the dangerous atmosphere itself.

Administrative Law > Judicial Review > Standards of Review > General Overview

Labor & Employment Law > Occupational Safety & Health > Administrative Proceedings > Jurisdiction

Administrative Law > Judicial Review > Remedies > Mandamus

Administrative Law > Judicial Review > Standards of Review

Labor & Employment Law > ... > Administrative Proceedings > Judicial Review > Standards of Review

HN3[] Judicial Review, Standards of Review

In an administrative mandamus proceeding, the court is bound by the State Board of Control findings on all issues of fact within its jurisdiction which are supported by substantial evidence on the record. Cal. Gov't Code. § 17559. The interpretation of an administrative regulation, however, like the interpretation of a statute, is a question of law ultimately to be resolved by the courts.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Administrative Law > Judicial Review > Standards of Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN4[] Reviewability, Factual Determinations

Where the substantial evidence test applies, the court exercises an essentially appellate function in determining whether the administrative findings are supported by substantial evidence and the proceedings free from legal error; the scope of our appellate review is coextensive with that of the superior court.

Business & Corporate Compliance > ... > State & Local Taxes > Tax Law > State & Local Taxes

HN5[] Tax, State & Local Taxes

As defined by Cal. Rev. & Tax. § 2206, costs mandated by the federal government include any increased costs mandated upon a local agency after January 1, 1973, in order to comply with the requirements of federal statute or regulation. Although an executive order implementing a

federal law may result in federally mandated costs in this general definitional sense, former § 2253.2(b)(3), as amended in 1978 (see now Cal. Gov't. Code, § 17556 (c), provided that state reimbursement is available to a claimant if the executive order mandates costs which "exceed the mandate" of federal law or regulation.

Business & Corporate Compliance > ... > Labor & Employment Law > Occupational Safety & Health > Industry Standards

Governments > Legislation > General Overview

HN6[] Occupational Safety & Health, Industry Standards

See 29 C.F.R. § 1910.134(e)(3) (1986).

Business & Corporate Compliance > ... > Labor & Employment Law > Occupational Safety & Health > Industry Standards

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employers

Labor & Employment Law > Occupational Safety & Health > General Overview

Labor & Employment Law > Occupational Safety & Health > Administrative Proceedings > Jurisdiction

HN7[] Occupational Safety & Health, Industry Standards

By definition, regulated employers under federal OSHA do not include the political subdivisions of a state. 29 U.S.C.S § 652(5), 29 C.F.R. § 1910.2(c). On the other hand, the state OSHA broadly defines the "places of employment" over which the Division of Occupational Safety and Health of the Department of Industrial Relations exercises safety jurisdiction to include public agency employers within the state. Cal. Lab. Code § 6303 (a).

Business & Corporate Compliance > ... > Occupational Safety & Health > Administrative Proceedings > Federal Preemption

Labor & Employment Law > Occupational Safety & Health > Administrative Proceedings > Jurisdiction

Labor & Employment Law > Occupational Safety & Health > General Overview

Business & Corporate Compliance > ... > Occupational Safety & Health > Administrative Proceedings > OSHA Rulemaking

HN8[] Administrative Proceedings, Federal Preemption

Where a state chooses to adopt its own occupational safety and health plan, the federal OSHA requires as a condition for approval of the plan that the state establish and maintain a comprehensive program which extends, to the extent permitted by state law, to all employees of public agencies of the state and its political subdivisions. 29 U.S.C.S § 667(c)(6), 29 C.F.R. § 1902.3(j).) A state plan, if approved, must also provide for the development and enforcement of safety standards at least as effective as the standards promulgated under federal OSHA. 29 U.S.C.S. § 667(c)(2).) The initial decision to establish locally a federally approved plan is an option which the state exercises freely. In no sense is the state compelled to enter a compact with the federal government to extend jurisdiction over occupational safety to local government employers in exchange for the removal of federal preemption. 29 U.S.C.S. § 667(b).

Labor & Employment Law > Occupational Safety & Health > General Overview

Transportation Law > Private Vehicles > Safety Standards > Seat Belts

HN9[] Labor & Employment Law, Occupational Safety & Health

Regulation 5182 provides: (b) An approved safety belt with a life line attached or other approved device shall be used by employees wearing respiratory equipment within tanks, vessels, or confined spaces. At least one employee shall stand by on the outside while employees are inside, ready to give assistance in case of emergency. If entry is through a top opening, at least one additional employee, who may have other duties, shall be within sight and call of the stand-by employee. (c) When conditions require the wearing of respiratory equipment in a confined space, at least two men equipped with approved respiratory equipment, exclusive of the employees that may be necessary to operate blowers and perform stand-by duties, shall be on the job. One or more of the employees so equipped may be within the confined space at the same time, provided, however, that this shall not apply to tanks of less than 12 feet in diameter, when entrance is through a side manhole. Cal. Admin. Notice Register, tit. 8, Register 72, No. 6, dated Feb. 5, 1972.

Business & Corporate Compliance > ... > State & Local Taxes > Tax Law > State & Local Taxes

HN10[] Tax, State & Local Taxes

See Cal. Rev. & Tax. Code § 2207.

Headnotes/Syllabus

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted the petition of the State Division of Occupational Safety and Health challenging a decision of the State Board of Control approving the claim of a local fire control district for reimbursement, under Rev. & Tax. Code, § 2207 (state reimbursement of state-mandated local costs), for expenses incurred in maintaining additional firefighters on duty at fires requiring the use of artificial breathing devices pursuant to a regulation delineating standby and rescue procedures. The district construed the regulation as requiring, in addition to the "buddy system" pairs of firefighters with respirators it employed as a standard firefighting practice, a third standby firefighter prepared to undertake rescue of the others, if necessary. The division took the position that the regulation merely passed on nonreimbursable standards mandated by the federal government. (Superior Court of Sacramento County, No. 299306, Roger K. Warren, Judge.)

The Court of Appeal affirmed, holding that Rev. & Tax. Code, § 2207, subd. (f), which did not become effective until after the fiscal years for which reimbursement was sought, was not intended to be retroactive and could not support the claim. Turning to Rev. & Tax. Code, § 2207, subd. (c), which was in effect during those fiscal years, the court deferred to the division's interpretation of the regulation, concluding that, so construed, it did not require the district to increase its respirator-equipped manpower; rather, it contemplated that one firefighter so equipped be maintained on standby, whether two "buddies" or a single firefighter entered the hazardous atmospheres to which the regulation applied. Thus, the court held that the district sought reimbursement for its own interpretation that the "buddy system" was a minimum standard to which the standby requirement had been added, not an express state mandate that three firefighters be deployed at every hazardous-atmosphere fire. (Opinion by Puglia, P. J., with Regan and Sparks, JJ., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

CA(1)[↓] (1)

Mandamus and Prohibition § 74—Mandamus—Review—Administrative Regulation.

--The interpretation of an administrative regulation, like the interpretation of a statute, is a question of law ultimately to be resolved by the courts. Where the substantial evidence test applies, the superior court exercises an essentially appellate function in determining whether the administrative findings are supported by substantial evidence and the proceedings are free from legal error. The scope of the Court of Appeal's review is coextensive with that of the superior court.

CA(2)[↓] (2)

Fires and Fire Districts § 2—Statutes and Ordinances—Occupational Safety and Health—Reimbursement of State-mandated Local Costs.

--The 1974 legislative finding of federal mandate underlying the state Occupational Safety and Health Act (Lab. Code, § 6300 et seq.) has been superseded by former Rev. & Tax. Code, § 2253, subds. (b) and (c), as amended, and does not in and of itself preclude an administrative finding that there is no federal mandate preventing reimbursement to a local fire district for state-mandated costs.

CA(3a)[↓] (3a) CA(3b)[↓] (3b)

Fires and Fire Districts § 2—Statutes and Ordinances—Health and Safety Regulations—State-mandated Local Costs—Federally Mandated Costs.

--Because the state was not required to promulgate a health and safety regulation requiring certain manpower and equipment minimums for firefighting in hazardous atmospheres in order to comply with federal law, the exception for federally mandated costs, to the requirement that the state reimburse local agencies for costs incurred by compliance with state-mandated standards, did not apply to a local fire district's claim for reimbursement for the costs of compliance with the state regulation.

CA(4)[↓] (4)

Labor § 6—Regulation of Working Conditions—Occupational Safety and Health Regulations—Federal Preemption.

--Under § 667 of the federal Occupational Safety and Health Act (OSHA) (29 U.S.C. § 651 et seq.), California is preempted from regulating matters covered by the federal OSHA standards unless the state has adopted a federally approved plan. The federal law does not, however, confer federal power upon a state that has adopted such a plan. It merely removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health. There is no indication in the language of the act that a state with an approved plan may not establish more stringent standards than those developed by the federal OSHA, or grant to its own occupational safety and health agency more extensive jurisdiction than that enjoyed by the federal OSHA.

CA(5)[↓] (5)

State of California § 11—Fiscal Matters—Reimbursement of Local Governments—Reimbursement for Increased Program Levels.

--State regulations that do not increase program levels above those required prior to January 1, 1973, do not result in "costs mandated by the state" within the meaning of Rev. & Tax. Code, § 2207, subd. (c), which requires that the state reimburse

local governments for costs incurred in meeting state mandates.

CA(6)[] (6)

State of California § 11—Fiscal Matters—Reimbursement of Local Governments for State-mandated Costs—Statute—Construction—Retroactivity of Amendments.

--The 1980 amendment to Rev. & Tax. Code, § 2207 (reimbursement of local agency for "costs mandated by the state"), was substantive in nature, rather than procedural or remedial, since it significantly expanded the situations in which a claimant could seek reimbursement for such costs. Nothing in the legislative history of the 1980 amendment expressed a legislative intent that the amendment's provisions be applied retroactively. A statute affecting substantive rights is presumed not to have retrospective application unless the courts can clearly discern from the express language of the statute or extrinsic interpretive aids that the Legislature intended otherwise.

CA(7)[] (7)

State of California § 11—Fiscal Matters—Reimbursement of Local Governments—State-mandated Costs—Retroactivity.

-- Rev. & Tax. Code, § 2207, subd. (f), which provides for state reimbursement of local governmental agencies for costs incurred as a result of enactments after January 1, 1973, that remove options previously available to such agencies, thereby increasing program or service levels, or that prohibit specific activities with the result that such agencies use more costly alternatives, applies prospectively only to costs incurred by local agencies after its effective date, by Jan. 1, 1981. The statute cannot support a claim for reimbursement arising before its effective date.

CA(8)[] (8)

Statutes § 31—Construction—Language—Words and Phrases—Singular and Plural.

--As a general rule of construction, words used in the singular include the plural and vice versa.

CA(9)[] (9)

Statutes § 44—Construction—Aids—Contemporaneous Administrative Construction—Ambiguous Statutes.

--In view of inherent ambiguities in a regulation of the state Division of Occupational Safety and Health (Division) delineating firefighting manpower and equipment safety and health standards, the interpretation given the regulation by the Division, which is charged with its enforcement, was entitled to great weight. Thus, it was proper to defer to that agency's interpretation that the regulation requires the presence of only two persons using respiratory equipment in work places involving hazardous atmospheres, not withstanding that the State Board of Control, in ruling on a claim of reimbursement, had adopted a different interpretation.

CA(10)[] (10)

Fires and Fire Districts § 2—Statutes and Ordinances—Hazardous Atmospheres Regulations—Standby Regulation—State-mandated Costs.

--Increased local program levels, such as would be reimbursable by the state under Rev. & Tax. Code, § 2207, subd. (c), were not mandated by the adoption of hazardous atmospheres firefighting regulations by the Division of Occupational Safety and Health. Although division inspectors previously gave firefighting agencies the impression that three-person teams equipped with respirators would be required, rather than the standard-practice two-person teams, the practice of

continuing to use the two-person teams while adding a third to stand by was a choice made by local fire districts. The regulation did not expressly require three-person teams, and no agency had been cited for failure to use them. Verbal exchanges between regulators and the agencies do not rise to the level of a legislative mandate or official policy.

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Judges: Opinion by Puglia, P. J., with Regan and Sparks, JJ., concurring.

Opinion by: PUGLIA

Opinion

[*797] [663]** In this appeal we consider whether a safety regulation promulgated by the Division of Occupational Safety and Health (Division) of the Department of Industrial Relations mandates increased costs to local **[*798]** government such that they are reimbursable under the provisions of Revenue and Taxation Code section 2201 et seq. [1] With respect to the period of time in issue, we conclude that the regulation does not create reimbursable state-mandated costs.

[*2]** On October 8, 1980, Arcade Fire District (Arcade) filed a test claim with the State Board of Control (Board) asserting that title 8, section 5144, subdivision (g), of the California Administrative Code (hereafter referred to as Regulation) imposed additional manpower requirements upon it and other local fire protection districts beyond service levels required prior to January 1, 1973. [2] A local governmental agency (§ 2211), Arcade sought state reimbursement under former section 2231. (Repealed Stats. 1986, ch. 879, § 23; see now Gov. Code, § 17561.) Arcade claimed it incurred additional manpower costs during **[**664]** fiscal years 1978-1979 and 1979-1980 as a result of Regulation 5144, subdivision (g), and that these costs were mandated by the state within the meaning of section 2207.

[*3]** HN1[↑]

Section 2207 defines reimbursable "'Costs mandated by the state.'" They include "any increased costs which a local agency is required to incur as a result of . . . (c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973." An "'executive order'" includes a regulation issued by a state agency such as the Division (§ 2209, subd. (c)). Specifically excluded from the definition of "'[costs] mandated by the State'" are "'[costs] mandated by the federal government'" as defined in section 2206 and former section 2253.2, subdivision (b)(3) (repealed Stats. 1986, ch. 879, § 41; see now Gov. Code, § 17556, subd. (c)).

Regulation 5144, subdivision (g), was first adopted by the Division effective August 11, 1974. As amended effective October 14, 1978, the regulation provides: "In atmospheres immediately hazardous to life or health, at least two persons equipped with approved respiratory equipment shall be on the job. Communications shall be maintained between both or all individuals present. Standby persons, **[***4]** at least one of which shall be in a location which **[*799]** will not be affected by any likely incidents, shall be present with suitable rescue

[1] All references to sections or former sections of an unspecified code are to the Revenue and Taxation Code.

[2] In 1985, administrative jurisdiction to hear and decide claims for reimbursement of state-mandated costs was transferred from the State Board of Control to the newly created Commission on State Mandates. (Gov. Code, § 17500 et seq.)

equipment including self-contained breathing apparatus." [3]

At the administrative hearing, Arcade established that it has always adhered to a practice, known as the "buddy system," whereby two firefighters enter a burning structure together. Arcade also presented evidence that the buddy system is considered essential to the safety of both firefighters and the public and is practiced by firefighting agencies nationwide. Prior to the 1974 effective date of Regulation 5144, subdivision (g), Arcade was unaware of any standby requirement and used only two-person teams in its engine companies. After its effective date, Arcade interpreted the regulation to mandate a minimum firefighting team **[***5]** of at least three persons equipped with respiratory equipment, one of whom was required to stand by outside a burning structure while the other two operated together under the "buddy system." In support of this interpretation, Arcade presented evidence that Division inspectors had previously informed local fire protection districts that Regulation 5144, subdivision (g), requires a minimum of three fire fighters at the scene.

In opposition to Arcade's claim, the Division maintained that any costs incurred as a result of Regulation 5144, subdivision (g), were federally mandated because the state regulation merely implemented a federal regulation under the 1979 Federal Occupational Safety and Health Act. (29 U.S.C. § 651 et seq.) Even if a state mandate were involved, the Division contended, Arcade's interpretation of the regulation was erroneous. In the Division's view, HN2[↑] Regulation 5144, subdivision (g), requires only two persons to be on the job when atmospheres immediately hazardous to life or health are encountered -- one person to stand by in a location unaffected by likely incidents and the other to encounter the dangerous atmosphere itself. While the Division would certainly **[***6]** encourage the use of three-person teams at the option of local fire districts, it takes the position that additional manpower is neither mandated by the express language of the regulation nor, as a matter of official policy, a firefighting standard which the Division seeks to enforce.

The Board found the regulation created a reimbursable state-mandated cost and approved Arcade's claim. The Board apparently concluded the regulation did not "explicitly require three-person companies" but considered its effect nonetheless "was to remove the previously existing option of public fire departments to deploy two-person **[**665]** companies," and that this requirement "exceeded federal and prior state safety regulations."

[*800] The Division sought mandamus to review the Board's ruling. (See former § 2253.5 repealed Stats. 1986, ch. 879, § 44; see now Gov. Code, § 17559; Code Civ. Proc., § 1094.5.) The superior court found the Board had abused discretion in allowing Arcade's claim and issued a peremptory writ of mandate directing the Board to set aside its decision.

Arcade appeals from the order granting the Division mandamus relief. In challenging the court's conclusion that **[***7]** Regulation 5144, subdivision (g), did not create state-mandated costs, Arcade contends the court (1) applied the wrong standard of review, (2) improperly considered new evidence and legal issues which were not presented at the administrative hearing, and (3) erred in ruling that section 2207, subdivision (f), did not apply.

I

Preliminarily, we set forth the applicable standard of review. HN3[↑] In an administrative mandamus proceeding, we are bound by the Board's findings on all issues of fact within its jurisdiction which are supported by substantial evidence on the record. (See former § 2253.5; Gov. Code, § 17559.) CA(1)[↑] **(1)** The interpretation of an administrative regulation, however, like the

[3] The 1978 amendment deleted from the last sentence the concluding clause "in accordance with Section 5182, Confined Spaces," which had been included in the original version in 1974.

interpretation of a statute, is a question of law ultimately to be resolved by the courts. (*Carmona* v. *Division of Industrial Safety* (1975) 13 Cal.3d 303, 310 [118 Cal.Rptr. 473, 530 P.2d 161]; *Skyline Homes, Inc.* v. *Occupational Safety & Health Appeals Bd.* (1981) 120 Cal.App.3d 663, 669 [174 Cal.Rptr. 665]; see also *People* ex rel. *Fund American Companies* v. *California Ins. Co.* (1974) 43 Cal.App.3d 423, 431 [117 Cal.Rptr. 623].)

HN4[↑] Where the substantial evidence test applies, **[***8]** the superior court exercises an essentially appellate function in determining whether the administrative findings are supported by substantial evidence and the proceedings free from legal error; the scope of our appellate review is coextensive with that of the superior court. (*Bank of America* v. *State Water Resources Control Bd.* (1974) 42 Cal.App.3d 198, 207 [116 Cal.Rptr. 770]; *City of Sacramento* v. *State of California* (1984) 156 Cal.App.3d 182, 190 [203 Cal.Rptr. 258], disapproved on other grounds in *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 58, fn. 10 [233 Cal.Rptr. 38].; see also *Swaby* v. *Unemployment Ins. Appeals Bd.* (1978) 85 Cal.App.3d 264, 269 [149 Cal.Rptr. 336].) We therefore focus our review on the administrative proceedings, declining to consider specific claims of error committed by the superior court.

We shall also consider, as a preliminary matter, whether a federal mandate or an equally or more restrictive pre-1973 state regulation exists which would **[*801]** bar Arcade's claim for reimbursement. (See §§ 2206; 2207, subds. (c), (f); former § 2253.2, subd. (b)(3).) Although these legal theories may **[***9]** not have been thoroughly developed by the Division in the administrative proceedings, we are not foreclosed from addressing them on appeal. (See *City of Merced* v. *State of California* (1984) 153 Cal.App.3d 777, 781 [200 Cal.Rptr. 642]; *Frink* v. *Prod* (1982) 31 Cal.3d 166, 170-171 [181 Cal.Rptr. 893, 643 P.2d 476].) Such consideration will not involve receipt of evidence not before the Board. The Board found Regulation 5144, subdivision (g), exceeded the requirements of both federal and pre-1973 state safety regulations. Our review necessarily requires that we take judicial notice of any statutes and published administrative regulations which impact upon the contentions of the parties. (See Evid. Code, § 451, subds. (a), (b); Gov. Code, § 11343.6; 44 U.S.C. § 1507.) In any event, Arcade is not prejudiced by our consideration of these issues on appeal because, as will appear, we reject the Division's arguments that a federal mandate or a pre-1973 state regulation bars Arcade's claim.

II

CA(2)[↑] **(2)** The California Occupational Safety and Health Act (state OSHA; Lab. Code, **[**666]** § 6300 et seq.), from which the Division derives its regulatory authority, was enacted **[***10]** in 1973 (Stats. 1973, ch. 993, §§ 39-107) as a state plan under the Federal Occupational Safety and Health Act of 1970 (federal OSHA; see 29 U.S.C. § 667). In 1974, an uncodified amendment to state OSHA was enacted which provided: "Notwithstanding Section 2231 of the Revenue and Taxation Code [providing for reimbursement to local governments for state-mandated costs], there shall be no reimbursement pursuant to this section . . . because the Legislature finds that this act and any executive regulations or safety orders issued pursuant thereto merely implement federal law and regulations." (Stats. 1974, ch. 1284, § 36, adding § 106 to ch. 993 of the Stats. of 1973.) [4] However, this legislative disclaimer of any reimbursable mandate with respect to state OSHA and regulations thereunder is not controlling here. Former section 2253, subdivisions (b) and (c) as amended (Stats. 1978, ch. 794, § 6; repealed Stats. 1986, ch. 879, § 40), permitted reimbursement claims for costs incurred after January 1, 1978, under an executive order or a bill chaptered after January 1, 1973, even though the bill or executive order contained a

[4] Chapter 993 of Statutes 1973 already had a section 106 as part of the original enactment. The original section 106 disclaimed any obligation to reimburse local costs incurred in complying with state OSHA "because the cost of implementing this act is minimal on a statewide basis in relation to the effect on local tax rates." (P. 1954.)

provision making inoperative former section 2231. Thus [***11] the legislative finding of federal mandate underlying [*802] state OSHA (Stats. 1974, ch. 1284, § 36) has been superseded and does not in and of itself preclude a finding such as the Board made here that there is no federal mandate preventing reimbursement of Arcade.

CA(3a)[↑] **(3a)** Having disposed of the express legislative declaration on the subject, we next consider whether state OSHA, under authority of which Regulation 5144, subdivision (g), was promulgated, in fact did no more than impose costs mandated by federal law.

HN5[↑] As defined by section 2206, "'[costs] mandated by the federal government'" include "any increased costs mandated . . . upon a local agency . . . after January [***12] 1, 1973, in order to comply with the requirements of federal statute or regulation." Although an executive order implementing a federal law may result in federally mandated costs in this general definitional sense, former section 2253.2, subdivision (b)(3), as amended in 1978 (see now Gov. Code, § 17556, subd. (c)), provided that state reimbursement is available to a claimant if the executive order mandates costs which "exceed the mandate" of federal law or regulation. (Stats. 1978, ch. 794, § 10, eff. Sept. 18, 1978.) [5]

[***13] We accept for purposes of discussion the Division's assertion that Regulation 5144, subdivision (g), simply mandates a safety standard patterned after and commensurate with a regulation promulgated under federal OSHA. Also governing the use of respirators, HN6[↑] 29 Code of Federal Regulations, section 1910.134(e)(3) (1986) reads in pertinent part: ". . . (i) In areas where the wearer, with failure of the respirator, could [**667] be overcome by a toxic or oxygen-deficient atmosphere, at least one additional man shall be present. Communications . . . shall be maintained between both or all individuals present. Planning shall be such that one individual will be unaffected by any likely incident and have the proper rescue equipment to be able to assist the other(s) in case of emergency. [para.] (ii) When self-contained apparatus or hose [*803] masks with blowers are used in atmospheres immediately dangerous to life or health, standby men must be present with suitable rescue equipment."

The federal regulation, unlike the state regulation in issue, has no applicability to local fire departments such as Arcade. HN7[↑] By definition, regulated employers under federal OSHA do not include [***14] the political subdivisions of a state. (29 U.S.C. § 652(5); 29 C.F.R. § 1910.2(c).) [6] On the other hand, the state OSHA broadly defines the "places of employment" over which the Division exercises safety jurisdiction to include public agency employers within the state. (Lab. Code, § 6303, subd. (a); see also *United Air Lines, Inc.* v. *Occupational Safety & Health Appeals Bd.* (1982) 32 Cal.3d 762, 767 [187 Cal.Rptr. 387, 654 P.2d 157].)

HN8[↑] Where a state chooses to adopt its own occupational safety and health plan, the federal OSHA requires as a condition for approval of the

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[5] Effective January 1, 1981, section 2206 was amended to limit the definition of "costs mandated by the federal government" to increased costs mandated *specifically* by the federal government upon a local agency and to exclude from that definition those costs which result from programs or services "implemented at the option of the state, . . ." (Stats. 1980, ch. 1256, § 3.) Correspondingly, subdivision (d) was added to section 2207 to include within the definition of "costs mandated by the state" any increased costs a local agency is required to incur as a result of a post-1973 executive order which implements or interprets a federal or state regulation and by such implementation or interpretation "increases program or service levels above the levels required by such federal statute or regulation." (Stats. 1980, ch. 1256, § 4; see also Gov. Code, § 17513, which excludes from "'[costs] mandated by the federal government'" "programs or services which may be implemented at the option of the state, ...") While these amendments are supportive of the conclusion we reach, we assume for present purposes they have no retrospective operation with respect to costs incurred by Arcade during fiscal years 1978-1979 and 1979-1980.

[6] Indeed, to our knowledge the federal government did not assert safety jurisdiction over "private fire brigades until federal regulations on the subject were first published in September 1980. (See 29 C.F.R. § 1910.156(a)(2) and (f)(1)(i); 45 Fed. Reg. 60706, amended May 1, 1981, 46 Fed. Reg. 24557.)

plan that the state establish and maintain a comprehensive program which extends, to the extent permitted by state law, "to all **[***15]** employees of public agencies of the State and its political subdivisions." (29 U.S.C. § 667(c)(6); 29 C.F.R. § 1902.3(j).) A state plan, if approved, must also provide for the development and enforcement of safety standards "at least as effective" as the standards promulgated under federal OSHA. (29 U.S.C. § 667(c)(2).) However, these conditions for approval do not render costs incurred by a local agency as a result of a state safety regulation federally mandated costs within the meaning of former section 2253.2, subdivision (b)(3). Clearly, the initial decision to establish locally a federally approved plan is an option which the state exercises freely. In no sense is the state *compelled* to enter a compact with the federal government to extend jurisdiction over occupational safety to local government employers in exchange for the removal of federal preemption. (29 U.S.C. § 667(b).) (Accord, *City of Sacramento* v. *State of California, supra*, 156 Cal.App.3d at pp. 194-199.)

CA(4)[↑] **(4)** In *United Air Lines, Inc.* v. *Occupational Safety & Health Appeals Bd., supra*, 32 Cal.3d 762, the court expressed this principle as follows: "Under the [29 United States Code] section **[***16]** 667 scheme, California is preempted from regulating matters covered by Fed/OSHA [Federal Occupational Safety and Health Administration] standards unless the state has adopted a federally approved plan. The section does not, however, confer federal power on a state -- like California -- that has adopted such a plan; it merely removes federal preemption so that the state may exercise its own sovereign powers **[*804]** over occupational safety and health. (See, e.g., *American Federation of Labor*, etc. v. *Marshall* (D.C.Cir. 1978) 570 F.2d 1030, 1033; *Green Mt. Power* v. *Com'r of Labor and Industry* (1978) 136 Vt. 15 [383 A.2d 1046, 1051]. See also 29 U.S.C. § 651(b)(11).) There is no indication in the language of the act that a state with an approved plan may not establish more stringent standards than those developed by Fed/OSHA (see *Skyline Homes, Inc.* v. *Occupational Safety & Health Appeals Bd.* (1981) 120 Cal.App.3d 663, 671 . . .) or grant to its own occupational safety and health agency more extensive jurisdiction than that enjoyed by Fed/OSHA." (*United Air Lines, Inc.*, supra, 32 Cal.3d at pp. 772-773.) CA(3b)[↑] **(3b)** Thus since Division was not required to promulgate **[***17]** **[**668]** Reguation 5144, subdivision (g), to comply with federal law, the exemption for federally mandated costs does not apply.

III

CA(5)[↑] **(5)** State regulations which do not *increase* program levels above the levels required prior to January 1, 1973, do not result in "costs mandated by the state" within the meaning of section 2207, subdivision (c). The Division submits that former Regulation 5182, which existed prior to 1973, provided standby personnel requirements which were equal to, if not more stringent than, those set forth in Regulation 5144, subdivision (g). A comparison of the two regulations, however, convinces us that former Regulation 5182 was limited to employees working within tanks, vessels, and similar "confined spaces" and was never intended more broadly to encompass fire fighters working in burning structures.

Subdivision (c) of former Regulation 5182 expressly required at least two persons on the job in addition to the standby employee when conditions necessitated the wearing of respiratory equipment in a confined space. [7] It was not replaced until

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[7] As pertinent here, former HN9[↑] Regulation 5182 provided: ". . . (b) An approved safety belt with a life line attached or other approved device shall be used by employees wearing respiratory equipment within tanks, vessels, or confined spaces . . . At least one employee shall stand by on the outside while employees are inside, ready to give assistance in case of emergency. If entry is through a top opening, at least one additional employee, who may have other duties, shall be within sight and call of the stand-by employee. [para.] (c) When conditions require the wearing of respiratory equipment in a confined space, at least two men equipped with approved respiratory equipment, exclusive of the employees that may be necessary to operate blowers and perform stand-by duties,

1978, when new article 108 (Regulations 5156-5159, Cal. Admin. Code, tit. 8), entitled "Confined Spaces," was added. **[***18]** (Cal. Admin. Notice Register, tit. 8, Register 78, No. 37.) We do not agree with the Division that Regulation 5182 covered fire fighters (see *Carmona* v. **[*805]** *Division of Industrial Safety, supra*, 13 Cal.3d at p. 310). Moreover, we note that the Division's reading of the regulation would undermine, if not invalidate, its alternative position that it has always required only a minimum two-person, firefighting team. Thus if Regulation 5144, subdivision (g), properly interpreted, requires a minimum of three persons as contended by Arcade, it does increase program levels above those required prior to January 1, 1973. Before we address that issue directly, we consider the rationale of the Board's decision.

[*19]** IV

The Board's approval of Arcade's claim was based on the conclusion that, although Regulation 5144, subdivision (g), did not expressly require three-person engine companies, its effect was to remove a previous option of local fire districts to use only two person companies. In so concluding, the Board apparently relied on the definition of "'[costs] mandated by the state'" as expressed in subdivision (f) rather than subdivision (c) of section 2207. Under subdivision (f), costs are mandated and reimbursable when they result from "Any . . . executive order issued after January 1, 1973, which . . . *removes an option previously available to local agencies* and thereby increases program or service levels . . . ." (Italics added.)

Because subdivision (f) did not become effective until January 1, 1981 (Stats. 1980, ch. 1256, § 4), the Division contends the Board could not retroactively apply the removal-of-an-option criterion to Arcade's October 1980 reimbursement claim for costs incurred during fiscal years 1978-1979 and 1979-1980. We agree.

CA(6)[↑] **(6)** We observe first that the amendment which added subdivisions (d) through (h) to section 2207 significantly expanded the situations in **[***20]** which a claimant could seek reimbursement for "'[costs] mandated by the state.'" (See *County of Los Angeles* v. **[**669]** *State of California* (1984) 153 Cal.App.3d 568, 572 [200 Cal.Rptr. 394].) Before 1981, the entire spectrum of state-mandated costs was confined to those defined in subdivisions (a) through (c) of section 2207. [8] As

shall be on the job. One or more of the employees so equipped may be within the confined space at the same time, provided, however, that this shall not apply to tanks of less than 12 feet in diameter, when entrance is through a side manhole." (Cal. Admin. Notice Register, tit. 8, Register 72, No. 6, dated Feb. 5, 1972.)

[8] HN10[↑] As amended, section 2207 now reads in full: "'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following:

"(a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program;

"(b) Any executive order issued after January 1, 1973, which mandates a new program;

"(c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973.

"(d) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which implements or interprets a federal statute or regulation and, by such implementation or interpretation, increases program or service levels required by such federal statute or regulation.

"(e) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which implements or interprets a statute or amendment adopted or enacted pursuant to the approval of a statewide ballot measure by the voters and, by such implementation or interpretation, increases program or service levels above the levels required by such ballot measure.

"(f) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which (i) removes an option previously available to local agencies and thereby increases program or service levels or (ii) prohibits a specific activity which results in the local agencies using a more costly alternative to provide a mandated program or service.

"(g) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which requires that an existing program or service be provided in a shorter time period and thereby increases the costs of such program or service.

"(h) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which adds new requirements to an existing optional program or service and thereby increases the cost of

the 1980 amendment necessarily increased the state's liability for **[*806]** locally incurred costs, it must be construed as substantive rather than procedural or remedial in nature. (See *Alta Loma School Dist.* v. *San Bernardino County Com. on School Dist. Reorganization* (1981) 124 Cal.App.3d 542, 553 [177 Cal.Rptr. 506].) A statute affecting substantive rights is presumed not to have retrospective application unless the courts can clearly discern from the express language of the statute or extrinsic interpretive aids that the Legislature intended otherwise. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587 [128 Cal.Rptr. 427, 546 P.2d 1371]; *Thompson* v. *Modesto City High School Dist.* (1977) 19 Cal.3d 620, 625, fn. 3 [139 Cal.Rptr. 603, 566 P.2d 237]; *Alta Loma School Dist., supra,* at p. 553.)

[*21]** Although all of the new subdivisions added by the 1980 amendment to section 2207 expressly deal with executive orders issued after January 1, 1973, nothing has been brought to our attention which would indicate the Legislature intended retroactive operation of the expanded definition to resulting costs *incurred* before the 1981 effective date of the amendment. When section 2207 was originally enacted in 1975, the Legislature provided that subdivisions (a) through (c) were "declaratory of existing law." (Stats. 1975, ch. 486, § 18.6.) However, the 1980 amendment adding subdivisions (d) through (h) conspicuously omits any such statement or other indication of retrospective application. CA(7)[↑] **(7)** Moreover, other related statutory provisions make it clear that the Legislature intended strictly to limit the time period within which a reimbursement claim may be brought for costs incurred during a prior fiscal year. (Former § 2218.5, see now Gov. Code, § 17560; former § 2231, subd. (d)(2), see now Gov. Code, § 17561, subd. **[*807]** (d)(2); former § 2253; former § 2253.8, repealed Stats. 1986, ch. 879, § 45, see now Gov. Code, § 17557.) Hence, we presume that subdivision (f) of section **[***22]** 2207 applies prospectively only to costs incurred by local agencies after its effective date, January 1, 1981, and not before. (Accord, *City of Sacramento* v. *State of California, supra,* 156 Cal.App.3d at p. 194, disapproved on other **[**670]** grounds in *County of Los Angeles* v. *State of California, supra,* 43 Cal.3d at p. 58, fn. 10.) Subdivision (f) therefore is not available to support Arcade's claim.

V

The remaining issue is whether Arcade incurred state-mandated costs within the meaning of subdivision (c) of section 2207. It will be recalled that under subdivision (c) of section 2207, reimbursable costs mandated by the state include "any increased costs which a local agency is required to incur as a result of . . . (c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973."

As recognized by the Board, the problem resides in the ambiguity of Regulation 5144, subdivision (g). No one contests the regulation's applicability to the occupation of fire fighting. CA(8)[↑] **(8)** (See fn. 9) But depending on the significance **[***23]** ascribed to certain of its language, e.g., "*In* atmospheres," "on the job," "Communications . . . between *both* or all" (italics added) and "standby persons," the regulation is reasonably susceptible to alternative interpretations: (1) at least two persons must *enter* a dangerous atmosphere, (i.e., to be "on the job" one must be "*in*" the atmosphere) while a third remains outside, (2) at least two persons must stand by (i.e., "standby persons") while others(s) perform a job in a dangerous atmosphere, [9] or (3) a total of two persons -- one active and one standing by -- is all that is required when working in a

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such program or service if the local agencies have no reasonable alternatives other than to continue the optional program."

[9] Notwithstanding the use of the plural ("standby persons"), a general rule of construction is that words used in the singular include the plural and vice versa. (See Lab. Code, § 13; Civ. Code, § 14.) Arcade does not contend the regulation requires more than one standby person.

dangerous atmosphere.

CA(9)[↑] **(9)** In view of these inherent ambiguities, the interpretation given the regulation by the Division **[***24]** as the administrative agency charged with its enforcement is entitled to great weight. (*People* v. *French* (1978) 77 Cal.App.3d 511, 521 [143 Cal.Rptr. 782]; see also *Pacific Legal Foundation* v. *Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101 111 [172 Cal.Rptr. 194, 624 P.2d 244]; *Carmona* v. *Division of Industrial Safety, supra,* 13 Cal.3d at p. 310.) We shall defer to the Division's interpretation that the **[*808]** intended meaning of the regulation, when considered generally and in the abstract, is to require the presence of only two persons using respiratory equipment in workplaces involving hazardous atmospheres. Such deference does not undercut the authority vested in the Board to determine the existence of state-mandated costs under section 2201 et seq. In the exercise of that authority the Board also owes a duty of deference to the administrative agency's interpretation of its regulation. The Board is not licensed to impress its own interpretation upon an administrative regulation in derogation of the reasonable construction of the responsible agency.

CA(10)[↑] **(10)** In this regard, Arcade contends that substantial evidence supports the conclusion that the **[***25]** practical consequence of Regulation 5144, subdivision (g), is to mandate an increase in firefighting manpower from two to three persons. Viewing as we must the evidence at the hearing in a light most favorable to Arcade, we accept as true the proposition that fire fighting agencies universally consider the two-person "buddy" system essential to the safety of the workers. We also accept as true that Division inspectors previously gave firefighting agencies the impression that three-person teams are a necessary safeguard.

It does not follow, however, that the regulation in question *mandates* an increase in "program levels above the levels *required* prior to January 1, 1973" as defined by section 2207, subdivision (c). (Italics added.) Although founded on safety reasons, the continued practice of using two fire fighters to enter a burning structure **[**671]** while adding a third to meet the requirement of a standby was a choice which rested with the local fire districts. As the Board recognized, the regulation does not expressly require three-person teams nor has the Division issued a citation for failure to use the additional manpower. Verbal exchanges between Division **[***26]** personnel and the fire districts do not rise to the level of a legislative mandate or official policy. Failing proof that it is impossible to fight fires without the use of "buddies," Arcade cannot inject its own safety standards into a state regulation and say it is a "requirement" of the state.

We conclude that Regulation 5144, subdivision (g), did not mandate an increase in Arcade's fire protection costs for the 1978-1979 and 1979-1980 fiscal years. Accordingly, there was no error in the superior court's order directing the Board to vacate its decision allowing Arcade's claim.

The order granting the Division's petition for a writ of mandate is affirmed.

End of Document

TAB 2

33 USCS § 1362

Current through PL 115-132, approved 3/9/18

United States Code Service - Titles 1 through 54 > TITLE 33. NAVIGATION AND NAVIGABLE WATERS > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL > GENERAL PROVISIONS

§ 1362. Definitions

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act [33 USCS § 1288].

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) " sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act [33 USCS § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone [15 UST § 1606].

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters.

(A) In general. The term "coastal recreation waters" means--

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) [33 USCS § 1313(c)] by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions. The term "coastal recreation waters" does not include--

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material.

(A) In general. The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions. The term "floatable material" includes--

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator. The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production. The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) Recreational vessel.

(A) In general. The term "recreational vessel" means any vessel that is--

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion. The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that--

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) Treatment works. The term "treatment works" has the meaning given the term in section 212 [33 USCS § 1292].

History

(June 30, 1948, ch 758, Title V, § 502, as added Oct. 18, 1972,P.L. 92-500, § 2, 86 Stat. 886; Dec. 27, 1977, P.L. 95-217, § 33(b), 91 Stat. 1577; Feb. 4, 1987, P.L. 100-4, Title V, §§ 502(a), 503, 101 Stat. 75; Nov. 18, 1988, P.L. 100-688, Title III, Subtitle B, § 3202(a), 102 Stat. 4154; Feb. 10, 1996, P.L. 104-106, Div A, Title III, Subtitle C, § 325(c)(3), 110 Stat. 259; Oct. 10, 2000, P.L. 106-284, § 5, 114 Stat. 875; Aug. 8, 2005, P.L. 109-58, Title III, Subtitle C, § 323, 119 Stat. 694; July 30, 2008, P.L. 110-288, § 3, 122 Stat. 2650.)

(As amended June 10, 2014,P.L. 113-121, Title V, Subtitle B, § 5012(b), 128 Stat. 1328.)

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TAB 2

33 USCS § 1342

Current through PL 115-132, approved 3/9/18

United States Code Service - Titles 1 through 54 > TITLE 33. NAVIGATION AND NAVIGABLE WATERS > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL > PERMITS AND LICENSES

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [33 USCS § 407], shall be deemed to be permits issued under this title [33 USCS §§ 1341 et seq.], and permits issued under this title [33 USCS §§ 1341 et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [33 USCS § 407], pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act [33 USCS §§ 1251 et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this

Act [33 USCS § 1314(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.]. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343];

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act [33 USCS § 1318] or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act [33 USCS § 1318];

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify

such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act [33 USCS § 1317(b)] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 [33 USCS § 1316] if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 [33 USCS § 1311] if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 [33 USCS §§ 1284(b), 1317, 1318].

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)].

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The

Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) of the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph [enacted Dec. 27, 1977], the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act [33 USCS §§ 1251 et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories. The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants. Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works. In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 309(a) of this Act [33 USCS § 1319(a)] that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 USCS § 1319].

(j) Public information. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [33 USCS §§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343], except any standard imposed under section 307 [33 USCS § 1317] for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act [33 USCS § 1311, 1316, or 1342], or (2) section 13 of the Act of March 3, 1899 [33 USCS § 407], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 [33 USCS § 407], the discharge by such source shall not be a violation of this Act [33 USCS §§ 1251 et seq.] if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement.

(1) Agricultural return flows. The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations. The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to

require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities.

(A) NPDES permit requirements for silvicultural activities. The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) Other requirements. Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 404 [33 USCS § 1344], existing permitting requirements under section 402 [33 USCS § 1342], or from any other federal law.

(C) The authorization provided in Section 505(a) [33 USCS § 1365(a)] does not apply to any non-permitting program established under 402(p)(6) [33 USCS § 1342(p)(6)] for the silviculture activities listed in 402(l)(3)(A) [33 USCS § 1342(l)(3)(A)], or to any other limitations that might be deemed to apply to the silviculture activities listed in 402(l)(3)(A) [33 USCS § 1342(l)(3)(A)].

(m) Additional pretreatment of conventional pollutants not required. To the extent a treatment works (as defined in section 212 of this Act [33 USCS § 1292]) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act [33 USCS § 1314(a)(4)] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act [33 USCS § 1317(b)(1)]. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act [33 USCS §§ 1317, 1319], affect State and local authority under sections 307(b)(4) and 510 of this Act [33 USCS §§ 1317(b)(4), 1370], relieve such treatment works of its obligations to meet requirements established under this Act [33 USCS §§ 1251 et seq.], or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program.

(1) State submission. The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage. A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval or major category partial permit programs. The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs. The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding.

(1) General prohibition. In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) [33 USCS § 1314(b)] subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) [33 USCS § 1311(b)(1)(C) or 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) [33 USCS § 1313(d)(4)].

(2) Exceptions. A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)

(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) [33 USCS § 1311(c), (g), (h), (i), (k), (n), or 1326(a)]; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act [33 USCS §§ 1251 et seq.] or for reasons otherwise unrelated to water quality.

(3) Limitations. In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 [33 USCS § 1313] applicable to such waters.

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [33 USCS § 1311].

(B) Municipal discharge. Permits for discharges from municipal storm sewers--

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

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

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

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows.

(1) Requirement for permits, orders, and decrees. Each permit, order, or decree issued pursuant to this Act [33 USCS §§ 1251 et seq.] after the date of enactment of this subsection [enacted Dec. 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance. Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report. Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels. No permit shall be required under this Act [33 USCS §§ 1251 et seq.] by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

History

(June 30, 1948, ch 758, Title IV, § 402, as added Oct. 18, 1972,P.L. 92-500, § 2, 86 Stat. 880; Dec. 27, 1977, P.L. 95-217, §§ 33(c), 54(c)(1), 65, 66, 91 Stat. 1577, 1591, 1599, 1600; Feb. 4, 1987, P.L. 100-4, Title IV, §§ 401-403, 404(a), (c) [(d)], 405, 101 Stat. 65-69; Oct. 31, 1992, P.L. 102-580, Title III, § 364, 106 Stat. 4862; Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, § 2021(e)(2), 109 Stat. 727; Dec. 21, 2000, P.L. 106-554, § 1(a)(4), 114 Stat. 2763; July 30, 2008, P.L. 110-288, § 2, 122 Stat. 2650.)

(As amended Feb. 7, 2014,P.L. 113-79, Title XII, Subtitle C, § 12313, 128 Stat. 992.)

33 USCS § 1362

Current through PL 115-132, approved 3/9/18

United States Code Service - Titles 1 through 54 > TITLE 33. NAVIGATION AND NAVIGABLE WATERS > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL > GENERAL PROVISIONS

§ 1362. Definitions

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act [33 USCS § 1288].

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) " sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act [33 USCS § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone [15 UST § 1606].

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters.

(A) In general. The term "coastal recreation waters" means--

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) [33 USCS § 1313(c)] by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions. The term "coastal recreation waters" does not include--

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material.

(A) In general. The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions. The term "floatable material" includes--

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator. The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production. The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) Recreational vessel.

(A) In general. The term "recreational vessel" means any vessel that is--

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) Exclusion. The term "recreational vessel" does not include a vessel that is subject to Coast Guard inspection and that--

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) Treatment works. The term "treatment works" has the meaning given the term in section 212 [33 USCS § 1292].

History

(June 30, 1948, ch 758, Title V, § 502, as added Oct. 18, 1972,P.L. 92-500, § 2, 86 Stat. 886; Dec. 27, 1977, P.L. 95-217, § 33(b), 91 Stat. 1577; Feb. 4, 1987, P.L. 100-4, Title V, §§ 502(a), 503, 101 Stat. 75; Nov. 18, 1988, P.L. 100-688, Title III, Subtitle B, § 3202(a), 102 Stat. 4154; Feb. 10, 1996, P.L. 104-106, Div A, Title III, Subtitle C, § 325(c)(3), 110 Stat. 259; Oct. 10, 2000, P.L. 106-284, § 5, 114 Stat. 875; Aug. 8, 2005, P.L. 109-58, Title III, Subtitle C, § 323, 119 Stat. 694; July 30, 2008, P.L. 110-288, § 3, 122 Stat. 2650.)

(As amended June 10, 2014,P.L. 113-121, Title V, Subtitle B, § 5012(b), 128 Stat. 1328.)

End of Document

TAB 3

Cal Evid Code § 452

Deering's California Codes are current through Chapter 3 of the 2018 Regular Session.

Deering's California Codes Annotated > EVIDENCE CODE > Division 4 Judicial Notice

§ 452. Matters which may be judicially noticed

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

History

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

End of Document

Cal Gov Code § 11515

Deering's California Codes are current through Chapter 3 of the 2018 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE > Title 2 Government of the State of California > Division 3 Executive Department > Part 1 State Departments and Agencies > Chapter 5 Administrative Adjudication: Formal Hearing

§ 11515. Official notice

In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

History

Added Stats 1945 ch 867 § 1.

End of Document

TAB 4

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: 10-TC-12 Water Code Division 6, Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4; Filed on June 30, 2011; By, South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, Biggs-West Gridley Water District, Claimants; *Consolidated with* 12-TC-01 Filed on February 28, 2013; California Code of Regulations, title 23, sections 597, 597.1 597.2, 597.3, and 597.4, Register 2012, No. 28; By, Richvale Irrigation District, Biggs-West Gridley Water District, Oakdale Irrigation District, Glenn-Colusa Irrigation District, Claimants.	Case Nos.: 10-TC-12 and 12-TC-01 *Water Conservation* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 5, 2014*) (*Served December 12, 2014*)

DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 5, 2014. Dustin Cooper, Peter Harman, and Alexis Stevens appeared on behalf of the claimants. Donna Ferebee and Lee Scott appeared on behalf of the Department of Finance. Spencer Kenner appeared on behalf of the Department of Water Resources. Dorothy Holzem of the California Special Districts Association and Geoffrey Neill of the California State Association of Counties also appeared on behalf of interested persons and parties.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed decision to deny the test claim by a vote of six to zero.

Summary of the Findings

The Commission finds that the two original agricultural water supplier claimants named in each test claim, Richvale Irrigation District and Biggs-West Gridley Water District, are not eligible to claim reimbursement under article XIII B, section 6, because they do not collect or expend tax revenue, and are therefore not subject to the limitations of articles XIII A and XIII B. However, two substitute agricultural water supplier claimants, Oakdale Irrigation District and Glenn-Colusa Irrigation District, are subject to articles XIII A and XIII B and are therefore claimants eligible to seek reimbursement under article XIII B, section 6. As a result, the Commission has jurisdiction to hear and determine test claims 10-TC-12 and 12-TC-01.

The Commission finds that the Water Conservation Act of 2009 (Act), and the Agricultural Water Measurement regulations promulgated by the Department of Water Resources (DWR) to implement the Act, impose some new required activities on urban water suppliers and agricultural water suppliers, including measurement requirements, conservation and efficient water management requirements, notice and hearing requirements, and documentation requirements, with specified exceptions and limitations.

However, the Commission finds that several agricultural water suppliers are either exempted from the requirements of the test claim statutes and regulations or are subject to alternative and less expensive compliance alternatives because the activities were already required by a regime of federal statutes and regulations, which apply to most agricultural water suppliers within the state.[1]

Additionally, to the extent that the test claim statute and regulations impose any new state-mandated activities, they do not impose costs mandated by the state because the Commission finds that urban water suppliers and agricultural water suppliers possess fee authority, sufficient as a matter of law to cover the costs of any new required activities. Therefore, the test claim statute and regulations do not impose costs mandated by the state pursuant to Government Code section 17556(d), and are not reimbursable under article XIII B, section 6 of the California Constitution.

COMMISSION FINDINGS

I. Chronology

06/30/2011	Co-claimants, South Feather Water and Power Agency (South Feather), Paradise Irrigation District (Paradise), Biggs-West Gridley Water District (Biggs), and Richvale Irrigation District (Richvale) filed test claim 10-TC-12 with the Commission.[2]
10/07/2011	Department of Finance (Finance) requested an extension of time to file comments, which was approved.

[1] See Public Law 102-565 and the Reclamation Reform Act of 1982 and the specific exceptions and alternate compliance provisions in the test claim statutes for those subject to these federal requirements, as discussed in greater detail in the analysis below.

[2] Exhibit A, *Water Conservation Act* Test Claim, 10-TC-12.

12/06/2011	Department of Water Resources (DWR) requested an extension of time to file comments, which was approved.
02/01/2012	DWR requested an extension of time to file comments, which was approved.
03/30/2012	DWR requested an extension of time to file comments, which was approved.
05/30/2012	DWR requested an extension of time to file comments, which was approved.
08/02/2012	DWR requested an extension of time to file comments, which was approved.
10/02/2012	DWR requested an extension of time to file comments, which was approved.
12/03/2012	DWR requested an extension of time to file comments, which was approved.
12/07/2012	Finance requested an extension of time to file comments, which was approved.
02/04/2013	DWR requested an extension of time to file comments, which was approved.
02/06/2013	Finance requested an extension of time to file comments, which was approved.
02/28/2013	Richvale and Biggs filed test claim 12-TC-01 with the Commission.[3]
03/06/2013	The executive director consolidated the test claims for analysis and hearing, and renamed them *Water Conservation.*
03/29/2013	DWR requested an extension of time to file comments, which was approved.
06/07/2013	Finance submitted written comments on the consolidated test claims.[4]
06/07/2013	DWR submitted written comments on the consolidated test claims.[5]
07/09/2013	Claimants requested an extension of time to file rebuttal comments, which was approved.
08/07/2013	Claimants filed rebuttal comments.[6]
08/22/2013	Commission staff issued a request for additional information regarding the eligibility status of the claimants.[7]
09/19/2013	Finance submitted comments in response to staff's request.[8]
09/20/2013	The State Controller's Office (SCO) submitted a request for extension of time to comments, which was approved for good cause.
09/23/2013	DWR submitted comments in response to staff's request.[9]

[3] Exhibit B, *Agricultural Water Measurement* Test Claim, 12-TC-01.

[4] Exhibit C, Finance Comments on Consolidated Test Claims.

[5] Exhibit D, DWR Comments on Consolidated Test Claims.

[6] Exhibit E, Claimant Rebuttal Comments.

[7] Exhibit F, Request for Additional Information.

[8] Exhibit G, Finance Response to Commission Request for Comments.

09/23/2013	The claimants submitted comments in response to staff's request.[10]
10/07/2013	SCO submitted comments in response to staff's request.[11]
11/12/2013	Commission staff issued a Notice of Pending Dismissal of 12-TC-01, and a Notice of Opportunity for a Local Agency, Subject to the Tax and Spend Limitations of Articles XIII A and B of the California Constitution and Subject to the Requirements of the Alleged Mandate to Take Over the Test Claim by a Substitution of Parties.[12]
11/22/2013	Co-claimants Richvale and Biggs filed an appeal of the executive director's decision to dismiss test claim 12-TC-01.[13]
11/25/2013	The executive director issued notice that the appeal would be heard on March 28, 2014.[14]
01/13/2014	Oakdale Irrigation District (Oakdale) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Dustin C. Cooper, of Minasian, Meith, Soares, Sexton & Cooper, LLP, as its representative.[15]
01/13/2014	Glenn-Colusa Irrigation District (Glenn-Colusa) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Andrew M. Hitchings and Alexis K. Stevens of Somach, Simmons & Dunn as its representative.[16]
01/15/2014	Commission staff issued a Notice of Substitution of Parties and Notice of Hearing which mooted the appeal.[17]
07/31/2014	Commission staff issued a draft proposed statement of decision.[18]
08/13/2014	South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, and Biggs West Gridley Water District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.

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[9] Exhibit H, DWR Response to Commission Request for Comments.

[10] Exhibit I, Claimant Response to Commission Request for Comments.

[11] Exhibit J, SCO Response to Commission Request for Comments.

[12] Exhibit K, Notice of Pending Dismissal.

[13] Exhibit L, Appeal of Executive Director's Decision.

[14] Exhibit M, Appeal of Executive Director Decision and Notice of Hearing.

[15] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District.

[16] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

[17] Exhibit P, Notice of Substitution of Parties and Notice of Hearing. Note that matters are only tentatively set for hearing until the draft staff analysis is issued which actually sets the matter for hearing pursuant to section 1187(b) of the Commission's regulations. Staff inadvertently omitted the word "tentative" in this notice.

[18] Exhibit Q, Draft Proposed Decision.

08/14/2014	Glenn Colusa Irrigation District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.
10/16/2014	Claimant filed comments on the draft proposed decision.[19]
10/17/2014	California Special Districts Association (CSDA) filed comments on the draft proposed decision.[20]
10/17/2014	Environmental Law Foundation (ELF)filed comments on the draft proposed decision.[21]
10/17/2014	DWR filed comments on the draft proposed decision.[22]
10/22/2014	Northern California Water Association (NCWA) filed late comments on the draft proposed decision.[23]
11/07/2014	Claimants filed late comments.[24]

II. Background

These consolidated test claims allege that Water Code Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] enacted by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) (10-TC-12) impose reimbursable state-mandated increased costs resulting from activities required of urban water suppliers and agricultural water suppliers. The claimants also allege that the Agricultural Water Measurement regulations issued by DWR (12-TC-01), codified at California Code of Regulations, title 23, sections 597-597.4, impose additional reimbursable state-mandated increased costs on agricultural water suppliers only.

The Water Conservation Act of 2009, pled in test claim 10-TC-12, calls for a 20 percent reduction in urban per capita water use on or before December 31, 2020, and an interim reduction of at least 10 percent on or before December 31, 2015.[25] In order to achieve these reductions, the Act requires urban retail water suppliers, both publicly and privately owned, to develop urban water use targets and interim targets that cumulatively result in the desired 20 percent reduction by December 31, 2020.[26] Prior to adopting its urban water use targets, each supplier is required to conduct at least one public hearing to allow community input regarding the supplier's implementation plan to meet the desired reductions, and to consider the economic

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[19] Exhibit R, Claimant Comments on Draft Proposed Decision.

[20] Exhibit S, CSDA Comments on Draft Proposed Decision.

[21] Exhibit T, Environmental Law Foundation Comments on Draft Proposed Decision.

[22] Exhibit U, DWR Comments on Draft Proposed Decision.

[23] Exhibit V, NCWA Comments on Draft Proposed Decision.

[24] Exhibit W, Claimants Late Rebuttal Comments.

[25] Water Code section 10608.16 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[26] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

impacts of the implementation plan.[27] This hearing may be combined with the hearing required under prior law (Water Code 10631) for adoption of the urban water management plan (UWMP).[28] An urban retail water supplier is also required to include in its UWMP, which is required to be updated every five years in accordance with pre-existing Water Code section 10621, information describing the baseline per capita water use; interim and final urban water use targets;[29] and a report on the supplier's progress in meeting urban water use targets.[30]

With respect to agricultural water suppliers, the Act requires implementation of specified critical efficient water management practices, including measuring the volume of water delivered to customers and adopting a volume-based pricing structure; and additional efficient water management practices that are locally cost effective and technically feasible.[31] In addition, the Act requires agricultural water suppliers (with specified exceptions)[32] to prepare and adopt, and every five years update, an agricultural water management plan (AWMP),[33] describing the service area, water sources and supplies, water uses within the service area, previous water management activities; and including a report on which efficient water management practices have been implemented or are planned to be implemented, and information documenting any determination that a specified efficient water management practice was not locally cost effective or technically feasible.[34]

Prior to preparing and adopting or updating an AWMP, the Act requires an agricultural water supplier to notify the city or county within which the supplier provides water that it will be preparing or considering changes to the AWMP;[35] and to make the proposed plan available for

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[27] Water Code section 10608.26 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[28] Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[29] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[30] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[31] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[32] See Water Code sections 10608.8(d) (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [agricultural water suppliers that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617 are exempt from the requirements of Part 2.55 (Water Code sections 10608-10608.64)]; 10608.48(f); 10828 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [an agricultural water supplier may meet requirements of AWMPs by submitting its water conservation plan approved by United States Bureau of Reclamation]; 10827 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [members of Agricultural Water Management Council and submit water management plans to council pursuant to the Memorandum of Understanding may rely on those plans to satisfy AWMP requirements]; 10829 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [adoption of an urban water management plan or participation in an areawide, regional, watershed, or basinwide water management plan will satisfy the AWMP requirements].

[33] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[34] Water Code sections 10608.48; 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[35] Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

public inspection and hold a noticed public hearing.[36] An agricultural water supplier is then required to implement the AWMP in accordance with the schedule set forth in the AWMP;[37] and to submit a copy of the AWMP to DWR and a number of specified local entities, and make the plan available on the internet, within 30 days of adoption.[38]

Finally, to aid agricultural water suppliers in complying with their measurement requirements and developing a volume-based pricing structure as required by section 10608.48, DWR adopted in 2012 the Agricultural Water Measurement Regulations,[39] which are the subject of test claim 12-TC-01. These regulations provide a range of options for agricultural water suppliers to implement accurate measurement of the volume of water delivered to customers. The regulations provide for measurement at the delivery point or farm gate of an individual customer, or at a point upstream of the delivery point where necessary, and provide for specified accuracy standards for measurement devices employed by the supplier, whether existing or new, as well as field testing protocols and recordkeeping requirements, to ensure ongoing accuracy of volume measurements.

To provide some context for how the the test claim statute and implementing regulations fit into the state's water conservation planning efforts, a brief discussion of the history of water conservation law in California follows.

A. Prior California Conservation and Water Supply Planning Requirements.

1. Constitutional and Statutory Framework of Water Conservation.

Article X, section 2 of the California Constitution prohibits the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. It also declares that the conditions in the state require "that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Moreover, article X, section 2 provides that "[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and *such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.*"[40] Although article X, section 2 provides that it is self-executing; it also provides that the Legislature may enact statutes to advance its policy.

The Legislature has implemented these constitutional provisions in a number of enactments over the course of many years, which authorize water conservation programs by water suppliers, including metered pricing. For example:

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[36] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[37] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[38] Water Code sections 10843; 10844 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[39] Code of Regulations, title 23, sections 597-597.4 (Register 2012, No. 28).

[40] Adopted June 8, 1976. Derivation, former article 14, section 3, added November 6, 1928 and amended November 5, 1974 [emphasis added].

- Water Code section 1009 provides that water conservation programs are an authorized water supply function for all municipal water providers in the state.[41]
- Water Code section 1011 furthers the water conservation policies of the state by providing that a water appropriator does not lose an appropriative water right because of water conservation programs. [42]
- Water Code sections 520 -529.7 require water meters and recognize that metered water rates are an important conservation tool.[43]
- Water Code section 375(b) provides that public water suppliers may encourage conservation through "rate structure design." The bill amending the Water Code to add this authority was adopted during the height of a statewide drought. In an uncodified portion of the bill, the Legislature specifically acknowledged that conservation is an important part of the state's water policy and that water conservation pricing is a best management practice.[44]
- Water Code sections 370-374 provide additional, alternate authority (in addition to a water supplier's general authority to set rates) for public entities to encourage conservation rate structure design consistent with the proportionality requirements of Proposition 218.[45]
- Water Code section 10631(f)(1)(K) establishes water conservation pricing as a recognized water demand management measure for purposes of UWMPs, and other conservation measures including metering, leak detection and retrofits for pipes and plumbing fixtures.[46]

In addition, the Legislature has long vested water districts with broad authority to manage water to furnish a sustained, reliable supply. For example:

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[41] Statutes 1976, chapter 709, p. 1725, section 1.

[42] Added by statutes 1979, chapter 1112, p. 4047, section 2, amended by Statutes, 1982, chapter 876, p. 3223, section 4, Statutes 1996, chapter 408, section 1, and Statutes 1999, chapter 938, section 2.

[43] Added by Statutes 1991, chapter 407 and amended by Statutes 2004, chapter 884, section 3 and Statutes 2005, chapter 22. See especially, Water Code section 521 (b) and (c)).

[44] Statutes 1993, chapter 313, section 1.

[45] Statutes 2008, chapter 610 (AB 2882). See Exhibit X, Senate Floor Analysis AB 2882; Assembly Floor Analysis AB 2882.

[46] Water Code section 10631(f)(1)(K) (Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 712 (SB 553); Stats. 2001, ch. 643 (SB 610); Stats. 2001, ch. 644 (AB 901); Stats. 2002, ch. 664 (AB 3034); Stats. 2002, ch. 969 (SB 1384); Stats. 2004, ch. 688 (SB 318); Stats. 2006, ch. 538 (SB 1852)).

- Irrigation Districts have the power to take any act necessary to furnish sufficient water for beneficial uses and to control water.[47] They have general authority to fix and collect charges for any service of the district.[48]
- County Water Districts have similar power to take any act necessary to furnish sufficient water and express authority to conserve.[49]
- Municipal Water Districts also have broad power to control water for beneficial uses and express power to conserve.[50]

2. Existing Requirements to Prepare, Adopt, and Update Urban Water Management Plans.

The Urban Water Management Act of 1983 required urban water suppliers to prepare and update an UWMP every five years.[51] This Act has been amended numerous times between its original enactment in 1983 and the enactment of the test claim statute in 2009.[52] The law pertaining to UWMPs in effect immediately prior to the enactment of the test claim statute consisted of sections 10610 through 10657 of the California Water Code, which detail the information that must be included in UWMPs, as well as who must file them.

According to the Act, as amended prior to the test claim statute, "[t]he conservation and efficient use of urban water supplies are of statewide concern; however, the planning for that use and the implementation of those plans can best be accomplished at the local level."[53] The Legislature declared as state policy that:

> (a) The management of urban water demands and efficient use of water shall be actively pursued to protect both the people of the state and their water resources.
>
> (b) The management of urban water demands and efficient use of urban water supplies shall be a guiding criterion in public decisions.

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[47] Water Code section 22075 added by Statutes 1943, chapter 372 and section 22078 added by Statutes 1953, chapter 719, p. 187, section 1.

[48] Water Code section 22280, as amended by statutes 2007, chapter 27, section 19.

[49] Water Code sections 31020 and 31021 added by Statutes 1949, chapter 274, p. 509, section 1.

[50] Water Code sections 71610 as amended by Statutes 1995, chapter 28 and 71610.5 as added by Statutes 1975, chapter 893, p. 1976, section 1.

[51] Statutes 1983, chapter 1009 added Part 2.6 to Division 6 of the Water Code, commencing at section 10610.

[52] Enacted, Statutes 1983, chapter 1009; Amended, Statutes 1990, chapter 355 (AB 2661); Statutes 1991-92, 1st Extraordinary Session, chapter 13 (AB 11); Statutes 1991, chapter 938 (AB 1869) Statutes 1993, chapter 589 (AB 2211); Statutes 1993, chapter 720 (AB 892); Statutes 1994, chapter 366 (AB 2853); Statutes 1995, chapter 28 (AB 1247); Statutes 1995, chapter 854 (SB 1011); Statutes 2000, chapter 712 (SB 553); Statutes 2001, chapter 643 (SB 610); Statutes 2001, chapter 644 (AB 901); Statutes 2002, chapter 664 (AB 3034); Statutes 2002, chapter 969 (SB 1384); Statutes 2004, chapter 688 (SB 318); Statutes 2006, chapter 538 (SB 1852); Statutes 2009, chapter 534 (AB 1465).

[53] Water Code section 10610.2 (Stats. 2002, ch. 664 (AB 3034)).

(c) Urban water suppliers shall be required to develop water management plans to actively pursue the efficient use of available supplies.[54]

The Act specified that each urban water supplier that provides water for municipal purposes either directly or indirectly to more than 3,000 customers or supplies more than 3,000 acre feet of water annually shall prepare, update, and adopt its urban water management plan at least once every five years on or before December 31, in years ending in five and zero.[55]

a. Contents of Plans

The required contents of an UWMP are provided in sections 10631 through 10635. These statutes are prior law and have not been pled in this test claim. As last amended by Statutes 2009, chapter 534 (AB 1465), section 10631 requires that an adopted UWMP contain information describing the service area of the supplier, reliability of supply, water uses over five year increments, water demand management measures currently being implemented or being considered or scheduled for implementation, and opportunities for development of desalinated water.[56] Section 10631 further provides that urban water suppliers that are members of the California Urban Water Conservation Council and submit annual reports in accordance with the "Memorandum of Understanding Regarding Urban Water Conservation in California," may submit those annual reports to satisfy the requirements of section 10631(f) and (g), pertaining to current, proposed, and future demand management measures.[57]

Section 10632 requires that an UWMP provide an urban water shortage contingency analysis, which includes actions to be taken in response to a supply shortage; an estimate of minimum supply available during the next three years; actions to be taken in the event of a "catastrophic interruption of water supplies," such as a natural disaster; additional prohibitions employed during water shortages; penalties or charges for excessive use; an analysis of impacts on revenues and expenditures; a draft water shortage contingency resolution or ordinance; and a mechanism for determining actual reductions in water use.[58]

Section 10633, as amended by Statutes 2002, chapter 261, specifies that the plan shall provide, to the extent available, information on recycled water and its potential for use as a water source in the service area of the urban water supplier. The preparation of the plan shall be coordinated with local water, wastewater, groundwater, and planning agencies that operate within the supplier's service area, and shall include: a description of wastewater collection and treatment systems; a description of the quantity of treated wastewater that meets recycled water standards; a description of recycled water currently used in the supplier's service area; a description and quantification of the potential uses of recycled water; projected use of recycled water over five year increments for the next 20 years; a description of actions that may be taken to encourage the

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[54] Water Code section 10610.4 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

[55] Water Code sections 10617 (Stats. 1996, ch. 1023(SB 1497)); 10621(a) (Stats. 2007, ch. 64 (AB 1376)).

[56] Water Code section 10631 (Statutes 2009, chapter 534 (AB 1465)).

[57] Water Code section 10631(i) (Statutes 2009, chapter 534 (AB 1465)).

[58] Water Code section 10632 (Stats. 1995, ch. 854 (SB 1011)).

use of recycled water; and a plan for optimizing the use of recycled water in the supplier's service area.[59]

As added by Statutes 2001, chapter 644, and continuously in law up to the adoption of the test claim statute, section 10634 requires the UWMP to include, to the extent practicable, information relating to the quality of existing sources of water available to the supplier over the same five-year increments as described in Section 10631(a); and to describe the manner in which water quality affects water management strategies and supply reliability.[60]

And finally, section 10635, added by Statutes 1995, chapter 330, requires an urban water supplier to include in its UWMP an assessment of the reliability of its water service to customers during normal and dry years, projected over the next 20 years, in five year increments.[61]

b. Adoption and Implementation of Plans

Sections 10640 through 10645, as added by Statutes 1983, chapter 1009 and Statutes 1990, chapter 355, provide the requirements for adoption and implementation of UWMPs, including public notice and recordkeeping requirements associated with the adoption of each update of the UWMP.

Section 10640 provides that every urban water supplier required to prepare an UWMP pursuant to this part shall prepare its UWMP pursuant to Article 2 (commencing with Section 10630), and shall "periodically review the plan ... and any amendments or changes required as a result of that review shall be adopted pursuant to this article."[62] Section 10641 provides that an urban water supplier required to prepare an UWMP may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water demand management methods and techniques.[63]

Section 10642 provides that each urban water supplier shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the service area prior to and during the preparation of its UWMP. Prior to adopting an UWMP, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to section 6066 of the Government Code. A privately owned water supplier is required to provide a similar degree of notice, and the plan shall be adopted after the hearing either "as prepared or as modified..."[64]

Section 10643 provides that an UWMP shall be implemented "in accordance with the schedule set forth in [the] plan."[65] As amended by Statutes 2007, chapter 628, section 10644 requires an

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[59] Water Code section 10633 (Stats. 2002, ch. 261 (SB 1518)).

[60] Water Code section 10634 (Stats. 2001, ch. 644 (AB 901)).

[61] Water Code section 10635 (Stats. 1995, ch. 330 (AB 1845)).

[62] Water Code section 10640 (Stats. 1983, ch. 1009).

[63] Water Code section 10640 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

[64] Water Code section 10642 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552)).

[65] Water Code section 10643 (Stats. 1983, ch. 1009).

urban water supplier to submit to DWR, the State Library, and any city or county within which the supplier provides water supplies, a copy of its plan and copies of any changes or amendments to the plans no later than 30 days after adoption. Section 10644 also requires DWR to prepare and submit to the Legislature, on or before December 31, in the years ending in six and one, a report summarizing the status of the UWMPs adopted pursuant to this part. The report is required to identify the outstanding elements of the individual UWMPs. DWR is also required to provide a copy of the report to each urban water supplier that has submitted its UWMP to DWR.[66] And lastly, in accordance with section 10645, not later than 30 days after filing a copy of its UWMP with DWR, the urban water supplier and DWR shall make the plan available for public review during normal business hours.[67]

c. Miscellaneous Provisions Pertaining to the UWMP Requirement

While sections 10631 through 10635 provide for the lengthy and technical content requirements of UWMPs, and sections 10640 through 10645 provide the requirements of a valid adoption of a UWMP, several remaining provisions of the Urban Water Management Planning Act provide for the satisfaction of the UWMP requirements by other means, and provide for the easing of certain other regulatory requirements and the recovery of costs.

- Section 10631, as amended by Statutes 2009, chapter 534 (AB 1465), provides that urban water suppliers that are members of the California Urban Water Conservation Council shall be deemed in compliance with the demand management provisions of the UWMP "by complying with all the provisions of the 'Memorandum of Understanding Regarding Urban Water Conservation in California'...and by submitting the annual reports required by Section 6.2 of that memorandum."[68] These suppliers, then, are not separately required to comply with sections 10631(f) and (g), which require a description and evaluation of the supplier's "demand management measures" that are currently or could be implemented.[69]
- Section 10652 streamlines the adoption of UWMPs by exempting plans from the California Environmental Quality Act (CEQA). However, section 10652 does not exempt any project (that might be contained in the plan) that would significantly affect water supplies for fish and wildlife.[70]
- Section 10653 provides that the adoption of a plan shall satisfy any requirements of state law, regulation, or order, including those of the State Water Resources Control Board and the Public Utilities Commission, for the preparation of water

[66] Water Code section 10644 (Stats. 1983, ch. 1009; Stats. 1990, ch. 355 (AB 2661); Stats. 1992, ch. 711 (AB 2874); Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552); Stats. 2004, ch. 497 (AB 105); Stats. 2007, ch. 628 (AB 1420)).

[67] Water Code section 10645 (Stats. 1990, ch. 355 (AB 2661)).

[68] Water Code section 10631 (as amended, Stats. 2009, ch. 534 (AB 1465)).

[69] Water Code section 10631(f-g) (as amended, Stats. 2009, ch. 534 (AB 1465)).

[70] Water Code section 10652 (Stats. 1983, ch. 1009; Stats. 1991-1992, 1st Ex. Sess., ch. 13 (AB 11); Stats. 1995, ch. 854 (SB 1011)).

management plans or conservation plans; provided, that if the State Water Resources Control Board or the Public Utilities Commission requires additional information concerning water conservation to implement its existing authority, nothing in this part shall be deemed to limit the board or the commission in obtaining that information. In addition, section 10653 provides that "[t]he requirements of this part *shall be satisfied by any urban water demand management plan prepared to meet federal laws or regulations after the effective date of this part*, and which substantially meets the requirements of this part, or by any existing urban water management plan which includes the contents of a plan required under this part."[71] The plain language of section 10653 therefore exempts an urban retail water supplier that is already required to prepare a water demand management plan from any requirements of an UWMP added by the test claim statutes.

- Section 10654 provides expressly that an urban water supplier "may recover in its rates the costs incurred in preparing its plan and implementing the reasonable water conservation measures included in the plan." Any best water management practice that is included in the plan that is identified in the "Memorandum of Understanding Regarding Urban Water Conservation in California" (discussed below) is deemed to be reasonable for the purposes of this section.[72] Therefore, suppliers are expressly authorized to recover the costs of implementing "reasonable water conservation measures" or any "best water management practice...identified in [the MOU for Urban Water Conservation]."

3. Prior Requirements to Prepare, Adopt, and Update Agricultural Water Management Plans, Which Became Inoperative by their own Terms in 1993.

The Agricultural Water Management Planning Act was enacted in 1986 and became inoperative, by its own terms, in 1993.[73] The 1986 Act stated in its legislative findings and declarations that "[t]he Constitution requires that water in the state be used in a reasonable and beneficial way..." and that "[t]he conservation of agricultural water supplies are of great concern." The findings and declarations further stated that "[a]gricultural water suppliers that receive water from the federal Central Valley Water Project are required by federal law to develop and implement water conservation plans," as are "[a]gricultural water suppliers applying for a permit to appropriate water from the State Water Resources Control Board..." Therefore, the act stated that "it is the policy of the state as follows:"

(a) The conservation of water shall be pursued actively to protect both the people of the state and their water resources.

(b) The conservation of agricultural water supplies shall be an important criterion in public decisions on water.

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[71] Water Code section 10653 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)) [emphasis added].

[72] Water Code section 10654 (Stats. 1983, ch. 1009; Stats. 1994, ch. 609 (SB 1017)).

[73] Statutes 1986, chapter 954 (AB1658). See Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

(c) Agricultural water suppliers, who determine that a significant opportunity exists to conserve water or reduce the quantity of highly saline or toxic drainage water, shall be required to develop water management plans to achieve conservation of water.[74]

Specifically, the 1986 Act provided that every agricultural water supplier serving water directly to customers "shall prepare an informational report based on information from the last three irrigation seasons on its water management and conservation practices..." That report "shall include a determination of whether the supplier has a significant opportunity to conserve water or reduce the quantity of highly saline or toxic drainage water through improved irrigation water management..." If a "significant opportunity exists" to conserve water or improve the quality of drainage water, the supplier "shall prepare and adopt an agricultural water management plan..." (AWMP).[75] The Act provided, however, that an agricultural water supplier "may satisfy the requirements of this part by participation in areawide, regional, watershed, or basinwide agricultural water management planning where those plans will reduce preparation costs and contribute to the achievement of conservation and efficient water use and where those plans satisfy the requirements of this part." The requirements of an AWMP or an informational report, where required, included quantity and sources of water delivered to and by the supplier; other sources of water used within the service area, including groundwater; a general description of the delivery system and service area; total irrigated acreage within the service area; acreage of trees and vines within the service area; an identification of current water conservation practices being used, plans for implementation of water conservation practices, and conservation educational practices being used; and a determination of whether the supplier has a significant opportunity to save water by means of reduced evapotranspiration, evaporation, or reduction of flows to unusable water bodies, or to reduce the quantity of highly saline or toxic drainage water.[76] In addition, an AWMP "shall address all of the following:" quantity and source of surface and groundwater delivered to and by the supplier; a description of the water delivery system, the beneficial uses of the water supplied, conjunctive use programs, incidental and planned groundwater recharge, and the amounts of delivered water that are lost to evapotranspiration, evaporation, or surface flow or percolation; an identification of cost-effective and economically feasible measures for water conservation; an evaluation of other significant impacts; and a schedule to implement those water management practices that the supplier determines to be cost-effective and economically feasible.[77]

The Act further provided that an agricultural water supplier required to prepare an AWMP "may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water conservation and management methods and techniques."[78] And, "[p]rior to adopting a plan, the agricultural water supplier shall make the plan available for public inspection and shall hold a public hearing thereon." This requirement

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[74] Former Water Code section 10802 (Stats. 1986, ch. 954 (AB 1658)).

[75] Former Water Code section 10821 (as added, Stats. 1986, ch. 954 (AB 1658)).

[76] Former Water Code section 10825 (as added, Stats. 1986, ch. 954 (AB 1658)).

[77] Former Water Code section 10826 (as added, Stats. 1986, ch. 954 (AB 1658)).

[78] Former Water Code section 10841(as added, Stats. 1986, ch. 954 (AB 1658)).

applies also to privately owned water suppliers.[79] In addition, the Act states that an agricultural water supplier shall implement its AWMP in accordance with the schedule set forth in the plan, and "shall file with [DWR] a copy of its plan no later than 30 days after adoption."[80] Finally, the 1986 Act provided for funds to be appropriated to prepare the informational reports and agricultural water management plans, as required, and provided that "[t]his part shall remain operative only until January 1, 1993, except that, if an agricultural water supplier fails to submit its information report or agricultural water management plan prior to January 1, 1993, this part shall remain operative with respect to that supplier until it has submitted its report or plan, or both."[81]

As noted above, the AWMP requirements provided by the Agricultural Water Management Planning Act became inoperative as of January 1, 1993,[82] and therefore do not constitute the law in effect immediately prior to the test claim statute, even though, as shown below, the test claim statute reenacted substantially similar plan requirements. However, the federal requirement to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the federal Central Valley Project Improvement Act (Public Law 102-565) or the federal Reclamation Reform Act of 1982, remained the law throughout and does constitute the law in effect immediately prior to the test claim statute, with respect to those suppliers subject to one or both federal requirements.[83]

4. The Water Measurement Law, Statutes 1991, chapter 407, applicable to Urban and Agricultural Water Suppliers.

The Water Measurement Law (Water Code sections 510-535) requires standardized water management practices and water measurement, and is applicable to Urban and Agricultural Water Suppliers, as follows:[84]

- Every water purveyor that provides potable water to 15 or more service connections or 25 or more yearlong residents must require meters as a condition of *new* water service.[85]
- Urban water suppliers, except those that receive water from the federal Central Valley Project, must install meters on all municipal (i.e., residential and governmental) and industrial (i.e., commercial) service connections on or before January 1, 2025 and shall charge each customer that has a service connection for which a meter has been installed based on the actual volume of deliveries beginning on or before January 1, 2010 service. A water purveyor, including an

[79] Former Water Code section 10842(as added, Stats. 1986, ch. 954 (AB 1658)).

[80] Former Water Code sections 10843 and 10844 (as added, Stats. 1986, ch. 954 (AB 1658)).

[81] Former Water Code sections 10853; 10854; 10855 (as added, Stats. 1986, ch. 954 (AB 1658)).

[82] Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

[83] See Water Code section 10828 (added, Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[84] The Water Measurement Law was added by Statutes 1991, chapter 407.

[85] Section 525 as amended by statutes 2005, chapter 22.

urban water supplier, may recover the cost of the purchase, installation, and operation of a water meter from rates, fees, or charges.[86]

- Urban water suppliers receiving water from the federal Central Valley Project (CVP) shall install water meters on all residential and non-agricultural commercial service connections constructed prior to 1992 on or before January 1, 2013 and charge customers for water based on the actual volume of deliveries, as measured by a water meter, beginning March 1, 2013, or according to the CVP water contract. Urban water suppliers that receive water from the CVP are also specifically authorized to "recover the cost of providing services related to the purchase, installation, and operation and maintenance of water meters from rates, fees or charges.[87]
- Agricultural water providers shall report annually to DWR summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis. However, the Water Measurement Law does not require implementation of water measurement programs or practices that are not locally cost effective.[88]

The test claim statute, as noted above, requires agricultural water suppliers to measure the volume of water delivered to customers and to adopt a volume-based pricing structure. However, the test claim statute also contemplates a water supplier that is both an agricultural and an urban water supplier, by definition: section 10829 provides that an agricultural water supplier may satisfy the AWMP requirements by adopting an UWMP pursuant to Part 2.6 of Division 6 of the Water Code; and the definitions of "agricultural" and "urban retail" water suppliers in section 10608.12 are not, based on their plain language, mutually exclusive. The record on this test claim is not sufficient to determine how many, if any, agricultural water suppliers are also urban retail water suppliers,[89] and consequently would be required to install water meters on new and existing service connections in accordance with Water Code sections 525-527, and to charge customers based on the volume of water delivered. In addition, the record is not sufficient to determine whether and to what extent some agricultural water suppliers may already have implemented water measurement programs which were locally cost effective, in accordance with section 531.10. However, to the extent that an agricultural water supplier is also an urban water supplier, sections 525-527 may constitute a prior law requirement to accurately measure water delivered and charge customers based on volume, and the test claim statute may not impose new requirements or costs on some entities. And, to the extent that water measurement programs or practices were previously implemented pursuant to section 531.10, some of the activities required by the test claim statute and regulations may not be newly required, with respect to certain agricultural suppliers. These caveats and limitations are noted where relevant in the analysis below.

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[86] Section 527 as amended by statutes 2005, chapter 22.

[87] Section 526 as amended by Statutes 2004, chapter 884.

[88] Section 531.10 as added by Statutes 2007, chapter 675.

[89] See Water Code section 10608.12, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) for definitions of "agricultural water supplier" and "urban retail water supplier."

III. Positions of the Parties

A. Claimants' Positions:

The four original claimants together alleged a total of $72,194.48 in mandated costs for fiscal year 2009-2010 (although Paradise maintains a different fiscal year than the remaining claimants). In addition, claimants project that program costs for fiscal year 2010-2011, and for 2011-2012, will be "higher," but claimants allege that they are unable to reasonably estimate the amount.

South Feather Water and Power Agency and Paradise Irrigation District

South Feather and Paradise allege that they are urban retail water suppliers, as defined in Water Code section 10608.12. As such, they allege that they are required to establish urban water use targets "by July 1, 2011 by selecting one of four methods to achieve the mandated water conservation." South Feather and Paradise further allege that they are "mandated to adopt expanded and more detailed urban water management plans in 2010 that include the baseline daily per capita water use, urban water use target, interim urban water use target, compliance daily per capita water use, along with the bases for determining estimates, including supporting data."[90] South Feather and Paradise allege that thereafter, UWMPs are to be updated "in every year ending in 5 and 0," and the 2015 plan "must describe the urban retail water supplier's progress towards [*sic*] achieving the 20% reduction by 2020."[91] Finally, South Feather and Paradise allege that they are required to conduct at least one noticed public hearing to allow community input, consider economic impacts, and adopt a method for determining a water use baseline "from which to measure the 20% reduction."[92]

Prior to the Act, South Feather and Paradise allege that there was no requirement to achieve a 20 percent per capita reduction in water use by 2020. They allege that they were required to adopt UWMPs prior to the Act, but not to include 'the baseline per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with bases for determining those estimates, including supporting data."[93] And they allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts...or to adopt a method for determining an urban water use target."[94]

Biggs-West Gridley Water District and Richvale Irrigation District

Richvale and Biggs allege that they are required to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate," in accordance with regulations adopted by DWR pursuant to the Act.[95] They further allege that they are required to adopt a pricing structure for water customers

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[90] Exhibit A, 10-TC-12, page 3.

[91] *Ibid.*

[92] Exhibit A, 10-TC-12, page 4.

[93] Exhibit A, 10-TC-12, pages 7-8.

[94] Exhibit A, 10-TC-12, page 8.

[95] Exhibit A, 10-TC-12, page 4.

based on the quantity of water delivered, and that "[b]ecause Richvale and Biggs are local public agencies, the change in pricing structure would have to be authorized and approved by its [*sic*] customers through the Proposition 218 process."[96]

In addition, Richvale and Biggs allege that "[i]f 'locally cost effective' and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices," as specified. They additionally allege that on or before December 31, 2012, they are required to prepare AWMPs that include a report on the implementation and planned implementation of efficient water management practices, and documentation supporting any determination made that certain conservation measures were held to be not locally cost effective or technically feasible.[97] Finally, Richvale and Biggs allege that prior to adoption of an AWMP, they are required to notice and hold a public hearing; and that after adoption the plan must be distributed to "various entities" and posted on the internet for public review.[98]

Prior to the Act, Richvale and Biggs assert, agricultural water suppliers "were not required to have a pricing structure based, at least in part, on the quantity of water delivered." In addition, prior to the Act, "there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible." And, Richvale and Biggs allege that prior to the Act the number of agricultural water suppliers subject to the requirement to develop an AWMP was significantly fewer, and now the "contents of the plans" are "more encompassing than plans required under the former law."[99] Richvale and Biggs allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing prior to adopting the plan, make copies of it available for public inspection, or to publish the time and place of the hearing once per week for two successive weeks in a newspaper of general circulation."[100]

As discussed below, in the early stages of Commission staff's review and analysis of these consolidated test claims, it became apparent that Richvale and Biggs, the two claimants representing agricultural water suppliers, are not subject to the revenue limits of article XIII B, and do not collect or expend "proceeds of taxes," within the meaning of articles XIII A and XIII B.[101] After additional briefing and further review, it was concluded that Richvale and Biggs are indeed not eligible for reimbursement under article XIII B, section 6. The Commission's executive director therefore issued a notice of pending dismissal and offered an opportunity for another eligible local claimant, subject to the tax and spend limitations of articles XIII A and XIII B, to take over the test claim.[102] Richvale and Biggs filed an appeal of that decision, and maintain that they are eligible local government claimants pursuant to Government Code section 17518, and that the fees or assessments that the districts would be required to establish or increase to comply with the requirements of the test claim statute and regulations would be

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[96] *Ibid.*

[97] Exhibit A, 10-TC-12, pages 4-6.

[98] Exhibit A, 10-TC-12, page 6.

[99] Exhibit A, 10-TC-12, page 8.

[100] Exhibit A, 10-TC-12, page 9.

[101] Exhibit F, Commission Request for Additional Information, page 1.

[102] Exhibit K, Notice of Pending Dismissal.

characterized as taxes under article XIII B, section 8, because such fees or assessments would exceed the reasonable costs of providing water services.[103] This decision addresses these issues.

Glenn-Colusa Irrigation District and Oakdale Irrigation District

Glenn-Colusa and Oakdale requested to be substituted in as parties to these consolidated test claims, in place of Richvale and Biggs.[104] Both Glenn-Colusa and Oakdale submitted declarations asserting that they receive an annual share of property tax revenue, and therefore are subject to articles XIII A and XIII B of the California Constitution. Both additionally allege that they incur at least $1000 in increased costs as a result of the test claim statute and regulations, and that they are subject to the requirements of the test claim statutes and regulations as described in the test claim narrative.[105]

Claimants' Collective Response to the Draft Proposed Decision

In comments on the draft proposed decision, the claimants focus primarily on the findings regarding the ineligibility of Richvale and Biggs to claim reimbursement based on the evidence in the record indicating that neither agency collects or expends tax revenues subject to the limitations of articles XIII A and XIII B. The claimants also address the related findings that all claimants have sufficient fee authority under law to cover the costs of the mandate, and thus the Commission cannot find costs mandated by the state, pursuant to section 17556(d).

Specifically, the claimants argue that "[f]ees and charges for sewer, water, or refuse collection services are excused from the formal election process, but not from the majority protest process."[106] Therefore, claimants conclude that "[a]gencies that provide water, sewer, or refuse collection services, including Claimants, lack sufficient authority to unilaterally impose new or increased fees or charges in light of Proposition 218's majority protest procedure."[107]

In addition, claimants note the Commission's analysis in 07-TC-09, *Discharge of Stormwater Runoff*, and argue that the Commission should not "ignore a prior Commission decision that is directly on point..." The claimants assert that "as this Commission has already recognized..." Proposition 218 "created a legal barrier to establishing or increasing fees or charges..." and as a result claimants "can do no more than merely propose new or increased fees for customer approval and the customers have the authority to then accept or reject..." a fee increase.[108]

The claimants assert that the reasoning of the draft proposed decision "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218..."[109] and "would create a class of local agencies that are per se ineligible for reimbursement under this test

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[103] Exhibit L, Appeal of Executive Director's Decision.

[104] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

[105] *Ibid.*

[106] Exhibit R, Claimant Comments on Draft Proposed Decision, page 10.

[107] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[108] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[109] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."[110] The claimant calls this a "sea change in Constitutional interpretation..."[111]

The claimants argue, based on this interpretation of the effect of Proposition 218, that the draft proposed decision inappropriately excluded Richvale and Biggs from subvention, "because they do not currently collect or expend tax revenues."[112] The claimants argue that "this additional 'requirement' [is] based on an outdated case that predates Proposition 218 and on an inapplicable line of cases that apply only to redevelopment agencies, while ignoring the strong policy underlying the voters' approval of the subvention requirement."[113] The claimants argue that after articles XIII C and XIII D, "assessments and property-related fees and charges have joined tax revenues as among local entities' 'increasingly limited revenue sources...'"[114]

The claimants further argue that: "Agencies like Richvale and Biggs that need additional revenue to pay for new mandates but are subject to the limitations of Proposition 218 are faced with three problematic options: (a) do not implement the mandates in light of revenue limitations; (b) implement the mandates with existing revenue; or (c) propose a new or increased fee or charge, assessment, or special tax to implement the mandates."[115] The claimants argue for the Commission to take action to expand the scope of reimbursement: "the subvention provision should be read in harmony with later Constitutional enactments and protect not just tax revenue, but assessment and fee revenue as well."[116]

Finally, in late comments, the claimants challenge DWR's reasoning, including the figures cited by the department, that due to the existence of a substantial number of private water suppliers, the test claim statutes do not impose a "program" within the meaning of article XIII B, section 6.[117]

B. State Agency Positions:

Department of Finance

Finance maintains that "the Act and Regulations do not impose a reimbursable mandate on local agencies within the meaning of Article XIII B, section 6."[118] Finance asserts that each of the claimants is a special district authorized to charge a fee for delivery of water to its users, and therefore has the ability to cover the costs of any new required activities.[119] Finance further

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[110] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[111] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[112] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[113] Exhibit R, Claimant Comments on Draft Proposed Decision, page 16.

[114] Exhibit R, Claimant Comments on Draft Proposed Decision, page 17.

[115] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

[116] Exhibit R, Claimant Comments on Draft Proposed Decision, page 21.

[117] Exhibit W, Claimant Late Comments, pages 1-4.

[118] Exhibit C, Finance Comments, page 1.

[119] Exhibit C, Finance Comments, page 1.

asserts that the conservation efforts required by the test claim statute and regulations will result in surplus water accruing to the claimant districts, which are authorized to sell water. Finance concludes that "each district will likely have the opportunity to cover all or a portion of costs related to implementation of the Act or Regulations with revenue from surplus water sales."[120] Moreover, Finance argues that "special districts are only entitled to reimbursement if they are subject to the tax and spend limitations under articles XIII A and XIII B...*and only when the mandated costs in question can be recovered solely from the proceeds of taxes*."[121] Finance argues that the claimants "should be directed to provide information that will enable the Commission on State Mandates to determine if they are subject to tax and spending limitations."[122] Finance did not submit comments on the draft proposed decision.

State Controller's Office

In response to Commission staff's request for additional information regarding the uncertain eligibility of the test claimants, the SCO submitted written comments confirming that the "Butte County Auditor-Controller has confirmed for fiscal years 2010-2011, 2011-2012, and 2012-2013," that South Feather and Paradise both received proceeds of taxes, but Richvale and Biggs did not.[123] However, the SCO also noted that none of the four claimants reported an appropriations limit for fiscal years 2010-2011, 2011-2012, and 2012-2013. The SCO stated that "Government Code section 7910 requires each local government entity to annually establish its appropriations limit by resolution of its governing board," and that "Government Code section 12463 requires the annual appropriations limit to be reported in the financial transactions report submitted to the SCO." However, the SCO noted that it "has the responsibility to review each report for reasonableness, yet we are not required to audit any of the data reported." The SCO concluded, therefore, that "we are unable to determine which special district is subject to report an annual appropriations limit." The SCO did not comment on the draft proposed decision.

Department of Water Resources

DWR argues, in comments on the consolidated test claims, first, that the Water Conservation Act of 2009 applies to public and private entities alike, and is therefore not a "program" within the meaning of article XIII B, section 6. In addition, DWR argues that the Act is not a "new program," because it is "a refinement of urban and agricultural water conservation requirements that have been part of the law for years." DWR further asserts that even if the Act "were an unfunded state mandate, it would not be reimbursable since the water suppliers have sufficient non-tax sources to offset any implementation costs." And, DWR asserts that the test claim regulations on agricultural water measurement do not impose any requirements on water suppliers because "they are free to choose alternative measurement methods." And finally, DWR argues that the Act does not impose any new programs or higher levels of service "because what is required is compliance with general and evolving water conservation standards based on

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[120] Exhibit C, Finance Comments, page 2.

[121] Exhibit C, Finance Comments, page 2 [emphasis in original].

[122] Exhibit C, Finance Comments, page 2.

[123] Exhibit J, SCO Comments, pages 1-2.

the foundational reasonable and beneficial water use principle dating from before the 1928 amendment – Article X, section 2 – to California's Constitution revising water use standards."[124]

In comments on the draft proposed decision, DWR "concurs with and fully supports the ultimate conclusion reached…", but reiterates and expands upon its earlier comments with respect to whether the alleged test claim requirements constitute a new program or higher level of service that is uniquely imposed upon local government.[125] DWR argues that "a law that governs private and public entities alike is not a 'program' for purposes of article XIII B…"[126] DWR continues:

> Claimants, in their Rebuttal Comments, ignore DWR's reference to the language of the Water Conservation Act, which by its plain terms is made applicable to both public and private entities. Instead, Claimants seek to shift attention away from the nature of the activity and focus instead on the number of entities engaged in that activity. Claimants concede that the law and regulations adopted pursuant to that law do in fact apply to both private and public entities, but argue that because (according to their calculation) "only 7.67%" of urban retail water suppliers are private, the requirements of the Water Conservation Act ought to be treated as reimbursable "programs" because those requirements "fall overwhelmingly on local governmental agencies."[127]

DWR maintains that "there are, in fact, 72 private wholesale and retail suppliers out of a total of 369…so the proportion of private water suppliers is actually 16.3 percent." And, "based on data submitted in the 2010 urban water management plans, it turns out that private retail water suppliers serve 19.7 percent of the population and account for 17.3 percent of water delivered."[128]

DWR acknowledges that there are more public than private water suppliers, but asserts that "[u]nder the Supreme Court's test in *County of Los Angeles v. State of California* the question is not whether an activity is more likely to be undertaken by a governmental entity, but whether the activity implements a state policy and imposes unique requirements on local governments, but is one that does not apply generally to all residents and entities in the state."[129] DWR explains that "generally," in this context, is not synonymous with "commonly," and therefore the prevalence of public water suppliers as to private is not relevant to the issue; rather, "generally" refers to

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[124] Exhibit D, DWR Comments, page 2.

[125] Exhibit U, DWR Comments on Draft Proposed Decision, page 1.

[126] Exhibit U, DWR Comments on Draft Proposed Decision, page 2 [citing Exhibit D, DWR Comments, filed June 7, 2013; *Carmel Valley Fire Protection District v. State* (1987) 190 Cal.App.3d 521, 537].

[127] Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [quoting Exhibit E, Claimant's Rebuttal Comments, pages 3-4].

[128] Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

[129] Exhibit U, DWR Comments on Draft Proposed Decision, page 3. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

laws of general application, meaning "those that apply to all persons or entities of a particular class."[130] The Water Conservation Act, DWR maintains, "does just that."[131]

In addition, DWR disputes that the provision of water services is a "classic governmental function," as asserted by the claimants.[132] The California Supreme Court has held that reimbursement should be limited to new "programs" that carry out the governmental function of providing services to the public.[133] DWR maintains that there is an important distinction between public purposes, and private or corporate purposes, and that that distinction should control in the analysis of a new program or higher level of service. In particular, DWR identifies the provision of utilities to municipal customers as a corporate activity, rather than a governmental purpose:

> Of the myriad services provided by government, although some may be difficult to categorize, at either end of the spectrum the categories are fairly clear. At one end, such things as police and fire protection have long been recognized as true governmental functions, those that implicate the notion of the "government as sovereign." At the other end, however, are public utilities such as power generation, and, of particular significance to this claim, municipal water districts.[134]

DWR argues that "California law thus draws a distinction between the many utilitarian services that could as easily be (and often are) undertaken by the private sector, and those that implicate the unique authority vested in the state and its political subdivisions." DWR continues: "Maintaining a police force, for instance, is easily understood as something fundamental to the government *as government*." "On the other hand," DWR reasons, "there is nothing intrinsically governmental about a government entity operating a utility and providing services such as electricity, natural gas, sewer, garbage collection, or water delivery."[135]

DWR thus "urges the Commission to give full consideration to the fact that the Water Conservation Act is a law of general application that applies to private as well as public water

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[130] Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [citing *McDonald v. Conniff* (1893) 99 Cal.386, 391.

[131] Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

[132] Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing Exhibit E, Claimant Rebuttal Comments, page 4].

[133] Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 50].

[134] Exhibit U, DWR Comments on Draft Proposed Decision, page 5 [citing *Chappelle v. City of Concord* (1956) 144 Cal.App.2d 822, 825; *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Davoust v. City of Alameda* (1906) 149 Cal. 69, 72; *City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 593; *Nourse v. City of Los Angeles* (1914) 25 Cal.App. 384, 385; *Mann Water & Power Co. v. Town of Sausalito* (1920) 49 Cal.App. 78, 79; *In re Bonds of Orosi Public Utility Dist.* (1925) 196 Cal. 43, 58; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274].

[135] Exhibit U, DWR Comments on Draft Proposed Decision, page 6.

suppliers alike." And, DWR reiterates: "contrary to Claimants' suggestion, water delivery, while clearly an important service, is not a classic "governmental function" in the constitutional sense."[136]

C. Interested Person Positions:[137]

California Special Districts Association

CSDA asserts that "the Proposed Decision fails to appropriately analyze the provisions of Article XIII B Section 6...as amended by Proposition 1A in 2004..."[138] CSDA argues that the draft proposed decision "rather analyzes the original language of Article XIII B Section 6 adopted as Proposition 4 in 1978, before the adoption of Proposition 218 adding articles XIII C and XIII D to the Constitution and before the adoption of Proposition 1A amending Article XIII B Section 6."[139]

CSDA argues that the plain language of article XIII B, section 6, as amended by Proposition 1A, "indicates that the mandate provisions are applicable to all cities, counties, cities and counties, and special districts without restriction."[140] CSDA further asserts that "[t]he plain language also mandates the state to appropriate the 'full payment amount' of costs incurred by local government in complying with state mandated programs, without any qualification as to the types of revenues utilized by local governments in paying the costs of such compliance."[141] CSDA reasons that "there are no words of limitation indicating that suspension of mandates is only applicable to those local government agencies which receive proceeds of taxes and expend those proceeds of taxes in complying with state mandated programs." Therefore, absent "such limiting language, the holding of the Proposed Decision which limits eligibility for claiming reimbursement...to those local agencies receiving proceeds of taxes is contradicted by the mandate provisions of Proposition 1A, and is therefore incorrect as a matter of law."[142]

CSDA also argues that the voters' intent and understanding in adopting Proposition 1A is controlling, and can be determined by examining the LAO analysis in the ballot pamphlet.[143] CSDA argues that "[t]he LAO analysis of Proposition 1A in the ballot pamphlet fails to mention any restriction or limitation on state mandates to be reimbursed or suspended, and such analysis is totally silent as to any requirement that reimbursable mandates be limited to those mandates imposed on local governments which receive and expend proceeds of taxes..." In fact, CSDA argues, the LAO analysis indicates that Proposition 1A "expand(s) the circumstances under

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[136] Exhibit U, DWR Comments on Draft Proposed Decision, page 7.

[137] "Interested person" is defined in the Commission's regulations to mean "any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission." (Cal. Code Regs., tit. 2, § 1181.2(j).)

[138] Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

[139] Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

[140] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[141] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[142] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[143] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

which the state is responsible for reimbursing cities, counties and special districts for complying with state mandated programs by including all programs for which the state even had partial financial responsibility before such transfer."[144] CSDA maintains that "[t]herefore the voters who approved Proposition 1A by 82% of the popular vote had no understanding of this limitation on reimbursement of state mandates to local governments which is the basic holding of the Proposed Decision."[145] CSDA relies on the language of the ballot pamphlet, which states: "if the state does not fund a mandate within any year, the state must eliminate local government's duty to implement it for that same time period."[146] CSDA concludes that "[t]he plain words of Proposition 1A support this voter intent to require the state to fully reimburse the costs incurred by all cities, counties, cities and counties and special districts in implementing any state program in which the complete or partial financial responsibility for that program has been transferred from the state to local government, not just those cities, counties, cities and counties, and special districts which receive proceeds of taxes."[147]

In addition, CSDA argues that the Commission's analysis must read together and harmonize articles XIII A, XIII B, XIII C, and XIII D.[148] Specifically, CSDA argues that pursuant to article XIII C, added by Proposition 218, property-related fees are subject to "majority protest procedures" and "may not be expended for general governmental services…which are available to the public at large in substantially the same manner as they are to property owners..." [149] And, revenues from property-related fees "may not be used for any purpose other than that for which the fee was imposed;" and "may not exceed the costs required to provide the property related service."[150] In addition, CSDA asserts that the amount of a property-related fee must not exceed the proportional cost of providing the service to each individual parcel subject to the fee.[151] CSDA also notes that "Article XIII D includes similar provisions restricting the ability of local governments to raise and expend assessment revenue."[152] CSDA argues that "[a]nalyzed together, all of these restrictions on the raising and expenditure of property related fees and charges by local government agencies specified in Articles XIII C and D of the Constitution severely limit the ability of local government agencies to utilize revenue for property related fees and charges to fund the costs of state mandated programs."[153] CSDA goes on to argue that "[t]hose restrictions are more onerous and stringent than the restrictions imposed on local government agencies in expending proceeds of taxes by virtue of the appropriations limit in

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[144] Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

[145] Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

[146] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[147] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[148] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[149] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[150] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[151] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[152] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[153] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

Article XIII B."[154] CSDA concludes that "[t]he Proposed Decision should be modified to recognize these restrictions imposed by Articles XIII C and D."[155]

Environmental Law Foundation Position

ELF states, in its comments, that it agrees with the draft proposed decision, however, "[t]o aid the Commission in developing its final decision, we would like to present an additional ground upon which the Commission could rely in denying the test claim..."[156] ELF asserts that "the Commission should find that charges for irrigation water are not 'property-related fees' for the purposes of Article XIII D of the California Constitution."[157] Specifically, ELF agrees that the test claim statutes are exempt from the voter-approval requirements of article XIII D, section 6(c);[158] however, ELF also argues that "charges for irrigation water are not 'property-related fees' at all." ELF reasons: "As a result, raising them does not trigger the substantive or procedural requirements contained in Article XIII D, and the claimant districts may increase them free of any constitutional obstacle."[159]

ELF continues: "Article XIII D, § 3 restricts local governments' ability to levy a new "assessment, fee, or charge" without complying with the substantive and procedural requirements of section 4 (assessments) and section 6 (property-related fees)." However, ELF asserts that "Section 2 of Article XIII D makes Proposition 218's relatively limited reach abundantly clear."[160] ELF notes that section 2 defines a fee or charge as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."[161] ELF therefore reasons that "[f]ees that are not 'imposed upon a parcel' or that are not imposed upon a 'person as an incident of property ownership' or that are not a 'user fee or charge for a property related service' are not subject to Article XIII D."[162] ELF notes that in *Apartment Association of Los Angeles County v. City of Los Angeles*[163] the court held that an inspection fee imposed upon landlords was not imposed upon them as property owners, but as business owners and, therefore the fee was not subject to article XIII D.[164] The court, ELF

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[154] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[155] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[156] Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

[157] Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

[158] Exhibit T, ELF Comments on Draft Proposed Decision, page 3 [citing Exhibit Q, Draft Proposed Decision, page 80].

[159] Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[160] Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[161] California Constitution, article XIII D, section 2; Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[162] Exhibit T, ELF Comments on Draft Proposed Decision, pages 3-4.

[163] (2001) 24 Cal.4th 830.

[164] Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

explains, found that this type of fee was "not 'property related' because it was dependent on the property's use – it was not imposed on the property simply as an incident of ownership."[165]

ELF goes on to note that "no case has squarely addressed the issue…" but the courts have recognized that not all water service charges are necessarily subject to article XIII D. In *Pajaro Valley Water Management Agency v. Amrheim,*[166] the court held that a groundwater augmentation charge was a property-related fee, but "it rested that conclusion on the fact that the majority of users were residential users, not large-scale irrigators."[167] And, ELF notes, other cases have found that domestic water use is "necessary for 'normal ownership and use of property.'"[168] ELF concludes that these cases, and others, "present no obstacle to the conclusion that irrigation water is not a property-related service."[169] ELF concludes that fees for irrigation water are not "property-related" but a business-related fee, and that therefore the Commission should deny this test claim.[170]

Northern California Water Association Position

In late comments on the draft proposed decision, NCWA seeks to "highlight and emphasize how onerous and expensive these new state mandates are in the Sacramento Valley."[171] NCWA argues that "[t]hese statewide benefits, achieved through implementation of incredibly expensive mandates, ought to be funded by the state and not borne exclusively by the impacted local agencies' landowners."[172] NCWA continues: "The draft proposed decision, in an effort to circumvent the clear requirements to reimburse for these types of state mandates, has attempted to avoid reimbursement by exerting exclusions that are not appropriate for the facts before the Commission."[173] NCWA denies that any "exemptions" apply to the test claim statutes, and "urge[s] the Commission to modify the draft proposed decision to reimburse these and other similarly affected water suppliers."[174]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

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[165] Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

[166] (2007) 150 Cal.App.4th 1364.

[167] Exhibit T, ELF Comments on Draft Proposed Decision, pages 4-5.

[168] Exhibit T, ELF Comments on Draft Proposed Decision, page 5 [citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427; *Bighorn Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205].

[169] Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

[170] Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

[171] Exhibit V, NCWA Comments on Draft Proposed Decision, page 1.

[172] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

[173] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

[174] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs 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.

The purpose of article XIII B, 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."[175] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] ..."[176]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[177]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[178]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[179]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not

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

[176] *County of Los Angeles v. State of California* (*County of Los Angeles I*) (1987) 43 Cal.3d 46, 56.

[177] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist.*) (2004) 33 Cal.4th 859, 874.

[178] *Id.* at 874-875 (reaffirming the test set out in *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56).

[179] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

reimbursable if an exception identified in Government Code section 17556 applies to the activity.[180]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[181] 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.[182] 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."[183]

The parties raise the following issues in their comments:

- The test claim statute and executive order do not impose a new program or higher level of service that is subject to article XIII B, section 6 because the Water Conservation Law and implementing regulations apply to both public and private water suppliers alike, and do not impose requirements uniquely upon local government.
- The test claim statute and executive order do not impose a new program or higher level of service because the provision of water and other utilities is an activity that could be, and often is, undertaken by private enterprise, and is therefore not a quintessentially governmental service in the manner that police and fire protection are generally accepted to be.
- The test claim does not result in costs mandated by the state for agricultural water suppliers because fees or charges for the provision of irrigation water are not "property-related" fees or charges subject to the limitations of articles XIII C and XIII D.

As described below, the Commission denies this claim on the grounds that most of the code sections and regulations pled do not impose new mandated activities, and all affected claimants have sufficient fee authority as a matter of law to cover the costs of any new requirements. Therefore, this decision does not make findings on the additional potential grounds for denial raised in comments on the draft proposed decision summarized above.

A. South Feather Water and Power Agency, Paradise Irrigation District, Oakdale Irrigation District, and Glenn-Colusa Irrigation District are Subject to the Revenue Limitations of Article XIII B, and are Therefore Eligible for Reimbursement Pursuant to Article XIII B, Section 6.

1. To be eligible for reimbursement, a local agency must be subject to the taxing and spending limitations of articles XIII A and XIII B.

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[180] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[181] *County of San Diego, supra*, 15 Cal.4th 68, 109.

[182] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332.

[183] *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose, supra*].

An interpretation of article XIII B, section 6 requires an understanding of articles XIII A and XIII B. "Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend taxes for public purposes."[184]

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A drastically reduced property tax revenue previously enjoyed by local governments by providing that "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property," and that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties..."[185] In addition to limiting the property tax, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by voters.[186]

Article XIII B was adopted by the voters as Proposition 4 less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13."[187] While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[188]

Article XIII B established an "appropriations limit," or spending limit for each "entity of local government" beginning in fiscal year 1980-1981.[189] Specifically, the appropriations limit provides as follows:

> The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.[190]

No "appropriations subject to limitation" may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.[191] Article XIII B does not limit the ability to expend government funds collected from *all sources*; the appropriations limit is based on "appropriations subject to limitation," which means, pursuant to article XIII B, section 8, "any authorization to

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

[185] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[186] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[187] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 (*County of Placer*).

[188] *Ibid.*

[189] California Constitution, article XIII B, section 8(h) (added, Nov. 7, 1979).

[190] California Constitution, article XIII B, section 1 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[191] California Constitution, article XIII B, section 2 (added, Nov. 7, 1979).

expend during a fiscal year the *proceeds of taxes* levied by or for that entity."[192] Appropriations subject to limitation do not include "local agency loan funds or indebtedness funds"; "investment (or authorizations to invest) funds...of an entity of local government in accounts at banks...or in liquid securities";[193] "[a]ppropriations for debt service"; "[a]ppropriations required to comply with mandates of the courts or the federal government"; and "[a]ppropriations of any special district which existed on January 1, 1978 and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 [and one half] cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."[194]

Proposition 4 also added article XIII B, section 6 to require the state to reimburse local governments for any additional expenditures that might be mandated by the state, and which would rely solely on revenues subject to the appropriations limit. The California Supreme Court, in *County of Fresno v. State of California*,[195] explained:

> 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 I, 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.) 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.*[196]

Not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement. Redevelopment agencies, for example, have been identified by the courts as being exempt from the restrictions of article XIII B. In *Bell Community Redevelopment Agency v. Woolsey*, the Second District Court of Appeal concluded that a redevelopment agency's power to issue bonds, and to repay those bonds with its tax increment, was not subject to the spending limit of article XIII B. The court reasoned that to construe tax increment payments as appropriations subject to limitation "would be directly contrary to the mandate of section 7," which provides that "[n]othing in this Article shall be construed to impair the ability of the state or of any local government to meet its obligations with

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[192] California Constitution, article XIII B, section 8 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990) [emphasis added].

[193] California Constitution, article XIII B, section 8.

[194] California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[195] *County of Fresno, supra,* (1991) 53 Cal.3d 482.

[196] *Id,* at p. 487. Emphasis in original.

respect to existing or future bonded indebtedness."[197] In addition, the court found that article XVI, section 16, addressing the funding of redevelopment agencies, was inconsistent with the limitations of article XIII B:

> Article XVI, section 16, provides that tax increment revenues "may be irrevocably pledged" to the payment of tax allocation bonds. If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit [*sic*], it is clear that tax allocation proceeds cannot be irrevocably pledged to the payment of the bonds. Annual bond payments would be contingent upon factors extraneous to the pledge. That is, bond payments would be revocable every year of their life to the extent that they conflicted with an annual appropriation limit. The untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds.[198]

The court therefore concluded that redevelopment agencies could not reasonably be subject to article XIII B, and therefore upheld Health and Safety Code section 33678, and ordered that the writ issue to compel Woolsey to publish the notice.

Accordingly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,[199] the court held that redevelopment agencies were not eligible to claim reimbursement because Health and Safety Code section 33678 exempted tax increment financing, their primary source of revenue, from the limitations of article XIII B.

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity." The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...
>
> For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limits also support denying reimbursement under section 6... [The] costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies' collection of tax revenues.[200]

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[197] (1985) 169 Cal.App.3d 24, at p. 31 [quoting article XIII B, section 7].

[198] *Id*, at p. 31.

[199] (1997) 55 Cal.App.4th 976.

[200] *Redevelopment Agency of San Marcos, supra*, 55 Cal.App.4th at pp. 986-987 [internal citations omitted].

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates,* affirmed the reasoning of the *San Marcos* decision, holding that a redevelopment agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[201]

Therefore, pursuant to the plain language of article XIII B, section 9 and the decisions in *County of Fresno, supra, Redevelopment Agency of San Marcos, supra,* and *City of El Monte, supra,* a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

Nevertheless, claimants argue that *County of Fresno* and the redevelopment agency cases do not apply in this case. Specifically, claimants argue that *County of Fresno, supra,* predates Proposition 218, which added articles XIII C and XIII D to the California Constitution, and is factually distinguishable from this test claim because the test claim statute at issue in *County of Fresno* specifically authorized user fees to pay for the mandated activities. With respect to the redevelopment cases (*Bell Community Redevelopment Agency, Redevelopment Agency of San Marcos,* and *City of El Monte*), the claimants argue that the courts' findings rely on Health and Safety Code section 33678, which specifically excepts the revenues of redevelopment agencies from the scope of revenue-limited appropriations under article XIII B.[202] In addition, the claimants argue that the above reasoning "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218…" and "would create a class of local agencies that are per se ineligible for reimbursement under this test claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."[203] In addition, both the claimants and CSDA suggest that the Commission broaden the scope of reimbursement eligibility under article XIII B, section 6, beyond that articulated by the courts, and beyond the plain language of articles XIII A and XIII B.[204] The claimants and CSDA urge the Commission to consider the restrictions placed on special districts' authority to impose assessments, fees, or charges by articles XIII C and XIII D to be part of the "increasingly limited revenues sources" that subvention under section 6 was intended to protect. The claimants and CSDA would have the Commission broadly interpret and extend the subvention requirement and treat fee authority subject to proposition 218 as proceeds of taxes, "to advance the goal of 'preclud[ing] the state from shifting financial responsibility for carrying out governmental functions onto local entities that [are] ill equipped to handle the task."[205]

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[201] (2000) 83 Cal.App.4th 266, 281-282 (*El Monte*).

[202] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18.

[203] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 14-15.

[204] See Exhibit R, Claimant Comments on Draft Proposed Decision, page 21; Exhibit S, CSDA Comments on Draft Proposed Decision, pages 10-12 [Arguing that the restrictions of articles XIII C and XIII D are more onerous than the revenue limits of article XIII B, and the Commission should "recognize these restrictions…" and "Articles XIII A, B, C, and D should be read together and harmonized…"].

[205] Exhibit R, Claimant Comments on Draft Proposed Decision, page 21 [quoting *County of Fresno, supra* 53 Cal.3d, at p. 487.].

The claimant's comments do not alter the above analysis. The factual distinction that claimants allege between this test claim and *County of Fresno* is not dispositive.[206] Specific fee authority provided by the test claim statute is not necessary: so long as a local government's statutory fee authority can be legally applied to alleged activities mandated by the test claim statute, there are no *costs mandated by the state* within the meaning of Government Code section 17514 and article XIII B, section 6, to the extent of that fee authority.[207] If the local entity is not compelled to rely on *appropriations subject to limitation* to comply with the alleged mandate, no reimbursement is required.[208]

The claimant's comments addressing the redevelopment cases are similarly unpersuasive. Those cases are discussed above not as analogues for the types of special districts represented in this test claim, but only to demonstrate that *not all local government entities* are subject to articles XIII A and XIII B, and that an agency that is not bound by article XIII B cannot assert an entitlement to reimbursement under section 6.[209]

Moreover, enterprise districts, and indeed any local government entity funded exclusively through user fees, charges, or assessments, *are* per se ineligible for mandate reimbursement. This is so because only a mandate to expend revenues that are subject to the appropriations limit, as defined and expounded upon by the courts,[210] can entitle a local government entity to mandate reimbursement. In other words, a local agency that is funded solely by user fees or charges, (or tax increment revenues, as discussed above), or appropriations for debt service, or any combination of revenues "other than the proceeds of taxes" is an agency that is not subject to the appropriations limit, and therefore not entitled to subvention.[211]

This interpretation is supported by decades of mandates precedent and is consistent with the purpose of article XIII B. As discussed above, "Section 6 was included in article XIII B in recognition that article XIII A...severely restricted the *taxing* powers of local governments."[212] Article XIII B "was not intended to reach beyond taxation..." and "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue..."[213] The issue, then, is

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[206] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18. *County of Fresno, supra*, 53 Cal.3d at p. 485.

[207] See also, *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 812 ["Claimants can choose not to required these fees, but not at the state's expense."

[208] See *Redevelopment Agency of San Marcos, supra*, 55 Cal.App.4th at p. 987 ["No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes."].

[209] *City of El Monte, supra*, (2000) 83 Cal.App.4th 266, 281-282 [citing *Redevelopment Agency of San Marcos, supra*, (1997) 55 Cal.App.4th 976].

[210] See *Placer v. Corin* (1980) 113 Cal.App.3d 443; *Bell Community Redevelopment Agency, supra* (1985) 169 Cal.App.3d 24; *County of Fresno, supra* (1991) 53 Cal.3d 482; *Redevelopment Agency of San Marcos, supra*, (1997) 55 Cal.App.4th 976.

[211] California Constitution, article XIII B, section 9 (Adopted Nov. 6, 1979; Amended June 5, 1990).

[212] See *County of Fresno, supra*, 53 Cal.3d at p. 487 [emphasis added].

[213] *Ibid.*

not *how many* different sources of revenue a local entity has at its disposal, as suggested by claimants;[214] it is whether and to what extent those sources of revenue (and the appropriations to be made) are *limited* by articles XIII A and XIII B. Based on the foregoing, nothing in claimants' comments alters the above analysis.

The Commission also disagrees with the interpretation offered by CSDA. CSDA argues in its comments that Proposition 1A, adopted in 2004, made changes to article XIII B, section 6, which must be considered by the Commission, and that the voters' intent and understanding when adopting Proposition 1A should weigh heavily on the Commission's interpretation of the amended text.[215] However, the amendments made by Proposition 1A require the Legislature to either pay or suspend a mandate for local agencies, and expand the definition of a new program or higher level of service. The plain language of Proposition 1A does not address which entities are eligible to claim reimbursement, and does not require reimbursement for all special districts, including those that do not receive property tax revenue and are not subject to the appropriations limitation of article XIII B.[216] CSDA's comments do not alter the above analysis.

Based on the foregoing, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

2. Biggs-West Gridley Water District and Richvale Irrigation District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, Oakdale Irrigation District and Glenn-Colusa Irrigation District are subject to the taxing and spending limitations, have been substituted in as claimants for both of the consolidated test claims, and are eligible for reimbursement under article XIII B, section 6 of the California Constitution.

10-TC-12 was originally filed by four co-claimants: South Feather, Paradise, Biggs, and Richvale.[217] 12-TC-01 was filed by Richvale and Biggs only,[218] and the two test claims were consolidated for analysis and hearing and renamed *Water Conservation*. Based on the analysis herein, the Commission finds that Richvale and Biggs are ineligible to claim reimbursement under article XIII B, section 6, and test claim 12-TC-01 would have to be dismissed for want of an eligible claimant.[219] However, Oakdale and Glenn-Colusa have requested to be substituted in on both test claims in the place of the ineligible claimants.[220] The analysis below will therefore address the eligibility of each of the six co-claimants, and will show that South Feather, Paradise,

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[214] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 20-21.

[215] See, e.g., Exhibit S, CSDA Comments on Draft Proposed Decision, page 7.

[216] See California Constitution, article XIII B, section 6 (b-c).

[217] Exhibit A, Test Claim 10-TC-12.

[218] Exhibit B, Test Claim 12-TC-01.

[219] See Exhibit K, Notice of Pending Dismissal.

[220] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

Oakdale, and Glenn-Colusa are all eligible to claim reimbursement under article XIII B, section 6, and therefore the Commission maintains jurisdiction over both of the consolidated test claims.

a. Biggs-West Gridley Water District and Richvale Irrigation District are not eligible to claim reimbursement under article XIII B, section 6.

The Districts have acknowledged that "Richvale and Biggs do not receive property tax revenue."[221] With respect to Richvale, that statement is consistent with the original test claim filing, in which Richvale stated that it "does not receive an annual share of property tax revenue."[222] However, Biggs had earlier stated in a declaration by Karen Peters, the District's Executive Administrator, that "Biggs receives an annual share of property tax revenue," and for "Fiscal Year 2011 the amount of property tax revenue is expected to be approximately $64,000."[223] Biggs has since determined that the Peters declaration was in error, and a more recent declaration from Eugene Massa, the District's General Manager, states that "[t]hat revenue estimate actually reflects Biggs' *assessment*, equating to $2 per acre within Biggs' boundaries." Mr. Massa goes on to state that "Biggs does not currently receive any share of ad valorem *property tax* revenue."[224,225]

Even though Richvale and Biggs acknowledge that they receive no property tax revenue, they argue that they and "other similarly situated public agencies should not be deemed ineligible for subvention due to a historical quirk that resulted in those agencies not receiving a share of ad valorem property taxes."[226] The "historical quirk" to which Richvale and Biggs refer, it is assumed, is the fact that Richvale and Biggs either did not exist or did not share in ad valorem property tax revenue as of the 1977-78 fiscal year, which would render at least some portion of

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[221] Exhibit I, Claimant Response to Request for Additional Information, page 1.

[222] Exhibit A, South Feather Water and Power Test Claim, page 22.

[223] Exhibit A, 10-TC-12, page 30.

[224] Exhibit I, Claimant Response to Request for Additional Information, page 393 [emphasis added].

[225] See also Exhibit X, Special Districts Annual Report 2010-2011, pages 184; 389; 1051 [The Special Districts Annual Report for 2010-2011 is consistent with Richvale's statement that it does not receive property tax revenue. Table 8 indicates no property tax receipts, and Table 1 does not indicate an appropriations limit. Biggs did not submit the necessary information to the SCO, and therefore does not appear in Tables 1 or 8 of the 2010-2011 Special Districts Annual Report. Based on that report, and the admissions of the Districts, a notice of dismissal was issued on November 12, 2013 for test claim 12-TC-01, for which Richvale and Biggs were the only named claimants. In response to the Notice of Pending Dismissal, the Districts submitted an Appeal of Dismissal, in which they argue that Proposition 218 undermines a local agency's fee authority, and that the Districts are eligible for reimbursement "for the reasons already explained in the Districts' 'Claimants' Response to Request for Additional Information 10-TC-12 and 12-TC-01.'" (Exhibit K, Notice of Pending Dismissal; Exhibit L, Appeal of Executive Director's Decision)].

[226] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

their revenues subject to the appropriations limit, in accordance with article XIII B, section 9.[227] They argue that all public agencies are ill-equipped to cover the costs of new mandates, whether they are subject to the tax and spend limits of articles XIII A and XIII B, or the fee and assessment restrictions of articles XIII C and XIII D.[228] In addition, Richvale and Biggs assert that to the extent they do have authority to raise revenues other than taxes, any increased fees or assessments necessary to cover the costs of the required activities would, by definition, be classified as proceeds of taxes under article XIII B, section 8.[229]

The Districts' reasoning is both circular and fundamentally unsound. Article XIII B, section 8 provides that "proceeds of taxes" includes "all tax revenues and the proceeds to an entity of government from (1) regulatory licenses, user charges, and user fees *to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service*, and (2) the investment of tax revenues."[230] The districts argue, therefore, that "proceeds of taxes" includes not only revenues directly derived from taxes, "but also revenues exceeding the costs to fund the services provided by the agency." The Districts argue that Richvale and Biggs are unable, under Proposition 218, to impose new fees as a matter of law, and must reallocate existing fees, which constitute "proceeds of taxes" under article XIII B, section 8. But Proposition 218 added article XIII D to expressly provide that fees or charges "*shall not be extended, imposed, or increased*" if revenues derived from the fee or charge exceed the funds needed to provide the property-related service; and "shall not be used for any purpose other than that for which the fee or charge was imposed."[231] Therefore, Proposition 218 imposes an absolute bar to raising fees beyond those necessary to provide the property-related service, or "reallocating" fees for a purpose other than that for which the fee or charge was imposed.

Moreover, Richvale and Biggs' reasoning that such fees *would automatically and by definition* constitute proceeds of taxes under article XIII B, section 8, rests on the initial presumption that such fees or charges would "exceed" those necessary to provide the service. In other words, the Districts presume that the costs of the mandate are unrelated to, or exceed, the costs of providing water service to the districts' users.[232] On the contrary, any fees or charges, whether *new or existing*, imposed by Richvale and Biggs are imposed for the purpose of providing irrigation water. The alleged mandated activities imposed upon irrigation districts by the test claim statute and regulations are required for those districts to *continue* providing irrigation water. Therefore, utilizing revenues from fees or charges to comply with the alleged new requirements is not

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[227] Section 9 states that appropriations subject to limitation do not include: "Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977–78 fiscal year levy an ad valorem tax on property in excess of 12 1/2 cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."

[228] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

[229] Exhibit I, Claimant Response to Request for Additional Information, page 3.

[230] Exhibit I, Claimant Response to Request for Additional Information, page 3 [citing California Constitution, article XIII B, section 8 (emphasis added)].

[231] Article XIII D, section 6(b) (added November 5, 1996, by Proposition 218).

[232] Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

"divert[ing] existing revenues from their authorized purposes..."[233] Rather, the increased or reallocated fees are merely being used to ensure that claimants can continue to provide water service consistently with all applicable legal requirements. Claimants' assertion that an increase or reallocation of fees alters the legal significance of such fees pursuant to article XIII B, section 8 is not supported by the law or the record.

Simply put, Richvale and Biggs do not impose or collect taxes[234] and the Commission cannot say, as a matter of law, that fees increased or imposed to comply with the alleged mandate would constitute proceeds of taxes, within the meaning of article XIII B, section 8. Unless or until a court determines that article XIII B, section 8 can be applied in this manner, the Commission must presume that only those local government entities that collect and expend proceeds of taxes, within the meaning of article XIII A, are subject to the spending limits of article XIII B, including section 6.

Based on the foregoing, the Commission finds that Richvale Irrigation District and Biggs-West Gridley Water District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible to claim reimbursement under article XIII B, section 6.

b. South Feather Water and Power Agency and Paradise Irrigation District are eligible to claim reimbursement under article XIII B, section 6.

Claimants state that "South Feather and Paradise receive property tax revenue," and "are in the process of establishing their appropriations limits for their current fiscal years."[235]

Declarations attached to claimants' response state that both South Feather and Paradise are in the process of determining and adopting an appropriations limit. Kevin Phillips, Finance Manager of Paradise, stated that during his tenure, "I have not calculated or otherwise established Paradise's appropriation limit as set forth in Proposition 4." Mr. Phillips further states that "[a]t the request of Paradise's legal counsel, I have begun working to establish Paradise's appropriation limit and intend...to ask Paradise's Board of Directors to adopt a resolution...for its current fiscal year."[236] Similarly, Steve Wong, Finance Division Manager of South Feather, states that he has not "calculated or otherwise established South Feather's appropriation limit" during his employment with South Feather. Mr. Wong further states that "[a]t the request of South Feather's legal counsel, I have begun working to establish South Feather's appropriation limit and intend, after the requisite public review period, to ask South Feather's Board of Directors to adopt a resolution establishing South Feather's appropriation limit for its current fiscal year."[237]

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[233] See Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

[234] Note that special districts generally have statutory authorization to impose special taxes, but only with two-thirds voter approval (See article XIII A, section 4). However, there is no evidence in the record indicating that Richvale or Biggs currently collects or expends special taxes.

[235] Exhibit I, Claimant Response to Request for Additional Information, pages 1-2.

[236] See Exhibit I, Claimant Response to Request for Additional Information, page 394.

[237] See Exhibit I, Claimant Response to Request for Additional Information, page 427.

Based on the foregoing, the Commission finds that both South Feather and Paradise are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

3. Oakdale Irrigation District and Glenn-Colusa Irrigation District are eligible to claim reimbursement under article XIII B, section 6 and are thus substituted in as claimants in the consolidated test claims in place of Biggs-West Gridley Water District and Richvale Irrigation District.

Pursuant to the Notice of Pending Dismissal, Oakdale submitted a request to be substituted in as a party on 10-TC-12 and 12-TC-01 on January 13, 2014. Oakdale states that it is subject to the tax and spend limitations of articles XIII A and XIII B, and that it is an agricultural water supplier "subject to the mandates imposed by the Agricultural Water Measurement Regulations...and the Water Conservation Act of 2009."[238] The declaration of Steve Knell, Oakdale's General Manager, attached to the Request for Substitution, states that Oakdale "receives an annual share of ad valorem property tax revenue from Stanislaus and San Joaquin counties." The declaration further states that the District "received $5,701,730 in property taxes for 2011-2013 and expects to receive approximately $1.9 million in 2014."

The Special Districts Annual Reports for 2010-2011 and 2011-2012 do not indicate an appropriations limit for Oakdale in Table 1,[239] but they do indicate that Oakdale received property tax revenue in Table 8 for 2010-2011 and 2011-2012.[240]

Similarly, Glenn-Colusa submitted a request to be substituted in as a party on both test claims. Glenn-Colusa asserted in its request that it "is subject to the tax and spend limitations of Articles XIII A and XIII B of the California Constitution," and is an agricultural water supplier, subject to "the mandates imposed by the Water Conservation Act of 2009...and the Agricultural Water Measurement Regulations."[241] In declarations attached to the Request for Substitution, Thaddeus Bettner, General Manager of Glenn-Colusa, asserts that the District "received $520,420 in property taxes in 2013 and expects to receive $528,300 in 2014."[242]

Table 8 of the Special Districts Annual Report indicates that Glenn-Colusa collected property taxes in 2010-2011 and 2011-2012,[243] but Table 1 does not indicate an appropriations limit for the district.[244]

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[238] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District, page 2.

[239] Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 159 and 157, respectively.

[240] Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 381 and 379, respectively.

[241] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, pages 1-2.

[242] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, page 7.

[243] Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 357 and 355, respectively.

[244] Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 104 and 101, respectively.

Based on the evidence in the record, including the declarations of the General Managers of Oakdale and Glenn-Colusa, as well as the information reported to the SCO in the Special Districts Annual Reports for fiscal years 2010-2011 and 2011-2012, both the substitute claimants collect some amount of property tax revenue. In turn, because property tax revenue is subject to the appropriations limit, both claimants also expend revenues subject to the appropriations limit, in accordance with article XIII B. A local government entity that is subject to both articles XIII A and XIII B is eligible for subvention under article XIII B, section 6, and is an eligible claimant before the Commission.

The Commission concludes that both Oakdale and Glenn-Colusa are subject to article XIII B as a matter of law, because they have authority to collect and expend property tax revenue.

Based on the foregoing, the Commission finds that Oakdale and Glenn-Colusa are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

B. Some of the Test Claim Statutes and Regulations Impose New Requirements on Urban Retail Water Suppliers.

Test claim 10-TC-12 alleged all of Part 2.55 of Division 6 of the Water Code, which consists of sections 10608 through 10608.64. The following analysis addresses only those sections of Part 2.55 containing mandatory language, and those sections specifically alleged in the test claim narrative. Sections 10608.22, 10608.28, 10608.36, 10608.43, 10608.44, 10608.50, 10608.56, 10608.60, and 10608.64 are not analyzed below, because those sections were not specifically alleged to impose increased costs mandated by the state, and because they do not impose new requirements on local government.

1. Water Code sections 10608, 10608.4(d), 10608.12(a; p), and 10608.16(a), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Water Code section 10608 states the Legislature's findings and declarations, including: "Water is a public resource that the California Constitution protects against waste and unreasonable use..." and "Reduced water use through conservation provides significant energy and environmental benefits, and can help protect water quality, improve streamflows, and reduce greenhouse gas emissions." Subdivision (g), specifically invoked by the claimants,[245] states that "[t]he Governor has called for a 20 percent per capita reduction in urban water use statewide by 2020."[246] The plain language of this section establishes a goal, but does not, itself, impose any new requirements on local government.

Water Code section 10608.4 as added, states the "intent of the legislature," including, as highlighted by the claimants,[247] to "[e]stablish a method or methods for urban retail water suppliers to determine targets for achieving increased water use efficiency by the year 2020, in

[245] Exhibit A, Test Claim 10-TC-12, page 3.

[246] Water Code section 10608(a; d; g) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[247] Exhibit A, Test Claim 10-TC-12, page 3.

accordance with the Governor's goal of a 20 percent reduction."[248] The plain language of this section expresses legislative intent, and does not impose any new activities on local government

Water Code section 10608.16(a), as added, states that "[t]he state shall achieve a 20 percent reduction in urban per capita water use in California on or before December 31, 2020." In addition, section 10608.16(b) provides that the state "shall make incremental progress towards the state target specified in subdivision (a) by reducing urban per capita water use by at least 10 percent on or before December 31, 2015."[249] The plain language of this section is directed to the State generally, and does not impose any new mandated activities on local government.

Water Code section 10608.12 provides that "the following definitions govern the construction of this part:" An "urban retail water supplier " is defined as "a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes."[250] The claimants allege that the Water Conservation Act imposes unfunded state mandates on urban retail water suppliers, and that South Feather and Paradise "are 'urban retail water suppliers,' as defined."[251] Likewise, under section 10608.12, an "agricultural water supplier" is defined as "a water supplier, either publicly or privately owned, providing water to 10,000 or more irrigated acres, excluding recycled water."[252] The claimants allege that this definition "expanded the definition of what constitutes an agricultural water supplier," and thus required a greater number of entities to adopt AWMPs and perform other activities under the Water Code.[253] However, whatever new activities may be required by the test claim statutes, the plain language of amended section 10608.12 does not impose any new requirements on urban retail water suppliers or agricultural water suppliers; section 10608.12 merely prescribes the applicability and scope of the other requirements of the test claim statutes.

Based on the foregoing, the Commission finds that sections 10608, 10608.4 10608.12, and 10608.16, pled as added, do not impose any new requirements on local government, and are therefore denied.

2. Water Code sections 10608.20(a; b; e; and j), 10608.24, and 10608.40, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) impose new required activities on urban water suppliers.

Prior law required the preparation of an urban water management plan, and required urban water suppliers to update the plan every five years. The test claim statutes add additional information related to conservation goals to that required to be included in a supplier's UWMP, and authorize an extension of time from December 31, 2010 to July 1, 2011 for the adoption of the next UWMP. As added by the test claim statute, section 10608.20 provides, in pertinent part:

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[248] Water Code section 10608.4 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[249] Water Code section 10608.16(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[250] Water Code section 10608.12(p) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[251] Exhibit A, 10-TC-12, page 2.

[252] Water Code section 10608.12(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[253] Exhibit A, 10-TC-12, page 8.

(a)(1) Each urban retail water supplier shall develop urban water use targets and an interim urban water use target by July 1, 2011. Urban retail water suppliers may elect to determine and report progress toward achieving these targets on an individual or regional basis, as provided in subdivision (a) of Section 10608.28, and may determine the targets on a fiscal year or calendar year basis.

(2) It is the intent of the Legislature that the urban water use targets described in subdivision (a) cumulatively result in a 20-percent reduction from the baseline daily per capita water use by December 31, 2020.

(b) An urban retail water supplier shall adopt one of the following methods for determining its urban water use target pursuant to subdivision (a):

(1) Eighty percent of the urban retail water supplier's baseline per capita daily water use.

(2) The per capita daily water use that is estimated using the sum of the following performance standards:

(A) For indoor residential water use, 55 gallons per capita daily water use as a provisional standard. Upon completion of the department's 2016 report to the Legislature pursuant to Section 10608.42, this standard may be adjusted by the Legislature by statute.

(B) For landscape irrigated through dedicated or residential meters or connections, water efficiency equivalent to the standards of the Model Water Efficient Landscape Ordinance set forth in Chapter 2.7 (commencing with Section 490) of Division 2 of Title 23 of the California Code of Regulations, as in effect the later of the year of the landscape's installation or 1992. An urban retail water supplier using the approach specified in this subparagraph shall use satellite imagery, site visits, or other best available technology to develop an accurate estimate of landscaped areas.

(C) For commercial, industrial, and institutional uses, a 10-percent reduction in water use from the baseline commercial, industrial, and institutional water use by 2020.

(3) Ninety-five percent of the applicable state hydrologic region target, as set forth in the state's draft 20x2020 Water Conservation Plan (dated April 30, 2009). If the service area of an urban water supplier includes more than one hydrologic region, the supplier shall apportion its service area to each region based on population or area.

(4) A method that shall be identified and developed by the department, through a public process, and reported to the Legislature no later than December 31, 2010...[254]

In addition, section 10608.20(e) provides that an urban retail water supplier "shall include in its urban water management plan due in 2010...the baseline daily per capita water use, urban water

[254] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining estimates, including references to supporting data."[255]

And, section 10608.20(j) provides that an urban retail water supplier "shall be granted an extension to July 1, 2011..." to adopt a complying water management plan, and that an urban retail water supplier that adopts an urban water management plan due in 2010 "that does not use the methodologies developed by the department pursuant to subdivision (h) shall amend the plan by July 1, 2011 to comply with this part."[256]

Section 10608.40 provides that an urban retail water supplier shall also "report to [DWR] on their progress in meeting their urban water use targets as part of their [UWMPs] submitted pursuant to Section 10631."[257]

Section 10608.24 provides that each urban retail water supplier "shall meet its interim urban water use target by December 31, 2015," and "shall meet its [final] urban water use target by December 31, 2020."[258]

As discussed above, prior law required the adoption of an UWMP, which, pursuant to section 10631, included a detailed description and analysis of water supplies within the service area, including reliability of supply in normal, dry, and multiple dry years, and a description and evaluation of water demand management measures currently being implemented and scheduled for implementation.[259] Pursuant to existing section 10621, that plan was required to be updated "once every five years...in years ending in five and zero."[260] And, existing section 10631(e) also required identification and quantification of past, current and projected water use over a five-year period including, but not necessarily limited to, all of the following uses:

> (A) Single-family residential.
>
> (B) Multifamily.
>
> (C) Commercial.
>
> (D) Industrial.
>
> (E) Institutional and governmental.
>
> (F) Landscape.
>
> (G) Sales to other agencies.
>
> (H) Saline water intrusion barriers, groundwater recharge, or conjunctive use, or any combination thereof.

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[255] Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[256] Water Code section 10608.20(j) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[257] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[258] Water Code section 10608.24(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[259] Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

[260] Water Code section 10621 (Stats. 2007, ch. 64 (AB 1376)).

(I) Agricultural.[261]

However, nothing in prior law required the adoption of urban water use targets, baseline information on a per capita basis (as opposed to on a type of use basis), interim and final water use targets, assessment of present and proposed measures to achieve the targeted reductions, or a report on the supplier's progress toward meeting the reductions.

Based on the foregoing, the Commission finds that Water Code sections 10608.20, 10608.24, and 10608.40, as added by the test claim statute, impose new requirements on urban retail water suppliers, as follows:

- Develop urban water use targets and an interim urban water use targets by July 1, 2011.[262]
- Adopt one of the methods specified in section 10608.20(b) for determining an urban water use target.[263]
- Include in its urban water management plan due in 2010 the baseline daily per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining those estimates, including references to supporting data.[264]
- Report to DWR on their progress in meeting urban water use targets as part of their UWMPs.[265]
- Amend its urban water management plan, by July 1, 2011, to allow use of technical methodologies developed by the department pursuant to subdivisions (b) and (h) of section 10608.20.[266]
- Meet interim urban water use target by December 31, 2015.[267]
- Meet final urban water use target by December 31, 2020.[268]

The activities required to meet the interim and final urban water use targets are intended to vary significantly among local governments based upon differences in climate, population density, levels of per capita water use according to plant water needs, levels of commercial, industrial, and institutional water use, and the amount of hardening that has occurred as a result of prior conservation measures implemented in different regions

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[261] Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

[262] Water Code section 10608.20(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[263] Water Code section 10608.20(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[264] Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[265] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[266] Water Code section 10608.20(i) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[267] Water Code section 10608.24(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[268] Water Code section 10608.24(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

throughout the state. Local variations, therefore, are not expressly stated in the test claim statutes.

3. Water Code section 10608.26, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), requires urban water suppliers to conduct at least one public hearing to allow community input regarding an urban retail water supplier's implementation plan.

Section 10608.26 provides that "[i]n complying with this part," an urban retail water supplier shall conduct at least one public hearing "to accomplish all of the following:" (1) allow community input regarding the urban retail water supplier's implementation plan; (2) consider the economic impacts of the urban retail water supplier's implementation plan; and (3) adopt one of the four methods provided in section 10608.20(b) for determining its urban water use target.[269]

The claimants assert that "prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts of the implementing the 20% reduction [*sic*], or to adopt a method for determining an urban water use target."[270]

Section 10642, added by Statutes 1983, chapter 1009, required a public hearing prior to *adopting an UWMP*, as follows:

> Prior to adopting a plan, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to Section 6066 of the Government Code...[271]

However, section 10608.26 requires a public hearing for purposes of allowing public input regarding an implementation plan, considering the economic impacts of an implementation plan, or adopting a method for determining the urban water supplier's water use targets, as required by section 10608.20(b). DWR, the agency with responsibility for implementing the Water Conservation Act, has interpreted these two requirements as only requiring one hearing.[272] As the implementing agency, DWRs interpretation of the Act is entitled to great weight.[273]

Based on the foregoing, the Commission finds that section 10608.26 imposes a new and additional requirement on urban retail water suppliers, as follows:

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[269] Water Code section 10608.26(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[270] Exhibit A, 10-TC-12, page 8 [citing Water Code section 10608.26(a)(1-3)].

[271] Water Code section 10642 (Stats. 1983, ch. 1009) [citing Government Code section 6066 (Stats. 1959, ch. 954), which provides for publication once per week for two successive weeks in a newspaper of general circulation].

[272] Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[273] *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11.

Include in the public hearing on the adoption of the UWMP an opportunity for community input regarding the urban retail water supplier's implementation plan; consideration of the economic impacts of the implementation plan; and the adoption of a method, pursuant to section 10608.20(b), for determining urban water use targets.[274]

4. Water Code section 10608.42, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new requirements on local government.

Section 10608.42 provides:

> The department shall review the 2015 urban water management plans and report to the Legislature by December 31, 2016, on progress towards achieving a 20-percent reduction in urban water use by December 31, 2020. The report shall include recommendations on changes to water efficiency standards or urban water use targets in order to achieve the 20-percent reduction and to reflect updated efficiency information and technology changes.[275]

The claimants allege that section 10608.42 requires an UWMP, adopted by an urban retail water supplier, to "describe the urban retail water supplier's progress toward achieving the 20% reduction by 2020."[276] However, the plain language of this section is directed to DWR, and does not, itself, impose any new activities or requirements on local government.

Based on the foregoing, the Commission finds that section 10608.42 does not impose any new requirements on local government, and is therefore denied.

5. Water Code sections 10608.56 and 10608.8, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Section 10806.56 provides that "[o]n and after July 1, 2016, an urban retail water supplier is not eligible for a water grant or loan awarded or administered by the state unless the supplier complies with this part."[277] The plain language of this section does not impose any new requirements on local government; the section only states the consequence of failing to comply with all other requirements of the Act.

Section 10608.8 provides that "[b]ecause an urban agency is not required to meet its urban water use target until 2020 pursuant to subdivision (b) of Section 10608.24, an urban retail water supplier's failure to meet those targets shall not establish a violation of law for purposes of any state administrative or judicial proceeding prior to January 1, 2021."[278] The plain language of

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[274] Water Code section 10608.26 ((Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)). See also Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[275] Water Code section 10608.42 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[276] Exhibit A, 10-TC-12, page 3.

[277] Water Code section 10608.56 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[278] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

this section does not impose any new requirements on local government; rather, the section states that no violation of law shall occur until after the date that urban water use targets are supposed to be met.

The claimants allege that Water Code section 10608.56 imposes reimbursable state-mandated costs, alleging that "[f]ailure to comply with the aforementioned mandates by South Feather and Paradise will result, on and after July 1, 2016, in ineligibility for water grants or loans awarded or administered by the State of California." In addition, the claimants allege that "a failure to meet the 20% target shall be a violation of law on and after January 1, 2021," citing Water Code section 10608.8.[279] The plain language of sections 10608.8 and 10608.56, as described above, do not impose any new activities or tasks on local government; the provisions that the claimants allege only state the consequences of failing to comply with all other requirements of the Act.

Based on the foregoing, the Commission finds that sections 10806.56 and 10806.8 do not impose any new requirements on local government, and are therefore denied.

C. Some of the Test Claim Statutes and Regulations Impose New Requirements on Non-exempt Agricultural Water Suppliers.

Chapter 4 of Part 2.55 of Division 6 of the Water Code consists of a single code section that addresses water conservation requirements for agricultural water suppliers: section 10608.48. The remaining provisions of the test claim statute addressing agricultural water suppliers were added in Part 2.8 of Division 6 of the Water Code, consisting of sections 10800-10853, and address agricultural water management planning requirements. Sections 10608.8 and 10828 provide for exemptions from the requirements of Part 2.55 and Part 2.8, respectively, under certain circumstances, which are addressed where relevant below.

1. Water Code section 10608.48(a-c), as amended by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), imposes new requirements on some agricultural water suppliers to implement efficient water management practices, including measurement and a pricing structure based in part on quantity of water delivered; and to implement up to fourteen other efficient water management practices, if locally cost effective and technically feasible.

Section 10608.48 provides for the implementation by agricultural water suppliers of specified critical efficient water management practices, including measurement and volume-based pricing; and *additional* efficient water management practices, where locally cost effective and technically feasible, as follows:

> (a) On or before July 31, 2012, an agricultural water supplier shall implement efficient water management practices pursuant to subdivisions (b) and (c).
>
> (b) Agricultural water suppliers shall implement *all of the following critical efficient management practices*:
>
> (1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).

[279] Exhibit A, 10-TC-12, page 4.

(2) Adopt a pricing structure for water customers based at least in part on quantity delivered.

(c) Agricultural water suppliers shall implement *additional efficient management practices*, including, but not limited to, practices to accomplish all of the following, *if the measures are locally cost effective and technically feasible*:

(1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.

(2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.

(3) Facilitate the financing of capital improvements for on-farm irrigation systems.

(4) Implement an incentive pricing structure that promotes one or more of the following goals:

(A) More efficient water use at the farm level.

(B) Conjunctive use of groundwater.

(C) Appropriate increase of groundwater recharge.

(D) Reduction in problem drainage.

(E) Improved management of environmental resources.

(F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.

(5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.

(6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

(7) Construct and operate supplier spill and tailwater recovery systems.

(8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.

(9) Automate canal control structures.

(10) Facilitate or promote customer pump testing and evaluation.

(11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.

(12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:

(A) On-farm irrigation and drainage system evaluations.

(B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.

(C) Surface water, groundwater, and drainage water quantity and quality data.

(D) Agricultural water management educational programs and materials for farmers, staff, and the public.

(13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.

(14) Evaluate and improve the efficiencies of the supplier's pumps.[280]

The claimants allege that section 10608.48 requires agricultural water suppliers (Oakdale and Glenn-Colusa) to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate." In addition, they allege, agricultural water suppliers are required to "adopt a pricing structure for water customers based on the quantity of water delivered." The claimants further allege that "[i]f 'locally cost effective' and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices" specified in section 10608.48(c).[281]

The claimants argue that prior to the test claim statute, agricultural water suppliers "were not required to have a pricing structure based, at least in part, on the quantity of water delivered," and were not required to measure the volume of water delivered if it was not locally cost effective to do so. The claimants assert that "[w]hile subdivision (a) of Water Code section 531.10 was a preexisting obligation, subdivision (b) of that same section gave an exception to the farm-gate measurement requirement if the measurement devices were not locally cost effective." The claimants conclude that now "[t]he Act requires compliance with subdivision (a) regardless of whether it is locally cost effective."[282] In addition, the claimants assert that prior to the Act, "there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible."[283]

Section 531.10 of the Water Measurement Law, as added by Statutes 2007, chapter 675 provides, in its entirety:

(a) An agricultural water supplier shall submit an annual report to the department that summarizes aggregated farm-gate delivery data, on a monthly or bimonthly basis, using best professional practices.

(b) Nothing in this article shall be construed to require the implementation of water measurement programs or practices that are not locally cost effective.

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[280] Water Code section 10608.48(a-c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)) [emphasis added].

[281] Exhibit A, Test Claim 10-TC-12, page 4.

[282] Exhibit A, 10-TC-12, page 8.

[283] Exhibit A, 10-TC-12, page 8.

(c) It is the intent of the Legislature that the requirements of this section shall complement and not affect the scope of authority granted to the department or the board by provisions of law other than this article.

The plain language of section 531.10 required agricultural water suppliers to submit an annual report to DWR summarizing aggregated data on water delivered to individual agricultural customers using best professional practices, but only if water measurement programs or practices were locally cost effective.[284] Therefore, to the extent that water measurement programs or practices *were* locally cost effective, such activities were required to comply with prior law. Section 10608.48(b), in turn, does not impose a *new* requirement to "[m]easure the volume of water delivered to customers with sufficient accuracy to comply with [section 531.10(a),]" if such water measurement activities were already performed. However, section 10608.48(b) also requires an agricultural water supplier, *regardless of local cost-effectiveness*, to "[m]easure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 *and to implement paragraph (2)*," which requires suppliers to implement a pricing structure based at least in part on volume of water delivered. Therefore, section 10608.48(b) imposes a new requirement to the extent that prior law activities were not sufficient to also implement a pricing structure based at least in part on quantity of water delivered.

Moreover, Water Code section 10608.8 provides that "[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement" (QSA), as defined in Statutes 2002, chapter 617, section 1, for as long as the QSA remains in effect.[285] The local agency parties to the QSA include the San Diego County Water Authority, Coachella Valley Water District, Imperial Irrigation District, and Metropolitan Water District of Southern California.[286] As a result, by the plain language of Water Code section 10608.8 those entities are exempt and are not mandated by the state to comply with the requirements of Part 2.55 of Division 6 of the Water Code, including section 10608.48.

Based on the foregoing, the Commission finds that section 10608.48 imposes new requirements on agricultural water suppliers, except those that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617, section 1, for as long as QSA remains in effect, as follows:

- Measure the volume of water delivered to customers with sufficient accuracy to (1) comply with subdivision (a) of Water Code section 531.10, which previously imposed the requirement, with specified exceptions, for agricultural water suppliers to submit an annual report summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis, using best professional practices; and (2) implement a pricing structure for water customers based at least in part on quantity of water delivered.[287]

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[284] Water Code section 531.10 (Stats. 2007, Ch. 675 (AB 1404)).

[285] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[286] Exhibit X, Quantification Settlement Agreement, dated October 10, 2003.

[287] Water Code section 10608.48(b)(1) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

This activity is only newly required if measurement of farm-gate delivery data was not previously performed by the agricultural water supplier pursuant to a determination under section 531.10(b) that such measurement programs or practices were not locally cost effective, or if measurement data was not sufficient to implement a pricing structure based at least in part on quantity of water delivered.[288]

- Implement a pricing structure for water customers based at least in part on quantity of water delivered.[289]
- *If the measures are locally cost effective and technically feasible,* implement additional efficient management practices, including, but not limited to, practices to accomplish all of the following:

  (1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.

  (2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.

  (3) Facilitate the financing of capital improvements for on-farm irrigation systems.

  (4) Implement an incentive pricing structure that promotes one or more of the following goals:

  (A) More efficient water use at the farm level.

  (B) Conjunctive use of groundwater.

  (C) Appropriate increase of groundwater recharge.

  (D) Reduction in problem drainage.

  (E) Improved management of environmental resources.

  (F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.

  (5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.

  (6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

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[288] Water Code section 531.10(a-b) previously required reporting annually to the Department of Water Resources aggregated farm-gate delivery data, summarized on a monthly or bi-monthly basis, unless such measurement programs or practices were not locally cost effective. If an agricultural water supplier had not determined that such practices were not locally cost effective, then the prior law, Section 531.10(a) would have required measurement, and the activity is not therefore new.

[289] Water Code section 10608.48(b)(2) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(7) Construct and operate supplier spill and tailwater recovery systems.

(8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.

(9) Automate canal control structures.

(10) Facilitate or promote customer pump testing and evaluation.

(11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.

(12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:

(A) On-farm irrigation and drainage system evaluations.

(B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.

(C) Surface water, groundwater, and drainage water quantity and quality data.

(D) Agricultural water management educational programs and materials for farmers, staff, and the public.

(13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.

(14) Evaluate and improve the efficiencies of the supplier's pumps.[290]

2. Water Code sections 10608.48(d-f) and 10820-10829, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers, as defined pursuant to section 10608.12, to prepare and adopt on or before December 31, 2012, and to update on or before December 31, 2015, and every five years thereafter, an agricultural water management plan, as specified. However, many agricultural water suppliers, including all participants in the Central Valley Project and United States Bureau of Reclamation water contracts, are exempt from the requirement to *prepare and adopt* an agricultural water management plan pursuant to 10826, because they were already required by existing federal law to prepare a water conservation plan, which they may submit to satisfy this requirement.

As noted above, the test claim statute repealed and added Part 2.8 of Division 6 of the Water Code, commencing with section 10800. While a number of the activities alleged in these consolidated test claims were required by the prior provisions of the Water Code that were repealed and replaced by the test claim statute, those provisions were by their own terms no longer operative immediately prior to the effective date of the test claim statute. Former Water Code section 10855, as added by Statutes 1986, chapter 954, provided that "[t]his part shall

[290] Water Code section 10608.48(c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

remain operative only until January 1, 1993..." Therefore, the provisions added by the test claim statute, which became effective on February 3, 2010, impose new requirements or activities.[291]

Section 10820, as added, provides that all agricultural water suppliers *shall prepare and adopt* an AWMP on or before December 31, 2012, and shall update that plan on December 31, 2015, and on or before December 31 every five years thereafter.[292]

Section 10826, as added, provides that the plan "shall do all of the following:"

> (a) Describe the agricultural water supplier and the service area, including all of the following:
>
> (1) Size of the service area.
>
> (2) Location of the service area and its water management facilities.
>
> (3) Terrain and soils.
>
> (4) Climate.
>
> (5) Operating rules and regulations.
>
> (6) Water delivery measurements or calculations.
>
> (7) Water rate schedules and billing.
>
> (8) Water shortage allocation policies.
>
> (b) Describe the quantity and quality of water resources of the agricultural water supplier, including all of the following:
>
> (1) Surface water supply.
>
> (2) Groundwater supply.
>
> (3) Other water supplies.
>
> (4) Source water quality monitoring practices.
>
> (5) Water uses within the agricultural water supplier's service area, including all of the following:
>
> (A) Agricultural.
>
> (B) Environmental.
>
> (C) Recreational.
>
> (D) Municipal and industrial.
>
> (E) Groundwater recharge.
>
> (F) Transfers and exchanges.

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[291] Bills introduced in an extraordinary session take effect 91 days after the final adjournment of that extraordinary session. (Cal. Const. Art. IV, Sec. 8(c)(1).) The 7th Extraordinary Session concluded on November 4, 2009. Thus, the effective date of SB X7 7 is February 3, 2010.

[292] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(G) Other water uses.

(6) Drainage from the water supplier's service area.

(7) Water accounting, including all of the following:

(A) Quantifying the water supplier's water supplies.

(B) Tabulating water uses.

(C) Overall water budget.

(8) Water supply reliability.

(c) Include an analysis, based on available information, of the effect of climate change on future water supplies.

(d) Describe previous water management activities.

(e) Include in the plan the water use efficiency information required pursuant to Section 10608.48.[293]

Meanwhile, section 10608.48(d) provides that agricultural water suppliers "shall include in the agricultural water management plans required pursuant to [section 10820] a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report, and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future."[294]

Furthermore, section 10608.48 provides that if a supplier "determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination."[295] And, the section further provides that "[t]he data shall be reported using a standardized form developed pursuant to Section 10608.52."[296]

In addition, section 10828 provides that:

> (a) Agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, *may submit those water conservation plans to satisfy the requirements of Section 10826, if both of the following apply*:
>
> (1) The agricultural water supplier has adopted and submitted the water conservation plan to the United States Bureau of Reclamation within the previous four years.
>
> (2) The United States Bureau of Reclamation has accepted the water conservation plan as adequate.

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[293] Water Code section 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[294] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[295] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[296] *Ibid.*

(b) This part does not require agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, to prepare and adopt water conservation plans according to a schedule that is different from that required by the United States Bureau of Reclamation.[297]

And, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.[298]

Based on the plain language of section 10828, those local agencies who are CVP or USBR contractors may submit a copy of their water conservation plan already submitted to USBR in satisfaction of the requirements of section 10826 (which provides for the contents of an AWMP). In addition, section 10828(b) provides that CVP or USBR contractors are not required to adhere to the "schedule" for preparing and adopting AWMPs, as provided in section 10820, above. Therefore, the requirements of section 10820, to prepare and adopt an AWMP on or before December 31, 2012, and to update the AWMP on or before December 31, 2015 and every five years thereafter, do not apply to CVP or USBR contractors, who may instead rely on the schedule for updating and readopting their water conservation plans.

Both Glenn-Colusa and Oakdale are contractors with the United States Bureau of Reclamation (USBR) and as a result are required by federal law to prepare water conservation plans. Glenn-Colusa and Oakdale are also CVP contractors, as are dozens of other local agencies.[299]

As noted above, Water Code section 10608.8 provides that "[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement" (QSA), as defined in Statutes 2002, chapter 617, section 1 for as long as QSA remains in effect.[300] Therefore, a supplier that is a party to the QSA is not mandated by the state to include the water use efficiency reporting requirements in the plan pursuant to section 10680.48.

Additionally, section 10608.48(f) provides that an agricultural water supplier "may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to the United States Bureau of Reclamation that meets the requirements described in Section 10828."[301] Therefore, the requirements to include in a supplier's AWMP a report on efficient water management practices and documentation on those practices determined not to be cost effective or technically feasible, pursuant to section 10608.48(d-e), do not apply to CVP or

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[297] Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[298] Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[299] Exhibit X, Bureau of Reclamation, Mid-Pacific Region, Central Valley Project (CVP) Water Contractors, dated March 4, 2014.

[300] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[301] Water Code section 10608.48(e; f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

USBR contractors that prepare and submit water conservation plans to USBR.[302] The *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, issued by DWR, "encourages" suppliers to file certain "documentation as an attachment with the USBR-accepted water management/conservation plan."[303] However, the plain language of section 10608.48(f) states that a supplier may satisfy the requirements of section 10608.48(d) and (e) by submitting to DWR its water conservation plan prepared for USBR. And, section 10828, as shown above, exempts CVP and USBR contractors from the requirement to prepare an AWMP in the first instance. Finally, pursuant to section 10829, the requirement to adopt an AWMP in the first instance does not apply if the supplier adopts a UWMP, or participates in regional water management planning.

Based on the foregoing, the Commission finds that newly added sections 10820 and 10826, and 10608.48(d-f), impose the following new requirements on agricultural water suppliers, except for suppliers that adopt a UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and CVP and USBR contractors:

- On or before December 31, 2012, prepare and adopt an agricultural water management plan in accordance with section 10826.[304]
- On or before December 31, 2015, and every five years thereafter, update the agricultural water management plan, in accordance with section 10820 et seq.[305]
- If a supplier becomes an agricultural water supplier, as defined, after December 31, 2012, that agricultural water supplier shall prepare and adopt an agricultural water management plan within one year after the date that it has become an agricultural water supplier.[306]
- Include in the agricultural water management plans required pursuant to Water Code section 10800 et seq. a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report,

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[302] Water Code section 10608.48(f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[303] Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 11, "The agricultural water suppliers that submit a plan to USBR may meet the requirements of section 10608.48 (d) and (e) [report of EWMPs implemented, planned for implementation, and estimate of efficiency improvements, as well as documentation for not locally cost effective EWMPs] by submitting the USBR-accepted plan to DWR. "DWR *encourages* CVPIA/RRA water suppliers to also provide a report on water use efficiency information (required by section 10608.48(d);see Section 3.7 of this Guidebook)." Emphasis added.

[304] Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[305] Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[306] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future.[307]

In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[308]

- If an agricultural water supplier determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination.[309]

  In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[310]

- Report the data using a standardized form developed pursuant to Water Code section 10608.52.[311]

  An agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[312]

3. Section 10608.48(g-i), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new activities on local government.

Section 10608.48(g) provides that on or before December 31, 2013, DWR shall submit to the Legislature a report on agricultural efficient water management practices that have been implemented or are planned to be implemented, and an assessment of those practices and their effects on agricultural operations. Section 10608.48(h) states that DWR "may update the efficient water management practices required pursuant to [section 10608.48(c)]," but only after conducting public hearings. Section 10608.48(i) provides that DWR "shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement" of section 10608.48(b).

The plain language of these sections section 10608.48(g-i) is directed to DWR, and does not impose any activities or requirements on local government.

4. Sections 10821, 10841, 10842, 10843, and 10844, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers.

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[307] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[308] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[309] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[310] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[311] Water Code section 10608.48(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[312] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

Water Code section 10821, as added, provides that an agricultural water supplier required to prepare an AWMP pursuant to this part, "shall notify each city or county within which the supplier provides water supplies that the agricultural water supplier will be preparing the plan or reviewing the plan and considering amendments or changes to the plan."[313]

In addition, newly added section 10841 requires that the plan be made available for public inspection and that a public hearing shall be held as follows:

> Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned agricultural water supplier pursuant to Section 6066 of the Government Code. A privately owned agricultural water supplier shall provide an equivalent notice within its service area and shall provide a reasonably equivalent opportunity that would otherwise be afforded through a public hearing process for interested parties to provide input on the plan...[314]

Section 10842 provides that an agricultural water supplier shall implement its AWMP "in accordance with the schedule set forth in its plan."[315]

Following adoption of an AWMP, section 10843 requires an agricultural water supplier to submit a copy of its AWMP, no later than 30 days after adoption, to DWR and to the following affected or interested entities:

> (2) Any city, county, or city and county within which the agricultural water supplier provides water supplies.
>
> (3) Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.
>
> (4) Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
>
> (5) Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
>
> (6) The California State Library.
>
> (7) Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.[316]

Finally, newly added section 10844 requires an agricultural water supplier to make its water management plan available for public review via the internet, as follows:

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[313] Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[314] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[315] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[316] Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(a) Not later than 30 days after the date of adopting its plan, the agricultural water supplier shall make the plan available for public review on the agricultural water supplier's Internet Web site.

(b) An agricultural water supplier that does not have an Internet Web site shall submit to [DWR], not later than 30 days after the date of adopting its plan, a copy of the adopted plan in an electronic format. [DWR] shall make the plan available for public review on [its] Internet Web site.[317]

The prior provisions of the Water Code pertaining to the adoption and implementation of AWMPs, as explained above, were inoperative by their own terms as of January 1, 1993.[318] Therefore, the requirements to hold a public hearing, to implement the plan in accordance with the schedule, to submit copies to DWR and other specified local entities, and to make the plan available by either posting the plan on the supplier's web site, or by sending an electronic copy to DWR for posting on its web site, are new activities with respect to prior law.

However, section 10828, as discussed above, provides that USBR or CVP contractors may satisfy the requirements of section 10826 by submitting their water conservation plans adopted within the previous four years pursuant to the Central Valley Improvement Act or the Reclamation Reform Act of 1982.[319] This section does not expressly exempt CVP or USBR contractors from all requirements of Part 2.8, but only from the content requirements of the plan itself, and the requirement to adopt according to the "schedule" set forth in section 10820, as discussed above. Accordingly, DWR's *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 [AWMP]* provides:

> All agricultural water suppliers required to prepare new agricultural water management/conservation plans must prepare and complete their plan in accordance with Water Code Part 2.8, Article 1 and Article 3 requirements for notification, public participation, adoption, and submittal (refer to Section 3.1 for details). *The federal review process may incorporate many requirements specified in Part 2.8, Articles 1 and 3; as such the federal process may meet the requirements of Part 2.8, otherwise, the agricultural water supplier would have to complete those requirements in Part 2.8, Articles 1 and 3 that are not already a part of the federal review process.*[320]

Article 1 of Part 2.8 includes section 10821, which requires an agricultural water supplier to notify the city or county that it will be preparing an AWMP. Therefore, to the extent that the "federal process" of adopting a water conservation plan for USBR or CVP also requires notice to the city or county, this activity is not newly required. Article 3 of Part 2.8 includes sections 10840-10845, pertaining to the adoption and implementation of AWMPs. Those requirements include, as discussed above, noticing and holding a public hearing; implementing the plan in

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[317] Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[318] See former Water Code sections 10840-10845; 10855 (Stats. 1986, ch. 954).

[319] Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[320] Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 94 [emphasis added].

accordance with the schedule set forth in the plan; submitting a copy of the AWMP to specified state and local entities within 30 days after adoption; and making the AWMP available on the supplier's website, or submitting the AWMP for posting on DWR's website. To the extent that the "federal process" satisfies those requirements, they are not newly required by the test claim statutes.

In addition, as noted above, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.[321] That exception would include all of the notice and hearing requirements identified below.

Based on the foregoing, the Commission finds that Water Code sections 10821, 10841, 10842, 10843, and 10844 impose new requirements on agricultural water suppliers, except those that adopt an UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and except to the extent that suppliers that are USBR or CVP contractors have water conservation plans that satisfy the AWMP adoption requirements, as follows:

- Notify the city or county within which the agricultural supplier provides water supplies that it will be preparing the AWMP or reviewing the AWMP and considering amendments or changes.[322]
- Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan.[323]
- Prior to the hearing, notice of the time and place of hearing shall be published in a newspaper within the jurisdiction of the publicly owned agricultural water supplier once a week for two successive weeks, as specified in Government Code 6066.[324]
- Implement the AWMP in accordance with the schedule set forth in the AWMP.[325]
- An agricultural water supplier shall submit to the following entities a copy of its plan no later than 30 days after the adoption of the plan. Copies of amendments or changes to the plans shall be submitted to the entities identified within 30 days after the adoption of the amendments or changes.
    - DWR.
    - Any city, county, or city and county within which the agricultural water supplier provides water supplies.
    - Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.

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[321] Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[322] Water Code section 10821(Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[323] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[324] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[325] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
- Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
- The California State Library.
- Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.[326]

- An agricultural water supplier shall make its agricultural water management plan available for public review on its web site not later than 30 days after adopting the plan, or for an agricultural water supplier that does not have a web site, submit an electronic copy to the Department of Water Resources not later than 30 days after adoption, and the Department shall make the plan available for public review on its web site.[327]

5. Agricultural Water Measurement Regulations, California Code of Regulations, Title 23, Division 6, sections 597 through 597.4, Register 2012, Number 28.

California Code of Regulations, title 23, section 597 provides that under authority included in Water Code section 10608.48(i), DWR is required to adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirements of section 10609.48(b).[328] The plain language of this section does not impose any new activities or requirements on local government.

Section 597.1 provides that an agricultural water supplier providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article, and a supplier providing water to 10,000 or more irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article unless sufficient funding is provided pursuant to Water Code section 10853. A supplier providing water to 25,000 irrigated acres or more, excluding acres that receive only recycled water, is subject to this article. A supplier providing water to wildlife refuges or habitat lands, as specified, is subject to this article. A *wholesale* agricultural water supplier is subject to this article at the location at which control of the water is transferred to the receiving water supplier, but the wholesale supplier is not required to measure the ultimate deliveries to customers. A canal authority or other entity that conveys water through facilities owned by a federal agency is not subject to this article. An agricultural water supplier that is a party to the QSA, as defined in Statutes 2002, chapter 617, section 1, is not subject to this article. And finally, DWR is not subject to this article.[329] None of the above-described provisions of section 597.1 impose any new requirements or activities on local government.

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[326] Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[327] Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[328] Code of Regulations, title 23, section 597 (Register 2012, No. 28).

[329] Code of Regulations, title 23, section 597.1 (Register 2012, No. 28).

Section 597.2 provides definitions of "accuracy," "agricultural water supplier," "approved by an engineer," "best professional practices," "customer," "delivery point," "existing measurement device," "farm-gate," "irrigated acres," "manufactured device," "measurement device," "new or replacement measurement device," "recycled water," and "type of device."[330] Based on the plain language of 597.2, the definitions provided in section 597.2 do not impose any new requirements or activities on local government.

Section 597.3 requires an agricultural water supplier to measure surface water and groundwater that it delivers to its customers and provides a range of options to comply with section 10608.48(i), as follows:

> An agricultural water supplier subject to this article shall measure surface water and groundwater that it delivers to its customers pursuant to the accuracy standards in this section. The supplier may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section. Measurement device accuracy and operation shall be certified, tested, inspected and/or analyzed as described in §597.4 of this article.
>
> **(a) Measurement Options at the Delivery Point or Farm-gate of a Single Customer**
>
> An agricultural water supplier shall measure water delivered at the delivery point or farm-gate of a single customer using one of the following measurement options. The stated numerical accuracy for each measurement option is for the volume delivered. If a device measures a value other than volume, for example, flow rate, velocity or water elevation, the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume as described in §597.4(e).
>
> (1) An existing measurement device shall be certified to be accurate to within +12% by volume,
>
> and,
>
> (2) A new or replacement measurement device shall be certified to be accurate to within:
>
> (A) ±5% by volume in the laboratory if using a laboratory certification;
>
> (B) ±10% by volume in the field if using a non-laboratory certification.
>
> **(b) Measurement Options at a Location Upstream of the Delivery Points or Farm-gates of Multiple Customers**
>
> (1) An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options described in §597.3(a) if the downstream individual customer's delivery points meet either of the following conditions:

[330] Code of Regulations, title 23, section 597.2 (Register 2012, No. 28).

(A) The agricultural water supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device.

(B) An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at a single farm-gate, accuracy standards of measurement options in §597.3(a) cannot be met by installing a measurement device or devices (manufactured or on-site built or in-house built devices with or without additional components such as gauging rod, water level control structure at the farm-gate, etc.). If conditions change such that the accuracy standards of measurement options in §597.3(a) at the farm-gate can be met, an agricultural water supplier shall include in its Agricultural Water Management Plan, a schedule, budget and finance plan to demonstrate progress to measure water at the farm-gate in compliance with §597.3(a) of this article.

(2) An agricultural water supplier choosing an option under paragraph (b)(l) of this section shall provide the following current documentation in its Agricultural Water Management Plan(s) submitted pursuant to Water Code §10826:

(A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those points.

(B) When applicable, the agricultural water supplier shall document the water measurement device unavailability and that the water level or flow conditions described in §597.3(b)(l)(B) exist at individual customer's delivery points downstream of the point of measurement as approved by an engineer.

(C) The agricultural water supplier shall document all of the following criteria about the methodology it uses to apportion the volume of water delivered to the individual downstream customers:

(i) How it accounts for differences in water use among the individual customers based on but not limited to the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system, and;

(ii) That it is sufficient for establishing a pricing structure based at least in part on the volume delivered, and;

(iii) That it was approved by the agricultural water supplier's governing board or body.[331]

Thus, one option under these regulations, in order to measure the volume of water delivered, as required by section 10608.48, is measurement "at the delivery point or farm-gate of a single customer" using an existing measurement device certified to be accurate to within 12 percent by volume, or a new measurement device certified to be accurate within 5 percent if certified in a laboratory or within 10 percent if certified in the field. Another option is to measure upstream of a delivery point or farm gate if the supplier does not have legal access to the delivery point for an individual customer, or if the standards of measurement cannot be met due to large fluctuations in flow rate or velocity during the delivery season. If this option is chosen, appropriate documentation explaining the option must be provided, as described above.

The claimants allege that section 597.3 requires agricultural water suppliers to measure at a delivery point or farm gate "by either (1) using an existing measurement device, certified to be accurate within ±12% by volume or (2) a new or replacement measurement device, certified to be accurate within ±5% by volume in the laboratory if using a laboratory certification or ±10% by volume in the field if using a non-laboratory certification." In addition, the claimants allege that the regulations provide for "limited exceptions" if the supplier is unable to measure at the farm-gate, which allow, in certain circumstances, for upstream measurement.[332] The claimants assert that prior to these regulations, "there was no requirement to measure water delivered to the farm-gate of *each* single customer, with limited exception."[333]

DWR argues that these regulations merely provide options, and are not therefore a mandate. Specifically, DWR asserts that "[n]o local government is required to comply with those regulations." DWR asserts that "the regulations exist as a resource for agricultural water suppliers who wish to comply with certain requirements…described in the 2009 Water Law." DWR concludes that "[the regulations] are optional, and the suppliers are free to comply with the law in other ways."[334]

Section 10608.48(i) provides that DWR "shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement" to comply with the measurement requirements of subdivision (b).[335] The phrase "may use or implement" suggests that the regulations provide a choice for agricultural water suppliers, rather than a mandate.

However, Section 10608.48(b) states that agricultural water suppliers "shall implement all of the following critical efficient management practices…(1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to [adopt a pricing structure based in part on quantity of water delivered]."[336] Moreover, the plain language of section 597.3 of the regulations, as cited above, states that an agricultural water

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[331] Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

[332] Exhibit B, 12-TC-01, page 4.

[333] Exhibit B, 12-TC-01, page 6.

[334] Exhibit D, DWR Comments, page 11.

[335] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[336] *Ibid.*

supplier "shall measure surface water and groundwater that it delivers to customers pursuant to the accuracy standards in this section." The language states that the supplier "may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section."[337] There is no express provision for choosing a measurement option or combination of options not listed in section 597.3. Although an agricultural water supplier may pick which one of the regulatory options to comply with, it "shall" pick one of them based on the plain language of section 597.3. As a result, most agricultural water suppliers are required to implement one of the measurement options provided by 597.3. As discussed above though, there are several water suppliers exempt from this requirement, including parties to the QSA, suppliers providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, and suppliers providing water to more than 10,000 irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, unless sufficient funding is provided pursuant to Water Code section 10853. Thus, section 597.3 requires the following for those agencies which are not exempt:

- Measure water delivered at the delivery point or farm-gate of a single customer using one of the following options.
    - An existing measurement device certified to be accurate to within ±12% by volume.
    - A new or replacement measurement device certified to be accurate to within:
        - ±5% by volume in the laboratory if using a laboratory certification;
        - ±10% by volume in the field if using a non-laboratory certification.

      If a device measures a value other than volume (e.g., flow rate, velocity or water elevation) the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume.[338]
- Measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers if:
    - The supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device; or
    - An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season, accuracy standards of measurement cannot be met by installing a measurement device or devices.[339]
- And, when a supplier chooses to measure water delivered at an upstream location:

[337] Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

[338] Code of Regulations, title 23, section 597.3(a) (Register 2012, No. 28).

[339] Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

- Provide, where applicable, documentation to demonstrate the lack of legal access at delivery points of individual or groups of customers downstream of the point of measurement; or documentation of the water measurement device unavailability and that water level or flow conditions exist that prohibit meeting accuracy standards, as approved by an engineer.
- Document the following about its apportionment of water delivered to individual customers:
  - How the supplier accounts for differences in water use among individual customers based on the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system;
  - That it is sufficient for establishing a pricing structure based at least in part on the volume of water delivered; and
  - That it was approved by the agricultural water supplier's governing board or body.[340]

Section 597.4, also alleged in this consolidated test claim, requires that measurement devices be certified and documented as follows:

(a) Initial Certification of Device Accuracy

The accuracy of an existing, new or replacement measurement device or type of device, as required in §597.3, shall be initially certified and documented as follows:

(1) For existing measurement devices, the device accuracy required in section 597.3(a) shall be initially certified and documented by either:

(A) Field-testing that is completed on a random and statistically representative sample of the existing measurement devices as described in §597.4(b)(1) and §597.4(b)(2). Field-testing shall be performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer.

Or,

(B) Field-inspections and analysis completed for every existing measurement device as described in §597.4(b)(3). Field-inspections and analysis shall be performed by trained individuals in the use of field inspection and analysis, and documented in a report approved by an engineer.

(2) For new or replacement measurement devices, the device accuracy required in sections 597.3 (a)(2) shall be initially certified and documented by either:

[340] Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

(A) Laboratory Certification prior to installation of a measurement device as documented by the manufacturer or an entity, institution or individual that tested the device following industry-established protocols such as the National Institute for Standards and Testing (NIST) traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device.

Or,

(B) Non-Laboratory Certification after the installation of a measurement device in the field, as documented by either:

(i) An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devices for each type of device installed at specified locations.

Or,

(ii) A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.

(b) Protocols for Field-Testing and Field-Inspection and Analysis of Existing Devices

(1) Field-testing shall be performed for a sample of existing measurement devices according to manufacturer's recommendations or design specifications and following best professional practices. It is recommended that the sample size be no less than 10% of existing devices, with a minimum of 5, and not to exceed 100 individual devices for any particular device type. Alternatively, the supplier may develop its own sampling plan using an accepted statistical methodology.

(2) If during the field-testing of existing measurement devices, more than one quarter of the samples for any particular device type do not meet the criteria pursuant to §597.3(a), the agricultural water supplier shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed an additional 100 individual devices for the particular device type. This second round of field-testing and corrective actions shall be completed within three years of the initial field-testing.

(3) Field-inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards

of §597.3(a) and operation and maintenance protocols meet best professional practices.

(c) Records Retention

Records documenting compliance with the requirements in §597.3 and §597.4 shall be maintained by the agricultural water supplier for ten years or two Agricultural Water Management Plan cycles.

(d) Performance Requirements

(1) All measurement devices shall be correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.

(2) If an installed measurement device no longer meets the accuracy requirements of §597.3(a) based on either field-testing or field-inspections and analysis as defined in sections 597.4 (a) and (b) for either the initial accuracy certification or during operations and maintenance, then the agricultural water supplier shall take appropriate corrective action, including but not limited to, repair or replacement to achieve the requirements of this article.

(e) Reporting in Agricultural Water Management Plans

Agricultural water suppliers shall report the following information in their Agricultural Water Management Plan(s):

(1) Documentation as required to demonstrate compliance with §597.3 (b), as outlined in section §597.3(b)(2), and §597.4(b)(2).

(2) A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.

(3) If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:

(A) For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: Volume = flow rate x duration of delivery.

(B) For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is

derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.

(C) For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).

(4) If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.

Thus, the plain language of section 597.4 requires agricultural water suppliers to certify and document the initial accuracy of "existing, new or replacement measurement device[s]," as specified.[341] In addition, section 597.4 provides that field-testing "shall be performed" following "best professional practices," and either sampling "no less than 10% of existing devices," as recommended by the department, or developing a "sampling plan using an accepted statistical methodology." Then, if field testing results in more than a quarter of any particular devices failing the accuracy criteria described in section 597.3(a), above, the supplier "shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices..."[342] In addition, section 597.4 provides that records documenting compliance "shall be maintained...for ten years or two Agricultural Water Management Plan cycles."[343] Section 597.4 further provides that "all measurement devices shall be correctly installed, maintained, operated, inspected, and monitored," and if a device no longer meets the accuracy requirements of section 597.3, the supplier "shall take appropriate corrective action," including repair or replacement, if necessary.[344] And finally, section 597.4 requires agricultural water suppliers to report additional information regarding their compliance and "best professional practices" for water measurement in their agricultural water measurement plan.[345]

As noted above, some agricultural water suppliers may have been required pursuant to section 531.10 to measure farm-gate water deliveries.[346] To the extent that those measurement programs or practices satisfy the requirements of these regulations, the regulations do not impose new activities.[347] In addition, for any agricultural water supplier that is also an urban water supplier,

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[341] Code of Regulations, title 23, section 597.4(a) (Register 2012, No. 28).

[342] Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

[343] Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

[344] Code of Regulations, title 23, section 597.4(d) (Register 2012, No. 28).

[345] Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

[346] Water Code section 531.10 (Stats. 2007, ch. 675 (AB 1404)).

[347] See discussion above addressing section 10608.48(a-c).

existing sections 525 through 527 required those entities to install water meters on new and existing service connections, as specified.[348] To the extent that any such water meter on an agricultural service connection satisfies the measurement requirements of these regulations, the regulations do not impose any new activities or requirements.

Based on the foregoing, the Commission finds that section 597.4 imposes new requirements on agricultural water suppliers not exempt from the water measurement requirements, and not already required by existing law to take part in the programs or practices of water measurement, discussed above, that would satisfy the accuracy standards of these regulations, as follows:

- Certify the initial accuracy of existing measurement devices by either:
    - Field-testing that is completed on a random and statistically representative sample of the existing measurement devices, performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer; or
    - Field inspections and analysis for every existing measurement device, performed by individuals trained in the use of field inspection and analysis, and documented in a report approved by an engineer.[349]
- Certify the initial accuracy of new or replacement measurement devices by either:
    - Laboratory certification prior to installation of the device as documented by the manufacturer or an entity, institution, or individual that tested the device following industry-established protocols such as the National Institute of Standards and Testing traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device; or
    - Non-laboratory certification after installation of a measurement device in the field, documented by either:
        - An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devises for each type of device installed at specified locations; or
        - A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.[350]
- Ensure that field-testing is performed as follows:

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[348] Section 525 as amended by statutes 2005, chapter 22; Section 527 as amended by statutes 2005, chapter 22; Section 526 as amended by Statutes 2004, chapter 884.

[349] Code of Regulations, title 23, section 597.4(a)(1) (Register 2012, No. 28).

[350] Code of Regulations, title 23, section 597.4(a)(2) (Register 2012, No. 28).

- Field-testing shall be performed for a sample of existing measurement devices according to the manufacturer's recommendations or design specifications and following best professional practices.
- If more than one quarter of the samples for any particular device type do not meet the accuracy criteria specified in section 597.3(a), the supplier shall provide in its Agricultural Water Management Plan a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed 100 additional devices for the particular device type, and shall complete the second round of field-testing and corrective actions within three years of the initial field-testing.
- Field inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards specified in section 597.3(a) and that operation and maintenance protocols meet best professional practices.[351]

- Maintain records documenting compliance with the requirements of sections 597.3 and 597.4 for ten years or two Agricultural Water Management Plan cycles.[352]
- Ensure that all measurement devices are correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.[353]
- If an installed measurement device no longer meets the accuracy requirements of section 597.3(a) based on either field-testing or field-inspections and analysis for either the initial accuracy certification or during operations and maintenance, take appropriate corrective action, including but not limited to, repair or replacement of the device.[354]
- Report the information listed below in its Agricultural Water Management Plan(s). :
  - Documentation, as required, to demonstrate that an agricultural water supplier that chooses to measure upstream of a delivery point or farm-gate for a customer or group of customers has complied justified the reason to do so, and has taken appropriate steps to ensure that measurements can be allocated to the customer or group of customers sufficiently to support a pricing structure based at least in part on quantity of water delivered.

[351] Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

[352] Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

[353] Code of Regulations, title 23, section 597.4(d)(1) (Register 2012, No. 28).

[354] Code of Regulations, title 23, section 597.4(d)(2) (Register 2012, No. 28).

- A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.
- If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:
    - For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: Volume = flow rate x duration of delivery.
    - For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.
    - For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).
- If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.[355]

D. The Test Claim Statutes and Regulations do not Result in Increased Costs Mandated by the State, Because the Claimants Possess Fee Authority Sufficient as a Matter of Law to Cover the Costs of any New Mandated Activities.

As the preceding analysis indicates, many of the requirements of the test claim statutes are not new, at least with respect to *some* urban or agricultural water suppliers, because suppliers were previously required to perform substantially the same activities under prior law. Additionally, many of the alleged test claim statutes do not impose any requirements at all, based on the plain language. However, even if the new requirements identified above could be argued to mandate a new program or higher level of service, the Commission finds that the costs incurred to comply

[355] Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

with those requirements are not costs mandated by the state, within the meaning of article XIII B, section 6 and Government Code section 17514, because all affected entities have fee authority, sufficient as a matter of law to cover the costs of any mandated activities.

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state, as defined in section 17514, if the local government claimant "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.*[356] 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 I, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*[357]

Accordingly, in *Connell v. Superior Court of Sacramento County,*[358] the Santa Margarita Water District, among others, was denied reimbursement based on its authority to impose fees on water users. The water districts submitted evidence that funding the mandated costs with fees was not practical: "rates necessary to cover the increased costs [of pollution control regulations] would render the reclaimed water unmarketable and would encourage users to switch to potable water."[359] The court concluded that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs." Water Code section 35470 authorized the levy of fees to "correspond to the cost and value of the service," and "to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose."[360] The court held that the Districts had not demonstrated "that anything in Water Code section 35470 limits the authority of the Districts to levy fees 'sufficient' to cover their costs,"

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

[357] *Id,* at p. 487 [emphasis added].

[358] (Cal. Ct. App. 3d Dist. 1997) 59 Cal.App.4th 382.

[359] *Id,* at p. 399.

[360] *Ibid.*

and that therefore "the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry."[361]

Likewise, in *Clovis Unified School District v. Chiang*, the court found that the SCO was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts' authority to impose fees, even if there existed practical impediments to collecting the fees. In making its decision the court noted that the concept underlying Government Code sections 17514 and 17556(d) is that "[t]o the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost."[362] The court further noted that, "this basic principle flows from common sense as well." The court reasoned: "As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[363]

1. The claimants have statutory authority to levy fees or charges for the provision of water.

Both Finance and DWR asserted, in comments on the test claim, that the test claim statutes are not reimbursable pursuant to section 17556(d). Finance argued that the claimants are "statutorily authorized to charge a fee for the delivery of water," and thus "each of these water agencies has the ability to cover any potential initial and ongoing costs related to the Act and Regulations with fee revenue."[364] DWR asserted that "Senate Bill 1017, which amended the [Urban Water Management Act] in 1994," provides authority for an urban water supplier "to recover the costs of preparing its [urban water management plan] and implementing the reasonable water conservation measures included in the plan in its water rates."[365]

For the following reasons, the Commission finds that the claimants have statutory authority to establish and increase fees or assessments for the provision of water services.

Water Code section 35470 provides generally that "[a]ny [water] district formed on or after July 30, 1917, may, in lieu in whole or in part of raising money for district purposes by assessment, make water available to the holders of title to land or the occupants thereon, and may fix and collect charges therefor." Section 35470 further provides that "[t]he charges may vary in different months and in different localities of the district to correspond to the cost and value of the service, and the district *may use so much of the proceeds of the charges as may be necessary to defray the ordinary operation or maintenance expenses of the district and for any other lawful purpose.*"[366] In addition, section 50911 provides that an irrigation district may "[a]dopt a schedule of rates to be charged by the district for furnishing water for the irrigation of district lands."[367]

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[361] *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

[362] *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, at p. 812.

[363] *Ibid.*

[364] Exhibit C, Finance Comments on Test Claim, page 1.

[365] Exhibit D, DWR Comments on Test Claim, pages 8-9 [citing Water Code section 10654].

[366] Water Code section 35470 (Stats. 2007, ch. 27 (SB 444)) [emphasis added].

[367] Water Code section 50911 (Stats. 2007, ch. 27 (SB 444)).

More specifically, and pertaining to the requirements of the test claim statutes, Water Code section 10654 permits an urban water supplier to "recover in its rates" for the costs incurred in preparing and implementing water conservation measures.[368] And, section 10608.48 expressly requires agricultural water suppliers to "[a]dopt a pricing structure for water customers based at least in part on quantity delivered."[369] This provision indicates that the Legislature intended user fees to be an essential component of the water conservation practices called for by the Act. And finally, Water Code section 10608.32, as added *within the test claim statute*, provides that all costs incurred pursuant to this part may be recoverable in rates subject to review and approval by the Public Utilities Commission.[370]

Based on the foregoing, the Commission finds that both agricultural and urban water suppliers have statutory authority to impose or increase fees to cover the costs of new state-mandated activities.

2. Nothing in Proposition 218, case law, or any prior Commission Decision, alters the analysis of the claimants' statutory fee authority.

The claimants argue that both Finance and DWR cite *Connell v. Superior Court* and "ignore the most recent rulings on the subject of Proposition 218 where their exact arguments were considered and overruled by the Commission in *Discharge of Stormwater Runoff*, 07-TC-09." The claimants argue that "under Proposition 218, Claimants' customers could reject the Board's action to establish or increase fees or assessments, yet Claimants would still be obligated to implement the mandates."[371] In comments on the draft proposed decision, the claimants reiterate, more urgently:

> The Commission should not accept its staff's invitation to ignore a prior Commission decision that is directly on point, and which was based on a plain reading of the California Constitution, all in order to reject the test claim here. To do so would undermine the Commission' s credibility, eviscerate the Commission's Constitutional duty to reimburse agencies for new state mandates, and have far-reaching negative effects.[372]

For the following reasons, the claimant's argument is unsound. In *Connell v. Superior Court, supra* the court held that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs," and that the economic viability of the necessary rate increases "was irrelevant and injected improper factual questions into the inquiry."[373] *Connell* did not address the possible impact of Proposition 218 on the districts' fee authority, because the districts did not "contend that the services at issue...are among the 'many services'

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[368] Water Code section 10654 (Stats. 1994, ch. 609 (SB 1017)).

[369] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[370] Water Code section 10608.32 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[371] Exhibit E, Claimant Rebuttal Comments, pages 11-12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

[372] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

[373] *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

impacted by Proposition 218."[374] The claimants here argue that *Connell* is no longer good authority, because Proposition 218 has changed the landscape of special districts' legal authority to impose fees or charges.

Proposition 218, adopted by the voters in 1996, also known as the "Right to Vote on Taxes Act," declared its purpose to protect taxpayers "by limiting the methods by which local governments exact revenue from taxpayers without their consent." Proposition 218 added articles XIII C and XIII D to the Constitution;[375] article XIII C addresses assessments, while article XIII D addresses user fees and charges. The claimants allege that article XIII D, section 6, specifically, imposes a legal or constitutional hurdle to imposing or increasing fees, which undermines any analysis of statutory fee authority under Government Code section 17556(d).

The requirements of article XIII D, section 6 to which claimants refer provide as follows:

> Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:
>
> (1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.
>
> (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. *If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.*
>
> [¶…¶]
>
> (c) Voter Approval for New or Increased Fees and Charges. *Except for fees or charges for sewer, water, and refuse collection services*, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures

[374] 59 Cal.App.4th at p. 403.

[375] Exhibit X, Text of Proposition 218.

similar to those for increases in assessments in the conduct of elections under this subdivision.[376]

The claimants have acknowledged that they have fee authority, absent the restrictions of articles XIII C and XIII D: "Claimants do not deny that, before the passage Proposition 218, the Water Code would have provided Claimants sufficient authority, pursuant to their governing bodies' discretion, to unilaterally establish or increase fees or charges for the provision of water services."[377] After Proposition 218, the claimants argue they are now "authorized to do no more than *propose* a fee increase that can be rejected" by majority protest.[378] Furthermore, the claimants maintain that the Commission's decision in *Discharge of Stormwater Runoff* recognized the limitations imposed by article XIII D, section 6, and the effect on local governments' fee authority: "[f]inding *Connell* inapposite, the Commission observed that 'The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one.'"[379]

However, claimants' reliance on the Commission's prior action is misplaced, and claimants' assertions about the effect of Proposition 218 on the law of *Connell* are overstated. Commission decisions are not precedential, and in any event the current test claim is distinguishable from the analysis in *Discharge of Stormwater Runoff*. The Commission, in *Discharge of Stormwater Runoff*, deviated from the rule of *Connell*, and found that Proposition 218, as *applied to the claimants* and *the mandated activities in that test claim*, constituted a legal and constitutional barrier to increasing fees. The test claim was brought by the County of San Diego and a number of cities, and alleged various mandated activities and costs related to reducing stormwater pollution.[380] The Commission found that although the County and the Cities had a generalized fee authority based on regulatory and police powers,[381] "[w]ith 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."[382] The Commission reasoned that "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,"[383] and that "[a]bsent 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)."[384] Thus, the

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[376] California Constitution, article XIII D, section 6 (added, November 5, 1996, by Proposition 218) [emphasis added].

[377] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[378] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[379] Exhibit E, Claimant Rebuttal Comments, page 12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

[380] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 1.

[381] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 103.

[382] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 105.

[383] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 106.

[384] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107.

Commission concluded that "[t]he voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one."[385]

Here, Proposition 218 does not impose a legal and constitutional hurdle, because fees for the provision of water services are expressly exempt from the voter approval requirements of Proposition 218.[386] The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water."[387] Thus, an urban or agricultural water supplier that undertakes measures to ensure the conservation of water, to produce more water, and enhance the quality and reliability of its supply, is providing water service, within the meaning of the Omnibus Act. The statutory and regulatory metering and other conservation practices required of the claimants therefore describe "water service." Unlike the test claimants in *Discharge of Stormwater Runoff* (cities and counties), the services for which fees or charges would be increased are expressly exempt from the voter approval requirements in article XIII D, section 6(c), and the decision and reasoning of the Commission in *Discharge of Stormwater Runoff* is not relevant. Therefore, the Commission's earlier decision is distinguishable on the very same ground that renders *Connell* significantly poignant. The claimants cannot rely on the unwillingness of voters to raise fees, because the fees in question fall, based on the plain language of the Constitution, outside voter-approval requirement of article XIII D, section 6(c).

Claimants acknowledge that fees for water service "are excused from the formal election requirement under article XIII D section 6(c), [but] the majority protest provision in subdivision (a)(2) still applies and constitutes a legal barrier to Claimants' fee authority."[388] Claimants therefore argue that they "find themselves required to implement and pay for the newly mandated activities, yet are authorized to do no more than *propose* a fee increase that can be rejected by a simple majority of affected customers."[389]

However, the so-called "majority protest provision," which claimants allege constitutes a legal barrier to claimants' fee authority, presents either a mixed question of fact and law, which has not been demonstrated based on the evidence in the record, or a legal issue that is incumbent on the courts first to resolve. In order for the Commission to make findings that the claimants' fee authority has been diminished, or negated, pursuant to article XIII D, section 6(a), the claimants would have to provide evidence that they tried and failed to impose or increase the necessary fees,[390] or provide evidence that a court determined that Proposition 218 represents a

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[385] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107 [citing *Connell v. Superior Court, supra*, 59 Cal.App.4th 382, at p. 401].

[386] See California Constitution, article XIII D, section 6(c).

[387] Government Code section 53750(m) (Stats. 2002, ch. 395).

[388] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

[389] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[390] If a claimant were to provide evidence that it had tried and failed to impose or increase fees, that evidence could constitute costs "first incurred," within the meaning of Government Code section 17551, and a claimant otherwise barred from reimbursement under section 17556(d) could thus potentially demonstrate that it had incurred costs mandated by the state, as defined in

constitutional hurdle to fee authority as a matter of law. The Commission cannot now say, as a matter of law, that the claimants' fee authority is insufficient based on the speculative and uncertain threat of a "written protests against the proposed fee or charge [being] presented by a majority of owners of the identified parcels..."[391]

Based on the foregoing analysis, the Commission cannot find costs mandated by the state, within the meaning of Government Code section 17514, because the claimants have sufficient fee authority, as a matter of law, to establish or increase fees or charges to cover the costs of any new required activities.

V. Conclusion

Based on the foregoing analysis, the Commission finds that the Water Conservation Act of 2009, enacted as Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), and the Agricultural Water Measurement Regulations issued by the Department of Water Resources, found at Code of Regulations, title 23, section 597 et seq., do not impose a reimbursable state-mandated program on urban retail water suppliers or agricultural water suppliers within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission therefore denies this test claim.

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section 17514. The Commission does not make findings on this issue, but merely observes the potentiality.

[391] See article XIII D, section 6(a)(2).

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RE: **Decision**

Water Conservation, 10-TC-12 and 12-TC-01
Water Conservation Act of 2009 et al.
South Feather Water and Power Agency, Paradise Irrigation District,
Oakdale Irrigation District, and Glenn-Colusa Irrigation District, Claimants

On December 5, 2014, the foregoing decision of the Commission on State Mandates was adopted in the above-entitled matter.

Heather Halsey, Executive Director

Dated: December 12, 2014

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 March 16, 2018, I served the:

- **Claimant's Rebuttal Comments filed March 15, 2018**

  California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0036, 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 March 16, 2018 at Sacramento, California.

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COMMISSION ON STATE MANDATES

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Claim Number: 10-TC-10

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

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City of Chino
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City of Fontana
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County of San Bernardino
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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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